

Federal Court



Cour fédérale

Date: **20191003**

Docket: IMM-1527-19

Citation: 2019 FC 1204

Ottawa, Ontario, **October 3, 2019**

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**EHIMIAGHE PRESLEY AYENI
VICTORIA ISIMEME AYENI
EMMANUEL AYENI
ESTHER AIRAOA AYENI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by Senior Immigration Officer [Officer]. On December 21, 2018, the Officer declined the Applicants' request for permanent

residence on humanitarian and compassionate grounds [H&C] pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[2] The Applicants are Ehimiaghe Presley Ayeni [Principal Applicant], his wife Victoria, and their two children, Esther and Emmanuel. They are citizens of Nigeria. The Applicants arrived in Canada in June 2016 and have been in Canada ever since.

[3] The Applicants claimed refugee protection because of Mr. Ayeni's sexual orientation. Mr. Ayeni says he is bisexual. He claims that he fled Nigeria with his family after he was caught having sexual intercourse with a man named Buwa Chukwu. Buwa Chukwu has since died. The Applicants submitted an article stating that, because of his sexual orientation, Buwa was beaten to death by community members.

[4] Mr. Ayeni claims that because he is bisexual, both he and his family will be persecuted in Nigeria should they return. ~~In 2017, the Principal Applicant alleges that he was forcibly taken by the army on two separate occasions, and that he was beaten and suffered degrading treatments while detained. He was only released in exchange of a promise to pay a specific amount of money, and with the understanding that more beatings would otherwise take place.~~

A. *Procedural History*

[5] The Refugee Protection Division [RPD] heard the Applicants' claims and concluded they were not Convention Refugees in a decision published August 29, 2016. Credibility was a serious issue at the RPD and featured heavily in the Officer's decisions as well. The RPD stated that, because of contradictions and inconsistencies, the credibility issues were "so detrimental to [Mr. Ayeni's] overall credibility that they undermine his allegation that he is bisexual" (RPD's decision, at para 33). The Officer relied heavily on this finding of credibility in her decision.

[6] The Applicants appealed to the Refugee Appeal Division [RAD], but their appeal was denied because of lack of jurisdiction. Their application for leave and judicial review of the RAD's decision was also denied.

[7] Subsequently, the Canada Border Services Agency [CBSA] issued a Direction to Report for Removal, but the Applicants did not show up. The CBSA issued a warrant for their arrest. In July 2018, the Applicants presented themselves and the CBSA executed the warrant but released the Applicants on the same day. The CBSA scheduled the Applicants' deportation for March 2019, but in March, Justice Martine St-Louis granted a stay of deportation.

III. Decision under Review

[8] In reviewing the H&C application, the Officer assessed the Applicants' personal circumstances and establishment in Canada, the adverse country conditions in Nigeria, and the

best interests of the children. The Officer concluded that the circumstances did not justify a humanitarian and compassionate exemption under section 25 of the IRPA.

A. *Personal Circumstances and Establishment in Canada*

[9] Both Mr. and Mrs. Ayeni have jobs in Canada, but the Officer wrote that they did not submit any evidence to support their employment. Consequently, the Officer gave “this allegation no weight”.

[10] Moreover, Mr. and Mrs. Ayeni both volunteer in Canada, and they submitted letters of support to show they volunteer with five organizations. Mrs. Ayeni additionally volunteers with the Non-Status Women’s Collective. Mr. Ayeni’s son is in school in Canada, but the Officer found that his schooling was not a significant factor. Although Mr. Ayeni’s daughter is in daycare, the Applicants did not submit any evidence to support her enrollment and the Officer concluded again that it was a weightless allegation.

B. *Adverse Country Conditions*

[11] The Officer addressed the credibility concerns at this point in the decision. The Officer listed the inconsistencies that the RPD identified in their decision: Mr. Ayeni inconsistently stated when and whether he lived openly as a bisexual; omitted to explain how his relationship with Buwa began; inconsistently identified whether the police in Nigeria were seeking him; evaded explanation about a period of time where he was in hiding; and, inconsistently described his relationship with his wife. These inconsistencies undermined his claim that he is bisexual.

[12] The Applicants submitted a publication by the Canadian Immigration and Refugee Board as evidence of the country conditions in Nigeria. The publication states that same-sex relationships are illegal in Nigeria, that punishment for same-sex activity can be violent, that LGBTQ people are ostracized. The publication also states that both real and perceived sexual orientation are grounds for violence, and that violence is most often perpetrated by non-state actors.

[13] The Officer did not address the publication in the H&C decision. Instead, the Officer addressed other evidence submitted by the Applicants including an excerpt from a “crime diary” and two articles that identify Mr. Ayeni by name as someone who was in a same-sex relationship with Buwa Chukwu. One article is a blog post available online, and the other is a newspaper article. The Officer found that neither the crime diary nor the articles were probative because they were replete with typos and/or pop-up advertisements that blocked portions of text. Further, the Officer concluded that the dates on the articles further undermined Mr. Ayeni’s credibility because, although he claims he received the articles after his hearing, the dates on the articles pre-date his hearing. The Officer noted that the Applicants did not show the articles were widely read. The Officer did not consider the country conditions further because Mr. Ayeni’s credibility made the issue a moot point.

[14] A psychological assessment reported that Mr. Ayeni was exhibiting symptoms consistent with post-traumatic stress disorder, generalized anxiety disorder, and a major depressive disorder. Mr. Ayeni did not demonstrate that he could not access the appropriate services in Nigeria, so the Officer considered the assessment of little significance.

[15] Finally, because both Mr. and Mrs. Ayeni have higher education degrees and work experience in Nigeria, the Officer concluded that there was no evidence they would have undue difficulty re-establishing themselves in Nigeria.

C. *Best Interests of the Child*

[16] The Officer accepted evidence from a registered psychotherapist that, in general, uprooting children into unstable or chaotic situations has “serious psycho-social ramifications”. The Officer countered that there was no evidence the children had chaotic lives in Nigeria, and that they had already been uprooted and moved to Canada where they subsequently established themselves. The Officer concluded that it was in the best interest of the children to be in a supportive and loving environment, which the Ayeni family could provide in Nigeria. While Mr. Ayeni’s son would have to begin at a new school in Nigeria, it would not compromise his best interests.

IV. Positions of the Parties

A. *The Applicants’ Position*

[17] The Applicants argue that it was not reasonable for the Officer to disregard their establishment in Canada merely because they did not provide proof of employment.

[18] The Applicants argue that the Officer did not give enough significance to the best interests of the child, or reasonably consider the evidence. Specifically, they argue that the

Officer did not consider the future difficulties the children would face including poverty and discrimination.

[19] The Applicants argue that the Officer's analysis of the crime diary and articles was unreasonable. They submit that the crime diary and articles [supporting documents] do not contain obvious deficiencies which would justify their exclusion. The Applicants cite *Adebayo v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 330 at para 34, for the proposition that "typographical errors are not enough to find a document to be fraudulent" and "clerical errors are not necessarily determinative of authenticity". They argue that the problems with the supporting documents fall within the range of typographical and clerical errors; they are not obvious deficiencies. Further, the Applicants argue that they mitigated the deficiencies of the documents by providing corroborating affidavits, which is consistent with federal court jurisprudence (Applicants' Reply, at para 19 citing *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 58). The supporting documents show that Mr. Ayeni has appeared as an LGBTQ person on the internet, and that information is accessible to anyone who speaks English.

[20] The Applicants argue that Mr. Ayeni and his family are at risk of almost certain persecution in Nigeria because Mr. Ayeni appears as described above. They argue that returning the Applicants would be contrary to the *Canadian Charter of Rights and Freedoms* and the *Convention Against Torture*.

B. *The Respondent's Position*

[21] The Respondent argues that the Officer's decision is "a reasonable possible acceptable outcome based on the facts and law" (Respondent's Memorandum and Affidavit, at para 1). The Respondent notes that permanent residence on humanitarian and compassionate grounds is "an exceptional and discretionary measure" (Respondent's Memorandum and Affidavit, at para 17). The Respondent argues it was reasonable for the Officer to conclude that, while Mr. and Mrs. Ayeni volunteer extensively, their establishment in Canada was not such that returning to Nigeria would be considerably difficult because, as the Officer noted, Mr. and Mrs. Ayeni have work experience in Nigeria and higher education. It was reasonable for the Officer to disregard their employment in Canada and the daughter's daycare enrollment due to lack of supporting evidence.

[22] On the issue of credibility, the Respondent argues that the RPD had already made a finding of non-credibility which was part of the record in front of the Officer (Respondent's Memorandum and Affidavit, at para 40). The Respondent argues it was open to the Officer to conclude that the new evidence "did not counterbalance the factual findings of non-credibility" and, further, the Officer justified her decision by listing the deficiencies with the new evidence as well (Respondent's Memorandum and Affidavit, at paras 53–54).

[23] The Applicants' arguments about the best interests of the child are without merit. Their arguments amount to requesting the Officer weigh the evidence differently, but the Officer provided reasons for her decision, and was clearly alert to the interests of the children.

V. Relevant Dispositions

[24] The following dispositions are relevant in this case:

**Humanitarian and
compassionate
considerations — request of
foreign national**

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

**Séjour pour motif d'ordre
humanitaire à la demande de
l'étranger**

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VI. Analysis

[25] As *Dunsmuir v New Brunswick*, 2008 SCC 9, the standard of review to be applied by this Court is reasonableness. In addition, subsection 25(1) of the IRPA confers broad discretion on the Minister, and by implication on his delegate, the officer, to determine H&C applications. Accordingly, if the Officer's decision is defensible in respect of fact and law, and it is justified, transparent and intelligible, it should stand.

[26] The Applicants appear to have contributed and continue to contribute to their community. They also appear to have the economic means and certain social grounds to be at least considered for H&C considerations. In *Jhabbar v Canada (Citizenship and Immigration)*, 2014 FC 1226,

Justice Alan S. Diner wrote:

[14] A proper assessment of establishment in Canada is essential to a proper H&C determination: See *Hamam v MCI*, 2011 FC 1296 at para 52; *Raudales*, above, at para 19. While the H&C process is not designed to eliminate hardship, but to provide relief from unusual and undeserved or disproportionate hardship, evidence of establishment is still a significant factor that must be properly considered and weighed in an H&C analysis: *Hamam* at para 54.

[15] In *Raudales*, as in this case, the officer found that since the refugee process takes several years to run its course, a certain level of establishment would be expected. The officer in that case went on to say that the applicant had established himself as any student would, but that he had not remained in Canada for so long or established such strong ties that it would be unreasonable for him to return to Honduras. The court held that the finding was contrary to the overwhelming weight of evidence put forward, and that absent a proper assessment of establishment, a proper determination could not be made: *Raudales* at paras 18-19.

[27] Regarding their H&C application, the Applicants have submitted multiple pieces of evidence in respect of their social and economic establishment in the community:

- A letter from the École Laurendeau-Dunton (P-18) and a letter from Eagle Plains Public School (P-19) as proof of their son's current and previous enrolment in school;
- Letters of support from members of various community organizations, explaining the Principal Applicant's involvement in the Christ Embassy Church to which the Applicants are committed as congregants and benefactors (P-10, P-11 and P-17);
- In addition, letters of support were submitted from members of multiple community organization in which the Applicants have been actively volunteering (P-13, P-14, P-15 and P-16);
- Written testimony from the Principal Applicant as to the fact that he has been financially independent and working to support his family (P-6);
- Residential lease and proof of payments of the lease obligations (P-8 and P-9).

[28] Therefore, such considerations require, at the very least, certain explanations in the decision itself as to whether the H&C grounds are substantial enough to grant the Applicants the possibility of remaining in Canada. The evidence on file does bear certain weight which needs explanations: thus, is there enough in the H&C considerations to grant the Applicants their request?

[29] The Court, in considering the Officer's reasoning, determined the following in respect of the assessment of evidence: in her reasoning, the Officer relies heavily on the findings of credibility of the RPD, which she is entitled to do. Nevertheless, due to the findings on

credibility of the RPD, the Officer gave little probative value to potentially relevant documents submitted by the Principal Applicant that required more consideration.

[30] More specifically, the Officer highlights syntax errors in the crime diary that are well within the range of typographical or inadvertent clerical errors and do not ordinarily undermine the credibility of the document.

[31] Moreover, the Officer dismissed the relevance and probative value of a blog post, which names the Principal Applicant as the lover of Mr. Chukwu and identifies him by photo. The Officer independently confirmed that the blog post is accessible online; however, an unreasonable burden was placed on the Principal Applicant to demonstrate that the blog post is “widely viewed and accessed by the public”. The Officer was, in fact, able to have access to the blog. As the blog post publicly identifies the Principal Applicant as bisexual, and, thereby, potentially endangers his life in Nigeria, recognizing the country condition evidence thereon, more demonstrative consideration is required for a reasonable assessment.

[32] Similarly, the Officer dismissed the relevance and probative value of a photocopy of a newspaper called “South-South News” which reports the death of Mr. Chukwu and the escape of Mr. Ayeni without adequately providing an explanation.

[33] Finally, the Officer has not given proper consideration to a letter by the Ogute Community which invites the Principal Applicant to a spiritual cleansing because of the fact that he was caught having sex with another man. The Officer simply rejected the letter on the basis

that the RPD's credibility findings outweighed its probative worth, which the Officer may have been in position to do, had she adequately considered key evidence, discussed above, for its probative value with explanations.

[34] This Court recognizes that certain peripheral evidence does appear to embellish, to strengthen the narrative; nevertheless, the core of the narrative needs due consideration before the peripheral evidence can be said to be an embellishment.

VII. Conclusion

[35] For all the above reasons, this judicial review is granted and the matter is returned to be considered anew by a different officer.

JUDGMENT in IMM-1527-19

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the matter be considered anew by a different officer. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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