Federal Court  Cour fédérale

Date: 20190930

Docket: IMM-361-19

Citation: 2019 FC 1245

Montréal, Quebec, September 30, 2019

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

BLESSING EFFIONG EKPENYONG

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a visa officer's decision to deny her application for a temporary work permit/visa under the Temporary Foreign Worker Program [the Program] in Canada. The Applicant submits that the visa officer's decision was unreasonable in light of credible evidence to the contrary. The Respondent disagrees.

[2] The parties also disagree as to whether the visa officer should have communicated with the Applicant to address concerns related to her visa application.

[3] The application for judicial review is allowed for the reasons set out below.

II. **Background**

[4] The Applicant was born on October 22, 1991 and is a citizen of Nigeria. From March 2015 to December 2018, the Applicant worked as a childcare attendant at a group of schools in the Delta State/Effurun Sapele region of Nigeria.

[5] On May 14, 2018, the Applicant and her prospective employer, a resident of Fort McMurray, Alberta, entered into a Temporary Foreign Worker Program In-Home Caregiver Employer/Employee Contract [the Contract]. According to the terms of the Contract, the Applicant was to work as a live-in caregiver for the prospective employer's two young children for a 24-month period at their home in Fort McMurray. The Applicant's tasks would include childcare, light housekeeping and meal preparation. The Contract also specified that the Applicant would work 44 hours per week.

[6] On May 16, 2018, the prospective employer submitted a Labour Market Impact Assessment [LMIA] application for the position to be occupied by the Applicant. On June 19, 2018, Employment and Social Development Canada/Service Canada sent a letter informing her that she received a positive LMIA. The letter states that the "hiring of foreign nationals in the

specified occupation and at the specified work location is likely to have a positive or neutral impact on the Canadian labour market."

[7] On August 3, 2018, the Applicant requested a temporary work permit/visa under the Program so as to begin her employment under the Contract. The LMIA number was included on the visa application form. In her application for temporary residence, the Applicant indicated that she had not travelled to any country or territory in the past five years. The visa application did not contain information pertaining to her assets or available funds.

III. **The Decision Under Review**

[8] In a letter dated November 30, 2018, a visa officer with the Visa Section of the Canadian High Commission in London, United Kingdom, advised the Applicant that her application for a temporary work permit/visa had been denied [the Decision]. The visa officer determined that her application did not meet the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], for the following reasons:

> - I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 216(1) of the IRPR, based on your travel history.
>
> - I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 216(1) of the IRPR, based on the limited employment prospects in your country of residence.
>
> - I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 216(1) of the IRPR, based on your personal assets and financial status.

[9] The Global Case Management System Notes [GCMS Notes] supporting the visa officer's decision, made on the same day, contain the following:

> Applicant seeking to work as caregiver, caring for two children under the age of two. Applicant shows no proof of funds/assets, or of previous travel history. Currently working in daycare section of a school, making 20,000 naira (approx. $75 Canadian) per month. Given Applicant's travel history, funds, and employment opportunities in COR versus in Canada, I am not satisfied that Applicant is sufficiently established to motivate a return to COR at the end of period authorized for stay. For these reasons, application is refused.

IV. **Issues**

[10] This application for judicial review raises two issues:

(1) Did the visa officer act reasonably in denying the Applicant's work permit/visa application?

(2) Did the visa officer commit a breach of procedural fairness in not communicating with the Applicant to address concerns related to her visa application?

V. **Standard of Review**

[11] The first issue engages the reasonableness standard of review, requiring the decision to fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." In assessing whether it does, this Court must consider whether the decision is justified, transparent, and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[12] A visa officer's assessment for a temporary work permit requires a balancing of many factors. Thus, discretionary decisions of this type are entitled to a high degree of deference since they usually involve questions of fact and relate to a visa officer's recognized expertise (*Singh v Canada (Citizenship and Immigration)*, 2017 FC 894 at paras 15–16 [*Singh*]; *Portillo v Canada*

(Citizenship and Immigration), 2014 FC 866 at para 17; *Ngalamulume v Canada (Citizenship and Immigration)*, 2009 FC 1268 at para 16; *Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 at para 19).

[13] Although a visa officer's duty to provide reasons when evaluating a temporary resident visa application is minimal, the visa officer must nonetheless provide adequate reasons that justify his or her decision (*Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 621 at para 9). If the visa officer's reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*NFLD Nurses*]; *Sibal v Canada (Citizenship and Immigration)*, 2019 FC 159 at para 22).

[14] Regarding the procedural fairness issue, the standard of review is correctness: *Lawal v Canada (Citizenship and Immigration)*, 2008 FC 861 at paragraph 15; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at paragraph 100; *Jin v Canada (Citizenship and Immigration)*, 2008 FC 1129 at paragraph 13; *Bahr v Canada (Citizenship and Immigration)*, 2012 FC 527 at paragraph 15; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at paragraph 53.

[15] However, the level of procedural fairness owed by the visa officer is relaxed, considering the nature of the administrative process for visa applications (*Zhang v Canada (Minister of*

Citizenship and Immigration), 2006 FC 1381 at para 37 [*Zhang*]; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 21 [*Zhou*]).

VI. **Analysis**

(1) Did the visa officer act reasonably in denying the Applicant's work permit/visa application?

A. Principles relating to the sufficiency of reasons

[16] The Applicant submits that the visa officer's decision and reasoning is problematic. She argues that the visa officer failed to give weight to her previous employment history in Nigeria and her letter of recommendation, misconstrued the nature of the Applicant's work permit application, and erred in drawing a negative inference from the Applicant's lack of travel history. In essence, the Applicant argues that the visa officer was not alive to what was before him and failed to provide sufficient reasons to justify his decision to reject the Applicant's visa application.

[17] The Respondent argues that the visa officer considered all of the relevant factors and rendered a reasonable decision. The Respondent argues that the visa officer was reasonable when he considered the Applicant's low salary in Nigeria, her status as a single woman, and the economic conditions in Nigeria when deciding to refuse the Applicant's work permit application. The Respondent further states that visa officers are not required to provide detailed reasons in support of their decisions.

[18] The first issue relates to the sufficiency of the reasons. As the Supreme Court clarified in *NFLD Nurses* at paragraph 21, issues related to "alleged deficiencies or flaws in the reasons" given by an administrative decision-maker are intimately associated with reasonableness review.

[19] In addition, the burden is upon visa applicants to rebut the presumption that they are immigrants seeking to remain in Canada, and to convince a visa officer that they will leave Canada at the end of their stay (*Danioko v Canada (Minister of Citizenship and Immigration)*, 2006 FC 479 at para 15; *Li v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 791, [2001] FCJ No 1144 (QL) at para 35 [*Li*]; *Fakhri Adhari v Canada (Citizenship and Immigration)*, 2017 FC 854 at para 29).

[20] As set out in *Mohammed v Canada (Citizenship and Immigration)*, 2017 FC 992 at para 13:

> There are several guideposts for this analysis which are clearly established: (1) there is a legal presumption according to which any person seeking to enter Canada is presumed to be an immigrant; it is up to the applicant to rebut this presumption: *Danioko v Canada (Citizenship and Immigration)*, 2006 FC 479 at para 15; (2) it is not for the Court to re-weigh the evidence; (3) the Officer is presumed to have reviewed all of the evidence unless the contrary is shown (Florea *v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL) (FCA)) and is not required to make reference to every document submitted (*Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317, [1992] FCJ No 946 (QL) (FCA); *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 20; (4) the Officer's reasons for decision include the form and the letter, as well as the GCMS notes prepared for the case.

B. Application of these principles to the present case

[21] The London-based visa officer's reasons for denying the visa are brief and formulaic. In essence, the visa officer found that the Applicant did not meet her burden to show that she would leave Canada at the end of her work contract. This determination was made on the basis of the Applicant's lack of evidence of funds, absence of travel history, and poor employment prospects in Nigeria.

[22] I accept that it has become commonplace for visa officers to use templates in rendering their decisions, especially when faced with a high volume of applications. I have no difficulty in principle with visa officers finding efficiencies in the manner in which they undertake their work. I also accept that visa officers enjoy a wide berth of discretion in making their decisions and may take into account objective criteria (*Zhang* at para 37; *Zhou* at para 21).

[23] However, when using templates, visa officers should bring the necessary modifications or render reasons that would indicate their thought process in an intelligible manner, and address evidence that may contradict important findings of fact. In this case, by simply stating objective determinations, the visa officer did not establish the basis for understanding how he interpreted the evidence to arrive at his decision.

[24] The visa officer's reasons are rather hurried, and do not explain the thought process that underlies his decision to refuse the work visa. As an example, I pointed out to the Respondent's counsel that the Decision makes reference to subsection 216(1) of the IRPR, which relates to study permits, rather than to section 200 of the IRPR, which relates to work permits. It may well

be that the visa officer simply forgot to modify the template to reflect the proper reference to the legislation. Although this may suggest inattention and a hurried approach, in and of itself it is not fatal in this case as the remarks in the GCMS Notes seem to be in line with work permit application criteria.

[25] That said, the Decision does suffer from a series of shortcomings.

[26] First, the visa officer failed to give sufficient weight to evidence showing that the Applicant had a reasonable employment history in Nigeria. In the GCMS Notes, there is a brief mention of the Applicant's employment in Nigeria ("Currently working in daycare section of a school . . . "). However, the visa officer does not mention how this fact negatively impacts future employment prospects, in particular given the Applicant's positive letter of recommendation from her current employer, nor does he mention the Applicant's training certificates and over three years of employment in Nigeria. These are all relevant factors which may well go to displacing a finding that the Applicant had poor employment prospects in Nigeria. Given the significance placed by the visa officer on the purported limited employment prospects in Nigeria, it seems to me that the visa officer in this case should have specifically addressed the Applicant's current employment history.

[27] Second, the visa officer seems to have drawn a negative inference from the Applicant's salary in Nigeria. In the GCMS Notes, the visa officer states that the Applicant makes "20,000 naira (approx. $75 Canadian) per month", without any further explanation as to whether this salary is sufficient to maintain a reasonable standard of living in the Applicant's place of

residence. While visa officers may use their general knowledge and expertise in making determinations, there is nothing in the GCMS Notes that contextualizes the Applicant's salary in Nigeria against living standards in that country.

[28] Although the prospect of better job opportunities in Canada is a factor to consider on the very issue of her return to Nigeria after her employment, I would say that such is the case for most applicants in similar circumstances coming from countries with a significantly lower standard of living than Canada. By simply stating the Applicant's salary without any comment, and by simply asserting that there are limited employment prospects in Nigeria without addressing the evidence of the Applicant's stable employment history, makes it very difficult to say that the conclusion of the visa officer is justified, transparent and intelligible, and does not allow me to determine whether the conclusion reached is within the range of acceptable outcomes.

[29] Third, the visa officer also cites the Applicant's limited funds upon arrival as a factor justifying the denial of the Applicant's visa application, but without any mention of the fact that the Applicant is coming to Canada with a job in hand with the prospect of earning $598.40 per week plus benefits (room and board included). I cannot assess the visa officer's reasoning without further comment on his part on how the job in hand in Canada would not otherwise render the criterion of the sufficiency of funds as having been met.

[30] I accept that further comment would not be necessary in the case of a study permit under subsection 216(1) of the IRPR, but I would think it would be in a case such as this one.

[31] Fourth, the visa officer did not act reasonably in assessing the Applicant's travel history as a further reason to deny the application. The Federal Court has consistently held that a work permit applicant's lack of travel history should be treated as a neutral factor in terms of the his or her likelihood of returning to their country of citizenship (see *Ogunfowora v Canada (Citizenship and Immigration)*, 2007 FC 471 at para 42; *Huang v Canada (Citizenship and Immigration)*, 2009 FC 135 at para 13; *Adom v Canada (Citizenship and Immigration)*, 2019 FC 26 at para 15).

[32] It is thus an error for a visa officer to use the Applicant's lack of previous travel history as a negative factor in determining whether the Applicant will not leave Canada after her employment.

[33] Although I agree with the Respondent that it is within the visa officer's discretion to assign degree of weight to the evidence, I must say that the visa officer should have in this case articulated even short reasons so as to allow this Court to assess whether the overall outcome fits "comfortably within the principles of justification, transparency and intelligibility", *Singh* at paragraph 21.

[34] On the whole, I find that the visa officer was not attuned to the nature and content of the Applicant's work permit application. Although I understand what the visa officer is saying, I do not understand why he is saying it; it is important that I do.

(2) Did the visa officer commit a breach of procedural fairness in not communicating with the Applicant to address concerns related to her visa application?

[35] Citing *Wang v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 258 [*Wang*], the Applicant argues that the visa officer should have at least made a telephone call to the Applicant so as to allow her to respond to his concerns about her visa application prior to rejecting it.

[36] I first note that in the context of a visa application, the process is at the lower end of detail and formality, and the duty of fairness regarding the visa application process is relaxed. As the Federal Court of Appeal [FCA] explained in *Canada (Minister of Citizenship and Immigration) v Khan*, 2001 FCA 345 at paragraph 31, several factors account for this limited duty of fairness, namely, "the absence of a legal right to a visa; the imposition on the Applicant of the burden of establishing eligibility for a visa; the less serious impact on the individual that the refusal of a visa typically has, compared with the removal of a benefit." The FCA went on to caution against "imposing a level of procedural formality that, given the volume of applications that visa officers are required to process, would unduly encumber efficient administration" (at para 32).

[37] Additional communication with a visa applicant may be appropriate in certain circumstances, say where the visa officer harbours doubts as to the credibility of the evidence provided or the sincerity of testimonial evidence, or if the officer relies on extrinsic evidence that is outside the visa officer's general expertise or relies on overly broad generalizations or stereotypes (see *Salman v Canada (Citizenship and Immigration)*, 2007 FC 877 at para 12; *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501 at para 24).

[38] The *Wang* case is one such situation in which a telephone call may well have been appropriate. In that case, this Court found that the visa officer should have provided the Applicant with an opportunity to respond to concerns about the "sincerity of [the Applicant's] cousin's offer of support, and [the Applicant's] *bona fides* as a temporary visitor to Canada" (*Wang* at para 13).

[39] A visa officer should also inform the Applicant of his or her concerns when he or she obtains extrinsic evidence that may be used to support the final decision (*Ali v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7681 (FC) at para 20).

[40] This Court has also held that visa officers may not justify their decisions on cultural or regional generalizations without allowing the applicant to respond: *Yuan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1356 at paragraph 12; *Hernandez Bonilla v Canada (Minister of Citizenship and Immigration)*, 2007 FC 20 at paragraphs 25–27.

[41] With those exceptions, this Court has consistently rejected the argument that an applicant has the right to clarify his or her application or respond to the merits of the visa officer's decision: *Ling v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1198 at paragraph 16; *Li*; *Wen v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1262.

[42] The factual circumstances of the present case do not fall within one of the exceptions that give rise to a heightened duty of fairness. There is no evidence to suggest that the visa officer

had doubts as to the credibility, veracity, or sincerity of the Applicant's evidence or that he relied upon broad generalizations about the Applicant's personal characteristics or country of origin.

[43] As a result, I find that the visa officer did not err in not providing the Applicant with an opportunity to further justify her visa application.

[44] However, on the whole, I find that the visa officer did not provide a sufficiently clear indication of the basis for his decision, and the reasons given fail to allow me to determine whether the conclusion reached is within the range of acceptable outcomes.

VII. **Conclusion**

[45] For these reasons, I would allow the application for judicial review. The decision of the visa officer is set aside and the matter is remitted to a different officer for redetermination. The parties did not submit a certified question and none arose.

JUDGMENT in IMM-361-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, the decision of the visa officer is set aside and the matter is remitted to a different officer for redetermination.

2. There is no question for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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