Federal Court Cour fédérale

Date: 20220623

Docket: IMM-3916-21

Citation: 2022 FC 948

Ottawa, Ontario, June 23, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

OGUNDEKO OLUBENGA BABAFUNMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision of a Senior Decision Maker in the Case Management Branch of Immigration, Refugees and Citizenship Canada [the Officer], dated May 21, 2021 [the Decision], which dismissed his application for permanent residence in Canada on humanitarian and compassionate [H&C] grounds under s. 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] As explained in more detail below, this application is allowed, because the Applicant was denied procedural fairness in the process leading to the Decision.

II. **Background**

[3] The Applicant is a citizen of Nigeria. He left Nigeria in 1984 to attend school in the United States [US], where he incurred three criminal convictions in 1990 and 1991. Following deportation to Nigeria in 2000, the Applicant came to Canada and claimed refugee protection. Although he was initially recognized as a Convention refugee, his status was vacated in 2006 because of his use of a fraudulent name in asserting his claim. While he has not been convicted of any offences in Canada, the Applicant is inadmissible on grounds of criminality for the three convictions in the US. He has one son, now an adult, who lives in Nigeria.

[4] In an effort to overcome his inadmissibility, the Applicant submitted an H&C application in November 2012. After a decision rejecting the application in 2017, he sought judicial review. Justice Elliott found that the officer considering his application had erred in analysing his criminality and the best interests of his godchildren in Canada and returned the decision for redetermination (see *Babafunmi v Canada (Citizenship and Immigration)*, 2019 FC 151).

[5] In support of his H&C application upon that redetermination, the Applicant emphasized his significant establishment in Canada, long-running rehabilitation, the best interests of his godchildren and his son in Nigeria, and hardship he would face if he were to return to Nigeria.

[6] On April 28, 2021, the Officer sent the Applicant a procedural fairness letter [PFL], stating concerns that he had misrepresented his place of residence as Dartmouth, Nova Scotia. These concerns arose from the Applicant's bank statements for March and April 2021, which suggested to the Officer that the Applicant was residing in Toronto, Ontario. The Officer gave the Applicant 15 days to respond and submit additional information. He replied by providing another affidavit, along with more documentation, including a letter from a friend stating that the Applicant had been temporarily staying with him in Toronto, documents from a property management company relating to the Applicant's lease of an apartment in Dartmouth, and copies of his electrical utility bills for the same address.

III. **Decision Under Review**

[7] In the Decision dated May 21, 2021, which is the subject of this application for judicial review, the Officer refused the H&C application.

[8] The Officer acknowledged that the Applicant's criminal convictions took place 30 years ago, with no subsequent criminal behaviour. However, the Officer concluded that the Applicant had been attempting over three decades to use different means to obtain permanent status in either the US or Canada and that some of those means involved fraud or misrepresentation, which was not indicative of rehabilitation.

[9] The Officer also concluded that the Applicant had misrepresented his actual place of residence. Based on the Applicant's bank statements and low electricity usage demonstrated by his utility bills, the Officer determined that the Applicant is leasing an apartment in Dartmouth,

Nova Scotia but is not actually living there. The Officer placed little weight on the letter from the Applicant's friend, because of the friend's interest in a positive outcome for the application, and noted that the Applicant had not provided additional bank statements to show a pattern of normal spending in Nova Scotia or telephone records to establish his presence there. The Officer concluded that the evidence established, on a balance of probabilities, that the Applicant is actually a resident of Toronto.

[10] The Officer then considered the Applicant's submissions regarding the best interests of his godchildren, who live with their parents in Dartmouth. However, based on the determination that the Applicant himself does not live in Dartmouth, the Officer gave little weight to these submissions, as the Applicant is absent from his godchildren's daily lives. The Officer found that the Applicant misrepresented his place of residence to bolster his application through his relationship with his godchildren.

[11] The Applicant provided submissions on hardship that he would face in returning to Nigeria. The Officer reviewed these submissions but did not find them compelling, other than concluding that the difference in the Applicant's economic prospects were likely to be difficult, a factor the Officer took into consideration. The Officer also considered the Applicant's long-term residence in Canada and active involvement in his community, representing positive establishment factors. However, ultimately the Officer concluded that the positive factors were outweighed by the Applicant's ongoing use of a false identity, his misrepresentation of his place of residence, and the seriousness of his past criminal offences.

IV. **Issues and Standard of Review**

[12] The Applicant raises the following issues for the Court's consideration:

A. Did the Officer fail to reasonably assess the Applicant's criminality and rehabilitation in light of the evidence?

B. Did the Officer breach the duty of procedural fairness in analysing the Applicant's place of residence?

C. Did the Officer fail to reasonably respond to the evidence regarding the Applicant's place of residence?

[13] As suggested by the articulation of the first and third issues above, they are subject to the standard of reasonableness. With respect to the second issue, regarding procedural fairness, the Court is required to consider whether the Applicant knew the case to be met and had a full and fair chance to respond (see *Li v Canada (Citizenship and Immigration)*, 2020 FC 754 [*Li*] at para 22).

V. **Analysis**

[14] My decision to allow this application for judicial review turns on the Applicant's submissions surrounding the procedural fairness of the Officer's analysis of his place of residence. As noted above, the Officer developed a concern, based on certain of the Applicant's bank statements, that he was residing in Toronto, Ontario rather than in Dartmouth, Nova Scotia as he had represented. Following receipt of the Applicant's submissions in response to the PFL

on this issue, the Officer concluded that, while he was leasing an apartment in Dartmouth, he was not actually living there. This conclusion significantly influenced the Officer's analysis of the best interests of the Applicant's godchildren and the outcome of his H&C application.

[15] In arriving at the conclusion that the Applicant was not residing in Dartmouth, the Officer considered the Applicant's lease document, the letter from his landlord, and the letter from the friend with whom he had allegedly been temporarily staying in Toronto. The Officer also noted that the Applicant had not provided additional bank statements to show a pattern of normal spending in Nova Scotia or telephone records to establish his presence there. The Respondent submits that the Officer's conclusion therefore turned on the sufficiency of the evidence submitted by the Applicant to address the residency concern. However, it is clear from the Decision that the determination on the Applicant's place of residence was based significantly on the Officer's analysis of the Applicant's electricity usage, demonstrated by his utility bills.

[16] It is therefore useful to set out this portion of the analysis in full:

> … To establish the fact that he is normally a resident of Dartmouth, NS, Mr. Babafunmi provided a sworn affidavit, a letter from his friend Douglas Ananiampong, documents from the property management company related to his lease of an apartment, and copies of utility bills from Nova Scotia Power for the same address. I have considered all of these documents and do not find that they establish, on a balance of probabilities, that Mr. Babafunmi resides in Dartmouth, NS. I accept that Mr. Babafunmi has consistently stated that he resided in Dartmouth, NS, at the same address provided, since 2003, as counsel pointed out in her covering letter. However, what the evidence regarding his tenancy and the payment of his rent to his property management company reveals is that Mr. Babafunmi leased an apartment in Nova Scotia, but not that he actually lives in it. In fact, the statements from Nova Scotia Power do not support a finding that Mr. Babafunmi was actually a regular resident at that address, although it does

> establish that he had an account with the utility company. The statements of account provide a history of past electric usage, and demonstrate that Mr. Babafunmi consistently uses around 70-80 kwh in any given two month period, the anomaly being a higher usage for the billing date of March 2020 which, oddly, was for a period of only 14 days. That anomaly aside, Mr. Babafunmi's electricity bill shows a usage of about 1 kWh/day, or roughly what a couple of 60 watt light bulbs consume with normal use. I do not require specialized knowledge about electricity usage to identify this exceptionally low consumption; as a resident of Canada who has also paid electricity bills for all of my adult life, I recognize below-normal usage, and Mr. Babafunmi's usage is well below normal, even for a single man living alone in an apartment. Given that a modest Energy Star refrigerator consumes between 350-450 kWh per year [footnote to website links for Burlington Hydro Appliance Usage Chart and Energy Star, both accessed on May 13, 2021], the documents that Mr. Babafunmi has submitted lead to a conclusion that if Mr. Babafunmi was, as he has stated repeatedly, actually living in and working from [footnote stating that Mr. Babafunmi wrote in his sworn affidavit of April 3, 2019: "I usually work from around 9am to 6pm. I work mainly from home in Nova Scotia but also maintain a storage space in Toronto."] the apartment that he was leasing in Dartmouth, he was either not going about normal daily and business activities in that apartment, such as charging his mobile device(s), using a computer, operating an electric stove, microwave, kettle or other food preparation device, heating his home, listening to the radio, watching television and switching on lights, as well as running a refrigerator, or he was using alternative sources of energy for which he has not provided supporting evidence. …

[17] The Applicant submits that, by employing the appliance usage data derived from the websites identified in the first footnote referenced above, the Officer relied on extrinsic information that was not disclosed to him. As such, the Applicant did not have an opportunity to comment on this information or the manner in which it was employed by the Officer in arriving at the Decision. The Applicant therefore argues that he was deprived of procedural fairness in connection with the Officer's analysis of the residence issue.

[18] In support of his submissions on procedural fairness, the Applicant has filed an affidavit that identifies information he would have provided to the Officer had he been given a chance to explain why his electricity consumption was lower than might be expected. I note that, while the general rule is that evidence in applications for judicial review is limited to material that was before the decision-maker, an exception applies when evidence is introduced to support an allegation of procedural unfairness, to illustrate what could have been provided had the decision-maker afforded the applicant an opportunity to do so (see *Nchelem v Canada (Citizenship and Immigration)*, 2016 FC 1162 at paras 13-15).

[19] The Applicant explains that his utility bills do not include heat, which is provided through a gas radiator at the cost of the landlord. He states that his electricity bills cover only lights, electrical outlets, and appliances in the unit, and that he uses power very sparingly (primarily for lights and charging his phone), because of his lifestyle and because he spends little time in his apartment. The Applicant says that he does not cook or use the appliances. Nor does he have a computer or TV in the unit. He says that he uses a computer at the library when he needs to access the Internet or send business-related invoices or emails. He also estimates that he spends approximately 75% of his time at his godchildren's residence, where he assists with their homework, meals, grocery shopping and other household needs.

[20] The Applicant's counsel also notes that copies of the webpages upon which the Officer apparently relied are not contained in the Certified Tribunal Record. However, the record before the Court includes an affidavit sworn by a legal assistant in the Applicant's counsel's office, which explains that she accessed the relevant websites on September 10, 2021, and attaches

printouts of the webpages. Based on this evidence, the Applicant challenges not only the procedural fairness but also the reasonableness of the Officer's analysis of the electricity usage. Counsel notes that, based on a review of the webpage printouts, the source of the 350-450 kWh per year refrigerator usage relied upon the Officer is not clear. While the figures identified by counsel are not significantly different, they are lower than those identified by the Officer, and counsel submits that they are well within the range shown by the Applicant's utility bills.

[21] In relation to the Applicant's procedural fairness arguments, the Respondent emphasizes that the Applicant is not entitled to an ongoing accounting or a "running score" of the weaknesses of his evidence and application. While I agree with this principle, it applies in the context of a decision-maker's assessment of the sufficiency of evidence, on the premise that applicants have a duty to put their best foot forward (see, e.g., *Bradshaw v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 632 at paras 78-79). As previously noted, I am not convinced that the Officer's determination, that the Applicant has not been residing in his Dartmouth apartment, is based merely on a sufficiency analysis. The expectation of putting one's best foot forward is premised on knowing the case one has to meet and, as explained below, I am not satisfied that the Applicant was afforded that opportunity.

[22] The Applicant submits that the Officer conducted a near-forensic analysis of his electrical consumption, employing information that can properly be characterized as extrinsic, because it was novel and unknown to Applicant, such that he did not know the case he had to meet. In advancing this argument, the Applicant acknowledges that the use of extrinsic evidence not specifically known to an applicant does not always represent a breach of procedural fairness. The

use of publicly available information, even if not specifically disclosed to an applicant, does not necessarily breach procedural fairness, provided it is not novel or significant (see *Li* at para 35; *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 at para 33). However, the Applicant submits that the conclusions drawn from the level of his electrical usage represent a novel issue that he could not have anticipated. As such, he argues that procedural fairness required that he be alerted to this new issue, including the extrinsic material on which the officer was relying, and afforded an opportunity to respond.

[23] I find these arguments compelling. As the Respondent submits, the Applicant was clearly on notice of the issue surrounding his place of residence. However, I cannot conclude that he could have anticipated that the Officer would analyze his electrical bills, in the manner demonstrated by the Decision, in addressing that issue. This procedural fairness concern is exacerbated by the fact that, even upon the hearing of the application for judicial review of the Decision, neither the parties nor the Court are in possession of the particular Internet evidence upon which the Officer relied. This fact may also call into question the reasonableness of the Decision. However, as I find that the Applicant was denied procedural fairness, and as the residence issue may be the subject of a further analysis, with the benefit of submissions from the Applicant after his H&C application is returned to another officer for redetermination, I decline to rule on the Applicant's reasonableness arguments.

[24] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-3916-21

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is returned to a different officer for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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