

Federal Court



Cour fédérale

Date: 20190408

Docket: IMM-2951-18

Citation: 2019 FC 424

Ottawa, Ontario, April 8, 2019

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**ELIKANA LOBOKA KWANYI
BETTY PONI
NANTIE GERIA**

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision made by an Immigration Officer [Officer] dated May 3, 2018 wherein the Officer denied the Applicants' applications for permanent

residence on humanitarian and compassionate [H&C] grounds under the humanitarian-protected persons and refugees abroad class.

II. BACKGROUND

[2] Elikana Loboka Kwanyi, Betty Poni, and Nantie Geria [Applicants] are refugees from Sudan who have lived in refugee camps in Uganda since 1994.

[3] Ms. Poni was born in a refugee camp in Uganda. She was separated from her family at the age of eleven after the Lord's Resistance Army attacked their refugee camp. Ms. Poni started living with Mr. Kwanyi and his family. She is considered a member of the family and is referred to as Mr. Kwanyi's niece. Ms. Geria is also Mr. Kwanyi's niece and she has lived with him since her mother died in 2005.

[4] Mr. Kwanyi's daughters in Canada filed an application to sponsor the Applicants for permanent residence in Canada on H&C grounds in 2008. The Roman Catholic Diocese in Thunder Bay, Ontario supported the application.

[5] Mr. Kwanyi was first interviewed in May 2012. The Officer made a positive decision at that time and determined that the Applicants met the requirements of the humanitarian-protected persons and refugees abroad class. The Officer informed the Applicants that any changes to their family composition would need to be reported. Mr. Kwanyi, however, maintains that he did not understand the requirement to report changes to the composition of his family.

[6] The Applicants were then required to undergo medical examinations after having received the positive decision in 2012. Ms. Poni did not attend the medical examination because she had recently given birth and was unfit to travel. A woman named Kiwaje attended the medical examination in place of Ms. Poni.

[7] The Applicants were interviewed again on August 25, 2016 in Kampala. Although no interpreter was provided, a distant relative of the Applicants with no formal training in English assisted. During this interview, the Applicants confirmed that an imposter was sent to complete the medical examination in place of Ms. Poni. During this interview, Mr. Kwanyi also disclosed the existence of two grandchildren which he had not declared in the 2012 interview.

[8] A Procedural Fairness Letter was sent to Mr. Kwanyi and Ms. Poni in November 2017. This letter requested submissions from the Applicants on the attendance of the imposter at the medical examination, Mr. Kwanyi's initial failure to disclose the existence of his grandchildren, and the identities of Mr. Kwanyi's grandchildren. The distant relative who assisted at the 2016 interview responded to the letters on behalf of the Applicants. The response, which was sent via email, purported to be from Mr. Kwanyi himself and admitted to being involved in sending an imposter and to failing to disclose the existence of the grandchildren. The author of the email asked for forgiveness and explained that his illiteracy was partly responsible for the mistakes. Mr. Kwanyi and Ms. Poni now maintain that they did not give instructions to the distant relative to write the email, that they did not give permission for the email to be sent, and that neither the Applicants nor their sponsors were given an opportunity to review it.

III. DECISION UNDER REVIEW

[9] The Officer sent letters to the Applicants on May 3, 2018 which denied their applications for permanent residence on H&C grounds.

[10] The Officer stated that both Mr. Kwanyi and Ms. Poni had admitted during the August 25, 2016 interview to having sent an imposter to the medical examination. Additionally, the Officer stated that Mr. Kwanyi had failed to disclose the existence of his grandchildren at the initial interview in 2012. The Officer also considered the explanation contained in the response to the Procedural Fairness Letter and held that Mr. Kwanyi's illiteracy could not excuse the sending of an imposter or failure to disclose the existence of the grandchildren.

[11] The Officer concluded that Mr. Kwanyi is inadmissible for contravening the obligation under s 16(1) of the Act to answer truthfully the questions put to him. The Officer also concluded that Ms. Poni is inadmissible for contravening s 16(1) by failing to answer all questions truthfully and s 16(1.1) of the Act by failing to attend the medical examination. Finally, the Officer refused Ms. Geria's application as a *de facto* dependent of Mr. Kwanyi because her application could not proceed on its own.

IV. ISSUES

[12] The issues to be determined in the present matter are the following:

1. What is the standard of review?
2. Did the Officer violate procedural fairness?

V. STANDARD OF REVIEW

[13] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[14] Courts have recently held that the standard of review for an allegation of procedural unfairness is ‘correctness’ (*Mission Institution v Khela*, 2014 SCC 24 at para 79; (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[15] While an assessment of procedural fairness on a standard of correctness accords with recent jurisprudence, it is not a doctrinally sound approach. A better conclusion is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated (at para 74) that the issue of procedural fairness,

requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

VI. STATUTORY PROVISIONS

[16] The following provisions of the Act are relevant to this application for judicial review:

**Application before
entering Canada Visa**

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

...

**Obligation — answer
truthfully**

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

**Obligation — appear
for examination**

(1.1) A person who

Visa et documents

11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

...

**Obligation du
demandeur**

16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

**Obligation de se
soumettre au contrôle**

1.1) L'auteur d'une

makes an application must, on request of an officer, appear for an examination.

demande au titre de la présente loi doit, à la demande de l'agent, se soumettre au contrôle.

...

...

Non-compliance with Act

Manquement à la loi

41 A person is inadmissible for failing to comply with this Act

41 S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait —

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, provision of this Act; and

acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent,

(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

le manquement à l'obligation de résidence et aux conditions imposées.

VII. ARGUMENT

A. *Applicants*

[17] According to the Applicants, the Officer breached procedural fairness in three ways. First, the Officer failed to take complete notes during the August 25, 2016 interview of the Applicants. Second, the Officer failed to provide the Applicants with an interpreter. Instead, the Applicants were required to use a distant relative who had no formal training in English or interpretation. Finally, the Officer relied on an inculpatory email sent by the distant relative who had assisted with the interpretation. This email purported to be from Mr. Kwanyi even though it was written in English and there was no indication that he had agreed with its contents.

[18] The Applicants submit that the Officer failed to take complete, contemporaneous notes during the interview. She made a brief summary of what transpired during the interview, but there is no indication of the questions asked or answers given. The Officer's failure to take sufficiently detailed contemporaneous notes of the interview hinders the Applicants' ability to make their case on judicial review. Further, the Court is prevented from undertaking a complete assessment of the fairness of the interview. Interview notes were particularly important in this case because the interview took place about two years before the Decision.

[19] The Applicants dispute the accuracy of the summary notes made by the Officer. For example, Mr. Kwanyi denies having knowledge about the plan to send an imposter to the medical examination. The Officer, however, noted that Mr. Kwanyi did have such knowledge. Similarly, Ms. Poni denies telling the Officer that she knew an imposter would be sent to the medical examination. The Officer, however, recorded that Ms. Poni did have such knowledge. These examples demonstrate that the Officer's notes are unreliable. Without a complete record of the interview, it is impossible to know whether the process was fair to the Applicants.

[20] The second breach of procedural fairness relates to the Officer's failure to provide a qualified interpreter for the Applicants at the August 25, 2016 interview. An independent and qualified interpreter was essential in these circumstances because of the allegations against the Applicants. While the Applicants were able to understand their interpreter, they do not know if he accurately conveyed what the Officer was saying. The Applicants did not waive their right to challenge interpretation problems.

[21] The third and final breach of procedural fairness was the Officer's reliance on the email that obviously came from the Applicants' distant relative. The Officer should have inquired as to whether the Applicants understood and agreed with the contents of the email. The Officer knew that Mr. Kwanyi could not speak English. Accordingly, the Officer should have inquired as to whether he had actually written or authorized the email. Additionally, the email was inconsistent with what Mr. Kwanyi had told the Officer during the earlier interview.

B. *Respondent*

[22] The Respondent submits that the affidavits submitted by the Applicants for this application contain information that was not before the Officer. The Applicants do not explain why they did not raise this information with the Officer. The Applicants should have raised any concerns about the quality of the interpretation with the Officer. New evidence may only be submitted in exceptional circumstances. The Applicants have failed to demonstrate that such circumstances exist. Accordingly, the evidence introduced through the affidavits is inadmissible.

[23] The Respondent argues that the Officer's reliance on the email sent in response to the Procedural Fairness Letter does not constitute a breach of procedural fairness. Instead, the failure to submit their own response to the Procedural Fairness Letter was simply the result of a lack of diligence on the part of the Applicants.

[24] The Respondent asserts that the notes taken by the Officer were not made at a later date after the interview. There was simply a delay in uploading the notes to the Global Case

Management System [GCMS]. A review of the notes demonstrates the questions that were asked and the answers provided. Additionally, the Applicants have not indicated that they took their own notes. The affidavits submitted by the Applicants must therefore be based on recollection alone.

[25] The Respondent says that the Applicants provided their own interpreter because of a lack of appropriate interpreters at the time. The Applicants did not attempt to reschedule the interview due to a lack of a proper interpreter. Furthermore, the Applicants did not indicate to the Officer that they were concerned with the quality of the interpretation. The Applicants have waived their right to now raise the issue of interpretation because they provided their own interpreter and failed to raise any concerns at the time of the interview.

[26] The Respondent concludes that no breach of procedural fairness resulted from the Officer's reliance on the emailed response to the Procedural Fairness Letter. The Applicants acknowledged that their distant relative was assisting them to respond to the Procedural Fairness Letter. Additionally, there is no indication that the Applicants attempted to submit their own response. This means that they knew that a response was being submitted on their behalf or that they had no plans to submit a response at all. Finally, the Applicants made no attempt to dispute the accuracy of the response or to request additional time to submit their own response.

VIII. ANALYSIS

A. *Introduction*

[27] This is an extremely sad case that, in my view, is more about misunderstanding and mischaracterization than dishonesty. This is hardly surprising given that: the head of the family, Mr. Kwanyi is illiterate and speaks no English; the Applicants and the Officer had to rely upon a volunteer interpreter with no formal training; the Applicants live in a refugee camp with limited phone access and no internet; and the Applicants had to travel for hours to attend the visa office interviews.

[28] In the end, it is my view that the practical difficulties faced by the Applicants and the Officer have resulted in procedural unfairness that requires this matter to be returned for reconsideration by a different officer.

[29] Although the refusal letter of May 3, 2018 refers to untruthfulness with regard to both the other person (imposter) who was sent to the medical examination instead of Ms. Poni, and the two grandchildren who were not declared at the 2012 interview, both sides agree that it is the “imposter” issue that is of prime concern and that the undeclared grandchildren issue would likely not have resulted in a refusal.

B. *The Imposter Situation*

[30] Ms. Poni was refused because an imposter was sent to pass the medical examination that she should have attended and Mr. Kwanyi was refused because he sent the imposter. The first ground of procedural unfairness alleged by the Applicants is that the Officer failed to keep, contemporaneous notes at the August 25, 2016 interview where the Applicants were confronted with the allegations of untruthfulness:

24. There is no clear record of what took place at the interview because the visa officer did not record the questions asked nor the answers provided. Instead, the visa officer typed a brief summary of the interviews, which he entered into GCMS on May 3, 2018, the date of his decision, and almost two years after the interviews took place.

25. The GCMS summary says that Ms. Poni admitted at the interview to having sent an imposter to the medical exam in her place. The GCMS summary does not reveal any such admission by Mr. Kwanyi. Both Mr. Kwanyi and Ms. Poni swear in their affidavits that they told the visa officer that it was Ms. Poni's father who sent Kiwaje to the medical exam, and both deny having been involved. They depose that they did not believe they had a full opportunity to explain what happened or that the visa officer understood what they were trying to say.

[31] We are not concerned with the whole interview in this application, but only with the misrepresentation issue. On this issue, the Officer has filed her own affidavit to explain how the meeting was recorded:

5. During the interviews, I took note [*sic*] on an office laptop using a standard word processing software. Although my notes are not a verbatim rendition of the interview, they capture a summary of my questions and the applicant's responses and are typed at the same time as the interview is taking place.

[32] The GCMS notes for Mr. Kwanyi say that the Officer “Explained purpose and process of the interview. Explained obligation to tell the truth. Told Applicant to advise me at any during [sic] clarifications are required.” The Applicants do not take issue with this.

[33] On the misrepresentation issues, the GCMS notes read as follows:

Eligibility passed. Asked PA what happened after the last interview. Said they went for a medical. Also said de facto dep Betty Poni was called for an interview but could not find the place. I asked if Betty did her medical the last time. They said yes. Asked if was her. They said that Betty’s father insisted to send another woman called Kiwaje to do the medical examination because Betty had just given birth and was not able to travel. Betty now has a son called Doko Joshua born in August 2013.

...

PA knew about the impostor at medical examination but stated it was Betty’s father who insisted to send somebody else.

[34] It seems to me, then, that on the misrepresentation issue there is, at least a summary record of what took place at the interview. Mr. Kwanyi was asked what had happened since the last interview, and he told the Officer that Ms. Poni’s father had insisted on sending another person to do the medical examination, and that he knew about the imposter but it was Ms. Poni’s father who had insisted.

[35] On this issue, as I will discuss later, the difficulty arises, not from the interview notes *per se*, but because in the Procedural Fairness Letter the Officer put this issue before Mr. Kwanyi in the following way:

At your second interview, it was determined that you persuaded your declared de facto dependant, Betty, to send an imposter to the medical exam as she had just had a child.

[36] Although I think we can depend upon the Officer's honesty – she has no reason to lie – we are without a verbatim record, and so completely dependent upon the Officer's summary of what she said to the Applicants and what they said to her. And this is particularly worrisome in the present case because there was no qualified interpreter available and both the Applicants and the Officer had to depend upon the dubious translation skills of a distant family member. The whole situation was primed for miscommunication and required the Officer to take more detailed notes of what was actually asked and what was said.

[37] So, the notes say that the Applicants said that:

Betty's father insisted to send another woman called Kiwaje to do the medical examination because Betty had just given birth and was not able to travel.

...

PA knew about the impostor at medical examination but stated it was Betty's father who insisted to send somebody else.

[38] Then the Officer tells us that she reviewed these notes, and she recounted her reasons for deciding Mr. Kwanyi had been dishonest with regards to this issue. She writes: "First, he acknowledged that he sent an imposter instead of Betty to do her medical interview." But this is not what the notes of the interview say. There is no such acknowledgment. The notes say that it was Ms. Poni's father who insisted on sending the imposter. And there is no explanation as to how or whether Mr. Kwanyi or Ms. Poni could have done anything but submit to the father's insistence. Unless this is explained, there is no way to gauge the extent of Mr. Kwanyi's or Ms. Poni's honesty and whether they contravened a provision of the Act.

[39] The Procedural Fairness Letter does not reflect the answer which the Officer says Mr. Kwanyi gave at the interview which was that “PA knew about the imposter at medical examination but stated it was Betty’s father who insisted to send somebody else.” We don’t know if the Officer is mistaking what was said at the interview or that she has, in some other way, determined that Mr. Kwanyi was lying when he said it was Ms. Poni’s father who “insisted.” This casts doubt on the accuracy of the interview notes. This doubt is carried into the Officer’s review of the notes where the Officer says that “First, he acknowledged that he sent an imposter instead of Betty to do her medical examination.” There is nothing in the interview notes that records what was actually said that could have been an acknowledgement. The interview notes say that Mr. Kwanyi knew about the imposter but they don’t say he sent her to the medical examination. The interview notes suggest that the father “insisted” not that Mr. Kwanyi “persuaded” Betty to send an imposter.

[40] Mr. Kwanyi’s “insistence” is also not reflected in the notes to Ms. Poni’s interview where she says it was her father who “insisted.”

[41] In addition, the interview notes for Mr. Kwanyi do not indicate what he was asked about his grandchildren or what he said in reply. In his review of the notes, the Officer says “he initially conceded the existence of two of his grandchildren. In response to the Procedural Fairness Letter, the principal applicant blames this on his lack of education and foolishness and asks for forgiveness.”

[42] In my view, the interview notes (although an honest attempt by the Officer to give her impression of what was said) are not sufficient to allow the Applicants or the Court to determine whether the Officer's impression was reasonable, given what was actually said. This is important because, in the Procedural Fairness Letter, the Officer made it clear that the concerns are "regarding your overall credibility as it relates to your refugee claim, availability of a durable solution, and admissibility to Canada." All of these issues could be impacted by whether Mr. Kwanyi was responsible for the imposter or deliberately concealing his grandchildren, or made an honest mistake, which is not out of the question given his illiteracy, his lack of English, his background and the complexities of the application process under the difficult circumstances in which the Applicants live.

[43] When it comes to the GCMS interview notes for Ms. Poni, there is again a contradiction on the crucial issue of who sent the imposter to the medical examination. The Officer's notes read in relevant part as follows:

Confronted with medical examination fraud: PA stated it is true. She had just delivered and sent somebody else to do the examination. He [*sic*] girl named Kiwaje went for her. PA stated that her father Simon Wani sent Kiwaje to do the examination. She knew it was wrong but her father insisted.

[44] So we don't know from the notes whether Ms. Poni herself perpetrated the fraud by sending Kiwaje to the medical examination, or whether her father sent Kiwaje. And we don't know if Ms. Poni knew about it at the time. The notes might also suggest that Ms. Poni had no choice in the matter against the wishes of an insistent father. The answers to these issues are highly material to the Officer's overall concerns with Ms. Poni's honesty. The notes are not

sufficient to allow Ms. Poni or the Court to understand the decision to refuse her application and to determine whether or not it is reasonable. This is procedurally unfair.

[45] I wish to make it clear that I am not here doubting the honesty of the Officer. In her affidavit sworn for the purposes of this application, however, she concedes that her notes “are not a verbatim rendition of the interview” and only capture “a summary of my questions and the applicant’s responses....”

[46] In his own affidavit filed with this application, Mr. Kwanyi makes it clear that the Officer’s summary is not an accurate summary of what he said:

5. THAT at the second interview in August 2016, my distant relation Mononye William Elia interpreted for us. The visa office did not provide an interpreter that day. I could understand William, but I did not know if he was telling the visa officer exactly what I said, or if he was telling me exactly what the visa officer said.

6. THAT the visa officer at the second interview showed me three photos. I knew one of the women to be Kiwaje, a friend of my niece, Betty Poni’s. The other two photos were of Betty. The visa officer asked me why Betty didn’t go to the medical exam and I explained she had had a baby. The visa officer told me that Kiwaje had gone to the medical exam in Betty’s place. I did not tell the visa officer that I knew Betty’s father had sent Kiwaje to the medical exam. I told the officer that I believed Betty’s father had sent Kiwaje.

7. THAT I did not send Kiwaje to the medical exam, and I did not know that Betty’s father was going to do so. I do not believe I had a full opportunity to explain what happened at the interview or that the visa officer understood what I was trying to say.

[47] Ms. Poni also has an alternative viewpoint as to what she actually said:

5. THAT I did not tell the visa officer that I knew Kwaje was going in my place because I did not know that my father was going

to send Kwaje, but I did tell the visa officer that it was my father who sent Kwaje. I was not able to attend the medical exam because I had just given birth and I was not well enough to travel, but I did not know Kwaje was going to go instead of me.

6. THAT I did not send Kwaje to the medical exam, and I did not know that my father was going to do so. I knew that he wanted to, but I had told him not to. I do not believe that I had a full opportunity to explain what happened at the interview or that the visa officer understood what I was trying to say.

[48] Normally, of course, in a dispute such as this over what was actually said, the Court would accept the officer's version because she/he has no reasons to lie and, in entering the notes, is simply following standard procedure. But in the present case, this is not possible because there is no clear indication of the actual questions and the actual responses. A summary might be acceptable in some cases, but in the present case, there was no qualified interpreter so that the Officer was required to be particularly careful as to precisely what was said in a situation where miscommunication and misunderstanding could easily arise.

[49] The problem is made worse by the Procedural Fairness Letter of November 26, 2017. In it, the Officer writes:

I have now completed an assessment of your applications for permanent resident visas in Canada as members of the Convention refugee abroad class or as members of the Humanitarian-Protected Persons Abroad designated class. I have concerns that you do not meet the requirements for immigration to Canada. Specifically, I have concerns that you have not presented complete and truthful information as required by section 16 of the Act, which states:

16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

You and your family were interviewed on two separate occasions in 2012 and 2016. At your second interview, it was determined that you persuaded your declared de facto dependent, Betty, to send an imposter to the medical exam as she had just had a child. You also indicated at interview that your grandchild, the child of your son, Wilson, was now in your care. You stated he was a boy born in 2008. The birth certificate for this child, however, indicates the child is a girl named Vanessa Yoture, born in 2009. Her birth certificate, issued in Uganda, does not list a biological mother, which is highly unusual.

[Emphasis added.]

[50] The words “it was determined” do not provide a basis for the determination. So the Applicants could have no idea what it was they said that caused the Officer to reach this determination. It is simply a general conclusion that would be very difficult to address and refute without some understanding of why the Officer had come to this conclusion.

[51] The final two paragraphs are also problematic because it isn't clear whether “this issue” includes the “imposter” issue:

I am not satisfied that you have put forward accurate information regarding the composition of your family. This causes me to have concerns regarding your overall credibility as it relates to your refugee claim, availability of a durable solution, and admissibility to Canada.

Before I make a final decision, you may submit additional information relating to this issue. You have 30 days from the date of this letter to submit additional information to me. Please ensure that you quote the application numbers indicated at the top of this message on any information you submit. If you choose not to respond with additional information an officer will make a decision based on the information presented, which may result in the refusal of these applications.

[52] Once again, given the illiteracy of Mr. Kwanyi, the fact that he does not speak or understand English, and that he was dependent upon an unqualified translator, it was imperative that specifics be provided so that the Applicants could appreciate why the Officer had made the determination that Mr. Kwanyi “persuaded your declared *de facto* dependent, Betty, to send an imposter to the medical exam as she had just had a child.”

[53] On the “imposter” issue, the response to the Procedural Fairness Letter reads, in relevant part, as follows:

First and foremost, there is a saying that education is wisdom, intelligence and light. Unfortunately, for me, i didn't go to school at all eversince i was born. As such an illiterate person is only guided by fear in anything he/she does, unlike a literate one who is guided by thinking and reasoning. So fear made me mess up at some points like fielding somebody in place of Poni Betty who could n,t travel with us to Kampala for the medical examination due to maternity reasons. I thought her absence from the medical examination would reduce our already known number hence could fail the process...

[Errors in original.]

[54] It has to be borne in mind that, even if Mr. Kwanyi could be said to have authorized this response, it would be no more than an attempt to answer a “determination” that had been communicated without a sufficient basis to allow the Applicants to refute it with their view of what they said at the interview. As a consequence, they could not know that the Officer had taken the view that Mr. Kwanyi had acknowledged he had sent an imposter instead of Ms. Poni to do her medical examination. It is little wonder, then, that the response – whoever composed or wrote it – offers little more than an apology for messing up and a request for forgiveness on this issue.

[55] The Applicants take the position that they never saw or authorized this response letter which appears to come from the distant relative who was helping them with the translation.

Mr. Elia, the relative who helped with the translation, has the following to say on this point in his affidavit for the application:

9. THAT I phoned Elikana and told him I would write the letter for him, but we did not discuss what I would write. It is difficult to speak by phone because the phone network at the camp frequently unreliable [*sic*]. We were running out of time and the deadline was approaching, so I sent an email without speaking to Elikana and Betty about it. I said what I thought would be helpful. I did not translate it to them, and they did not tell me what to say on their behalf.

[56] There is no need for me to assess the credibility or admissibility of this evidence. In the end, I think that procedural unfairness has occurred in this case because the interview notes are not sufficient to support the Officer's conclusions on the "imposter" situation and the Procedural Fairness Letter, in not providing a basis for the Officer's "determination" on point, was not sufficient, in the full context of this case, to allow the Applicants, or anyone acting on behalf of the Applicants, to respond to the "determination" in any meaningful way. An unsupported "determination" gave the Applicants or Mr. Elia little option but to provide an excuse and an apology. Had the Officer given the Applicants the basis for that determination, they would then have been able to explain that this was not what they said or intended to say.

[57] The parties agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-2951-18

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2951-18

STYLE OF CAUSE: ELIKANA LOBOKA KWANYI ET AL v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 7, 2019

JUDGMENT AND REASONS: RUSSELL J.

DATED: APRIL 8, 2019

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