

Date: 20080307

Docket: IMM-2900-07

Citation: 2008 FC 317

Ottawa, Ontario, March 7, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

SAMUEL UMACHI OGBONNAYA

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by visa officer Jean-Pierre Lavoie at the Canadian Deputy High Commission in Lagos, Nigeria dated June 21, 2007, refusing the applicant's application for a student visa.

FACTS

[2] The applicant is a 23-year-old citizen of Nigeria. Since graduating from high school in June 2003, he has been involved extensively in the Apapa Parish of the Presbyterian Church of Nigeria in

Lagos. He is the Youth President of the Lagos West Presbytery and serves on the Parish Congregational Board.

[3] On March 23, 2007, the applicant was granted admission to York University in Toronto. His program of study is a four year undergraduate degree in Economics at the Atkinson Faculty of Liberal and Professional Studies. According to the applicant's acceptance letter, his studies were to begin on September 5, 2007.

[4] On June 2, 2007, the applicant applied for a student visa at the Canadian Deputy High Commission in Lagos. In his application form, the applicant noted that his studies were being sponsored by the Apapa Parish of the Presbyterian Church of Nigeria. The applicant stated that the reason for the sponsorship was based on his leadership and commitment to the Church, as well as his contributions to the Church's management through his position on the Congregational Board.

[5] On June 21, 2007, the visa officer refused his application on two grounds: 1) the visa officer was not satisfied that the applicant was a *bona fide* student; and 2) the visa officer was not satisfied that the applicant would leave Canada at the end of his study period.

[6] On July 18, 2007, the applicant filed this application for leave and judicial review of the visa officer's decision. He has since had his university admission deferred, and is now scheduled to begin school in September 2008.

ISSUE

[7] The sole issue to be considered in this application is whether the visa officer erred in refusing to grant the applicant a student visa.

STANDARD OF REVIEW

[8] In *Tran v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1377, 59 Imm. L.R. (3d) 217, Mr. Justice Shore considered the appropriate standard of review to apply to a visa officer's decision, stating at paragraph 23:

¶ 23 In this case, the issues addressed by the Visa Officer are questions of fact. The Visa Officer was not satisfied that Mr. Le Minh Duc Tran was a *bona fide* temporary resident that would leave Canada at the end of the period authorized for his stay. Specifically, she was not convinced that Mr. Le Minh Duc Tran's ties with Vietnam were sufficiently strong to ensure his return after studying in Canada. Therefore, the appropriate standard of review is patent unreasonableness. In other words, the Court must not intervene unless it can be established that the decision is based on an erroneous finding of fact made in a perverse or capricious manner. ...

[9] The arguments before Mr. Justice Shore in *Tran* are the same as those before the Court in the case at bar; namely, whether the visa officer erred in concluding that the applicant was not a *bona fide* student and would not return to Nigeria following the completion of his studies. Accordingly, I agree with Mr. Justice Shore, and conclude that the appropriate standard of review to be applied to the visa officer's decision in the case at bar is that of patent unreasonableness.

RELEVANT LEGISLATION

[10] Under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), a foreign national seeking to obtain a student visa must convince the visa officer that he or she is not inadmissible to Canada and meets the eligibility requirements under the IRPA and the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations). Among those eligibility requirements, the foreign national must convince the visa officer that they are not an immigrant and that they intend to leave Canada by the end of the period authorized for their stay. The relevant provisions of the IRPA are outlined below:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

[...]

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,

[...]

(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.

[...]

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

[...]

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) 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] Subsection 216(1) of the Regulations elaborates on the criteria to be considered by the visa officer in assessing the application:

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

- (a) applied for it in accordance with this Part;
- (b) will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;
- (c) meets the requirements of this Part; and
- (d) meets the requirements of section 30.

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:

- a) l'étranger a demandé un permis d'études conformément à la présente partie;
- 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;
- c) il remplit les exigences prévues à la présente partie;
- d) il satisfait aux exigences prévues à l'article 30.

ANALYSIS

Preliminary Issue: **Did the applicant improperly include documents in this application that were not before the visa officer?**

[12] As a preliminary issue, the respondent argues that the applicant's affidavit improperly contains documents that were not before the visa officer when the applicant's application was considered. These documents include a "family declaration" by the applicant's brother dated July 17, 2007 and a letter supporting the applicant's application from Rev. Nzie Eke of the Apapa Parish dated July 16, 2007. These documents are contained at pages 17-18 of the applicant's Application Record.

[13] Upon reviewing the documents in question, the Court agrees with the respondent that neither of these documents were before the visa officer when the decision was made. Accordingly, they should not form part of the evidence considered by this Court. Both of the above-noted documents post-date the visa officer's decision, which was rendered on June 21, 2007. As a result, while both documents provide evidence supporting the applicant's claim that he is a *bona fide* student with strong ties to Nigeria, neither will be considered by this Court as part of this application for judicial review.

[14] The respondent also submits that it is "unclear what information contained in the Applicant's affidavit ... was before the immigration officer" since none of the documents contained within the affidavit were included in the visa officer's notes, which were dated December 11, 2007 and received by the Court on December 17, 2007. Despite not being included within the visa officer's notes, the Court concludes that all of the documents in question, except the "family declaration" and letter from Rev. Nzie Eke, were properly before the visa officer when the decision was made. The three documents the Court considers most relevant to the visa officer's decision – the letter from York University dated March 23, 2007; the "Confirmation of Sponsorship" from the Apapa Parish dated May 31, 2007; and the "Police Background Certificate" dated May 28, 2007 – all predate the applicant's application for a student visa, which was made on June 2, 2007. Accordingly, it is illogical that the applicant would obtain all of these documents in preparation and then not file them in support of his visa application. Moreover, the applicant has provided sworn testimony in his affidavit that these documents were before the visa officer. This testimony is uncontradicted by the evidence. Accordingly, the respondent's bald submission that it is "unclear"

whether these documents were before the visa officer is not sufficient to alter the Court's finding in this regard.

Issue: Did the visa officer err in refusing to grant the applicant a student visa?

[15] Based on the evidence that was properly before the visa officer when he rendered his decision, the Court finds that the visa officer was patently unreasonable in refusing the applicant's application for a student visa.

[16] First, in concluding that the applicant did not satisfy the visa officer that he would return to Nigeria by the end of the authorized period, the visa officer's notes suggest that this is due to the fact that the applicant lacks ties to Nigeria, and would therefore have no incentive to return upon the completion of his schooling. The Court finds such a conclusion patently unreasonable in light of the fact that the applicant's visa application lists a large and extensive family in Nigeria consisting of his mother, father, and six siblings, all of whom are older than the applicant. As well, the applicant stated that he does not have any relatives in Canada, thereby suggesting a strong incentive to return to Nigeria upon the completion of his studies. Moreover, the applicant has demonstrated strong ties to the Presbyterian Church of Nigeria, which would no doubt influence his decision to return to the country. These ties are demonstrated in the applicant's visa application where he states that since graduating high school he has been "deeply involved with youth work" at the Church, and are supported by the "Confirmation of Sponsorship" from the Apapa Parish, which states that the applicant has been "very active in the Parish."

[17] In light of these strong connections to Nigeria, it is also patently unreasonable that the visa officer would conclude that the applicant was not a *bona fide* student. This is especially the case in view of the fact that the applicant proffered a letter of acceptance from York University demonstrating that he had been accepted into the Economics program and was to begin studies in September 2007. The Court is surprised that the visa officer would reach such a conclusion while at the same time explicitly stating in his notes that the applicant had been accepted into a four year degree program at York University. While the visa officer's decision is no doubt premised on the fact that the applicant graduated high school in 2003, four years prior to filing his visa application, the officer, in concluding that the applicant has not taken any courses since then and has never worked, failed to consider the applicant's work and devotion to the Presbyterian Church of Nigeria during this time.

[18] Finally, while only secondary to the above two errors, the Court does note that the visa officer's conclusion that the applicant has no previous travel experience is directly contradicted by the "Confirmation of Sponsorship" from the Apapa Parish, which states that the applicant was chosen to represent Nigeria at the World Council of Churches Conference in Brazil in 2006.

[19] For all of the above reasons, the Court concludes that the visa officer was patently unreasonable in refusing the applicant's application for a student visa. Accordingly, the Court will allow this application and set aside the decision of visa officer Jean-Pierre Lavoie dated June 21, 2007.

[20] Both parties and the Court agree that this case does not raise a question that should be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed, the visa officer's decision is set aside, and the application is referred to another visa officer for redetermination with the direction that the new visa officer consider any new documents submitted by the applicant including the documents referred to in paragraph 12 of these Reasons.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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