Federal Court  Cour fédérale

Date: 20181116

Docket: IMM-4229-17

Citation: 2018 FC 1163

Ottawa, Ontario, November 16, 2018

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

AYODEJI AKANMU ALABI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Ayodeji Akanmu Alabi, the Applicant, is a citizen of Nigeria. He first came to Canada in 1998 and has a long history with the Canadian immigration system. In the matter before me, he seeks judicial review of a decision (Decision) in which his application for a Temporary Resident Permit (TRP) was denied by an officer (Officer) in the Immigration Section of Citizenship and Immigration Canada in Lagos, Nigeria. The application for judicial review is

brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the following reasons, the application will be allowed.

I. Background

[3] The immigration history of the Applicant is set out in the judgment of Justice McVeigh of this Court in *Alabi v Canada (Citizenship and Immigration)*, 2017 FC 294 at paragraphs 4-12. I will not repeat the history here other than to refer to background facts that provide necessary context for this judgment.

[4] The Applicant first made a TRP application in early 2015. It was refused and, on judicial review, the parties agreed to a redetermination of the refusal by way of consent judgment. The decision before Justice McVeigh was the second refusal of the Applicant's request for a TRP. At that time, the Applicant had outstanding humanitarian and compassionate (H&C) and criminal rehabilitation applications before Citizenship and Immigration Canada (CIC). Justice McVeigh found that the officer in question did not consider all of the Applicant's immigration history, stating (at para 20), "I would expect at the very least that the sixteen year relationship with his wife, and the outstanding eight year old H&C application, would be major factors to be considered".

[5] Justice McVeigh acknowledged the onus on the Applicant to present compelling reasons for the issuance of a TRP but emphasized his unique circumstances. She found that the Applicant

could reasonably have expected all of his immigration history, including copies of his pending H&C and rehabilitation applications, to be before the officer. She concluded (at paras 23-24):

> [23] Reliance on other applications would not normally constitute grounds for review although given the ongoing relationship between Mr. Alabi and CIC, the fact he was self-represented, and the fact this was a decision sent back for redetermination from the Federal Court, CIC should have included a review of all major factors that weigh both for and against Mr. Alabi. This is unique to these facts and of course I am not suggesting that is the case in other TRP applications.
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> [24] Some of the fault for this administrative breakdown belongs to Mr. Alabi as his submissions and evidence are sparse. However, the totality of his application was not sparse given his lengthy background with CIC which was all before what he saw as the decision maker. This is an exceptional circumstance and these findings will be distinguishable because of the distinctiveness of the situation.

[6] Justice McVeigh allowed the application for judicial review of the second TRP refusal decision, permitted the Applicant to make new submissions and sent the matter for redetermination by another officer. The third consideration and refusal of the Applicant's TRP request is the Decision before me.

II. Decision under review

[7] The Decision is dated August 8, 2017 and consists of a decision letter setting out the Officer's conclusion that there were insufficient grounds to merit the issuance of a TRP to the Applicant, and the Officer's Global Case Management System (GCMS) notes.

[8] In contrast to the brief January 2016 decision before Justice McVeigh, the reasons provided by the Officer in the GCMS notes are fulsome. The Officer first set out the Applicant's

Canadian immigration history: his inadmissibility to Canada on grounds of serious criminality and misrepresentation pursuant to paragraphs 36(1)(b) and 40(1)(a) of the IRPA, respectively; the Applicant's subsequent H&C and criminal rehabilitation applications; and, his deportation to Nigeria in 2015.

[9] The Officer reviewed the Applicant's TRP application and supporting documents received on July 7, 2017. The Applicant's stated reason for applying for a TRP was to enable him to return to Canada to support his Toronto-based company, Jodal Health Care Inc. (Jodal). In support of his application, the Applicant provided an affidavit, a marriage certificate dated May 24, 2016, letters from his spouse and children, and numerous awards and commendations from the Toronto police and Toronto-based politicians.

[10] The Officer noted that the Applicant admitted to his criminal past in the United States in his affidavit but did not admit to his misrepresentations in gaining entry to Canada in 1998. With respect to the letters from the Applicant's wife and children which referred to the Applicant's impeccable life in Canada over the past 20 years, the Officer concluded that the Applicant had not informed his family of his misrepresentations to the Canadian government because there was no mention in the letters of those misrepresentations. The Officer also discounted the importance of the award and commendation letters, stating they were predominantly in the name of Jodal and the company could continue to operate whether or not the Applicant is present in Canada.

[11] The Officer then reviewed the Applicant's family configuration in detail. The GCMS notes set out the inconsistent information the Applicant had submitted to CIC over the years in

his TRP, H&C and criminal rehabilitation applications. The Officer considered the Applicant's 2000 H&C application in which the Applicant stated that he had a spouse, four daughters, three brothers, three sisters and a father living in Nigeria. The Officer cited the processing notes for the H&C application and stated:

> There were concerns that these were not his bona fides family members during the processing of his application, quote "WE ARE CURRENTLY INVESTIGATING CLAIMED O/S SPOUSE AND DEP. COULD POSSIBLY BE A CASE OF PEOPLE SMUGGLING". I was not able to determine the names of the family members listed on the 2000 H&C application, but they are not the same configuration as stated on his current application.

[12] The Officer continued his assessment of the Applicant's family members and whether they returned with him to Nigeria after he left the United States. He questioned whether the individuals named were members of the Applicant's family and stated that this question "supports the concern that he might have been involved in people smuggling".

[13] Turning to his assessment of the reasons for the Applicant's request for a TRP, the Officer observed that the Applicant wished to return to Canada to support his company but had submitted no information regarding Jodal generally or any loss of income suffered due to his absence from Canada. In fact, the Applicant submitted no documentation from the period post-dating his deportation in 2015. The Officer also assessed the Applicant's family ties as part of the Decision even though the Applicant did not include his family as a reason for his desire to return to Canada in his updated TRP submissions. The Officer noted that the Applicant's children were all adults, with two living in Canada and three living in the United States, and that his wife is a Canadian citizen who was born in Nigeria and was able to travel back and forth to Nigeria.

[14] In his conclusions, the Officer returned to the issue of people smuggling:

> The question regarding [the Applicant's] involvement in people smuggling remains open, especially considering the various misrepresentations of his family configuration on his multiple applications. [The Applicant] was requested to submit reasons for H&C on his 2009 application in March 2014, but no response has been received to date. [The Applicant] states that he wishes to return to Cda due to his company, but he has not submitted documentation that supports his need to be in Canada to run the company. [The Applicant] has not been transparent on the various applications submitted to the Canadian government – he misrepresented his criminal past, the use of an alias, false date of birth and his American immigration history on his first H&C application and concerns were noted about possible people smuggling.

[15] The Officer weighed the fact that the Applicant ran a business in Canada and had submitted letters of commendation against his misrepresentations and lack of integrity in his dealings with the Canadian government. The Officer was not satisfied that there were compelling reasons to issue a TRP.

III. Issues

[16] The Applicant submits that his right to procedural fairness was breached as the Officer based the Decision on issues that were neither known or obvious to the Applicant, nor raised to him by the Officer. Specifically, the Applicant states that the Officer's reliance on the concern that he was engaged in people smuggling was a new issue that had not previously been communicated to him. The Applicant argues that the Officer was required to raise this issue prior to the Decision and permit him the opportunity to make submissions. I agree and find that the Officer breached the Applicant's right to a fair hearing for the reasons set out below in my analysis.

[17] The Applicant has also submitted that the Decision itself was unreasonable, arguing that the Officer failed to take into account the evidence before him and ignored the 2017 judgment of Justice McVeigh. As my finding on the Applicant's procedural fairness submission is dispositive of this application, I will address the Applicant's reasonableness submissions only briefly in my conclusion to this judgment.

IV. Standard of review

[18] The breach of procedural fairness raised by the Applicant will be reviewed for correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56 (*Canadian Pacific*)). The review focuses on the procedures followed in arriving at the Decision and not on the substance or merits of the case. I must assess whether the process followed by the Officer was just and fair having regard to all of the Applicant's circumstances, his substantive rights at stake and the other contextual factors identified by the Supreme Court of Canada (SCC) in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28 (*Baker*). Justice Rennie stated in *Canadian Pacific* at paragraph 54:

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 21) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

V. Legislative Background

[19] The parameters for the issuance of a TRP are set out in subsection 24(1) of the IRPA:

Temporary resident permit	**Permis de séjour temporaire**
24(1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.	24 (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

[20] The provision permits flexibility through the issuance of a TRP in cases where the strict application of the IRPA would lead to an individual's exclusion from Canada. Subsection 24(1) provides an officer with a broad discretionary power to be used in exceptional cases to allow such an individual to enter into or to remain in Canada. As the Officer stated in the Decision, an applicant is required to submit compelling evidence in support of his or her TRP application. Justice Heneghan in *Sellapah v Canada (Citizenship and Immigration)*, 2018 FC 198, described the TRP regime as follows (at para 9):

> [9] As noted by Justice Shore in *Farhat v. Canada (Citizenship and Immigration)*, [2006], 302 F.T.R. 54 at paragraph 2, the issuance of a TRP is part of an "exceptional regime". Evidence is required of something more than inconvenience to an applicant to justify the issuance of such a privilege.

VI. Analysis

[21] The Applicant submits that the Officer breached his rights to a fair hearing and to procedural fairness in raising in the Decision the concern that the Applicant was involved in people smuggling based on inconsistencies in the Applicant's descriptions of the composition of his family. The Applicant had no prior notice of the concern and emphasizes that the Decision marks the first time in his 20 years of dealing with CIC that it had been identified to him. He argues that the Officer's focus on this concern led him to ignore evidence and submissions made by the Applicant, contrary to subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7.

[22] In the Decision, the Officer emphasized the Applicant's prior representations regarding his family configuration and reiterated the "people smuggling" concern a number of times. The Officer initially referred to the processing notes of the Applicant's 2000 H&C application and the reference in those notes to a possible case of people smuggling. He returned to the issue repeatedly and adopted it as a factor in his conclusions. The Officer stated that "[t]he question regarding [the Applicant's] involvement in people smuggling remains open, especially considering the various misrepresentations of his family configuration on his multiple applications".

[23] The Respondent submits that the misrepresentations highlighted by the Officer derive from the Applicant's own submissions to CIC over the course of many years. Therefore, the Applicant was aware that concerns could be raised by an officer regarding the composition of his family. The Respondent argues that the Applicant had many opportunities to correct any

misrepresentations made in prior applications and to provide a clear statement of the make-up of his family in his TRP application.

[24] I agree with the Respondent that the Applicant ought to have been aware of the contradictions in the information submitted in his TRP application and the information contained in his prior immigration applications. However, I find the Officer's identification of a concern that the Applicant may have engaged in serious illegal activity in the guise of people smuggling was not an issue the Applicant should or could have been aware of.

[25] In order to assess the content of the duty of fairness owed by the Officer to the Applicant, it is necessary to return briefly to basic principles. A decision as to whether or not to issue a TRP pursuant to subsection 24(1) of the IRPA is highly discretionary. The onus is on the applicant to demonstrate compelling circumstances that would justify the issuance of the TRP in his or her particular circumstances. In addition, it is important to bear in mind that the consequences to the applicant of a refusal to issue a TRP are not permanent. These considerations, together with the fact that the TRP process is predicated on written submissions and the issuance of a decision relatively quickly, suggest a duty of fairness at the lower end of the spectrum having regard to the contextual factors identified by the SCC in *Baker*.

[26] Nonetheless, even at the low end of the procedural fairness spectrum, an applicant must be treated fairly. He or she must know the case they have to meet. In *César Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 880 (*César Nguesso*), Justice Bédard reviewed at length the content of the duty of procedural fairness owed to a TRP applicant, specifically as that duty

relates to a failure to disclose information before a decision is rendered. Justice Bédard reviewed the TRP process and the impact of a TRP on an applicant and stated (*César Nguesso* at para 62):

> [62] I find that the case law applicable to visas, which clearly recognizes that the onus is on applicants to file sufficient evidence in support of their applications, is equally applicable to TRPs. This case law establishes that it is not for the officer to inform the applicant that the evidence is inadequate or provide him or her with an opportunity to respond to concerns arising from an application that is unclear, incomplete or lacking sufficient evidence. The duty of fairness may require that officers disclose their concerns to applicants and provide them with an opportunity to respond when they relate to the credibility, veracity or authenticity of the evidence submitted by the applicant or to information of which the applicant could not have been aware. The duty of fairness does not, however, require that the applicant be provided with a running score or an opportunity to add to an incomplete or inadequately supported application. Justice Mosley provided a good description of these parameters in *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at paras 22-23, [2004] FCJ No 317:
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> > 22 It is well established that in the context of visa officer decisions procedural fairness requires that an applicant be given an opportunity to respond to extrinsic evidence relied upon by the visa officer and to be apprised of the officer's concerns arising therefrom: *Muliadi*, *supra*. In my view, the Federal Court of Appeal's endorsement in *Muliadi*, *supra*, of Lord Parker's comments in *In re H.K. (An Infant)*, [1967] 2 Q.B. 617, indicates that the duty of fairness may require immigration officials to inform applicants of their concerns with applications so that an applicant may have a chance to "disabuse" an officer of such concerns, even where such concerns arise from evidence tendered by the applicant. Other decisions of this court support this interpretation of *Muliadi*, *supra*. See, for example, *Fong v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 705 (T.D.), *John v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No 350 (T.D.) (QL) and *Cornea v. Canada (Minister of Citizenship and Immigration)* (2003), 30 Imm. L.R. (3d) 38 (F.C.T.D.), where it had been held that a visa officer should apprise an

> applicant at an interview of her negative impressions of evidence tendered by the applicant.
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> 23 However, this principle of procedural fairness does not stretch to the point of requiring that a visa officer has an obligation to provide an applicant with a "running score" of the weaknesses in their application: *Asghar v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1091 (T.D.)(QL) at para. 21 and *Liao v. Canada (Minister of Citizenship*
>
> *and Immigration)*, [2000] F.C.J. No. 1926 (T.D.)(QL) at para. 23. And there is no obligation on the part of a visa officer to apprise an applicant of her concerns that arise directly from the requirements of the former *Act* or *Regulations*: *Yu v. Canada (Minister of Employment and Immigration)* (1990), 36 F.T.R. 296, *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 151 F.T.R. 1 and *Bakhtiania v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No.1023 (T.D.)(QL).

[Emphasis added in *César Nguesso*.]

[27] As Justice Rennie concluded in *Canadian Pacific* (at para 56), in assessing whether a process was fair, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond". In the present case, the Applicant did not know the case he had to meet. He was not aware that CIC was concerned that he had engaged in illegal people smuggling. He was given no opportunity to respond to this concern. In my view, the suggestion of people smuggling in the processing notes to the Applicant's 2000 H&C application is not information of which he should or could have been aware. This concern had been known to CIC since it processed the 2000 H&C application. It is unfair that the concern would only now be raised to the Applicant in the Decision as a factor in the determination of his TRP application.

[28] I find that the Officer's reliance on an unsubstantiated concern of people smuggling by the Applicant was a breach of the Applicant's right to procedural fairness. The Officer was required to raise this concern with the Applicant in advance of the Decision and to provide him the opportunity to make submissions in answer.

VII. Conclusion

[29] The application for judicial review of the Decision is allowed.

[30] The Applicant has requested an order of *mandamus* on the basis of the decision of this Court in *Rudder v Canada (Citizenship and Immigration)*, 2009 FC 689 at paragraphs 37-38:

> [37] I conclude by finding that this is an appropriate case for the issuance of a direction that a different visa officer issue to Faye Rudder forthwith a TRV for a period of one month when it is suitable for the Applicant to travel to Canada. I find that on the evidence in the record this is the only reasonable result a Visa Officer could reach on a re-consideration.
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> [38] In *Pacific Pants Company Inc. et al v. the Minister of Public Safety and Emergency Preparedness*, 2008 FC 1050, this Court at paragraphs 48 and 49 had an opportunity to discuss the scope of paragraph 18.1(3)(b) of the *Federal Courts Act* which authorizes the Court on setting aside a decision to do so "with such directions as it considers to be appropriate". I referred to the Federal Court of Appeal's decision in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31, as authority that directions issued under paragraph 18.1(3)(b) may include directions in the nature of a directed verdict. In my view, a directed verdict is compelling on the facts of this case.
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> [Emphasis added in *Rudder*.]

[31] Unfortunately, I must conclude that this is not a proper case for an order of *mandamus* as the outcome of a redetermination of the Applicant's TRP request is not certain. I am fully aware

that I am sending the Applicant's request for a TRP for redetermination by another officer for the fourth time. In order to provide some finality to this matter, I note the following for consideration by the officer.

[32] First, the Applicant's long-outstanding H&C and criminal rehabilitation applications have now been determined. One of the submissions of counsel for the Applicant at the hearing was that the Applicant's request for a TRP was intended to permit him to come to Canada pending the outcome of his second H&C application. The fact that the H&C application has now been denied will be relevant on redetermination of the TRP request.

[33] Second, the Applicant submitted that the Decision was unreasonable. I make no finding as to whether or not the Decision was reasonable as a redetermination of the Applicant's TRP request will be based on different considerations in light of the passage of time, the resolution of his pending CIC applications, and the submissions to be made by the Applicant regarding the issue of people smuggling. However, I do wish to address certain of the Applicant's submissions.

[34] The Officer identified as problematic the lack of evidence submitted by the Applicant in support of his argument that he must return to Canada to adequately operate his Canadian health care business. Despite the Applicant's arguments to the contrary, the absence of such evidence is relevant to the Applicant's stated reason for a return to Canada and can be weighed against the more anecdotal evidence provided by the Applicant's wife. The Applicant also submits that the Officer ignored the 2017 order of Justice McVeigh. I do not agree as the Officer engaged with the information contained in the Applicant's prior CIC applications and considered the

Applicant's family circumstances. It is clear that all of the Applicant's information and immigration history was before the Officer.

[35] Finally, the Applicant submits that the Officer erred in his consideration of the letters provided by his wife and children. The Applicant argues that the Officer focused on what the letters did not state rather than on what they did state in support of the Applicant. I agree with the Applicant in this regard. The Officer extrapolated from the fact that none of the letters addressed the Applicant's misrepresentations to CIC upon his initial entry to Canada, to conclude that he had not been forthcoming with his family. I find that the conclusion drawn by the Officer was unwarranted. In each instance, the letters focused on the Applicant's conduct of his life in Canada and should not be faulted for failing to address an extraneous matter.

[36] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-4229-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the officer is set aside and the Applicant's request for a temporary resident permit remitted for redetermination by a different officer. The Applicant will be permitted to make written submissions to address the issue of the Applicant's family configuration and the concern raised in the decision under review that the Applicant may have engaged in people smuggling.
3. No question of general importance is certified.
4. No costs are ordered.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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