Federal Court  Cour fédérale

Date: 20121123

Docket: IMM-1582-12

Citation: 2012 FC 1354

Ottawa, Ontario, November 23, 2012

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ONOME JOSEPH IKEDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Onome Joseph Ikede [the Applicant] is seeking judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of the decision of Mark Giralt, immigration counsellor for the High Commission of Canada Immigration Section in Ghana [Officer], dated December 12, 2011, in which the Officer concluded that the Applicant is inadmissible for permanent residence in Canada for a period of two years, for a misrepresentation related to being the parent of two children in his visa application. The Applicant seeks an order setting aside the Officer's decision.

I. Background

[2] The Applicant is a citizen of Nigeria who applied for permanent residence as a provincial nominee in May 2008, at which point he paid the processing fee for himself, his spouse at the time and his two dependent children born in 1985 and 1986, the latter three of whom are living in Canada.

[3] In January 2009, the Applicant advised the immigration office that he had been separated from his spouse since July 2008; she was removed from his application in June 2010.

[4] In March 2011, the Applicant asked that his two children living in Canada be removed from his application. The immigration office requested updated information to ascertain the Applicant's current situation.

[5] In April 2011, the immigration office received an updated application which reflected the separation from his former spouse and the removal of his two children from his application.

[6] In June 2011, the Applicant asked to have his infant daughters; Onanefe and Oniefe born September 14, 2008 and April 5, 2010 respectively as well as his partner Enite (their mother) born February 8, 1983, accompany him to Canada.

[7] The Officer reviewing the file noted some discrepancies in the Applicant's file and sent a procedural fairness letter on June 13, 2011 asking for clarification as to the omission of the two infant children up until that point.

[8] The Officer reviewed the Applicant's response received in August 2011 and found the explanation not to be credible, as it was inconsistent with the message that the Applicant had sent in his correspondence in June 2011; specifically, there was no mention of any paternity concerns with respect to Onanefe Miriam Ikede and Oniefe Lisa Marie Ikede, which, was the Applicant's justification for failure to include the children in his submitted in the August 2011 letter.

[9] The case was referred for consideration of refusal, for misrepresentation concerning the children, and the application was refused on December 12, 2011. The Officer stated that the misrepresentation or withholding of this fact induced or could have induced errors in the administration of the *IRPA* because reliance on this information could have led to the conclusion that the Applicant had declared all his family members – a requirement in the assessment of admissibility for permanent residence.

[10] The decision turned on subsection 40(1)(a) of the *IRPA*, which states that a foreign national is inadmissible for permanent residence for misrepresentation if he or she directly or indirectly misrepresents or withholds material facts that induce or could induce an error in the administration of the *IRPA*.

II. Issues

[11] The Applicant raises the following issues in the application for judicial review:

a. Did the Officer err in his assessment of section 117 (9)(d) of the *Immigration and Refugee Protection Rules* [*IRPR*]?

b. Did the Officer reach a conclusion before fully examining the Applicant's application for permanent residence?

c. Did the Officer breach the Applicant's right to a fair hearing and/or principles of natural justice?

d. Did the Officer fail to consider the objective as set out in the *IRPA*?

[12] Having read the Applicant's factum, the two main issues, as rephrased, are:

a. Did the Officer err in his assessment of the evidence particularly in respect to his finding of lack of credibility?

b. Did the Officer breach the Applicant's rights to a fair hearing and the principles of natural justice?

III. Standard of Review

[13] Counsel for the Applicant and the Respondent agree that the applicable standard of review is reasonableness for the issue of the Board's assessment of the evidence (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]) and correctness for the issue of procedural fairness (*Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283, [2009] FCJ No 1643 at para 23; *Khan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 302, [2009] FCJ No 676 at para 11).

[14] When reviewing a decision on the standard of reasonableness, the Court is 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 para 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). The Court should only intervene if it finds that the impugned decision is unreasonable and falls outside the range of possible, acceptable outcomes.

IV. Analysis

A. *Did the Officer Err in his Assessment of the Evidence?*

[15] The Applicant submitted that the Officer erred in stating that the information provided by the Applicant would have induced an error in the administration of the *IRPA*, by failing to update the information concerning his being the father of two children and at the timing of finally advising the office of this fact, such that the Applicant's explanation was not credible.

[16] The Computer Assisted Immigration Processing notes [CAIP notes] indicate that the Applicant did not include his children Onanefe Miriam Ikede and Oniefe Lisa Ikede and their mother in the IMM008 form completed by the Applicant in April 2011, notwithstanding one of the children was born September 14, 2008 and the second child was born in 2010. The Applicant first acknowledged the children and their mother in a letter dated June 11, 2011 after receiving a procedural fairness letter.

[17] The Applicant explained in an email dated August 1, 2011 that he had not previously disclosed the two children and his partner given that the children's mother and he were not married, and that he did not accept parentage when the children were born because he had paternity reservations given he and the mother did not reside together (even though they had a sexual relationship). Further, the Officer found that it appeared that the Applicant had misrepresented his family's composition by failing to declare his older daughter Miriam Ikede in his family information form submitted and dated April 8, 2009, notwithstanding the daughter's date of birth was earlier, having been born in 2008.

[18] The Officer concluded that the information was material as it could have induced an error in the administration of the *IRPA*, as without the knowledge of the existence of both daughters, he would not have examined all family members in the application and would not have been able to make an accurate decision concerning inadmissibility.

[19] Counsel agreed that the "time of the application", as stated in section 117(9)(d) of the *IRPR*, refers to the time the applicant submits his application for visa and continues until the time the applicant is granted a right to enter Canada as a permanent resident at the port of entry (see *dela Fuente v Canada (MCI)*, 2006 FCA 186, [2006] FCJ 774). Accordingly, changes made by the Applicant with respect to his family composition were provided within that time, not after the Applicant was granted permanent resident status. In essence, counsel for the Applicant has argued that the Officer's credibility findings were flawed because the Officer failed to account for the Applicant's reasonable explanations for delays in acknowledging his two children and partner. Secondly, even if Applicant's credibility was undermined, the Officer had an obligation to allow the

Applicant to further explain the delay in acknowledging his children and the mother by way of an oral hearing.

[20] As has been noted, the Officer's credibility findings are entitled to the most deferential standard of review, that of reasonableness as this Court has found the Board has well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility (see *Rahaman v Canada (Minister of Citizenship and Immigration)*,[2000] FCJ No 1800, 101 ACWS (3d) 140 at para 38 (QL) (TD); and *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at para 14). In this case, the Officer's credibility findings were supported by the evidence before it, and are therefore reasonable. Moreover, it is open to the Officer to reject the Applicant's explanation therefore, as stated above, the Applicant's failure to put his best foot forward when given the opportunity to do so and not only acknowledge his children, but also explain why he had not included them earlier on his application, renders the Officer's findings reasonable.

[21] Moreover, as set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39, an oral hearing is not always necessary, and even under the duty of procedural fairness, there is no unqualified right to an oral hearing, or issue from a procedural fairness perspective. The question is whether an oral hearing is necessary to provide a reasonable opportunity for the parties to effectively make their case. In this case, it was not necessary.

B. *Did the Officer Breach the Applicant's Right to a Fair Hearing and/or Principles of Natural Justice?*

[22] The Applicant submits that the Officer acted unfairly or unreasonably by not alerting the Applicant about his reservations or concerns that negated the Applicant's case, in finding that he lacked credibility concerning his two children and partner given the timing of disclosure of the same. While there is no question that an Officer should give an opportunity to respond to any credibility concerns, either by conducting an interview or by sending the Applicant a letter setting out his concerns so those concerns could be addressed, in this case the Applicant was given such an opportunity by the Officer.

[23] Given that the explanation provided was found not to be credible, there was no further obligation to provide another or further opportunity to explain or respond to the Officer's concerns; the burden is on the Applicant to establish that show that he was not inadmissible (see *Shi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1224, [2005] FCJ No 1490 at para 16). As no convincing evidence was put forth by the Applicant in response to the procedural fairness letter, there was no breach of procedural fairness by the Officer.

[24] Neither party proposed a question for certification although Applicant's counsel asked the Court to consider a possible question under reserve, namely:

> When there is a credibility issue with respect to a visa applicant's application, is the applicant entitled to an oral hearing?

[25] This question has been answered in the negative in many cases before this Court, and therefore I do not consider it appropriate to certify.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicant's judicial review application is dismissed.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Kingsley Jesuorobo	FOR THE APPLICANT
Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kingsley I. Jesuorobo Barrister and Solicitor North York, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT