Federal Court Cour fédérale

Date: 20150424

Docket: IMM-6918-14

Citation: 2015 FC 534

Ottawa, Ontario, April 24, 2015

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

MODUPE GANIYAT IDOWU AJEIGBE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application by Modupe Ganiyat Idowu Ajeigbe [the Applicant] for a judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the decision of a Visa officer of the Immigration Section of the High Commission in Lagos refusing the Applicant's application for a temporary resident visa [the visa].

II. Alleged Facts

[2] The Applicant is from the City of Alakulo, Lagos, Nigeria.

[3] In 2007, her ex-husband submitted an application for a permanent visa as a member of the family class, which was refused in 2009. The application was dismissed pursuant to subsection 4(1) and paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, whereby the officer was of the opinion that the relationship with the husband never ceased.

[4] On or about June 3, 2014, the Applicant claimed to have been invited by her three Canadian children to come and visit them in Canada from December 15, 2014 to January 14, 2015. She applied for a temporary resident visa. This visa was denied on September 8, 2014. This is the decision under review.

III. Impugned Decision

[5] The Visa officer refused the visa because the Applicant did not meet the requirements for it. The Visa officer was not satisfied that the Applicant would leave Canada at the end of her stay as a temporary resident. In reaching his decision, the Visa officer considered the Applicant's travel history, her family ties in Canada and her country of residence, Nigeria. The Visa officer took into consideration the Applicant's marriage to Ramoni Oguntola in 2006 and her ex-husband sponsorship for her in 2007. The Visa officer stated that the Applicant's proper application should have been that of a family class sponsorship.

IV. Parties' Submissions

[6] The Applicant submits that the Visa officer erred in applying the wrong test in assessing the Applicant's credibility. The Applicant argues that if the Visa officer had doubts about the intentions of the Applicant, then the Visa officer had a duty to ask the Applicant questions regarding his concerns. The Respondent replies by saying that it was open to the Visa officer to find that the Applicant would not leave Canada at the end of her authorized stay since her children and her husband reside in Canada and also because her husband unsuccessfully tried to sponsor her in the past. The Respondent further states that the Visa officer did not make a credibility finding, as the Applicant claims, but rather found that she did not meet her onus of demonstrating that she would go back to Nigeria at the end of her stay in Canada. The Visa officer therefore did not need to ask the Applicant for more information.

[7] The Applicant further states that the Visa officer erred in stating that the proper way for the Applicant to visit her children, two of which are minor, is via a family class sponsorship. The Applicant also states that the 2007 application is extrinsic to the current application and the Visa officer should not have relied on it as much as he did. The Respondent however says that the 2007 application is mentioned in the Applicant's visa application and is therefore not extrinsic evidence.

[8] The Applicant further states that the Visa officer erred in stating that she married Ramoni Oguntola in 2006 since the evidence demonstrate that this man is actually her father and that her actual husband is Ajeigbe Julius Olusegun, which she remarried in 2006 after their divorce in

1999. The Respondent replies that this is a clerical error and that the Visa officer was referring to the Applicant's husband. The Respondent adds that this error is immaterial and does not affect the Visa officer's decision.

[9] The Applicant also submits that the Visa officer erred in weighing her ties in Canada. The Respondent however explains that the Visa officer was entitled to conclude that her family ties in Canada did not demonstrate that she would leave at the end of her stay.

[10] Finally, the Applicant also argues that the Visa officer failed to provide adequate reasons for his findings. The Respondent disagrees and submits that the reasons provided are sufficient to understand why the temporary visa application was dismissed by the Visa officer.

V. Issue

[11] I have reviewed the parties' submissions and respective records and I state the issue as follow:

1. Is the Visa officer's decision to deny the temporary resident visa reasonable?

VI. Standard of Review

[12] The question to issue a temporary resident visa by a visa officer is a discretionary decision, usually involving questions of facts, to which this Court affords deference (*Ngalamulume v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1268 at para 16 [*Ngalamulume*]). Visa officers also have a recognized expertise in assessing applications for

temporary visas (*Ngalamulume*, above). The reasonableness standard thus applies (*Ngalamulume*, above). This Court shall only intervene if it concludes that the decision is unreasonable and falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47).

VII. <u>Preliminary Matter</u>

[13] The Applicant has submitted documents in her Applicant's Application Record that are not part of the Certified Tribunal Record. According to case law, only evidence that was before the decision-maker can be considered by a Court on judicial review (*Adewale v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1190 at para 10 [*Adewale*]). In the case at bar, the Court's record only contains the Applicant's Visitor's Visa Application. It does not contain any other documents, which the Applicant alleges were not taken into account by the Visa officer. The Court issued a direction asking the parties what was their position on the matter.

[14] Counsel for the Applicant explained that her client informed her that the Visa officer returned to her all the supporting documents she had submitted along with her Nigerian Passport after denying her application. Counsel submitted that the Visa officer omitted or neglected to retain the supporting documents relied on by the Applicant in her record. The Respondent however argues that the Applicant never mentions in her Memorandum that her documents were not taken into account by the Visa officer and that the visa office has informed the Respondent that since storage space is minimal, all supporting documents were returned to the Applicant.

[15] In *Ngalamulume*, above, Justice Mandamin was in a situation where documents referred to by the Applicant were not part of the file before the visa officer. Justice Mandamin explained that the documents were also not in the record filed with the Court and that as such, they were not evidence and were excluded by the Court (at para 27).

[16] In *Adewale*, above, the Applicant stated that the certified tribunal record was incomplete and that certain documents were missing. Because no evidence was adduced to support the proposition that this evidence was before the visa officer, Justice Blanchard decided that he had no option but "to consider the certified tribunal record produced as reflecting the complete record before the visa officer" (at para 11).

[17] Pursuant to the leave order issued January 13, 2015, the Visa officer was ordered pursuant to Rules 15 and 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, to produce the decision and supporting documents. The Visa officer forwarded the letters and notes in support of the decision made. As a response to a Directive issued by this Court enquiring as to the reason for not having produced the documents in support of the visa application, counsel for the Respondent informed that the supporting documents were returned to the Applicant because of minimal storage space in the office. In *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 498, at para 15, Justice Layden-Stevenson explained that:

> [15] […] While the failure to provide a certified record in accordance with the Rules does not, in itself, warrant automatic quashing of the decision: *Hawco v. Canada (Attorney General)* (1998), 150 F.T.R. 106 (F.C.T.D.); *Murphy v. Canada (Attorney General)* (1997), 131 F.T.R. 33 (F.C.T.D.), there is authority for

> the proposition that Rule 17 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 is mandatory. The tribunal must prepare and produce a record containing all documents relevant to the matter that are in the possession or control of the tribunal. The decision may be set aside when the record is incomplete: *Gill v. Canada (Minister of Citizenship and Immigration)* (2003), 34 Imm. L.R. (3d) 29 (F.C); *Kong et al. v. Canada (Minister of Employment and Immigration)* (1994), 73 F.T.R. 204 (F.C.T.D.).

[18] In *Bolanos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 388, Justice Russell stated that an "incomplete record is not necessarily grounds to set aside a decision, particularly where the decision-maker considered the material in question and the material is available to the Court" (at para 52).

[19] In the case at bar, the only document in the Certified Tribunal Record is the Applicant's visa application. This Court has no way of validating the Applicant's argument that the Visa officer did not consider her documents, which she claimed were part of her application, as they are neither mentioned in the reasons provided by the Visa officer nor are they part of the Certified Tribunal Record. Only on this issue, this Court could conclude that because it does not have the visa application supporting documents, it has no way to satisfy itself that the Visa officer properly assessed the evidence in support of his conclusion.

[20] Having said that, it is appropriate in the present case to go further and assess this decision in light of the following documents. Given that this Court only has the Visa Application as part of the Certified Tribunal Record, only the Visa Application will be considered as reflecting the complete record before the Visa officer. The documents submitted by the Applicant will therefore not be considered.

VIII. Analysis

A. *Is the Visa officer's decision to deny the temporary resident visa reasonable?*

[21] There is a legal presumption that a foreign national seeking to enter Canada is presumed to be an immigrant (*Obeng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 754 at para 20). As for visa officers, this Court has consistently held that visa officers denying applications for temporary resident visa must provide minimal reasons for their decision (*Ngalamulume*, above at para 20). "An administrative tribunal's reasons are sufficient if they "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes"" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 465 at para 21).

[22] In this case, the decision is based on the following reasons:

> PA seeking a TRV to visit her children in Canada. Application for a visitor visa being refused because, in my opinion, the proper application is a family class sponsorship. PA is currently married to Ramoni Oguntula – they have been married since 2006. Of interest, her ex-husband in Canada and father of her children there submitted a sponsorship for the applicant as a wife. Notes on file say they reconciled. If so, is the Applicant's husband still her husband? I am of the opinion that based on the family ties in Canada the applicant is strongly motivated to stay in Canada. As such, I am of the opinion that she would not leave Canada at the end of her authorised stay. Refused.

[23] The first reason for which the Visa officer denied the temporary resident visa is based on his opinion that the proper application is a family class sponsorship. This finding is erroneous as

the visa application mentions that the purpose of the Applicant's travel is to visit her children (Certified Tribunal Record [CTR] page 2). The Visa officer was to evaluate the temporary visa application and not suggest a different avenue for the Applicant to come and visit her children in Canada.

[24] The second reason for which the Visa officer refused the visa is based on an erroneous appreciation of the evidence in relation to the Applicant's current husband. The Visa officer erred in stating that Ramoni Oguntula and the Applicant have been married since 2006 because the visa application clearly states that this man is in fact the Applicant's father (CTR page 6). The visa application also shows that the Applicant's current husband is Julius Olusegun Ajeigbe, whom she remarried in 2006 (CTR page 1). I disagree with the Respondent that this error is immaterial and that the Visa officer fully understood the Applicant's visa application. This type of misunderstanding of the facts of the case gives an impression that the Visa officer did not really put his mind into the facts of the case.

[25] These two conclusions by the Visa officer do not explain how he came to the conclusion that the Applicant is strongly motivated to stay in Canada nor that she would not leave at the end of her stay. On the face of the record itself, these reasons are based on an erroneous finding of facts (*Adewale*, above at para 12) and do not allow this Court to understand the reasoning behind the Visa officer's decision. Counsel for the Respondent did try to put some light into the reasons, but it is not her role to replace the reasoning made by the Visa officer. The intervention of this Court is thus warranted since the decision arrived at is not reasonable.

IX. Conclusion

[26] The Visa officer based his decision on erroneous findings of facts. The reasons provided do not allow this Court to understand the rejection of the visa application. The application will thus be allowed and the matter is to be remitted for reconsideration before another Visa officer.

[27] The parties were invited to submit questions for certification and the Applicant suggested the following one:

> At Judicial Review, is the Federal Court still bound to accept / consider the Tribunal Record under section 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* as complete, where written evidence from the Tribunal itself indicates and admits that : contrary to subsection 17(b), many documents / papers relevant to the matter which were in its possession / control, were returned to the Applicant, and as such do not form part of the Tribunal Record sent to the Court for determination of the matter?

[28] The Respondent opposes the question because it does not contemplate an issue of broad significance and because it is not determinative of the appeal. He admits only at this late stage that the documents filed by the Applicant in her affidavit were submitted to the Visa officer as part of her record. This Court therefore had access to the same documents as the Visa officer did. The Respondent adds that the question also does not transcend the interests of the immediate parties, as the question is based on a highly factual situation.

[29] The Applicant, in its reply, argues that the negligence and omission of the Respondent's Tribunal to present to the Court a record containing all the relevant materials that were before it constitutes a fundamental breach of law, namely of paragraph 15(1)(*b*) and subsection 17(*b*) of

the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. The Applicant adds that contrary to the Respondent's submissions, the documents provided by the Applicant as exhibits in her affidavit were not all the documents presented to the Visa officer, but only a few of them. The Applicant is of the opinion that the question is of broad significance that deserve judicial pronouncement.

[30] The principles governing the certification of a question pursuant to subsection 74(*d*) of IRPA were set out by the Federal Court of Appeal. The question "must be one that transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application" (*Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, 176 NR 4, at paras 4-6). It must be serious and of general importance and dispositive of the appeal (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras 11-12; *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras 22-29).

[31] As it can be noted above, the Visa officer's decision was assessed on the reasonableness of the decision, based on the Tribunal Record as filed, and not on the insufficiency of the Visa officer's record as filed. The question is therefore not determinative of the appeal. For this reason, the question will not be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is to be returned for reconsideration before another Visa officer.

2. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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