Federal Court  Cour fédérale

Date: 20160707

Docket: IMM-5357-15

Citation: 2016 FC 764

Ottawa, Ontario, July 7, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

HENRY AMECHI OGBUCHI

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the Act] of a decision [the Decision] by a visa officer [the Officer] at the High Commission of Canada in Accra, Ghana refusing the Applicant's application for a temporary resident visa as a student.

[2] The Applicant is a 42-year old citizen of Nigeria. On February 13, 2015, he was accepted by the Manitoba Institute of Trades and Technology [MITT] for a Post-Graduate Certificate in International Business. The duration of expected study was from September 10, 2015 to August 26, 2016.

[3] On July 14, 2015, the Applicant applied for a study visa. On his application, the Applicant stated that he studied economics and statistics at the University of Benin from 1995 to 1999 and that he has been employed by subsidiaries of Chevron Nigeria Ltd. since 2004 – as a Material/Warehouse Officer, a Senior Administrative/Project Management Officer, and an Inventory and Procurement Analyst. He also noted that he had previously applied for a student visa but was denied due to of a lack of evidence of his travel history, employment status, and financial status.

[4] On November 13, 2015, the Officer refused the Applicant's application for a study permit. The Officer was not satisfied that the Applicant would leave at the end of his stay in Canada. The Officer noted that "[i]n reaching this decision, I have considered several factors, including… length of proposed stay in Canada [and] purpose of visit".

[1] In the GCMS notes that accompany the refusal letter, the Officer provided the following reasons for the Decision:

> After a review of the application and supporting documents provided, program of study in Canada does not appear to be consistent with previous education and employment history. Based on the information provided, I am not satisfied that applicant is a genuine student who intends to complete course of study in Canada. I am also not satisfied that [the Applicant] would leave

> Canada at the end of an authorized stay given, in part, educational and employment history. Application is refused.

II. Analysis

[2] The standard of review applicable to a visa officer's assessment of an application for a study permit is reasonableness (*Akomolafe v Canada (Citizenship and Immigration)*, 2016 FC 472 at para 9; *Obot v Canada (Citizenship and Immigration)*, 2012 FC 208 at para 12). As long as the officer's assessment is transparent, intelligible, justifiable, and falls within a range of outcomes that are defensible in respect of the facts and the law, this Court will not intervene (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[3] The Applicant argues that he submitted evidence that he has a wife and three minor children in Nigeria; more than twelve years of gainful employment with an employer that expects him to return at the end of his studies; and substantial cash savings that go well beyond those necessary to fund his education and support his family. In light of all this, he submits that the Officer's assessment that the length of stay proposed by the Applicant and the purpose of the visit weigh against granting a permit is arbitrary and unsupported by the evidence.

[4] The Applicant cites *Zhang v Canada (Minister of Citizenship and Immigration),* 2003 FC 1493 at para 18 for the proposition that "visa officer decisions have been cancelled because the visa officer had not sufficiently taken into account the ties of family which bound the applicant to their home country". The Applicant also cites *Zuo v Canada (Citizenship and Immigration)*, 2007 FC 88 at para 31, where the Court found a visa officer's decision to refuse a study permit unreasonable because of, among other things, "the Officer's failure to consider the applicant's

ties to China"; and *Oloruntoba v Canada (Citizenship and Immigration)*, 2012 FC 1414, where Justice Zinn overturned a visa officer's decision in light of a failure to address clear evidence in the applicant's favour.

[5] The Respondent argues that the Applicant is simply taking issue with the weight that the Officer assigned to the evidence and that "the weight to be assigned to the factors… is not a basis for judicial review" (*Baylon v Canada (Citizenship and Immigration)*, 2009 FC 938 at para 25). The Respondent submits that the onus was on the Applicant to demonstrate that he would leave Canada at the end of the study period (*Dhillon v Canada (Citizenship and Immigration)*, 2009 FC 614 at para 41) and that he failed to do so. Finally, the Respondent argues that there was nothing unreasonable in the Officer's conclusion that the Applicant's program of study – his purpose of visit – was inconsistent with his education and employment history. As a result, the Decision should not be disturbed.

[6] I agree with the Applicant that the Decision lacked justification in this case. Specifically, the Officer did not offer any explanation as to why he found the Applicant's program of study in Canada to be inconsistent with his previous education and employment history.

[7] After all, the Applicant is seeking a post-graduate certificate in international business. He asserts that he studied economics and statistics in university and has been employed for over a decade by a large multinational business in the oil and gas sector, in part as a procurement analyst. I cannot understand, from the Officer's reasons, how this professional and educational background is inconsistent with a one-year study program in international business.

[8] It may be that the Officer was aware of underlying issues in the application. However, the only explanation regarding the reason for refusal – that the Applicant would not leave Canada at the end of his authorized stay because of his "educational and employment history" – is entirely unhelpful since the Officer does not state what it is about either his education or employment that is actually problematic.

[9] In other words, the Officer may have had perfectly justifiable reasons for basing a refusal on any of the grounds, but needed to state, with a modicum of clarity, what they were. A visa officer's reasons need not be perfect but they must "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). Where, as in this case, the reasons are so inadequate as to render the decision itself unjustified and unintelligible, and the conclusion thus falls, as a result, outside of the range of acceptable outcomes, then the decision should be reviewed and sent back for reconsideration.

[10] One final note: at the hearing, the Respondent made, for the first time, the observation that several of the documents contained in the Application Record and cited by the Applicant in his arguments – including the Applicant's alleged application cover letter and employment reference letters – were not in the Certified Tribunal Record [CTR] and therefore not before the visa officer. The Respondent submitted that, as a result, this Court could not consider those documents in its decision.

[11] The jurisprudence is clear that the onus is on the Applicant to demonstrate that something was before the decision-maker if it is not in the CTR:

> Where the Certified Tribunal Record does not contain a document or make any reference to such a document, a bare assertion by the applicant that the document was sent will not suffice to meet this burden (*Singh Khatra* at para. 6; *Adewale v. Canada (Citizenship and Immigration)*, 2007 FC 1190 at para. 11).
>
> (*El Dor v Canada (Citizenship and Immigration)*, 2015 FC 1406 at para 32)

[12] If the Applicant cannot overcome this presumption, the disputed evidence cannot be considered by this Court on judicial review (*Ajeigbe v Canada (Citizenship and Immigration)*, 2015 FC 534 at para 13; *Adewale v Canada (Citizenship and Immigration)*, 2007 FC 1190 at para 10 [*Adewale*]).

[13] While a review of the records suggests that the Respondent is correct, I need not rule on the document controversy since the unreasonableness of the Decision is clear even without considering the disputed documents. Having said that, it would be helpful to the Court in the future for parties to raise any issue of conflicting records in advance of the hearing so that it can be properly addressed. In *Adewale*, for example, Justice Blanchard ultimately concluded that he could not consider the disputed evidence, but only after Department of Justice brought a motion to strike it from the record.

[14] It is particularly incumbent on the Respondent to raise any evidentiary inconsistency in a timely manner when one of the arguments posited is that the officer in question sufficiently considered the evidence that was before him or her. Similarly, in situations where a piece of

disputed documentation is central to the applicant's position, the issue should be addressed up front and in a timely manner, lest that Applicant find him or herself in the position of being unable to overcome the presumption of a complete CTR.

III. Conclusion

[15] In light of the above, this application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. The matter is to be sent back for redetermination by a different officer.

3. There is no award as to costs.

4. There are no questions for certification.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5357-15
STYLE OF CAUSE:	HENRY AMECHI OGBUCHI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 28, 2016
JUDGMENT AND REASONS:	DINER J.
DATED:	JULY 7, 2016

APPEARANCES:

John Agwuncha	FOR THE APPLICANT
Aleksandra Lipska	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John Agwuncha Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT