Date: 20081205

Docket: IMM-5046-07

Citation: 2008 FC 1352

Ottawa, Ontario, this 5th day of December 2008

Before: The Honourable Mr. Justice Pinard

BETWEEN:

ADEJUMOKE ODUTOLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUGDMENT

[1] This is an application for judicial review of the decision of visa officer Michel Verge, dated October 2, 2007, refusing to issue a temporary resident visa to the applicant.

[2] The applicant, Ms. Adejumoke Odutola, is a citizen of Nigeria. On September 13, 2007 she applied for a temporary resident visa for herself and her infant son at the Canadian Deputy High Commission in Lagos, Nigeria, with the intention of visiting her brother, a lawyer in Ottawa. Her application was refused on October 2, 2007.

[3] The applicant has four dependent children. The three oldest are the offspring of her deceased ex-husband. The youngest, an infant, was born in July 2006, and is the subject of a paternity suit by the applicant against the putative father.

[4] The applicant, who is well-travelled and has never been refused entry as a visitor to any country, is concerned that the rejection of her application will pose obstacles to future travel, both to Canada to visit her brother and to other countries.

* * * * * * * *

[5] The visa officer determined that the applicant – or, more specifically, her infant son – did not satisfy the requirements of subsections 20(1)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and 179(*b*) of the *Immigration and Refugee Regulations*, SOR/2002-227 (the "Regulations"). Because the applicant refused to travel without her son, her application was also denied.

[6] The decision is recorded on a standard-form template, wherein the officer indicates that he was not satisfied that the applicant:

> (1) would return to her country of origin if granted a temporary resident visa;
>
> (2) would leave Canada at the end of the temporary period if she were authorized to stay, or
>
> (3) met the requirements relating to family ties in Canada and Nigeria.

[7] The reasons for the decision are provided in the Computer Assisted Immigration Processing System (CAIPS) notes. They make clear that the refusal to issue a visa to the applicant's child is based on the ongoing paternity suit mentioned above, which raised doubts in the officer's mind about the intentions of the applicant. In his view, because she is "asking for money from the probable father", she "could decide to leave [the child] in Canada with her brother to force the father to pay".

* * * * * * * *

[8] Subsection 20(1)(*b*) of the Act is relevant to the present proceeding:

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,

[…]

(*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.

20. (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :

[…]

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.

The following provision of the Regulations is also pertinent:

179. An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national

[…]

(*b*) will leave Canada by the end of the period authorized for their stay under Division 2;

179. L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

[…]

b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;

* * * * * * * *

[9] Decisions of visa officers are highly discretionary, and are therefore subject to deference. The Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at 222, establishes that "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness". Reasonableness, then, is the standard I apply here.

[10] There are two issues to assess when examining the reasons provided by the visa officer. The first has to do with the adequacy of the reasons. I agree with the respondent that the reasons in the officer's CAIPS notes, though spare, meet the benchmark established in the jurisprudence: they are "sufficiently clear, precise and intelligible so that a claimant may know why his or her claim has failed and be able to decide whether to seek leave for judicial review" (*Mendoza v. Minister of Citizenship and Immigration*, 2004 FC 687, at paragraph 4).

[11] The problem arises in connection with the second issue, namely, the reasoning that underlies the decision. The Supreme Court in *Dunsmuir*, *supra* (paragraph 47 at page 220), makes clear that administrative decision-makers "have a margin of appreciation within the range of acceptable and rational solutions" (see also *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at 270). The reasoning in this case does not fall within this margin.

[12] According to the respondent Minister, "the visa officer made it clear that because of the pending paternity suit the child's legal situation was not clear"; this, it is argued, "is a solid and

valid reason for refusing a visitor's visa". I cannot agree. Like the applicant, I can see no basis in the record or in logic for the conjecture that the ongoing paternity suit would motivate the applicant, who has full legal custody of her son, to leave her child in Canada as a means of coercing money from a man who denies the child is his.

[13] Moreover, speculation about the supposed implications of the paternity suit overwhelmed all of the other evidence, which indicates that the applicant is a regular traveller with strong ties to Nigeria, including her three remaining children, property and a career. The weight given to this improbable scenario, over and above countervailing evidence, is plainly unreasonable, which is sufficient to warrant the intervention of the Court.

[14] There is also, in my view, merit to the applicant's argument that the visa officer's failure to put the above theory before the applicant at the time of her interview constitutes a breach of natural justice. The applicant was forthcoming with him about her involvement in the paternity suit, and had no reason to believe, based on her interview, that it would provide the basis for the rejection of her application. In his affidavit dated July 7, 2008, the visa officer explains his reasoning as follows:

> 8. Normally, a minor child travelling with only one parent requires permission from both parents. This is to prevent child abduction, child trafficking, and other harm to the child. In this case, paternity was not yet established. The nature of the father's rights or the identity of the father was not clear.

[15] There is nothing in the reasons to suggest that these concerns grounded the decision; nor is there any reason to believe that the applicant had notice of the officer's concerns, given the subject matter of their discussion. I therefore conclude that the officer's failure to put his theory before the

applicant constituted a breach of procedural fairness. Although there is case law to support this result, I note that the jurisprudence on this point is mixed (see *Ogunfowora v. Minister of Citizenship and Immigration*, 2007 FC 471, at paragraph 41; *Yuan v. Minister of Citizenship and Immigration*, 2001 FCT 1356, 215 F.T.R. 66; *Wang v. Minister of Citizenship and Immigration*, 2003 FCT 258, 229 F.T.R. 313; and *Bonilla v. Minister of Citizenship and Immigration*, 2007 FC 20).

* * * * * * * *

[16] For all the above reasons, the application for judicial review is granted, the visa officer's decision dated October 2, 2007 is set aside, and the matter is sent back for re-determination by a different visa officer.

[17] Both parties are seeking costs for different reasons.

[18] Counsel for the applicant argues that his client is entitled to costs because of the importance of the error made by the visa officer. It is my view that no costs should be awarded to the applicant because there are no "special reasons" within the meaning of section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/2002-232. Special reasons may be found if one party has unnecessarily or unreasonably prolonged the proceedings, or where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith. The mere fact that the visa officer made a mistake is insufficient to warrant the granting of costs to the

applicant (see *Johnson v. Minister of Citizenship and Immigration*, 2005 FC 1262, at paragraphs 26 and 27).

[19] As for the respondent's formal request for costs, it is hereby dismissed, for the following reasons.

[20] On July 16, 2008, Michel Verge, the visa officer whose decision is the subject-matter of the present review, was cross-examined by applicant's counsel, Mr. Eastman. Michel Verge speaks both French and English, but because he is francophone, he asked to be cross-examined in French. The Court Administrator therefore provided an interpreter for his cross-examination.

[21] According to Ms. Burgos, counsel for the respondent, there were significant problems with the translation. She was therefore of the view that the English transcript of the cross-examination did not accurately reflect the visa officer's testimony and sought to have a bilingual transcript, which she would have prepared based on the tape, presented to the Court. Mr. Eastman agreed that she could have access to the tape of the cross-examination, but opposed having a combined French-English transcript of the cross-examination filed. Consequently, Ms. Burgos brought a motion to have the dual language transcript filed.

[22] There is disagreement between Ms. Burgos, on the one hand, and Mr. Eastman and his agent, Mr. Waldman, on the other, about who was responsible for the "undue delay" in the bringing of the motion to have the combined French-English transcript admitted into evidence.

[23] Ms. Burgos argues that Mr. Eastman improperly and without a reasonable basis delayed the proceedings by obliging her unnecessarily to file a motion on July 24, 2008, which was heard over four different sittings of the Court in front of three different Justices of the Court. His opposition to the filing of the bilingual transcript, she claims, was without merit. Moreover, she says that he contributed to the undue delay by failing to respond to her letters to him. Ms. Burgos also maintains that Mr. Eastman's behaviour was "contrary to the bilingual nature of Canada", in allegedly seeking repeatedly to deny the language rights of the visa officer, and to prevent the officer's evidence from being viewed by the Court in the official language of his choice, namely French. She seeks an award of costs against Mr. Eastman personally, in the amount of $3000, due to the 93.5 hours of additional work incurred in dealing with this motion.

[24] Mr. Eastman categorically denies these allegations. He argues that it is Ms. Burgos who delayed the proceeding, by rejecting repeated offers by the applicant to settle the matter without costs, and by persisting in bringing the motion after he had already agreed that she could access the tape of the cross-examination. Moreover, he claims that he had an arguable basis for opposing Ms. Burgos' motion, and therefore had a duty to his client to advance the position.

[25] A reading of Mr. Eastman's submissions on this issue, and Mr. Waldman's supporting affidavit, suggests that the there was no bad faith behind their posture. Without commenting on its merits, the record demonstrates that Mr. Eastman believed his position was founded on existing jurisprudence. At paragraph 4 of his submissions, he writes: "… I maintain that there were points on that motion taken by the Applicant that were and remain fairly arguable". Indeed, in his affidavit, Mr. Waldman (at paragraph 4) explains that, in opposing the motion, he took the position that the

Minister had "failed to adduce evidence to warrant challenging the reliability of the English transcript and that was required before the Court could consider what other steps to take."

[26] It is plain and undisputed that Mr. Eastman contested the filing of the combination French-English transcript; the record attests, however, to his agreement that the respondent have a copy of the cross-examination tape. In his letter of August 7, 2008 to respondent's counsel, Mr. Waldman wrote:

> . . . I am writing further to our recent conversation to confirm that I have instructions to not oppose your request to obtain access to the tapes. As I indicated it would appear to me that the appropriate course of action would be for you to retain an expert to determine whether or not there was any deficiency in the translation. If your expert concludes that there is a problem with the transcript that [*sic*] it would be open to you to seek to have the transcript struck.
>
> However, my client will not agree to the filing of the bilingual transcript because we believe that this will be highly prejudicial and that there is no basis in law for such a procedure. . . .
>
> (My emphasis.)

[27] In addition, I am not persuaded that Ms. Burgos' claim that Mr. Eastman's conduct demonstrates contempt for this country and this Court's bilingual nature is supported by the record. Mr. Eastman made no objection to the visa officer being cross-examined in French. I see no reason to infer the attitude alleged by Ms. Burgos from Mr. Eastman's position with respect to the motion to introduce the dual language transcript. As I understand it, he did not object in principle to the submission of a bilingual document; rather, he insisted that its submission be conditioned upon meeting an onus that he believed was established by the jurisprudence.

[28] As to Mr. Eastman's alleged silence in regard to the correspondence sent to him by opposing counsel, I am satisfied that his letter of July 24, 2008 provides an adequate explanation. Therein, Mr. Eastman writes:

> I informed counsel for the Respondent this afternoon that I have been preparing materials for an urgent stay motion and a motion to leave in the Ontario Superior Court all this week and consequently was not able to respond to her correspondence.

[29] Unlike the respondent, I do not see this as "the clearest of cases of improper and offensive conduct by a counsel that cannot be remedied in any manner but by awarding costs to the Respondent against the Applicant's counsel personally". I do not find that applicant's counsel's conduct warrants an order of costs against him personally. In coming to this conclusion, I am guided by the words of Chief Justice McLachlin in *Young v. Young*, [1993] 4 S.C.R. 3, cited by applicant's counsel in his submissions. At page 135, she writes:

> The Court of Appeal held that no order for costs should have been made against Mr. How. There is no need to repeat that entirely satisfactory analysis. The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.
>
> (My emphasis.)

[30] Accordingly, no costs are adjudicated in favour or against any of the parties in this matter.

JUDGMENT

The application for judicial review is granted. The decision of visa officer Michel Verge, dated October 2, 2007 is set aside, and the matter is sent back for re-determination by a different visa officer.

"Yvon Pinard"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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Ms. Maria Burgos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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