Federal Court  Cour fédérale

Date: 20180919

Docket: IMM-398-18

Citation: 2018 FC 930

Ottawa, Ontario, September 19, 2018

PRESENT: **The Honourable Mr. Justice Annis**

BETWEEN:

L.E.

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], of the decision rendered on January 4, 2018, by a Senior Immigration Officer [the Officer], refusing the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the IRPA.

II. Facts

[2] The Applicant is a 33 -year-old Nigerian citizen who arrived in Canada on July 29, 2014. She is the mother of three children: one son aged 5 years, and two daughters, aged 7 and 3. Upon her arrival to Canada, the Applicant made a claim for refugee protection.

[3] The Refugee Protection Division [RPD] rejected her claim on October 2, 2014, and found her to be wholly lacking in credibility. This Court denied leave in respect of the RPD decision on February 2, 2015.

[4] The Applicant did not cooperate with removal arrangements and was arrested by the Canadian Border Services Agency (CBSA) on August 20, 2015. While the Applicant was detained, CBSA agents confiscated her belongings, and discovered pornographic images of her children on her phone.

[5] The Applicant's Pre-Removal Risk Assessment [PRRA] application was also denied on March 31, 2016. This Court denied leave in respect of the PRRA decision on June 20, 2016, in file IMM-1658-16.

[6] The Applicant was charged with making, possessing and distributing child pornography in relation to photographic evidence on her cellphone involving her children. The Applicant was convicted of this offence in December 2016, and was sentenced to 18 months jail time.

[7] The trial decision is not contained in the Applicant's record. However, a sexual behaviour assessment prepared by a psychiatrist, Dr. Fedoroff, for the purposes of the Applicant's criminal court sentencing is included in the Applicant's record which provided some of the findings from the trial judgment, including highly negative conclusions regarding the Applicant's credibility. Her evidence was found to be "neither credible nor reliable" and that she "was inventing answers to suit her purpose and what she wanted the court to believe" and that she "would say anything to get herself out of difficulty";

[8] The photographs were found to meet the definition of child pornography as being "incomprehensible as 'innocent family photographs' as claimed by the Applicant", with the criminal court citing extensive incriminating evidence to support the conclusion. The criminal court also rejected any suggestion that the photographs were intended to describe to her husband medical issues the children were suffering from. Despite these conclusions, Dr. Fedoroff noted that she "accepts no responsibility for the alleged offence," claiming that she was "completely innocent".

[9] The Applicant's three children were temporarily in the custody of the Children's Aid Society and currently reside with their father in Canada, who filed a separate and ultimately successful refugee claim in 2015. Due to her conviction, the Applicant was banned from having contact with her children until approved by the Children's Aid Society [CAS] and her probation officer. As a result, she had no contact with her children between her conviction in December 2016 and the completion of her sentence in September 2017. She has had some supervised preapproved visits with her children since September 2017.

[10] While the Applicant was incarcerated at the Ottawa-Carleton Detention Centre, she reported various medical and emotional conditions that were dealt with by staff and doctors.

[11] On September 14, 2017, upon completing her sentence, the Applicant was placed on immigration detention pending her removal from Canada.

[12] In October 2017, the Applicant obtained a deferral of her scheduled removal from Canada, on the basis of new medical concerns. She requested a deferral until her husband's permanent residence application was concluded or alternatively, a deferral of three weeks to allow her to complete her pending medical procedures and to gather medication for her conditions. She was released from Immigration Hold on October 26, 2017.

[13] On October 30, 2017, the Applicant filed an application for permanent residence on H&C grounds, pursuant to subsection 25(1) of IRPA, seeking an exemption from her inadmissibility to Canada for serious criminality pursuant to s. 36(1) of the IRPA and on medical grounds so as to be eligible for inclusion in her husband's application for permanent residence as a protected person.

[14] The Applicant's H&C application was based on her medical needs—which she argued would not be met if she were sent back to Nigeria—as well as the interests of her children, which she argued will best be met if she is allowed to remain in Canada. The Applicant further alleged that she would be at risk if returned to Nigeria, due to her husband's criticism of Boko haram.

Finally, the Applicant alleged that she had received threats from loan sharks in Nigeria through WhatsApp on her phone.

[15] The application on H&C grounds was refused on January 4, 2018. The Officer assessed four aspects of the Applicant's claim, namely her criminal record, her alleged medical issues, her degree of establishment in Canada, and the best interests of her children [BIOC] , which were thereafter weighed in her global assessment of the Applicant's claim. The Officer concluded that the Applicant's case was insufficiently compelling to lead to a positive decision.

[16] The Applicant received the decision and reasons of her H&C application on January 24, 2018, during a regular sign-in with the CBSA. She was arrested at the same time and provided notice of pending removal scheduled for January 31, 2018. On January 26, 2018, the Applicant filed an application for leave and judicial review of this decision before this Honourable Court.

[17] On January 30, 2018, the Applicant was granted a stay of removal until the final determination of this matter. She was subsequently released by the Immigration Division on February 2, 2018. She was subsequently granted leave to pursue the within application for judicial review.

III. Issues

[18] The issues concerning the reasonableness of the Decision raised by the Applicant are as follows:

1. Whether the Officer failed to consider the Applicant's mental health and availability of mental health treatment in Nigeria?

2. Whether the Officer erred in her assessment of the expert evidence of Dr. Fedoroff in addressing the Applicant's criminal inadmissibility?

3. Whether the Officer ignored evidence and erred in the assessment of the Applicant's criminality?

4. Whether the Officer committed errors in assessing the evidence regarding the best interests of the children?

IV. Standard of Review

[19] The reasonableness standard applies to decisions on H&C applications, which involve the exercise of discretion and an analysis of questions of mixed fact and law: *Okoloubu v Canada (Citizenship and Immigration)*, 2008 FCA 326 at para 30, *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 at paras 54-55; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61.

V. Analysis

A. *Was the Officer's assessment of the Applicant's mental health and the availability of mental health treatment in Nigeria reasonable?*

[20] The Officer noted that the onus was on the Applicant to provide both i) documentary evidence from the Applicant's doctor confirming that the Applicant has been diagnosed with the condition, the appropriate treatment, and that treatment for the condition is vital to the Applicant's physical or mental wellbeing; and ii) confirmation from the relevant health

authorities in the country of origin attesting to the fact that acceptable treatment is unavailable in the country of origin. The Officer concluded that this onus was not met.

[21] The Officer emphasized the limited information provided by the Applicant. Specifically, the Officer had not been provided with a prognosis, the usual treatment outcomes for the Applicant's medical issues or with a letter from a medical doctor confirming that the Applicant requires further surgery. Nor had the Applicant provided any evidence with respect to her present medical condition despite obtaining the requested deferral of her removal. The Applicant failed to provide any updated medical documentation after her release from detention despite her counsel's stated intention to do so. In addition, the Officer noted that the Applicant had indicated, when obtaining her stay of removal in October 2017, less than three months before the Officer issued her decision, that the Applicant's medical situation could be addressed by a short deferral of removal of three weeks in order to complete the pending medical procedures and to gather the necessary medications for her removal to Nigeria.

[22] The Court does not agree that the Officer failed to sufficiently address the expert evidence of Dr. Federoff and other evidence concerning the Applicant's mental health, including a diagnosis for Post-Traumatic Stress Disorder [PTSD]. Dr. Federoff provided a sexual behaviour assessment in February 2017 for her criminal sentencing. His diagnosis was that she exhibited symptoms consistent with PTSD, which the Officer acknowledged in her decision and did not discount. However, Dr. Federoff's report provided background evidence in respect of the sentencing of the Applicant. He did not address the possible impacts on her PTSD were the Applicant to be removed to Nigeria. Dr. Federoff also pointed out limitations to his report based

upon a single session with the Applicant and largely predicated her information; from someone who the Officer noted has a history of serious credibility problems.

[23] Similarly, the letter from the Applicant's correctional social worker, Ms. Motiuk characterized her risk of removal as a "major stressor", but along with several others, including the legal proceedings and the finding that she was not credible. The report did not specifically address the Applicant's PTSD or the impact of removal on her PTSD or mental health. The only recommendation of the social worker was for the Applicant not to be removed until the H&C review was completed in order to allow her to rebuild her relationships with her family and for her to be released under supervision. In conclusion, the finding that there was no, or insufficient, medical evidence on the Applicant's mental health that the Officer could address was reasonable.

[24] The Officer also considered the issue of the availability of mental health treatment in Nigeria. The Court agrees that the Applicant provided little evidence to demonstrate that she would be unable to obtain treatment in Nigeria for her conditions. The obtaining of medication was not raised as an issue. In respect of counselling, the Court was drawn to a country condition report that indicated there were only 150 psychiatrists available in Nigeria and public funding of healthcare was limited. However, there was no indication that she was being treated by a psychiatrist or similar professional in Canada. Moreover, the Applicant's counsel acknowledged that privately funded medical care could be obtained in Nigeria, but incorrectly states that the Officer makes assumptions as to the Applicant's ability to pay for health services, and her access to health services in Canada at present. The officer's point was that the Applicant did not meet her onus to demonstrate that she could not pay for such health services or whether she was

receiving them in Canada at present. The Court concludes again that there was insufficient evidence in support of the Applicant's claim that she could not obtain treatment for her mental health condition in Nigeria, such that the decision can be said to be unreasonable.

B. *The Officer did not ignore evidence or err in the assessment of the Applicant's criminality*

[25] The Officer concluded that the Applicant had not demonstrated sufficiently compelling grounds to overcome her criminal inadmissibility and the circumstances of her criminal offending was not itself a sympathetic factor in her favour.

[26] The Applicant argues that the Officer did not undertake an appropriate assessment of the factors according to Immigration, Refugees and Citizenship Canada's manual on assessing inadmissibility and humanitarian and compassionate applications. She argues that he ignored evidence of mitigated risk, again with reference to Dr. Federoff's report. The principal problem with this argument is that the Applicant failed to present the Officer with the trial judge's reasoning in imposing what can only be considered a significant sentence of three years for a single act regarding child pornography. The Officer was provided neither with the evidence regarding sentencing, apart from that described by Dr. Federoff, nor the reasons of the trial judge.

[27] The starting point in any discussion attempting to mitigate or make exceptions to criminal convictions begins with the trial and sentencing procedures, particularly the reasons of the Court. In addition, Dr. Federoff pointed out in his report that the Applicant did not accept responsibility

for her actions leading to her conviction, which to this point in time has not been overturned on appeal.

[28] The Applicant also submits that the Officer erred by placing limitations on Dr. Federoff's report because the source of information was primarily from the Applicant. She cites the Supreme Court of Canada decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61 [*Kanthasamy*] at paragraph 49. The Supreme Court criticized the Officer in that matter because the report "rested mainly on hearsay" as the psychologist was "not a witness of the events that led to the anxiety experienced by the applicant". No one can disagree with that reasoning, for as the Court pointed out it would lead to most medical reports being rejected. That is not the same reasoning that applies when the report is based upon events that happened to an Applicant who has a significant history of not being credible in matters involving decision makers. In addition, the psychological report in *Kanthasamy* directly addressed the impact of removal. There was no similar evidence before the Officer in this matter.

[29] There is similarly no probative support for the Applicant's submission that the Officer's conclusions were "based on selective review of the evidence before her regarding the Applicant's credibility" or that he "misconstrued Dr. Federoff in his risk assessment." Dr. Federoff did not provide a risk assessment, while the Applicant's lack of credibility extends across both immigration and criminal matters, and has been detailed in a graphic fashion, including in Dr. Federoff's report.

[30] The Applicant also takes issue with the Officer's conclusion that despite the Applicant's own experience as a victim of female genital mutilation, it was not acceptable by Canadian standards for anyone to be preoccupied with the genitals of children. The Applicant describes such a reference as specious and harboring a "false attractiveness to it which on further scrutiny does not hold up". In view of the fact that the Applicant is seeking an exception to her being found inadmissible for serious criminality, these remarks would appear to reflect the views of the criminal court trial judge's conclusion that Applicant's conduct was "incomprehensible as 'innocent family photographs' as claimed by the Applicant". The Applicant argued that in Nigeria children often ran around naked and photographs of that nature taken by the Applicant were not meant to be pornographic in nature. The trial judge implicitly found such conduct was not acceptable by Canadian standards, besides the contention being not credible.

C. *Was the Officer's assessment of the best interests of the Applicant's children reasonable?*

[31] The Officer noted that while the BIOC should be given substantial weight, the interest of the child does not outweigh all other factors in a case and constitutes only one of several important factors that would be considered in the H&C decision.

[32] The Officer considered the evidence provided by the Applicant and that she has maintained a strong emotional bond and that the separation will cause her, her husband and her children to suffer. The Officer noted that the children were temporarily in the custody of the Children's Aid Society and that during her incarceration there had been pre-approved visits under supervision and that they were deemed to be successful given the positive interaction and impact on the children. Ms. Motiuk reported that the Applicant decided that the children would

remain with the father if removed because the children were happy and well-adjusted with her husband in their home. The Officer noted that in the event of a removal, separation would take place and that the Applicant's family would suffer emotionally in the separation from her and would likely cause the Applicant to be unhappy, lonely and depressed.

[33] However, the Officer emphasized that there was limited evidence with respect to the children and their relationship with the Applicant. No psychological assessments of the children were provided, or about the children's day-to-day lives. The Officer acknowledged that the Applicant had been found to be of low risk to reoffend. However the Applicant's criminal record and the fact that her children were victims of her offence together with the lack of other evidence presented challenges to concluding that it was in their best interest to be reunited with their mother.

[34] The Applicant's submission is that the Officer failed to properly assess the evidence regarding the BIOC issue. The problem with this submission is the paucity of objective evidence on the impact on the children in the mother's removal to Nigeria. She had been absent for a considerable period, and the Applicant expressed how well they had been doing with her husband in her absence. Moreover in particular reference to the view of the CAS, the Court does not find that it had completed the process of the Applicant being in an unsupervised situation with the children. The Court does not find therefore, evidence of an unqualified endorsement of the Applicant's reintegration with her children, as is argued by the Applicant.

[35] The Court is satisfied that the Officer was sufficiently "alert, alive and sensitive" to the best interests of the Applicant's children and concluded that it was in their best interest to remain in Canada with their father. There are no reviewable errors with respect to this issue, including the suggestion that the Officer did not consider the evidence that was on the record. It is not up to the Court to reweigh the evidence, particularly as the main issue relates to its insufficiency. The reality is that the Applicant did not appear to place much emphasis on this issue, rather leading with the argument of the Officer's alleged reviewable error by failing to properly evaluate Dr. Federoff's evidence in relation to the impact on her by removal, and the mitigation of her inadmissibility finding.

VI. Conclusion

[36] The Officer recognized that the Applicant's return to Nigeria will result in hardship and emotional distress for her and her family. Nonetheless, the Court does not conclude that the Officer's conclusion was unreasonable in rejecting the application because "insufficient factors that warrant exceptional consideration" had been adduced.

[37] In the words of the majority in *Kanthasamy* at paragraph 15, adopting the words of Janet Scott, the first Chair of the Board, in proceedings before the Special Joint Committee of the Senate and House of Commons, this is not a situation "that deportation might fall with much more force on some persons … than others because of their particular circumstances" [emphasis added], by which this Court understands was meant that the remedy should be accorded in circumstances that are generally considered to be exceptional in nature.

[38] In the Court's view, the exceptional nature of the application of section 25 of the IRPA was also implicitly understood in *Kanthasamy* at paragraphs 23 and 33 of its decision. In the first instance, it noted that "[n] or was s. 25(1) intended to be an alternative immigration scheme". Furthermore, it also set the bar at a level of exceptional circumstances at paragraph 33 of the decision by implicitly sanctioning the words "unusual and undeserved or disproportionate hardship" as applied in the guidelines. Although it did so with the strong caveat that this terminology not be determinative, as opposed to instructive, or be applied so as to fetter the Officer's decision, or used as discrete high thresholds in a way that limits the Officer's ability to consider and give weight to all relevant H&C considerations in a particular case, "unusual and undeserved or disproportionate hardship" remains the general guidepost for assessing H&C applications. This is especially pertinent to the assessment of the BIOC. These directions were not, however, intended to undermine the generally exceptional nature of section 25 of the IRPA.

[39] The Court concludes that the Officer's decision meets the requirements of justification, transparency and intelligibility within the decision-making process, and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[40] The application is therefore dismissed, with no questions are certified for appeal.

JUDGMENT in IMM-398-18

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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