Federal Court  Cour fédérale

Date: 20110208

Docket: IMM-2426-10

Citation: 2011 FC 141

Ottawa, Ontario, February 8, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MONICA DONKOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application to quash a decision dated March 4, 2010 of a Visa Officer at the High Commission in Accra, Ghana, denying the applicant's application for a Temporary Resident Visa (TRV). The applicant sought to come to Canada to serve as the surrogate mother for her sister's child. The visa request was denied on the basis that the Officer was not satisfied that the applicant would leave Canada at the end of her stay in Canada. The applicant seeks to set aside the decision and have the matter remitted to another visa officer for consideration. The standard of review of

this decision is reasonableness, which can only be assessed if the decision is first situated in the legislative, regulatory and policy context in which it is taken.

[2] At law, a foreign national seeking to enter Canada is considered to be an immigrant. In consequence, the law imposes an obligation on the foreign national seeking to enter Canada for a period of temporary residence to establish that they will leave Canada by the end of the period authorized for their stay. The *Immigration and Refugee Protection Act* (*IRPA*) provides:

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.	**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.
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. [Emphasis added]	**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. [Notre soulignement]

[3] The *IRPA Regulations*, SOR 2002-207, s. 179 states that a visa officer shall issue a TRV to a foreign national if, following an examination, it is established that the foreign national will leave Canada by the end of their stay. Operational guidance is given to visa officers in the Temporary Residence Manual (OP11) which indicates that in assessing an application an officer is to have regard to specific areas of concern including the purpose of the trip, its duration, the extent of family ties in Canada, ties to the country of residence, means of support in Canada, ability to leave Canada, whether the applicant intends to study or work in Canada, prior travel history and the existence of any serious medical condition.

[4] In the decision of March 4, 2010 the Visa Officer concluded that he was not satisfied that the applicant would leave Canada at the end of her stay as a temporary resident. In reaching this decision, the Officer noted, in particular, the applicant's travel history, family ties in Canada and in her country of residence, her limited employment prospects in her country of residence, and her personal assets and financial status. Nor was the Officer satisfied that the applicant had sufficient funds, including income or assets, to carry out her stated purpose in going to Canada or to maintain herself while in Canada and to affect her departure.

[5] The Visa Officer also concluded that the applicant had limited establishment in Ghana. The Computer Assisted Immigration Processing System (CAIPS) notes of the interview indicate that the applicant was not married, had no children and did not own a home. She lived with her sister and her brother-in-law in a house which was owned by her brother-in-law and worked in her sister's clothing store in Accra. The applicant had modest financial assets and limited employment prospects. The Officer put his concerns to the applicant directly:

> You are single, have no children, you do not own any assets, you have very limited funds – These factors do not satisfy me that you have strong ties to Ghana…
>
> My sister and her husband wants a child. That is why I am going.
>
> You are the applicant so you need to satisfy me that you would leave Canada by the end of the period authorized for your stay.
>
> I am going because of my sister and her husband. I am not going to remain in Canada.
>
> […]
>
> I am refusing your application because I am not satisfied that you have strong ties to Ghana and that you will leave Canada by the end of the period authorized for your stay.
>
> If we are talking in terms of money and property then I don't have. If we are talking in terms of myself. I know I will come back.

[6] The Visa Officer, on the evidence before him, had reason to be cautious. Several of the objective criteria or indicia which the Officer was directed by statute to consider were reasonably triggered by the applicant's evidence.

[7] To be weighed in the balance, however, was the applicant's assertion that she would return to Ghana and that the sole purpose of her trip was to serve as the surrogate mother for her sister's child. As well, while the statutory scheme did not allow for the posting of a bond, the applicant's sister and husband had offered to do so as further assurance that the applicant would return to Ghana after the birth of the child. The record also contains medical evidence as to the applicant's ability to have children and statutory declarations by the Canadian sister as to the purpose of the trip and her ability to support her sister when in Canada. The applicant's sister and husband are well established in Canada, are employed respectively as a nurse and pharmacist and earn substantial income.

[8] It is in this context that counsel for the applicant contends that the decision is unreasonable. He argues, forcefully, that the Visa Officer did not presume good faith and had no basis to doubt the legitimacy of the purpose of the trip or the applicant's statement that she would return. Counsel also argues that reliance on the absence of travel history was unreasonable, as everyone has to make their first trip.

[9] Travel history is a relevant consideration and can be a positive consideration when an applicant demonstrates a history of leaving and returning to their country of residence. However, in this case, it could not be a positive factor that weighed in the applicant's favour, or support the applicant in satisfying the onus that the legislation places on her. It would be, at best, neutral. Indeed, the CAIPS notes do not indicate that the lack of travel history was a significant factor in the Officer's consideration.

[10] With respect to the Officer's treatment of financial considerations, I accept that the issuance of a visitor's visa should not be limited to only individuals of means. However, the absence of any significant financial ties to her country of residence was clearly a relevant, and objective factor which the Visa Officer was obligated to take into account; *Duong v Canada (Minister of Citizenship and Immigration)* 2003 FC 834.

[11] With respect to the consideration of family ties and establishment that would support the conclusion that the applicant would return to Ghana, the Visa Officer also had before him evidence that the applicant had three sisters and a father living in Ghana. Apart from their existence, and her

relationship with the sister with whom she lived, there was no indication whatsoever as to the nature and extent of her relationship with her family in Ghana. All the Officer knew, on the information before him, was that the applicant was prepared to leave them from a period of 18 months, the projected length of the surrogacy. In contrast, the Visa Officer had before him, in the form of affidavits, statutory declarations and the interview with the applicant, clear evidence that the applicant was very close to her Canadian sister. This could be presumed from the proposed surrogacy arrangement.

[12] The applicant contends that the Visa Officer ignored the purpose of the visit and that if the Officer had regard to the legitimate reasons which underlie its purpose, he would not have rejected the application. The decision, however, does not indicate that the Visa Officer rejected the application because of its purpose. The "purpose of visit" was not checked as a factor of concern. Similarly, the Visa Officer noted the statutory declaration, the letters provided by the doctor and the proposed bond.

[13] The legislation requires that the applicant discharge the onus on her to establish that she would return to her country of residence. The altruism or *bona fides* of the purpose for coming to Canada does not translate into positive factors which would necessarily satisfy an officer that the applicant would return to her county of origin or otherwise displace relevant countervailing concerns. The allegation that the Officer presumed bad faith on the part of the applicant fails for the same reason. The Visa Officer is under a duty to be satisfied that the applicant will return to her country of origin and the onus is on the applicant to satisfy the officer to that effect. The Visa

Officer did not assume or discount the *bona fides* of the purpose of the trip or make any assumptions. The record indicates that he relied solely on the evidence before him.

[14] This Court, as a reviewing Court, cannot substitute its own appreciation of the evidence for that of the decision maker or substitute its view of the appropriate solution or remedy; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, para. 29. Here, the Officer considered all of the relevant factors and took no irrelevant factors into account. The decision falls within the range of possible acceptable outcomes that are defensible in respect of the law and the facts before the Officer. For these reasons, the application will be dismissed.

[15] No question of general importance was put forward for certification, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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