Federal Court  Cour fédérale

Date: 20100225

Docket: IMM-608-09

Citation: 2010 FC 223

Ottawa, Ontario, February 25, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MABEL SAMUEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of a visa officer (the visa officer) in Lagos, Nigeria, dated January 19, 2009, rejecting the applicant's application for a work permit.

[2] The applicant requests an order that the decision be set aside and the matter referred back to a different visa officer for redetermination.

Background

[3] The applicant is a citizen of Nigeria. She is married. Her husband, mother and siblings reside in Nigeria. In May of 2008, she submitted an application for a work permit to the Deputy High Commission of Canada in Lagos, Nigeria (High Commission) to work for a period of two years as a full time care worker with a child care centre in Calgary, Alberta.

[4] In her application, she listed her current employment as a head teacher of a nursery/primary school and her two previous jobs, both elementary school teaching positions. This listed employment as a teacher dated back continuously to 1997.

[5] A worker at the High Commission identified concerns relating to the applicant's ability to perform the work sought and determined that an interview was required. On November 13, 2008, a worker interviewed the applicant, canvassing her work experience and training, then assigned the application to the visa officer for assessment and final determination. Notes from the interview, referred to as CAIPS notes, were produced.

[6] The visa officer rejected the applicant's application for two reasons, both indicated in the letter of rejection. First, he found that the applicant had "no experience related to childcare in a Day

Care environment." Second, the applicant did not satisfy him that she would leave Canada by the end of the authorized period because the applicant had "No ties to Nigeria. No incentive to return"

Issues

[7] In my view, the issues that need to be resolved are as follows:

1. As a preliminary matter, what is the proper amount of weight that should be accorded to the applicant's third party affidavit in this judicial review proceeding?

2. What is the appropriate standard upon which to review the visa officer's decision?

3. Did the visa officer make an unreasonable finding of fact with respect to the applicant's ability to perform the work?

4. Did the visa officer act unreasonably in concluding that the applicant had not satisfied him that she would leave Canada at the end of her authorized stay?

Applicant's Written Submissions

[8] The applicant submits that the visa officer's conclusion regarding ability to perform the work was unreasonable, because it is completely contrary to the notes from the interview where it is acknowledged that the applicant was a "supervisor of those who are in direct contact with children." Clearly, a supervisor has the required experience to do the job of those she is supervising.

[9] The applicant further submits that the visa officer's decision regarding the applicant's lack of ties to Nigeria cannot stand. Her marriage was overlooked. It was not open to the officer to make such a conclusion without evidence to counter the evidence of her marriage. It was capricious of the visa officer to discountenance the fact that her husband and entire extended family live in Nigeria.

[10] Finally, there is no evidence that the applicant was asked any questions regarding her ties to Nigeria or her intentions to return. This would have been the perfect opportunity to elicit important information if the High Commission questioned her intentions to return.

Respondent's Written Submissions

[11] Regarding the preliminary issue, the respondent submits that the applicant's affidavit is worthy of little or no weight. The applicant has not filed her own affidavit based on personal knowledge in support of this application for judicial review, but rather filed the affidavit of Samantha Odion, a clerk at her counsel's office. The applicant, however, was represented by different counsel during the application process. The affidavit does not explain which parts are based on personal knowledge, or how such knowledge was acquired. To the extent that Samantha Odion purports to provide hearsay evidence, little or no weight ought to be afforded the affidavit. In certain portions of her affidavit, Ms. Odion appears to give opinion evidence. For example "she answered all questions put to her appropriately". Rule 12(1) of the *Federal Courts Immigration Rules*, SOR/93-22, states that affidavits shall be confined to such evidence as the deponent could give if testifying in court. This rule means that the common law rules regarding hearsay apply. No

reason was given as to why Ms. Odion's evidence was necessary. Furthermore, Rule 82 of the *Federal Court Rules*, SOR/98-106 says that a solicitor should not swear an affidavit and also appear to argue that same motion. This principle has been extended to solicitors' assistants. Since the applicant has not provided an affidavit based on personal belief, any error asserted by her must appear on the face of the record.

[12] Regarding the merits, the respondent states that a foreign national seeking to enter Canada is presumed to be an immigrant. This is a presumption for the applicant to rebut. It is the applicant who must demonstrate to a visa officer that he or she will leave voluntarily.

[13] The visa's officer's determination was a discretionary finding of fact and as such, is to be accorded considerable deference. The matter required the officer to draw on his experience and did not have only one possible result. His decision fell within the range of possible reasonable outcomes. Matters of fairness are not to be afforded deference, but the respondent asserts that the decision in question requires only the most basic procedural fairness.

[14] The respondent submits that the refusal was reasonable and procedurally fair. Ability to do the work was simply not demonstrated. The applicant was to work at a daycare. Neither her application, nor her interview answers indicated that she had any experience working at a daycare or training in this field. She only stated that she supervised nannies. The notes from the interview reveal that the interviewer was concerned that the applicant did not have any experience working directly with small children. Working as a primary school teacher was not similar enough. It is

analogous to the accepted knowledge that an architect is not qualified to build a building, while similarly a judge or criminal lawyer is not qualified to do police work. The visa officer's decision flowed from these well reasoned notes was not unreasonable.

[15] Finally, the respondent submits that the visa officer's conclusion regarding the applicant's ties to Nigeria was not unreasonable. The applicant provided minimal information to support her application. The visa officer considered her marriage, but concluded that that alone was not sufficient to prove that she would return after two years in Canada. The applicant demonstrated a willingness to live separate and apart from her husband and extended family for a lengthy period of time. The visa officer was not satisfied that the hardship of separation would outweigh the strong socio-economic incentives to stay in Canada. The visa officer here was under no duty to clarify her evidence or to inform her that her case was weak. It was not a case about credibility. There is no statutory right to an interview. There was no denial of procedural fairness in not providing the applicant an opportunity to further address her ties to Nigeria.

Analysis and Decision

[16] **Issue 1**

What is the proper amount of weight that should be accorded to the applicant's third party affidavit?

The applicant relies on facts in an affidavit sworn by Samantha Odion, a clerk at the law office representing the applicant. In my opinion, it should not be accorded any weight due to the following problems. It states:

> AFFIDAVIT OF SAMANTHA ODION
>
> I, SAMANTHA SAMUEL of the City of Toronto MAKE OATH AND SAY:
>
> 1. I am a clerk in the office of CHRISTIAN CHIJINDU, the solicitor for the applicant. As a result of my work I have knowledge of the matters herein deposed to, except where from the context it appears that I rely on the information of hers, all of which information I verily believe to be true.

[17] The first statement leaves the Court unsure as to which information she actually has personal knowledge of and which knowledge is based on belief. Information is not distinguished in the body of the document.

[18] The affidavit does not explain how she would have obtained her knowledge of the applicant other than merely stating, “as a result of my work…”. One can certainly call into question her knowledge of the applicant because while she is a clerk for the applicant’s current counsel, the applicant was represented by a different lawyer in a different city throughout the visa application process.

[19] Not only is the name misspelled on the second line, but many paragraphs in the document appear to be the words of the applicant written in the first person.

[20] Finally, some of the facts are actually expressions of opinion. For example "…she answered all questions put to her appropriately."

[21] Rule 12(1) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, requires that affidavits filed in connection with an application for leave shall be confined to such evidence as the deponent could give if testifying as a witness before the Court. This rule means that the usual common law rules of evidence apply, including the twin requirements of necessity and reliability for the admissibility of hearsay evidence (see *Toma v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 780, [2006] F.C.J. No. 1001 at paragraph 6).

[22] This Court has previously held that to the extent an affidavit purports to provide hearsay evidence, little or no weight ought to be afforded the affidavit (see *Huang v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 788 at paragraph 5).

[23] Here I cannot ascertain what parts of this document contain hearsay. I would not be comfortable accepting this evidence in a trial. Nor am I satisfied that a meaningful cross-examination could be conducted upon Ms. Odion. Finally, the applicant has not offered any explanation addressing my concerns regarding necessity or reliability of this evidence.

[24] For the preceding reasons, I would strike the affidavit and afford it no consideration whatever.

[25] The omission of an acceptable affidavit is not fatal to the applicant's claim, but following this Court's decision in *Zheng v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 619, [2005] F.C.J. No. 749 at paragraphs 22 and 23 (QL), the applicant is confined in both written and oral argument, to arguing from the record. Any error asserted by the applicant must appear on the face of the record.

[26] **Issue 2**

What is the standard of review?

The decision of the visa officer to refuse the applicant's request for a work permit was an administrative decision made in the normal exercise of the officer's legislative authority and was ostensibly a determination of fact. Such decisions often require visa officers to rely on their unique and localized expertise (see *Tran v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1377, [2006] F.C.J. No. 1732 at paragraph 32).

[27] Previous jurisprudence of this Court has determined that such decisions should be granted a high degree of deference (see *Akbar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1362, [2008] F.C.J. No. 1765 at paragraph 11).

[28] I note here also that findings of fact by administrative tribunals brought before this Court are subject to the standard of review imposed by paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides that the Court ought not interfere with a finding of fact unless it was made in a perverse or capricious manner or without regard for the evidence before it. The Supreme

Court in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 (QL) recently referred to the impact of these legislative instructions.

> 46 More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*.

[29] Issues that go to the fairness of an impugned decision, however, must be decided on a standard of correctness. This Court has recently held that no deference is owed to the decision maker in this regard, and that "it is up to this Court to form its own opinion as to the fairness of the hearing." (see *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 983 at paragraph 16).

[30] **Issue 3**

Did the visa officer make an unreasonable finding of fact with respect to the applicant's ability to perform the work?

Subsection 200(3) of the *Immigration and Refugee Protection Regulations* obliges an officer to assess the applicant and prevents an officer from issuing a work permit if there are reasonable grounds to believe that the foreign national is unable to perform the work sought. An applicant has the onus to establish that there are no reasonable grounds to believe that he or she will be unable to perform the work sought.

[31] In the case at bar, the applicant's ability to perform the work was identified as an issue that required further investigation and the applicant was called in for an in person interview. The applicant based her ability to work as a day care worker on her training and experience as a primary school teacher and as a head teacher in a nursery/primary school setting. At the interview, she was asked specific questions about her experience. She did not indicate that she had ever worked as a daycare worker, nor did she indicate that she had any training in this field. She understood that a daycare worker takes care of children, but stated that her duties as a head teacher were to "…make sure that the nannies are taking good care of the children."

[32] The CAIPS notes reflect that after hearing her answers, the officer who conducted the interview was still not satisfied that the applicant was suitable. The officer noted that "she is a teacher and does not have the experience of working directly with children in a daycare environment. … her experience appears to be related as a supervisor of those who are in direct contact with children." The visa officer's ultimate decision on this matter flowed from these notes.

[33] The applicant argues that someone who is a supervisor of those who take care of children clearly possesses the experience and skills to do the job of those she supervises.

[34] This is not always the case. There are many examples where people in so-called higher positions of authority or prestige do not have the skills required to perform the duties of those they delegate to. The officer who conducted the interview apparently regarded the skill of taking care of

small children as distinguishable from the skill of supervising daycare workers. The officer's findings in this regard are logical.

[35] In a similar case, *Chen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1378, [2005] F.C.J. No. 1674 (QL), Madam Justice Snider upheld a visa officer's reasonable determination that the job in question required a particular skill that the applicant did not have (see *Chen* above, at paragraph 14).

[36] The applicant here says she does have the skills required to work at a daycare. Even if I accept that as true, I still find that the visa officer's decision on this matter was based on an intelligible, justified and transparent set of reasons. Parliament gave visa officers the authority to employ their expertise to make these judgment calls. This determination falls within the range of acceptable, possible outcomes and as such, I would not intervene.

[37] Because of my finding on Issue 3, I need not deal with the final issue as noted. The officer gave two reasons for rejecting the applicant's application; namely, that she had "no experience related to childcare in a day care environment" and secondly, the applicant did not satisfy the officer that she would leave Canada at the end of the authorized period and return to Nigeria. It is only with respect to the second reason that a breach of the duty of procedural fairness is alleged. Hence, even if there was a breach of the duty of procedural fairness in relation to the second reason, it would be futile to quash the decision as the first reason is sufficient to reject the application.

[38] The application for judicial review is therefore dismissed.

[39] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[40] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Regulations*, SOR/2002-227

200.(1) Subject to subsections (2) and (3), an officer shall issue a work permit to a foreign national if, following an examination, it is established that	200.(1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) the foreign national applied for it in accordance with Division 2;	a) l'étranger a demandé un permis de travail conformément à la section 2;
(b) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;	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) the foreign national	c) il se trouve dans l'une des situations suivantes :
(i) is described in section 206, 207 or 208,	(i) il est visé par les articles 206, 207 ou 208,
(ii) intends to perform work described in section 204 or 205, or	(ii) il entend exercer un travail visé aux articles 204 ou 205,
(iii) has been offered employment and an officer has determined under section 203 that the offer is genuine and that the employment is likely to result in a neutral or positive effect on the labour market in Canada; and	(iii) il s'est vu présenter une offre d'emploi et l'agent a, en application de l'article 203, conclu que cette offre est authentique et que l'exécution du travail par l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien;

(d) [Repealed, SOR/2004-167, s. 56]

d) [Abrogé, DORS/2004-167, art. 56]

(e) the requirements of section 30 are met.

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

(2) Paragraph (1)(b) does not apply to a foreign national who satisfies the criteria set out in section 206 or paragraph 207(c) or (d).

(2) L'alinéa (1)b) ne s'applique pas à l'étranger qui satisfait aux exigences prévues à l'article 206 ou aux alinéas 207c) ou d).

(3) An officer shall not issue a work permit to a foreign national if

(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :

(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;

a) l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé;

(b) in the case of a foreign national who intends to work in the Province of Quebec and does not hold a Certificat d'acceptation du Québec, a determination under section 203 is required and the laws of that Province require that the foreign national hold a Certificat d'acceptation du Québec;

b) l'étranger qui cherche à travailler dans la province de Québec ne détient pas le certificat d'acceptation qu'exige la législation de cette province et est assujetti à la décision prévue à l'article 203;

(c) the specific work that the foreign national intends to perform is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute, unless all or almost all of the workers involved in the labour dispute

c) le travail spécifique pour lequel l'étranger demande le permis est susceptible de nuire au règlement de tout conflit de travail en cours ou à l'emploi de toute personne touchée par ce conflit, à moins que la totalité ou la quasi-totalité des salariés touchés par le conflit de travail

are not Canadian citizens or permanent residents and the hiring of workers to replace the workers involved in the labour dispute is not prohibited by the Canadian law applicable in the province where the workers involved in the labour dispute are employed;	ne soient ni des citoyens canadiens ni des résidents permanents et que l'embauche de salariés pour les remplacer ne soit pas interdite par le droit canadien applicable dans la province où travaillent les salariés visés;
(d) the foreign national seeks to enter Canada as a live-in caregiver and the foreign national does not meet the requirements of section 112; or	d) l'étranger cherche à entrer au Canada et à faire partie de la catégorie des aides familiaux, à moins qu'il ne se conforme à l'article 112;
(e) the foreign national has engaged in unauthorized study or work in Canada or has failed to comply with a condition of a previous permit or authorization unless	e) il a poursuivi des études ou exercé un emploi au Canada sans autorisation ou permis ou a enfreint les conditions de l'autorisation ou du permis qui lui a été délivré, sauf dans les cas suivants :
(i) a period of six months has elapsed since the cessation of the unauthorized work or study or failure to comply with a condition,	(i) une période de six mois s'est écoulée depuis les faits reprochés,
(ii) the study or work was unauthorized by reason only that the foreign national did not comply with conditions imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c);	(ii) ses études ou son travail n'ont pas été autorisés pour la seule raison que les conditions visées à l'alinéa 185a), aux sous-alinéas 185b)(i) à (iii) ou à l'alinéa 185c) n'ont pas été respectées,
(iii) section 206 applies to them; or	(iii) il est visé par l'article 206,
(iv) the foreign national was subsequently issued a	(iv) il s'est subséquemment vu délivrer un permis de séjour

temporary resident permit under subsection 24(1) of the Act.	temporaire au titre du paragraphe 24(1) de la Loi.

The *Federal Courts Act*, R.S.C. 1985, c. F-7

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
. . .	. . .
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-608-09
STYLE OF CAUSE:	MABEL SAMUEL - and – THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 25, 2009
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	February 25, 2010

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