Federal Court  Cour fédérale

Date: 20120213

Docket: IMM-3821-11

Citation: 2012 FC 208

Ottawa, Ontario, February 13, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

EKOMOBONG AKPAN OBOT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION **Respondent**

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Ekomobong Akpan Obot, is a 25 year old graduate student from Nigeria. On three occasions in 2010 and 2011 he requested a visa to continue his education in Canada. Each request was refused on the ground that he would be unlikely to return to Nigeria on the completion of his studies.

[2] Mr. Obot applies for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of the decision made on May 5, 2011, by an Immigration Officer of the Canadian Embassy in Vienna. For the reasons that follow, the application is granted.

BACKGROUND:

[3] Mr. Obot is from the delta region of southern Nigeria. His parents, siblings and extended family remain there. His mother is a qualified nurse employed at a university. A maternal uncle is a retired Rear Admiral of the Nigerian Navy. His father had a long career in government and is active in politics and business.

[4] The record indicates that Mr. Obot and his parents place a great emphasis on education. The father obtained undergraduate and graduate degrees at an American university. After working for a few years in the United States he returned to Nigeria with his family. Following high school, the applicant was sent to study in Europe. From 2006 to 2009 he attended the Academy of Economic Studies in Bucharest and obtained a B.Sc. in International Business and Economics. He then attended the International Business School in Budapest, affiliated with the Oxford Brookes University in the United Kingdom, and obtained a M.Sc. in Human Resources and Management in 2011.

[5] During his studies abroad, the applicant did not return to Nigeria. During one summer break he visited relatives in the United Kingdom. He has not worked, other than one summer where he served as a volunteer in the United Kingdom. His parents have provided for his tuition and living costs.

[6] The applicant applied for and was admitted to a pre-Masters of Business Administration programme at Trinity Western University in British Columbia. This is described by the university as an upgrade programme to ensure that candidates have the basic language and other skills required to complete an MBA.

[7] Mr. Obot has acknowledged that his application for a United Kingdom visitor's visa was initially refused. It was granted on reconsideration. There is no evidence that the applicant abused the terms of that visa by overstaying. His application for a study visa in the United States was denied for reasons that are not part of the record. In addition to the three formal applications for a Canadian study visa, the applicant has requested reconsideration on two occasions. He has not previously sought judicial review of the refusals.

DECISION UNDER REVIEW:

[8] The decision letter dated May 6, 2011 indicates that the application was rejected because the officer did not believe the applicant would leave Canada at the end of his stay. The officer's notes included in the Certified Tribunal Record, read in part as follows:

> Applicant has completed studies in Romania and Hungary. He is not established in any of these countries, he has completed what he had to do and has no reasons to return there after a stay in Cda. As for his country of origin, applicant had not resided in Nigeria since 2006. He has no children, property or career to return to. Many supporting documents were provided by father who's involved in national politics party that won the last election in APR11. Review of the conditions in Nigeria show that the election results were contested by opposition which led to riots and deaths (500 according to Red Cross estimations). The country is clearly divided in two following the elections and instable [sic] at the moment. As a result of the lack of ties to Romania, Hungary or Nigeria and of the conditions in Nigeria

> at the moment, I'm not satisfied there is sufficient evidence the applicant will leave Canada by the end of the period authorized for stay. Refusing this application.

.

ISSUES:

[9] The issues raised by this application are:

a. whether the exhibits attached to the applicant's second affidavit are admissible as they were not before the officer when the decision was made; and

b. whether the officer's decision was reasonable.

RELEVANT LEGISLATION:

[10] Paragraph 20(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 states:

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.

[11] Paragraph 216(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (hereafter the Regulations) reads:

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	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 :
(*b*) 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;

ANALYSIS:

Standard of Review

[12] The parties are agreed and I accept that an Immigration Officer's decision based on the belief that the applicant will not leave Canada at the end of his stay is a question of mixed fact and law. The standard of review is therefore reasonableness: *Loveridge v Canada (Minister of Citizenship and Immigration)*, 2011 FC 694 at para 10; and *Patel v Canada (Minister of Citizenship and Immigration)*, 2009 FC 602 at para 28.

[13] As the Supreme Court of Canada has recently instructed in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 a review of the adequacy of reasons does not invoke procedural fairness requiring the correctness standard; the Court may supplement the reasons by reference to the record; and deference should be accorded where the tribunal is alive to the question at issue and comes to a decision well within the range of acceptable outcomes.

[14] A finding of reasonableness is based on the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

Is the new evidence admissible?

[15] As a preliminary matter, the respondent objected to the admission of the applicant's second affidavit in support of his reply to the respondent's memorandum of argument as it attaches as exhibits letters from the applicant's father and uncle intended to rebut the officer's statements regarding conditions in Nigeria. As these letters were not before the officer at the time the decision was made, they are presumptively inadmissible: *Ochapawace First Nation v Canada (Attorney General)*, 2007 FC 920 aff'd by 2009 FCA 124.

[16] However, the Court may admit new evidence where it relates to procedural fairness and jurisdiction and upon consideration of the factors set out in *MacKay v Canada (Attorney General)* (1997), 129 FTR 286.

[17] In this instance, I am satisfied that the evidence should be admitted as it relates to a finding about conditions in Nigeria which was apparently made on extrinsic evidence and without inviting a response from the applicant. Those circumstances give rise to the consideration of whether procedural fairness was accorded the applicant.

Was the officer's decision reasonable?

[18] It was open to the officer to take into consideration the facts that the applicant had not lived in Nigeria since 2006 and had not returned there for visits with his family during breaks from his studies in Europe. As stated by Justice de Montigny in *Doret v Canada (Minister of Citizenship and Immigration)*, 2009 FC 447 at paragraph 25, the fact that an applicant does not have a history of returning to her country of origin from trips abroad is a relevant consideration.

[19] The applicant and his father provided an explanation for why he had not returned home – that the family wanted him to concentrate on his studies without distractions. While that may appear unusual from a western developed world perspective, it may be a more common practice in West Africa. In any event, there is no indication in the record that the officer considered whether the explanation was reasonable or not.

[20] With regards to the applicant's ties to Nigeria, the officer's reasons are not transparent, justified and intelligible. The applicant is 25 years old and a student, it is thus normal for him to have "no spouse, children or property" in Nigeria or anywhere else. Furthermore the officer did not consider that all of the applicant's family lives in Nigeria and did not consider the strength of his ties to his family: *Onyeka v Canada (Minister of Citizenship and Immigration)*, 2009 FC 336 at paras 21-22; *Li v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284 at para 30; and *Zhang v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1493 at paras 21-22.

[21] The officer's reasons do not disclose that she considered the fact that the applicant has no ties to Canada and no family in Canada. Unlike in *Doret*, above, he has travelled outside of his country and, thus far, has a record of returning to the countries in which he is temporarily resident while pursuing his studies. And he has encountered no difficulties with the authorities while living in those countries. It seems to me that this record cannot be used to support the inference that he does not intend to go back to Nigeria upon completion of his studies.

[22] With regards to conditions in Nigeria, there is nothing in the certified tribunal record to support the officer's statement that the country was split. The issue was not brought to the attention of the applicant and thus the applicant did not have the opportunity to make submissions on the matter. In fact, the consideration of Nigeria's current situation as a factor for denying a visa does not appear in the decision communicated to the applicant. The reasoning only appears in the officer's notes. The officer's decision must be based on the evidence: *Zuo v Canada (Minister of Citizenship and Immigration)*, 2007 FC 88 at para 12; and *Dunsmuir*, above, at para 47.

[23] The respondent contends that it was open to the officer to rely on her knowledge of conditions in Nigeria and cites *Baylon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 938 in support. In *Baylon*, Justice de Montigny accepted that an officer could consider evidence of general country conditions but found that the extraneous evidence was unsupported, undocumented and irrelevant. At paragraph 34 he stated: "[o]versimplified generalizations cannot and should not form the basis of what must always be an individualized assessment based on the particular circumstances of each individual." In this case the officer fell into the trap of an oversimplified generalization and did not conduct an individualized assessment.

[24] While I agree with the respondent that immigration officers become well versed in the conditions within the countries from which visa applications are made, this awareness does not constitute a form of “judicial notice” as was suggested in oral argument. To the extent that concept may apply to administrative decisions it would only arise where the facts are beyond dispute. Here, there is clearly a difference of opinion about the conditions in Nigeria and whether that would have a bearing on the applicant’s future return to that country.

[25] In the result I find that the decision to deny the applicant a student visa was unreasonable and I will order that the matter be remitted for reconsideration by a different officer in accordance with these reasons.

[26] No serious questions of general importance were proposed by the parties and none will be certified.

.

.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for reconsideration by a different Immigration Officer in accordance with the reasons for judgment.

No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3821-11
STYLE OF CAUSE:	EKOMOBONG AKPAN OBOT and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 1, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	February 13, 2012

APPEARANCES:

Malvin J. Harding	FOR THE APPLICANT
Edward Burnet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MALVIN J. HARDING Barrister & Solicitor Surrey, British Columbia	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT