Federal Court  Cour fédérale

Date: 20181002

Docket: IMM-5010-17

Citation: 2018 FC 978

Ottawa, Ontario, October 2, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

GREGORY OSADEBAMWEN OSAGIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On August 20, 2015, Citizenship and Immigration Canada ("CIC") told Gregory Osadebamwen Osagie (the "Applicant") that his permanent resident card renewal application was supported by humanitarian and compassionate ("H&C") grounds. He then left Canada before retrieving his new permanent resident card, having been advised that he could simply obtain a travel document from an overseas visa post in order to collect the card once it was ready

to be issued. But when he applied for a travel document at an overseas visa post, the visa post denied his application, finding that he was in violation of his residency requirements and that H&C factors did not merit relief in his case.

[2] On appeal before the Immigration Appeal Division ("IAD"), the Applicant argued that the visa post's decision was legally invalid and that H&C factors in his case warranted relief. On October 13, 2017 the IAD dismissed the appeal.

[3] The Applicant then applied to this Court for judicial review of that decision. I find that the IAD's decision is unreasonable and will set it aside for the reasons below.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a citizen of Nigeria and a medical doctor. He became a permanent resident of Canada along with his wife (Caroline Abolanle Osagie) and four children (Caroline, age 25; Gregory, age 22; Esther, age 18; and John, age 15) on August 2, 2009. His wife and children subsequently became Canadian citizens, but the Applicant did not. Instead of substantially residing in Canada after landing, the Applicant returned to Nigeria, where he continued to work as a doctor. He avers that he made this decision so that he could support his family in Canada and care for his aging parents in Lagos (his father has since passed away). His family needed support because his wife could not immediately find work in Canada, and his children were attending university.

[5] The Applicant applied to renew his permanent resident card from within Canada in May 2015. In a letter dated August 20, 2015, CIC (now known as “Immigration, Refugees and Citizenship Canada”) found that in spite of not meeting the residency requirement, there were sufficient H&C grounds to support the retention of his permanent resident status.

[6] The following day, the Applicant phoned the CIC Call Centre to make an urgent request to have his permanent resident card issued. He had planned to travel to Nigeria and, considering that his former card expired on August 17, 2015, he would need the new card in order to return to Canada. He says he was informed that he could obtain a travel document from abroad, considering that his permanent resident card had already been renewed.

[7] The Applicant's urgent request was refused, but having been advised that he could obtain a travel document from abroad, he travelled to Nigeria as planned. Later, in a letter dated October 22, 2015, CIC Canada provided further instructions about obtaining a new permanent resident card. The Applicant then applied for a travel document from the Canadian Deputy High Commission (“CDHC”) in Lagos so that he could travel back to Canada and obtain his permanent resident card.

[8] He received a response from the CDHC, which included two letters dated November 25, 2015. The first letter, authored by the “Visa Office” of the CDHC, rejects the Applicant’s request for a travel document. The second letter, authored by an Immigration Program Manager, states that the Applicant does not meet the residency obligation.

B. *Decision Under Review*

[9] The Applicant appealed the Visa Office's decisions to the IAD. The IAD hearing took place on August 28, 2017, and it dismissed the appeal on October 13, 2017. The IAD considered that there were two issues to resolve on appeal: first, whether the Lagos Visa Office's decision was legally valid, and second, whether the Applicant qualified for special relief from the residency obligation on H&C grounds.

[10] With respect to the legal validity of the decision, the IAD notes that the Applicant had made two separate applications: one for a new permanent residency card inland, and a second one for an overseas travel document. The IAD finds that, contrary to the Applicant's argument "the officer from the visa post of Lagos was not bound by the H&C analysis made in a previous application."

[11] With respect to the second issue, the IAD finds that the Applicant's situation did not warrant special relief on H&C grounds. The IAD first examines the extent of the Applicant's non-compliance with his residency obligation, noting that he was only about 51% compliant. The IAD then goes on to consider the reasons for the Applicant's departure from Canada, including his employment situation and the situation facing his aging parents. The IAD concludes that the Applicant could have secured a job in Canada but chose not to, and determines that other members of the Applicant's family could have provided care to his parents. The IAD further decides that the Applicant did not return to Canada at the first opportunity to fulfil his residency obligation, and that it is likely that he would continue working in Nigeria as a medical doctor even if he were granted H&C relief. The above factors weighed against the Applicant's H&C application.

[12] The IAD then turns to the issue of establishment, finding that the Applicant co-owns a house in Canada but that this factor is mitigated by the fact that he also owns a house and resides in Nigeria. While he declared some income in Canada, the IAD finds that the source of income is obscure and affords little weight to the establishment factor.

[13] Finally, the IAD analyzes the Applicant's family circumstances. He finds that the bonds between the Applicant and his family are "very strong," and therefore gives a great deal of weight to this factor. The IAD also finds that the entire family would experience hardship if the Applicant were to lose his permanent resident status, but notes that the family could visit him in Nigeria and further notes that this factor is not determinative. The IAD finds that there would be an "emotional impact" on the Applicant's children if the appeal is refused, but reasons that they have been living in the absence of their father's physical presence for the past seven years. The IAD finds that this absence mitigates the impact on the children, and is such that it does not outweigh the other negative H&C factors. Accordingly, the IAD dismisses the appeal.

III. **Issue**

[14] In my view, the primary issue that arises on this application for judicial review is as follows:

- Did the IAD commit a reviewable error in analyzing the H&C factors in the Applicant's case?

IV. **Standard of Review**

[15] The parties do not dispute that the standard of review applicable to this issue is reasonableness.

V. **Analysis**

A. *Did the IAD commit a reviewable error in analyzing the H&C factors in the Applicant's case?*

[16] The Applicant argues that the Visa Office and IAD erred in determining that his circumstances did not merit H&C relief. The Applicant notes that the positive H&C assessment of August 20, 2015 took place a mere three months before the decision to refuse him the travel document was rendered. This means that two decision-makers, tasked with evaluating the Applicant's eligibility for H&C relief, looked at the same facts but reached opposite conclusions.

[17] The Applicant further reiterates his explanation of his prolonged absence during the residency period, namely his need to work in Nigeria to finance his children's education and the need to care for his aging parents. Before the IAD, the Applicant adduced evidence that his first daughter has now graduated and is gainfully employed, as is his wife.

[18] The Applicant further contends that the IAD's assessment of the best interest of his children and hardship to his family was unreasonable. He takes issue with the IAD's determination that the best interest of the children could be served by contact through electronic means, as well as the IAD's finding that the family could visit the Applicant in Nigeria, claiming that the latter would be financially prohibitive. Finally, the Applicant argues that the IAD's conclusion that he will not return to Canada on a permanent basis is unsupported by the

evidence, in light of the fact that the Applicant is pursuing certification by the Medical Council of Canada (to practice medicine) and his strong family ties to Canada.

[19] The Respondent argues that the IAD has extensive discretion to consider and weigh evidence, and that it made a reasonable determination in the case at bar, including the best interest of the children. It contends that the Applicant has not demonstrated a material factual or legal error with the IAD's conclusions, but rather disagrees with the weighing of the evidence.

[20] I agree with the Applicant. The IAD's H&C analysis is unreasonably based on irrelevant factors. The IAD's role is to review the H&C factors, not the likelihood of the Applicant's future compliance with the residency obligation should the application be granted. The IAD also does not confront evidence directly contradicting its conclusion, such as the Applicant's testimony that he wishes to reunite with his family in Canada, his application to practice medicine in Canada, and arrangements made for his sibling to care for his widowed mother in Nigeria so he can return to Canada.

[21] I also take issue with the IAD's analysis of the Applicant's obligations to care for his aging parents. The IAD determined that the Applicant had many siblings in Nigeria who could have provided such care in the Applicant's place. In my view, the IAD has no business making such a determination. During the IAD hearing, the Applicant provided reasonable explanations about alternate care arrangements: in his culture the eldest son is responsible for caring for the parents, and his siblings were either too young or financially insecure to care for them before now. His wife added that, as a medical doctor, it was particularly appropriate for him to be present because of his father's critical health condition. Despite this evidence, the IAD simply

asserted that one of the other siblings could have played this role and commented that "[i]mmigrating to a new country includes making difficult choices" (IAD Decision, para 19). The IAD had no basis for assuming that the siblings were able or willing to care for the parents, and in any event the Applicant testified about the obstacles to that course (the other siblings were too young and lacked the resources to do so at that time). Immigration does involve difficult choices. This is why Parliament provided flexibility and relief from what would otherwise result in harsh consequences under a rigid application of the residency requirement. The decision-maker is owed deference in weighing the relevant factors. But the IAD's casual statement that immigration entails difficult choices, along with the bald assertion of a plausible alternative course of action, is insufficient.Certification

[22] Prior to the hearing, the Respondent's counsel proposed a question for certification. I shall reproduce it in its entirety:

> Does an inland determination by an officer that humanitarian and compassionate considerations relating to a permanent resident justify the retention of permanent resident status pursuant to paragraph 28(2)(c) of the *IRPA*, have the effect of permanently overcoming the breach of the residency obligation prior to that determination under paragraphs 31(3)(a) and (b) of the *IRPA* to assess the residency obligation of the applicant for the period covered by the prior determination?

[23] A certified question is "a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance" (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46. In my view, this question is not one which contemplates an issue of broad significance or general application.

VIIConclusion

[24] This application for judicial review is allowed. In my view, the IAD improperly engaged in extraneous considerations when it contemplated the likelihood of the Applicant meeting the residency obligation in the future, and drew factual conclusions that were not grounded in the evidence. Most problematic was the IAD's determination that the Applicant's siblings were able to care for their aging parents. In view of the fact that the IAD considered this to have a "negative impact" on the ultimate disposition of the appeal, it is possible that the IAD could have reached a different conclusion had the error not been committed. For that reason, the decision must be returned for redetermination.

JUDGMENT in IMM-5010-17

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter returned back for redetermination by a differently constituted panel.

2. No question is certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5010-17
STYLE OF CAUSE:	GREGORY OSADEBAMWEN OSAGIE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 11, 2018
JUDGMENT AND REASONS:	AHMED J.
DATED:	OCTOBER 2, 2018

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