



Date: 20130307

Docket: IMM-6119-12

Citation: 2013 FC 249

Calgary, Alberta, March 07, 2013

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

MATTHEW NDEGWA

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review was filed on June 19, 2012 in Calgary, Alberta. The Notice of Application claims prerogative relief in connection with a decision of an Immigration Officer (Officer) denying Mr. Ndegwa's application for permanent resident status under the spouse or common law partner in Canada class.

[2] The reason given by the Officer for refusing Mr. Ndegwa's application was his failure to prove his identity. The Kenyan passport relied upon by Mr. Ndegwa was found to have been altered

by means of the substitution of its biographical data page. The record discloses that the Officer called in Mr. Ndegwa for an interview on March 1, 2012 and confronted him with the evidence that his passport had been altered. This was followed up with a fairness letter dated March 5, 2012 advising Mr. Ndegwa that his passport was unacceptable proof of identity and affording him 30 days to respond. Mr. Ndegwa's counsel wrote to the Officer in March 15, 2012 advising that efforts would be taken to obtain a new passport or another acceptable travel document from Kenyan officials. That letter stated in part:

Our client advises that he contacted a relative in Kenya to assist in obtaining the passport. Our client did not wish to approach the Kenyan Consulate directly as he has previously made a refugee claim against Kenya.

After review of this matter, we can advise that the client will be approaching the Kenyan Consulate to request a passport or a travel document. We will forward proof of his efforts to do so and (hopefully) will forward a passport or travel document upon receipt. This should alleviate any concerns regarding inadmissibility under s. 40(1)(a) of the *IRPA*. We would also anticipate that we would have an opportunity to disabuse you of any concerns regarding the operation of this section in any event.

[3] When nothing further was heard from Mr. Ndegwa or his counsel the Officer proceeded to dismiss the application by letter of June 5, 2012.

[4] Mr. Ndegwa's counsel then wrote to the Officer explaining what efforts had been taken to obtain acceptable identity information and requesting that the matter be reopened for reconsideration. The Officer declined that request by decision letter dated June 29, 2012. That letter stated:

This letter is in response to the request for reconsideration of the refusal on your application for permanent resident status under the spouse or common law partner in Canada class.

Your application was considered on its substantive merits and has been refused. Your application was refused on June 5, 2012 and a refusal letter dated the same date was mailed to you, thereby fully concluding your application. After considering the additional submissions, the initial decision to refuse your application remains unchanged.

Should you obtain a valid and genuine passport and/or have additional information/submissions, you may wish to submit a new application for permanent residence in Canada, including fees to the Case Processing Centre in Vegreville, Alberta.

[5] Mr. Ndegwa's Notice of Application for Leave and for Judicial Review was filed on June 19, 2012. The application sought judicial review of the Officer's initial decision of June 5, 2012. When leave was granted by the Court it was in connection with the Officer's decision of June 5, 2012.

[6] Notwithstanding the above procedural background, the Memorandum of Fact and Law filed by counsel on behalf of Mr. Ndegwa challenged the reconsideration decision of June 29, 2012 - a decision that post-dated the Notice of Application. There is nothing in the Applicant's Memorandum that seeks to impugn the decision of June 5, 2012. Indeed, the Applicant's entire argument is focussed on the reasonableness of the Officer's refusal to reconsider the decision of June 5, 2012.

[7] Not surprisingly Counsel for the Respondent addressed this issue in his Memorandum of Argument by noting that the Applicant's substantive arguments were not relevant to the decision that had been challenged. Despite being put on notice about this inconsistency, counsel for Mr.

Ndegwa made no attempt to amend the Notice of Application or even to address the problem in his Further Memorandum of Fact and Law. Once again, the sole focus of the argument in reply concerned the reasonableness of the Officer's reconsideration decision.

[8] I am not prepared to ignore or to excuse the procedural error that was made on this application. Both the Notice of Application and the Order granting leave concern the Officer's decision of June 5, 2012 and not the reconsideration decision of June 29, 2012. It is not open to an applicant to obtain leave with respect to one decision and then to challenge another in argument: *Medina v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 504 para 32, [2010] FCJ no 611. There is nothing in the record to justify the setting aside of the decision that is the proper subject of this application, that being the decision of June 5, 2012.

[9] The decision of the Court in *Marr v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 367, [2011] FCJ no 520, is distinguishable, in part, because there the decision-maker's refusal to reconsider occurred before the Notice of Application was filed. In addition, the new evidence placed before the decision-maker in support of the reconsideration request conclusively answered the concern that had led to the initial decision and the decision-maker erroneously declined to consider it.

[10] In this case, the only basis for requesting reconsideration was that steps had been taken to obtain the required Kenyan passport. That was information the Officer already had. No actual evidence was provided to resolve the identity problem or to indicate when that evidence could be expected.

[11] In the face of Mr. Ndegawa's vague and inconclusive reconsideration submission it was neither unreasonable nor unfair for the officer to decline to reconsider the initial decision.

[12] As the Officer pointed out, Mr. Ndegwa has the right to reapply for permanent resident status on the basis of the presentation of a new Kenyan passport or other acceptable identity documents. If further work or cost is involved it is only because of the carelessness with which this matter has been handled throughout.

[13] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6119-12

STYLE OF CAUSE: MATTHEW NDEGWA v.
MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

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REASONS FOR JUDGMENT AND JUDGMENT BY: BARNES, J.

DATED: MARCH 07, 2013

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