Federal Court Cour fédérale

Date: 20091214

Docket: IMM-3411-09

Citation: 2009 FC 1268

Ottawa, Ontario, December 14, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

KABASELE NGALAMULUME

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision by an immigration officer (the visa officer) at the Canadian High Commission in Nairobi, Kenya, dated June 17, 2009 and received on June 27, 2009, denying the application made by the applicant's husband for a temporary resident visa.

Factual background

[2] The applicant, Kabasele Ngalamulume, resides in Ottawa and is a permanent resident of Canada. She is originally from the Democratic Republic of Congo in Africa, and she is married to François Kayibadi Ngalamulume, who is of Congolese nationality and is from the Democratic Republic of Congo. At the time of the application, he was living and working in Kinshasa, Congo.

[3] The applicant and her husband have three children who live in Canada with the applicant. They obtained permanent resident status after making a claim for refugee protection from within Canada.

[4] In 1997, when the applicant arrived in Canada, she stated that she was separated from her husband. At the time, she said that the husband from whom she was separated was named Kabangu Ngalamulume. She also stated that she did not know where he was and that they had only one child. Based on those statements, her application for permanent residence was approved.

[5] In 2004, the applicant stated that she was married to François Kayibadi Ngalamulume and that they had three children. She also stated that she was still in contact with her husband, who lived in Congo and owned a business. On July 8, 2004, an inadmissibility report under section 44 of the Act was issued against the applicant because of her contradictory statements about the composition of her family.

[6] At the time she arrived in Canada, the applicant's daughter Moleka stated that her father was named Tshibuabua Luf Mwanba and that her mother was Jacqueline Mbuyi Mwamba. Based on her statements, she obtained permanent residence in Canada on June 9, 1998. Later, in 2004, Moleka stated that the applicant was her mother and that François Kayibadi Ngalamulume was her father. On July 8, 2004, an inadmissibility report under section 44 of the Act was issued against Moleka because of her contradictory statements about the composition of her family.

[7] Mr. Ngalamulume applied for a temporary resident visa in 2007. The visa officer's notes indicate concerns about the composition of the family and the description of family relationships, and the application was denied.

[8] The applicant sent her husband an invitation to visit her temporarily and, on June 6, 2009, Mr. Ngalamulume applied to the Canadian embassy in Nairobi, Kenya to visit Canada between June 15 and 30, 2009.

[9] On June 17, 2009, a visa officer at the embassy in Nairobi, Kenya denied Mr. Ngalamulume's application for a temporary resident visa because she was not satisfied that he would leave Canada at the end of his stay as a temporary resident. In reaching that conclusion, she considered several factors, including his family ties in Canada and in his country of residence.

[10] The applicant is challenging that decision and seeks leave from the Court to apply for judicial review thereof.

Issues

[11] This application raises the following issues:

1. Did the visa officer provide reasons for her decision?

2. Is the visa officer's decision reasonable?

[12] For the reasons that follow, the application for judicial review will be dismissed.

Relevant legislation

[13] Subsection 20(1) of the Act imposes the following obligation on every foreign national who seeks to enter or remain in Canada:

Obligation on entry	Obligation à l'entrée au Canada
20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver:
(a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and	a) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;
(b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	b) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

[14] Section 179 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) imposes the following obligation on visa officers who issue temporary resident visas:

Issuance	Délivrance
179. An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national	**179.** L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis:
(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(b) will leave Canada by the end of the period authorized for their stay under Division 2;	b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;
(c) holds a passport or other document that they may use to enter the country that issued it or another country;	c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;
(d) meets the requirements applicable to that class;	d) il se conforme aux exigences applicables à cette catégorie;
(e) is not inadmissible; and	e) il n'est pas interdit de territoire;
(f) meets the requirements of section 30.	f) il satisfait aux exigences prévues à l'article 30.

<u>Standard of review</u>

[15] Based on the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Federal Court applies the reasonableness standard of review to decisions by visa officers to issue a temporary resident visa (*Dunsmuir*; *Odicho v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1039, 341 F.T.R. 18; *Obeng v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 754, 330 F.T.R. 196, at paragraph 21).

[16] The decision to issue a temporary resident visa to come to Canada is a discretionary decision by a visa officer. A high level of deference is accorded to visa officers' decisions on temporary resident visas, since such decisions usually involve a question of fact. As well, visa officers have recognized expertise in analysing and assessing applications for temporary resident visas (*Obeng*, at paragraph 21). The Court must therefore show deference to such a decision on judicial review (*De la Cruz v. Canada (Minister of Employment and Immigration)*, (1988), 26 F.T.R. 285, 14 A.C.W.S. (3d) 81; *Ji v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 786, 107 A.C.W.S. (3d) 125).

1. Did the visa officer provide reasons for her decision?

[17] The applicant submits that the visa officer unfairly penalized the person applying for a temporary resident visa by not explaining why she was denying the application. More specifically, the visa officer did not explain what element or component of his family ties in Canada and his country of residence was not satisfactory upon reviewing his file. In short, in the applicant's submission, the decision was vague and subjective and did not allow the unsuccessful visa applicant

to take any future action. The applicant submits that the visa officer also erred in law by basing her decision on incorrect or misinterpreted facts. The applicant's husband provided all the requested information and documents that met the requirements set out in the Act and the Regulations for a temporary resident visa.

[18] The respondent alleges, on the other hand, that the visa officer's decision was reasonable in light of the documentation and information she had before her, including the fact that the visa applicant's wife and children lived in Canada and had obtained permanent residence in Canada by making a claim for refugee protection from within Canada. Moreover, there were inadmissibility reports against the applicant and one of her daughters, since they had made false and contradictory representations about the composition of their family in order to obtain permanent residence in Canada.

[19] The respondent submits that there is a presumption that the visa officer assessed and considered all the evidence provided to her unless the contrary is established, which is not the case here (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (QL) (FCA), at paragraph 1).

[20] The courts have consistently held that visa officers must provide minimal reasons for their decisions denying applications for temporary resident visas (*Da Silva v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1138, 161 A.C.W.S. (3d) 974; *Obeng*, at paragraph 39; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 621, [2009] F.C.J. No. 798

(QL), at paragraph 9; *Jesuorobo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1092, 163 A.C.W.S. (3d) 126, at paragraph 11).

[21] Here, the visa officer did provide reasons for her decision using the CAIPS notes, and the reasons were based on the evidence in the file. The visa officer summarized the evidence she had before her and assessed it by stressing, *inter alia*, the history of misrepresentations already made and the strong family ties the applicant's husband had in Canada. The notes were sufficient to tell the applicant's husband why his application for a temporary resident visa was being denied (*Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 687, 131 A.C.W.S. (3d) 323, at paragraph 4). As stated by my colleague Justice Lagacé: "An applicant should not expect from a visa officer the same type of judgment a Court would generally render" (*Obeng*, at paragraph 39).

[22] After reading the documents in question, the Court is of the opinion that the visa officer's decision in this case, combined with the CAIPS notes, make it clear why Mr. Ngalamulume's application for a temporary resident visa was denied. In light of the above-mentioned tests developed by the courts, the visa officer therefore provided sufficient reasons for her decision.

3. Is the visa officer's decision reasonable?

[23] The applicant submits that the visa officer erred in law in deciding that the person applying for a temporary resident visa did not meet the statutory and regulatory requirements and in basing her decision to deny the application on incorrect or misinterpreted facts.

[24] According to the respondent, a review of the CAIPS notes shows that the visa officer analysed Mr. Ngalamulume's application for a temporary resident visa fully and thoroughly. After considering the documents provided in support of the application, the visa officer was not satisfied that Mr. Ngalamulume would leave Canada by the end of the period authorized for his stay. As a result, under the Act and the Regulations, the visa officer had to deny his application for a temporary resident visa. The respondent submits that that decision was open to the visa officer, particularly because the evidence in the file showed that Mr. Ngalamulume had stronger family ties in Canada than in Congo given the fact that his wife and children lived in Canada.

[25] There is a legal presumption that a foreign national who seeks to enter Canada is an immigrant, and it is up to the foreign national to rebut that presumption. Therefore, Mr. Ngalamulume had to prove to the visa officer, by presenting the relevant documents in support of his application, that he was not an immigrant and that he would leave Canada by the end of the period authorized for his stay. Mr. Ngalamulume did not rebut that presumption (*Obeng*, at paragraph 20; *Danioko v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 479, 292 F.T.R. 1).

[26] The visa officer examined all of the evidence before her, and the Court is of the opinion that she did not make any erroneous or irrelevant findings of fact. The visa applicant had to provide the requested documents in support of his application in order to satisfy the visa officer that his visit was credible and temporary and that he would return to Congo by the end of the period authorized for his stay.

[27] At the hearing, the respondent drew the Court's attention to certain documents filed in support of the applicant's arguments (see paragraph 15 of Kabasele Ngalamulume's affidavit and the account statements from the Royal Bank of Canada dated October 17, 2009). It is important to note that the documents in question were not part of the file before the visa officer, which served as the basis for her decision. The Court notes as well that the documents are not in the record filed with the Court. Accordingly, they are not evidence and are excluded by the Court.

[28] Thus, after considering all the evidence submitted by the visa applicant, the visa officer was not satisfied that he had discharged his burden of proving that he met the requirements of the Act and the Regulations. In particular, the evidence in the file showed that Mr. Ngalamulume's wife and children had made false and contradictory representations about the composition of their family in order to obtain permanent residence in Canada. The visa officer reached the reasonable conclusion that the evidence did not establish that Mr. Ngalamulume would leave Canada by the end of his stay (*Obeng*, at paragraph 36).

[29] It is clear that the visa officer's refusal can be explained by the fact that, in light of the documents she had before her in making her decision, she did not think the visa applicant intended to return to Congo.

[30] In the circumstances, the visa officer did not err in law, and it is not the Court's role to substitute its judgment for hers or to analyse the documents in support of an application differently (*Obeng*, at paragraph 40).

[31] The application for judicial review is therefore dismissed. The parties did not raise any question to be certified, and this matter contains no such question.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Richard Boivin"

Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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