Date: 20071126

Dockets: IMM-1817-07
IMM-1834-07

Citation: 2007 FC 1221

Ottawa, Ontario, November 26, 2007

PRESENT: The Honourable Mr. Justice Blais

BETWEEN:

Docket: IMM-1817-07

TEMITOPE J. AKINBOWALE
OLAOTAN AKINBOWALE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

- and -

Docket: IMM-1834-07

YETUNDE FOLASAD AKINBOWALE
OLAOTAN AKINBOWALE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These are two applications for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision dated February 15, 2007, rendered by the PRRA Officer J. Gullickson (the officer) wherein he denied the applicants' request for permanent residence on humanitarian and compassionate grounds (H&C) filed from within Canada. Mr. Temitope J. Akinbowale (the father) and his son Olaotan Akinbowale (the first child) are the applicants in file number IMM-1817-07. The first child is also an applicant in the file number IMM-1834-07, along with his mother, Yetunde Folasad Akinbowale (the wife). The two applications were heard together. They are based on the same set of facts and raise identical issues.

BACKGROUND

[2] On January 24, 2000, the father arrived in Canada and requested refugee protection at that time.

[3] On August 14, 2000, his wife and their first child arrived in Canada and made a refugee claim on August 22, 2000. She was pregnant at that time and gave birth to a son in Montreal in October 2000.

[4] The applicants were denied refugee status on August 7, 2003, by the Refugee Protection Division (the RPD).

[5] The RPD found, in a decision dated August 7, 2003, that the father was not in Nigeria at the time of his alleged persecution, but rather in the United States, where he was convicted once for grand larceny in 1992 and twice for possession of forged securities in 1996 and 1997.

[6] For these reasons, the RPD did not believe the wife's testimony about her arrest because of her husband's political opinion or the statement about meeting her husband and living with him from 1993 to 1997 in Nigeria. The leave for judicial review of that decision was refused by this Court on January 13, 2004.

[7] The wife gave birth to a daughter on June 20, 2005.

ISSUES FOR CONSIDERATION

[8] I believe the issues should be restated as follows:

1. Did the officer err in his assessment of the H&C factors?
2. Did the officer apply the right legal test to his H&C analysis?

PERTINENT LEGISLATION

[9] The humanitarian and compassionate exemption is found at subsection 25(1) of the Act, and reads as follows:

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that	**25.** (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant

it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	directement touché — ou l'intérêt public le justifient.

STANDARD OF REVIEW

[10] It is trite law that the applicable standard of review of decisions made on H&C grounds is reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, at paragraph 62). In *Ramirez v. Canada (Minister of Citizenship and Immigration),* 2006 FC 1404, Mr. Justice Yves De Montigny held, at paragraph 31:

> This Court will therefore interfere with the H&C decision only if it discloses no line of analysis which could reasonably lead the immigration officer from the evidence to the conclusion she reached. Having said this, I am also mindful of the fact that some of the applicants' arguments involve the interpretation of legal concepts. The issue of defining "hardship" in the context of analyzing the best interests of a child, for one, does not involve first and foremost an appreciation of the facts. The same can be said of the question as to whether an immigration officer must evaluate risk differently in the context of a PRRA application and an H&C application. While these issues are more properly characterized as questions of mixed fact and law as opposed to being fact-specific, I do not believe they warrant a different standard of review. Indeed, it seems to me the mixed nature of these questions merely reinforces the appropriateness of the reasonableness standard.

[11] However, on questions of procedural fairness, the appropriate standard is correctness.

ANALYSIS

1. Did the officer err in his assessment of the H&C factors?

[12] The applicants submit that the officer did not sufficiently assess the interests of the children in his decision, especially concerning the risk their daughter would face of undergoing Female Genital Mutilation (FGM) if they return to Nigeria.

[13] The relevant parts of the officer's decision read as follow:

> FGM
> The applicants allege that their Canadian daughter would face female genital mutilation (FGM) in Nigeria or they would be forced to leave their Canadian daughter behind to avoid FGM in Nigeria, which is an excessive difficulty.
> […]
> The applicants have not sufficiently shown how this daughter is seriously at risk of being forced to undergo FGM. Yetunde, the child's mother, has not indicated that FGM has been done to herself or anyone else in her family and has not indicated that it is customary in her family or particular community. Recent country information on Nigeria indicates that only 19 per cent of women in Nigeria undergo the FGM procedure and the applicants have not presented sufficient evidence that they [sic] would be a serious risk of being forced to have the procedure done to their daughter. Recent country report information indicates that 60 per cent of Yoruba women have had FGM, however, the applicants, even though they have indicated that they are Yoruba, have not mentioned this kind of information as a relevant factor regarding their daughter. Furthermore, these reports indicate that FGM is in decline and that educated women in urban areas are less likely to support the practice and that pressure to have FGM done emanates from the family. The adult applicants, who themselves are apparently against FGM, have not provided sufficient information that such pressure exists for them that they would lead to FGM for their daughter.

[14] It is established that on an H&C application for exemption, the onus of establishing their claim rests on the applicants' shoulders. As held by Mr. Justice Richard Mosley in *Bui v. Canada (Minister of Citizenship and Immigration),* 2005 FC 816, at paragraphs 11 and 12:

> [11] The standard of unusual, undeserved and disproportionate hardship for the grant of an exemption from the requirement to apply for a visa from outside of Canada is a high threshold: *Lee v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 139; *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206 (F.C.T.D.).
>
> [12] The applicant bears the onus of satisfying the decision-maker and may present whatever facts he believes are relevant. An oblique, cursory or obscure submission does not impose an obligation on the officer to inquire further: *Owusu,supra* at para. 9.

[15] It appears from the decision that the officer considered not having sufficient proof indicating that their daughter would have to undergo FGM. The evidence was to the effect that without family pressure, the practice was less likely to be performed. The fact that the applicants are alleging that their daughter would have to undergo FGM if they were sent back to Nigeria as a factor for their H&C applications surely indicates that they are against that practice.

[16] The officer's reasons on the interests of the children read as follows:

> Yetunde says that she has two Canadian born children born in 2000 and 2005 and that these children have known no other lifestyle or culture other than that in Canada. She says that these children are entitled to Canadian benefits and that it would be unfair to force them to live in a culture and lifestyle unknown to them. She says that the oldest child is in school and should finish his education, that he has friends in school and church and enjoys modern technology in education and has a more structured life in Canada.
>
> The applicant has not adequately specified what benefits that may exist in Canada that the applicants or their children would not have

> in Nigeria. I recognize that forcing the children to change school and to move from Canada may cause difficulties and the loss of friends but there is insufficient evidence to show that the move would be an excessive hardship for the children.

[17] Mr. Justice Denis Pelletier held, in *Irimie v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906 (QL), at paragraph 26, that the humanitarian and compassionate exemption process "is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship". Paragraph 12 of his decision reads as follows:

> […] It would seem to follow that the hardship which would trigger the exercise of discretion on humanitarian and compassionate grounds should be something other than that which is inherent in being asked to leave after one has been in place for a period of time. Thus, the fact that one would be leaving behind friends, perhaps family, employment or a residence would not necessarily be enough to justify the exercise of discretion.

[18] In *Liniewska v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 591, at paragraph 20, I noted that the applicant bears the burden of establishing that the officer did not take into consideration the evidence concerning the best interests of the children in his H&C evaluation:

> [20] The applicant has the onus of providing evidence regarding the adverse effects on the children if she were forced to leave. The immigration officer has an obligation to take that evidence into consideration. It is not sufficient for the applicant to simply state that the officer did not take the children's best interests into consideration, she must establish that the officer did not take into consideration the evidence bearing on the best interests of the children […]

[19] Given the evidence before him, I find the officer's conclusion to be reasonable. The applicants failed to demonstrate that the evidence before the officer could not reasonably lead to the decision rendered by the officer.

2. Did the officer apply the right legal test to his H&C analysis?

[20] The applicants submit that the officer erred in law by applying the wrong burden of proof when he determined that "[t]he applicants have not sufficiently shown how this daughter is seriously at risk of being forced to undergo FGM" and further that "the applicants have not presented sufficient evidence that they [*sic*] would be a serious risk of being forced to have the procedure done to their daughter". They argue that the officer should have considered the hardship associated with the return to Nigeria instead of the risk upon return of the applicants' daughter, who is a Canadian citizen and therefore is not subject to the PRRA program. In support of this allegation, they quote paragraph 42 of Mr. Justice Yves De Montigny's decision *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404. Since that decision makes a clear distinction between a PRRA and an H&C analysis of risk, I will also quote paragraphs 44, 45 and 48 of the decision:

> [42] It is beyond dispute that the concept of "hardship" in an H&C application and the "risk" contemplated in a PRRA are not equivalent and must be assessed according to a different standard. As explained by Chief Justice Allan Lutfy in *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296:
>
> > [3] In an application for humanitarian and compassionate consideration under section 25 of the Immigration and Refugee Protection Act (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or disproportionate hardship to obtain a permanent resident visa from outside Canada.

> [4] In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.
>
> [5] In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment. [Emphasis Added]

[…]

[44] There is not a scintilla in the above-quoted passage of a discussion relating to hardship as opposed to risk. Even in her conclusion, the officer returns to this theme and states: "I am satisfied that the applicant would be able to apply to immigrate to Canada through the standard overseas procedures without requiring an exemption from the usual requirements without putting her at risk to life or risk to her family's personal security."

[45] While it may be that violence, harassment and the poor health and sanitary conditions may not amount to a personalized risk for the purposes of a PRRA application, these factors may well be sufficient to establish unusual, undeserved or disproportionate hardship. […]

[48] Specifically, when deciding a PRRA, immigration officers are conducting a risk assessment. While it is true that H&C applications may also raise "risk factors," that does not change the fact that an H&C application is about assessing hardship. That an application may involve issues of risk does not convert the application into a second risk analysis. Rather, other issues, like

> the best interests of the children, and risk factors, are to be assessed as parts, or subsets, of this global hardship analysis.

[21] Unlike the case cited above, it is not because the officer looked for a personalised risk, but because he did not find that there was a serious risk that the daughter would undergo FGM that he finally concluded that the applicants did not show that they would suffer unusual, undeserved or disproportionate hardship. This is similar to another decision rendered by Justice De Montigny, *Pannu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356, at paragraph 37 which reads as follows:

> [37] I do not think that the reference in the last sentence to the risk to life of personal security is proof that the officer applied the wrong test. First of all, the officer could certainly adopt the factual conclusions in her PRRA decision to the analysis she was making in the H&C application (*Liyanage v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1045 at paragraph 41). Second, it is clear from a contextual reading of this paragraph that she was coming to the conclusion that the Applicant would not suffer unusual and undeserving, or disproportionate hardship since there was no objective evidence of personal risk. Not only did the officer correctly set out the H&C test at the very beginning of her reasons, but she also concluded her discussion of the Applicant's allegations of risk and hardship in the following way:
>
> > With the evidence before me, I find that the applicant has not provided sufficient persuasive evidence to establish that she faces a personalized risk to her life or a risk to the security of the person from her ex-husband if returned to India. Similarly, I find that the applicant has not provided sufficient probative evidence to establish the hardships associated with returning to India amounts to unusual and undeserved or disproportionate hardship.

[22] In the recent decision *Radji v. Canada (Citizenship and Immigration)*, 2007 FC 836, Mr. Justice Max M. Teitelbaum held, at paragraphs 8 and 27:

> [8] With respect to the risk allegations relating to the minor applicant, the Officer noted that the applicant had provided no evidence to support the allegation that she would be at risk of female genital mutilation if she returned to Benin. The Officer noted that although there is now a law which prohibits female genital mutilation in practice the government has not succeeded in completely eradicating the practice. The Officer also referred to an IRB Request for Information document that cited the assistant executive secretary of the Benin chapter of the l'Organization Femmes, Droit et Développement en Afrique as stating that Benin was in a period of transition with respect to this practice and that there was currently an education campaign to inform people about the new law. According to the documentary evidence approximately 17% of women in Benin have been subjected to female genital mutilation and that 70% of women from the Bariba, Yoa-Lokpa and Peul ethnic groups are subjected to it. The Officer noted that the applicant is not from one of these groups. She concluded that the applicant had not established that her daughter is at risk of female genital mutilation.
>
> […]
>
> [27] I agree with the respondent. The applicants made a significant number of claims but failed to bring forth evidence to support these claims. As the respondent noted, the applicants brought forward no evidence regarding the conditions for women in Benin, forced marriages, female genital mutilation and the availability of mental health care in Benin. Had the applicant believed that she deserved H&C relief because her mental health condition and that a return to Benin could affect her to the point that her daughter was at risk, then she should have raised this issue in the submissions and adduced evidence to support it. […]

[23] The facts and the findings of that decision are so similar to the ones in the case at bar that I will only point out that the risk of FGM was assessed in this H&C application and that the officer's decision was maintained.

[24] In the case at bar, I am of the opinion that "[i]t is clear from reading the decision as a whole that the Officer's decision was made in the context of evaluating the relevant factors raised by the [a]pplicant[s] and evaluating these factors using the proper threshold applicable in the H&C context, namely that an "unusual and undeserved or disproportionate hardship" must be demonstrated" (*Doukhi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1464, at paragraph 27).

[25] For the above reasons, these judicial review applications are dismissed.

[26] Neither counsel provided a question for certification.

JUDGMENT

1. The applications are denied.

2. There is no question for certification, and none will be certified.

"Pierre Blais"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1817-07

STYLE OF CAUSE:

TEMITOPE J. AKINBOWALE
OLAOTAN AKINBOWALE

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THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: November 20, 2007

REASONS FOR JUDGMENT AND JUDGMENT: BLAIS J.

DATED: November 26, 2007

APPEARANCES:

Me Nataliya Dzera	FOR THE APPLICANTS
Me Normand Lemyre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WAICE FERDOUSSI, ATTORNEYS Montreal, Quebec	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Me Jean-François Bertrand	FOR THE APPLICANTS
Me Normand Lemyre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BERTRAND, DESLAURIERS Montreal, Quebec	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT