Federal Court

Cour fédérale

Date: 20130801

Docket: IMM-10795-12

Citation: 2013 FC 845

Ottawa, Ontario, August 1, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

OLUKOLA OLUKUNMI ALADE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a decision of a visa officer dated August 21, 2012, refusing his application for family class sponsorship. He says, in broad terms, that the officer was bound as a matter of law to accept his application in light of his successful appeal of a previous visa officer decision refusing his application on the basis of the genuineness of the marriage and misrepresentation. He also contends that the decision is unreasonable and violates procedural fairness. Mandamus is sought remitting the matter to a different visa officer to determine his application.

[2] The applicant has not yet exhausted his appeal options. Therefore, the application must be dismissed.

Background

[3] The applicant was sponsored for a permanent resident visa by his Canadian spouse, Tammy Renee Alade. The couple met online on May 18, 2009. Ms. Alade travelled to meet the applicant in October of that year and they married in Nigeria on October 24, 2009.

[4] His application was initially refused on August 17, 2010 on the basis of the genuineness of their marriage and misrepresentation. The visa officer concluded that despite having represented in his application that he had never previously applied for a visa to Canada, the applicant had applied for a visitor's visa to Canada in 2008 using a different name, Kolawole Olukunmi Alade.

[5] In a decision dated July 11, 2011, the Immigration Appeal Division (IAD) found that the marriage was genuine. The IAD also determined that the applicant had committed a misrepresentation but found that there were sufficient humanitarian and compassionate factors to overcome his inadmissibility.

[6] Before the IAD, the applicant testified that he had never previously applied for a Canadian visa. The applicant testified that he had been defrauded by a travel consultant. He claimed to have given the consultant his photograph, personal information and money to make a visa application but the consultant disappeared before he could apply. He testified that the consultant must have

submitted an application without his knowledge or consent. He also said that he reported this to the police and provided a police report. He said that his name, date of birth and some background information had been modified. The applicant's real name is Olukola Olukunmi Alade, born December 7, 1982. The name in the visa application was Kolawole Olukunmi Alade, born December 7, 1983.

[7] The IAD expressly rejected this explanation, finding that it lacked credibility. It also found the applicant's answers to be vague, unhelpful and inconsistent. Despite a clear finding that the applicant had lied under oath, the IAD allowed his appeal on humanitarian and compassionate grounds, based largely on the best interests of Ms. Alade's daughter.

[8] On September 8, 2011, the Accra visa office requested that the applicant obtain a Nigerian Police Clearance Certificate for his real name, Olukola, and for his alternate name, Kolawole. The applicant complied with respect to his real name only. On January 31, 2012 the visa office repeated its request that the applicant provide the second police certificate. It set a deadline of March 30, 2012.

[9] The applicant visited various police stations to see if he could obtain the document requested by the visa officer. His evidence is that he received a consistent response – no police clearance certificate would be provided for a different name.

[10] After a discussion with an unidentified officer at the Accra office, on March 19, 2012, the applicant explained, in writing, that police certificates could only be obtained in relation to a

person's true identity, although he did not provide any document to this effect from the Nigerian officials.

[11] On August 16, 2012, the applicant swore an "affidavit of name verification" before the Nigeria High Court, which he then presented to police, and on August 17, 2012, he obtained a letter from the Nigerian police stating that "to the best of our knowledge and statistics" there was no criminal record under the name of his alias. This was not a formal police clearance certificate, but did confirm, as least from the applicant's perspective, that there was no criminal record in his alternate name.

[12] On August 20, 2012, the applicant and his spouse attended the High Commission. They were told that the application had been refused in July. Neither the applicant, nor his spouse had received a decision letter to this effect. The applicant told the officer that he had new documents to tender. They were asked to return the next day at 3:00 pm.

[13] At 11:54 am the next day, the visa officer emailed the applicant a decision letter. When he and his spouse arrived at 3:00 pm to their interview, the applicant was given a copy of the email and asked to leave the High Commission. The officer refused to accept the affidavit or the letter from the Nigerian police. The decision letter, dated August 2, 2012 was unsigned. The decision letter made reference to the written explanation delivered, prior to the deadline, on March 19, 2012.

[14] The applicant had no written communication with the visa office since January 31, 2012 and learned that the March 19, 2012 explanation was insufficient only on August 21, 2012.

Analysis

[15] Section 70 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) provides that an officer, in examining an application of a foreign national or permanent resident, is bound by a prior decision of the IAD. Decisions of a visa officer concerning the requirement to comply with the IAD are reviewed on a standard of correctness: *Ashraf et al v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1383.

[16] Section 72 provides that judicial review under the *IRPA* is broadly available. An applicant may apply for judicial review "with respect to any matter - a decision, determination or order made, a measure taken or a question raised" but the application may not be made until any right of appeal that may be provided by the *IRPA* is exhausted.

[17] The applicant submits that the visa officer did not have jurisdiction to refuse the application because the IAD decision is binding, by operation of Section 70 of the *IRPA*. The applicant submits that Parliament's intention was to achieve finality after an appeal and that the visa officer was therefore required to accept his application.

[18] Therefore, a central issue is the scope of the IAD decision. The applicant also argues that the visa officer breached procedural fairness in requiring compliance with a condition that could not be met or in making the decision without regard to the August 17th letter from the Nigerian police that there was no record of criminal conduct under the alternate name.

Governing Principles

[19] When a matter has been considered by the IAD and remitted to a visa officer, the visa officer is precluded from revisiting issues within the scope of the IAD decision. In *Au v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 8, the Court of Appeal said at para 16:

> However, the relief granted by the IAD is predicated on the facts presented to the IAD. Where new facts come to the attention of the visa officer, the visa officer is required to consider whether the sponsor and the person being sponsored meet the requirements of the Act, having regard to those new facts. Of course, the facts must be new in the sense that they arose after the IAD hearing or, as in this case, were within the knowledge of the sponsoree but were withheld from the IAD and were discovered subsequently. Also, the new facts considered by the visa officer must be material. A visa officer cannot seize on insignificant facts. To do that would, in effect, mean that the visa officer was considering whether the individual met the requirements of the Act on virtually the same material facts considered by the IAD.

[20] A second refusal is permitted only where new material facts are before the visa officer, or where material facts had been concealed. To allow otherwise would render the IAD appeal process nugatory and allow the visa officer to sit on appeal or review from the IAD decision.

[21] In the circumstances, even if generously interpreted, the IAD decision is not determinative of the question of inadmissibility for criminality. The IAD confirmed that there had been a misrepresentation in that the applicant had made a prior application, but made no finding on whether the applicant was inadmissible based on criminality. Nor had there been a prior decision on criminal inadmissibility. As such, the visa officer was not bound by the IAD decision.

[22] Subsection 16(1) of the *IRPA* requires the applicant to produce all relevant evidence and documents than the visa officer reasonably requires. The applicant bears the burden of convincing the visa officer that he meets the requirements of the *IRPA*.

[23] The applicant submits that it was unreasonable to expect a police certificate for his alias because the police force only provides certificates for genuine names. However, he did not provide any evidence from the Nigerian police to this effect before the applicable deadline.

[24] This, however, does not end the matter. The decision of the visa officer does not consider or address any of the information provided by the applicant. It was obviously scripted hastily on the evening of the 20th or morning of the 21st. It is unsigned. It is a bare statement of conclusions, which, under the circumstances, fails to meet the requisite standards of intelligibility, transparency and coherence. I note that the decision said to have made and delivered to the applicant in July was not produced in evidence.

[25] It is axiomatic that visa officers are not required to give detailed reasons, but whether the reasons meet the minimum threshold is informed by the context, the history of proceedings and the interests engaged. In this case, it was incumbent on the officer to address why she was not satisfied with the information presented. As there was evidence in the record that there had been a previous application by the applicant under a different name, it was reasonable to require further inquiries in respect of that name. However, the visa officer failed to consider the applicant's evidence that the proof requested could not be provided. The visa officer also did not consider the August 17, 2012

letter from the Nigerian police that there was no criminal record for the alternative name, as the applicant was not permitted to tender this evidence.

[26] In an obvious effort to address the deficiencies in the decision, the visa officer filed a subsequent affidavit. Affidavits of this nature are, in the main, inadmissible. It does not fall within the exception where basic factual information is required to complete the record. This affidavit was a clear attempt to supplement the reasons that were given.

Remedy

[27] Subsection 63(1) of the *IRPA* provides a sponsor with a right of appeal to the IAD from a decision not to issue a permanent resident visa in respect of a family class sponsorship. Paragraph 72(2)(a) provides that judicial review may not be commenced until any right of appeal under *IRPA* is exhausted.

[28] The Federal Court of Appeal has determined that subsection 72(2) precludes concurrent applications to this Court: *Somodi v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288. The Court of Appeal explained, at paragraphs 22 and 29:

> Parliament has prescribed a route through which the family sponsorship applications must be processed, culminating, after an appeal, with a possibility for the sponsor to seek relief in the Federal Court. Parliament's intent to enact a comprehensive set of rules in the IRPA governing family class sponsorship applications is evidenced both by paragraph 72(2)(a) and subsection 75(2).
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> […]
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> […] It would be illogical and detrimental to the objectives of the scheme to allow a multiplicity of proceedings on the same issue, in different forums, to parties pursuing the same interests. It would also

> be detrimental to the administration of justice as it would open the door to conflicting decisions and fuel more litigation. This is precisely what Parliament intended to avoid.

[29] An appeal to the IAD grants an appellant a *de novo* hearing on the merits and the IAD can consider whether there was a breach of natural justice.

[30] The IAD's decision did not prevent a visa officer from subsequently considering whether the applicant meets the requirement of the *IRPA* and, specifically that he is not inadmissible for criminality. The IAD decided that the application should continue to be processed. It did not guarantee a positive outcome with respect to criminality, nor did it grant a free pass in respect of that requirement.

[31] It is true that a visa officer cannot effectively overturn the IAD by rejecting an application based on the same facts as the IAD's decision when the underlying issue is the same: *Au*, above, at para 15. Here, however, the IAD determined that the applicant was not inadmissible for misrepresentation. Accordingly, it would have been impermissible for the visa officer to deny the application on the basis of misrepresentation or genuineness of marriage as there were no new facts. These issues had been decided by the IAD. However, the IAD made no finding regarding the applicant's inadmissibility based on criminality. It is appropriate and necessary for the visa officer to consider the applicant's alternate name, not as it relates to misrepresentation, but as it relates to the applicant's burden to demonstrate that he is not inadmissible for criminality: *Wu v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 393, paras 20-21.

[32] The applicant failed to satisfy the visa officer that he was not inadmissible. That decision is now before the IAD on appeal. Therefore the application for judicial review is dismissed and I see no basis to award costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-10795-12**
STYLE OF CAUSE:	**OLUKOLA OLUKUNMI ALADE v MCI**
PLACE OF HEARING:	Regina
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APPEARANCES:

Francis Poulin	FOR THE APPLICANT
Michael Brannen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Miller Thomson LLP Regina, Saskatchewan	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT