Federal Court Cour fédérale

Date: 20220413

Docket: IMM-2592-21

Citation: 2022 FC 533

Ottawa, Ontario, April 13, 2022

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

DAVID OKURUNGBE NMOYE
OBEHI MARGARET MNOYE
DAVID IFEANYICHUKWU OSEDOME OTA-NMOYE

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Background

[1] Mr. David Okurungbe Nmoye came to Canada on a Study Permit in September 2013. His wife, Obehi Margaret Nmoye, and 18-month-old son joined him in March of 2017. While in Canada, the couple gave birth to their daughter in December 2017. Their last Work Permit

elapsed in January 2019 and they applied for permanent residence from within Canada on humanitarian and compassionate grounds [H&C Application] in August 2020. At the time the H&C Application was considered, their son was five and their daughter was three.

[2] They now seek judicial review of the decision of the immigration Officer rejecting their H&C Application. In their view, the Officer improperly assessed the best interests of their minor children; he did not give sufficient weight to their establishment in Canada and hardship upon removal, while giving too much weight to the delay the Applicants encountered in regularizing their status in Canada.

II. Decision Under Review

[3] In the reasons for decision, the Officer considered the following factors: establishment in Canada, the best interest of the children, the impact of relocation to Nigeria, and the Applicants' adverse immigration history.

[4] The Officer found the Applicants' level of establishment not to be significant or extraordinary, noting that it is expected for foreign nationals to attain a certain degree of establishment in Canada, be financially independent, and have a clean criminal record, as the adult Applicants have done. He therefore gave the adult Applicants' establishment in Canada modest weight.

[5] The Officer then considered the best interest of the children. He considered the Applicants' argument that the children's physical, emotional and educational wellbeing could be

severely compromised due to inadequate infrastructure and services present in Nigeria should they be required to leave Canada. However, he finds that these are general issues that affect the Nigerian population at large and notes that Parliament did not intend for section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], to make up for the difference in standard of living between Canada and other countries.

[6] The Officer notes that the children have no specific health condition or medical issues and that they are supported by loving parents.

[7] The Officer finds that it is in the best interest of the children to remain under the care of both their parents. While acknowledging that the least impact and disruption to their lives would be to stay in Canada, he finds that considering their young age, they would adapt easily to their lives in Nigeria and benefit from the support from their extended family, including their grandmothers, aunts and uncle.

[8] Having considered all the facts specific to the children, the Officer gives this factor "some weight in favour of a positive decision."

[9] The Officer then turns to the alleged hardship the Applicants would suffer upon relocating to Nigeria. He notes that the adult Applicants have a long history of prior residence in Nigeria, including employment history, and that they will be able to re-establish themselves in that country. The Officer considers the adverse country conditions in Nigeria, including harsh social-economic and political conditions, lack of good employment prospects, increased prices of

food, and its homelessness crisis. Again, he finds those to be generalized to all Nigerians. He notes that different standards of living exist between countries and that it was not the intent of Parliament to make up for those differences. Section 25 of the *IRPA* is intended to give the Minister some flexibility to deal with extraordinary situations. Although the Officer recognizes there will be hardship in relocating to Nigeria, he finds that it will be minimized by the fact that the adult Applicants have spent most of their lives in that country, by their level of education and by their contacts and extended family members residing there.

[10] Consequently, the Officer gave the hardship of relocation little weight.

[11] Finally, the Officer gave "substantial negative weight" to the Applicants' adverse immigration history. He notes that the Applicants are without status in Canada since January 2019 and that the letter they received clearly stated that they were required to leave Canada. Yet, they stayed and the adult Applicants continued to work in Canada without authorization. The Officer finds this to be a serious negative consideration of the Application as it demonstrates the adult Applicants' failure to comply with the immigration laws of Canada.

[12] Having considered all the relevant factors, the Officer finds the humanitarian and compassionate considerations do not justify the exceptional remedy under section 25(1) of the *IRPA* and rejects the Application.

III. Issues and Standard of Review

[13] This Application for judicial review raises the following issues:

A. *Did the Officer err in his analysis of the BIOC?*

B. *Was the Officer's assessment of the evidence reasonable?*

[14] The Applicants argue that the Officer's assessment of the best interest of the children amounts to a breach of procedural fairness, which would be reviewable on a standard of correctness. I disagree.

[15] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Supreme Court unanimously held that the standard applicable when a court reviews an immigration Officer's assessment of the best interest of a child is that of reasonableness (the dissent was rather on the applicable test and on whether the Officer's decision was in fact reasonable).

[16] And this has not changed with the Court's more recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23.

IV. Analysis

A. *Did the Officer err in his analysis of the BIOC?*

[17] The Applicants argue that the Officer failed i) to conduct more than a "basic needs analysis", ii) to explicitly identify a child's interests and examine them with a great deal of attention in light of all the evidence, and iii) to give the children's best interest substantial weight.

[18] What the Supreme Court did in *Kanthasamy* is set aside the requirement that an applicant show an "unusual and undeserved or disproportionate" hardship in order to have his or her application granted. In that case, Justice Abella, writing for the majority, held that the Officer failed to consider the applicant's circumstances as a whole. Instead, the officer had applied the wrong hardship test to each of the factors that were specific to the applicant: his youth (the applicant was 17 years old), his mental health and evidence that he would face discrimination based on his ethnicity upon return to his country. In doing so, the officer had failed to consider the applicant's circumstances as a whole.

[19] However, the Supreme Court in *Kanthasamy* did not depart from its findings in *Baker v Canada (Citizenship and Immigration*, [1999] 2 SCR 817, where the Court held at paragraph 75 that:

> …for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[20] It did not depart either from the notion that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [individual] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the

provisions of the Immigration Act" (at para 13, citing Janet Scott, the first chair of the Immigration Appeal Board).

[21] The Applicants argue that the Officer erred by only assessing the children's "basic needs." Yet, the evidence did not point to any specific needs they would have. The Officer notes that the children do not have physical or mental health issues. The minor Applicants are normal five and three year old children whose world, at that age, revolves around their parents and whose needs are generally met by both their parents.

[22] The Applicants also contend that the Officer failed to identify the best interest of the children and to give that factor sufficient weight. I disagree. The Officer did say that the best interests of the children would be to remain in the care of their parents, be it in Canada or in Nigeria, while accepting that the least disrupting outcome would be for their H&C Application to be granted. However, that cannot be sufficient to warrant the remedy sought. Otherwise, all such applications would be granted. In my view, it was reasonable for the Officer to find that this factor did not outweigh other considerations. It was also reasonable for the Officer to consider the children Applicants' young age and find that this would inevitably facilitate their integration to Nigeria.

B. *Was the Officer's assessment of the evidence reasonable?*

[23] The Applicants' argument boils down to a dispute over the Officer's approach to weighing the evidence for and against granting their Application.

[24] The Applicants point to Nigeria's objective documentary evidence that "Nigeria has one of the world's worst healthcare systems", that it "is the African country with the lowest vaccination rate," and that its education system is in a state of "[near-complete] dilapidation", with the "world's highest percentage of children not enrolled in school".

[25] Yet the Applicants failed to indicate how these would apply to them. In my view, the evidence rather shows that the children have no specific needs, that the adult Applicants are well educated (21 years for the male Applicant and 19 years for the female Applicant), and that they have work experience both in Nigeria and in Canada. If one would identify their misfortune as the hardship to have to re-integrate their country of origin, that misfortune would be shared by all Nigerians.

[26] In fact, the only factor that is specific to the Applicants is that the adult Applicants have had the opportunity to complete their education in Canada. In my respectful view, section 25 of the *IRPA* was not intended to provide foreign students who do not have their Work Permit renewed an alternative means to obtain a permanent residence in Canada.

[27] Overall, I am of the view that the decision is reasonable and I see no reason for the Court to intervene.

V. Conclusion

[28] For the above reasons, I am dismissing this Application for judicial review. The Applicant's argument amounts to a quarrel over the weight the Officer gave to the different

factors under consideration in the H&C Application. In particular, it is within the purview of the Officer to consider the best interest of the children affected by the decision, and then to decide that other considerations, in this case adverse immigration history, outweigh the best interest of the children considerations.

[29] The parties have not proposed any question of general importance for certification and none arises from the facts of this case.

JUDGMENT in IMM-2592-21

THIS COURT'S JUDGMENT is that:

1. This Application for judicial review is dismissed;
2. No question of general importance is certified;
3. No cost are granted.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2592-21
STYLE OF CAUSE:	DAVID OKURUNGBE NMOYE, OBEHI MARGARET MNOYE, DAVID IFEANYICHUKWU OSEDOME OTA-NMOYE v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 23, 2022
JUDGMENT AND REASONS:	GAGNÉ A.C.J.
DATED:	APRIL 13, 2022

APPEARANCES:

Jeffrey L. Goldman	FOR THE APPLICANTS
Nimanthika Kaneira	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jeffrey L. Goldman Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT