Date: 20080603

Docket: IMM-4199-07

Citation: 2008 FC 697

Toronto, Ontario, June 3, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

MOJISOLA ODEWOLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks review, under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of a Non-Immigration Officer, Immigration Section (Officer), Canadian Consulate General in New York, U.S.A., rendered on August 20, 2007, wherein the Officer determined that the applicant did not meet the requirements for a Canadian study permit and refused her application

I. The facts

[2] A citizen of Nigeria, the applicant received a Temporary Resident Visa (TRP) by the Canadian visa office in Tunis, Tunisia, on October 2, 2006. The applicant's request for a TRP was made to assist a Canadian couple in taking care of their children on the family's return to Canada, and failed to mention that her employers were actually her sister and brother-in-law. The applicant also stated on that occasion that she had no intention to establish herself in Canada and failed to mention that her sister was sponsoring the applicant as a dependant of the applicant's mother.

[3] She arrived in Canada as a visitor on November 26, 2006 in order to assist her sister and brother-in-law, both Canadian citizens and presently residing in Canada, with their children. Her visa, originally valid until December 31, 2006, was later extended until December 1, 2007.

[4] The applicant's sister was informed by a letter, dated March 15, 2007, that she was eligible to sponsor the applicant's mother in support of her application for permanent residence in Canada. The applicant was included as a dependant child in her mother's application for permanent residence.

[5] The applicant was admitted to the York University in Toronto on July 19, 2007.

[6] In a letter to the Consulate General in New York, dated July 21, 2007, the applicant's sister and brother-in-law undertook to sponsor the applicant in support of her application for a Canadian

study permit. On July 24, 2007, the applicant submitted her application for a study permit at the Canadian Consulate General in New York.

[7] The application was refused because the applicant failed to demonstrate that her obligations or ties to her home country are such that would compel her to leave Canada following the completion of her studies and because the Officer was not satisfied that the applicant had dual intent pursuant to section 22(2) of the Act.

[8] The applicant seeks judicial review of the Officer's decision.

II. The Officer's Decision

[9] The Officer filed an affidavit in response to this application for judicial review. The Officer noted that the visa office in Lagos refused to issue study permits to the applicant three times in 2003 and that the applicant had been in Tunisia since June 2006 and was in the employ of her brother-in-law. The Officer observed that the documents in the file did not establish that the applicant had been a student since 2004, which raised the Officer's concerns regarding the applicant's eligibility as a dependant child in relation to the family class sponsorship. The Officer came to the following conclusion:

> Given the time that the Applicant had been absent from her home country, the circumstances of her entry into Canada, … her ties with Canada, and the approved family class sponsorship for her family, I came to the conclusion that the Applicant did not meet the requirements for a study permit and as a temporary resident, for she did not demonstrate to my satisfaction that her obligations in or that

> her ties to her home country are such that would compel her to leave Canada by the end of her authorized stay in the event her application for permanent residence is not approved, pursuant to s. 22(2) of *IRPA*.

III. Issues

1. Did the Officer err in concluding that the applicant's ties to her home country are such that they would not compel her to leave Canada by completion of her studies in the event the applicant is not granted permanent residence in Canada?

2. Did the visa officer breach the principles of natural justice by not giving the applicant the opportunity to address his concerns?

3. Did the visa officer rely on extraneous considerations in reaching its negative decision?

IV. Standard of Review

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 51, the Supreme Court of Canada states 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 while many legal issues attract a standard of correctness. Some legal issues however, attract the more deferential standard of reasonableness". Since the issues here raise mixed questions of law and fact, the Court finds the standard of review to be that of reasonableness.

[11] This standard requires the Court to engage in a somewhat probing examination of the reasons for a decision while also recognizing that, where there is some level of expertise or familiarity with the subject matter on the part of the decision maker, some measure of deference is owed. The Court's analysis of the Board's decision will therefore be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] […] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47).

V. Relevant Legislation

[12] The legislation relevant to this application is subsections 20(1)(b) and 22 of the Act and subsections 212 and 216(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) reading as follows:

The Act	**La Loi**
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 :
[...]	[...]
(*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.
22. (1) A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(*b*) and is not inadmissible.	**22.** (1) Devient résident temporaire l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)*b*) et n'est pas interdit de territoire.
(2) An intention by a foreign national to become a permanent resident does not preclude them from	(2) L'intention qu'il a de s'établir au Canada n'empêche pas l'étranger de devenir résident temporaire sur preuve qu'il aura quitté le Canada à la fin de la

becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.

The Regulations

212. A foreign national may not study in Canada unless authorized to do so by a study permit or these Regulations.

216. (1) Subject to subsections (2) and (3), an officer shall issue a study permit to a foreign national if, following an examination, it is established that the foreign national

(*a*) applied for it in accordance with this Part;

(*b*) will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

(*c*) meets the requirements of this Part; and

(*d*) meets the requirements of section 30;

[...]

période de séjour autorisée.

Les Règlements

212. L'étranger ne peut étudier au Canada sans y être autorisé par un permis d'études ou par le présent règlement.

216. (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis d'études à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) l'étranger a demandé un permis d'études conformément à la présente partie;

b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;

c) il remplit les exigences prévues à la présente partie;

d) il satisfait aux exigences prévues à l'article 30.

[...]

VI. Analysis

[13] Having regard to the Law and the evidence that was before the Officer, his findings do not meet the standard of reasonableness for the following reasons.

[14] Pursuant to subsection 22(2) of the Act, a person seeking a temporary entry into Canada may also hold the intention of establishing permanent residence.

[15] The Officer was therefore required to weigh the evidence in connection with the application for a study permit and assess the applicant's intention to leave Canada at the end of her studies under paragraph 20(1) (b) of the Act and subsection 216(1) of the Regulations.

[16] The Officer was not dealing with the family application for permanent residence, and the issue of dual intent arose only in relation to that application. The application for permanent residence was an irrelevant consideration for the purposes of the applicant's application for a Canadian study permit.

[17] Although in her affidavit the Officer acknowledged that she lacked jurisdiction to assess the applicant's eligibility for permanent residence under the family class sponsorship, she nevertheless took this factor into account, as evidenced by the above summary of the factors cited by the Officer. Thus, the Officer committed a reviewable error. *Moghaddam v. Canada (Minister of Citizenship and Immigration)*, 39 Imm. L.R. (3d) 239, 2004 FC 680 (F.C.).

[18] Such an approach is unacceptable in respect of the facts and law, and therefore the decision does not meet the test of reasonableness and will be set aside.

[19] The Court agrees with the parties that there is no question of general interest to certify.

JUDGMENT

FOR THE FOREGOING REASONS THIS COURT allows the application, sets aside the decision of the visa officer, and refers the matter to a different officer for redetermination.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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