Federal Court  Cour fédérale

Date: 20090504

Docket: IMM-1857-08

Citation: 2009 FC 447

Ottawa, Ontario, May 4, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MIMOSE DORET

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] In this application for judicial review, Mimose Doret is seeking to have the visa officer's decision refusing her application for a temporary resident visa, dated February 6, 2008, set aside. Throughout these proceedings, Ms. Doret, who lives in Haiti, has had minimal involvement, to the point where we can wonder whether she sincerely wants to challenge the visa officer's decision. For this reason, and because I find that the decision to refuse the visa application was neither unreasonable nor tainted by any breach of procedural fairness or natural justice, I am of the view that this application for judicial review must be dismissed.

THE FACTS

[2] Ms. Doret is a citizen of Haiti and is currently 33 years old. On February 26, 2008, she applied for temporary residence for a three-month stay in Canada. The reason for her trip was to come and visit Canada and Quebec following her engagement to Christian Savard, which apparently took place on February 16, 2008. The visa application was submitted with a sworn statement by Mr. Savard dated January 7, 2008, in which he promised to cover the costs of the trip and his fiancée's living and other expenses during her stay in Canada.

[3] According to her curriculum vitae, submitted in support of Mr. Savard's affidavit, Ms. Doret held several jobs following her vocational training to become an esthetician in 2003-04: in particular, she worked in the advertising section of a daily newspaper in Haiti, and also as a waitress in a restaurant. Between 2006 and 2008, she returned to school to take a secretarial course.

[4] In her visa application form, she indicated that she had never travelled outside her country. Two of her sisters live in Quebec City.

[5] Ms. Doret also submitted, in support of her visa application, a fiscal identity card from Haiti's Direction générale des impôts attesting that she had discharged her financial obligations to the state, as well as a bank statement showing an amount of roughly $23 CDN.

[6] The very same day on which she submitted her visa application, the applicant received a negative response from the visa officer. In the refusal letter, the visa officer justified her refusal by checking off the box indicating that she was not convinced Ms. Doret would leave Canada at the end of her stay as a temporary resident.

[7] The officer also indicated, checking the appropriate boxes, the factors she had taken into consideration in making this decision. There were four factors:

a. The applicant's previous trips
b. Her family ties in Canada and in her country of residence
c. Her current employment situation
d. Her financial situation.

PRELIMINARY REMARKS

[8] The application for leave and judicial review of the visa officer's decision was initially submitted jointly by Mimose Doret and Christian Savard on April 21, 2008. At the time, the respondent objected to Mr. Savard acting as applicant, since he was under no obligation to make an application for a temporary visa to be admitted to Canada. In a motion to the Court for directions, filed on June 19, 2008, in accordance with Rules 4, 54, 359 and 369 of the *Federal Courts Rules*, SOR/98-106, the respondent also asked the Court for directions as to whether Mr. Savard could represent Ms. Doret in her application for judicial review. Relying on section 119 of the *Federal Courts Rules* and on section 11 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the respondent argued that since Mr. Savard was not a solicitor, he could not represent Ms. Doret before the Court.

[9] In a decision dated July 28, 2008, Prothonotary Morneau sided with the respondent and ordered that Mr. Savard be removed as an applicant in the case at bar. He also found that Mr. Savard could not act as Ms. Doret's representative.

[10] Ms. Doret and Mr. Savard filed an appeal of that decision, which I heard in Quebec City on August 21, 2008. In a decision rendered four days later, I upheld the prothonotary's decision. With regard to the possibility of Mr. Savard representing Ms. Doret, I indicated in my order that the application for leave could proceed, based on the record already on file. At the same time, however, I allowed Ms. Doret to submit a new motion to be represented by Mr. Savard, in the event that her application for leave was allowed.

[11] The application for leave having been allowed by my colleague Justice Shore on January 6, 2009, Ms. Doret availed herself of the opportunity offered in my order dated August 25, 2008, to present a motion seeking to allow Mr. Savard to represent her during the hearing of her application for judicial review. This motion was submitted to me on March 18, 2009, in Quebec City. Mr. Savard once again argued that exceptional circumstances called for an exception to Rule 119, given that the applicant did not have the means to have herself represented by counsel and that she could not represent herself before the Court. He also argued that he did this out of a sense of dignity and personal reputation and that there were no other reasonable and effective ways to assert Ms. Doret's rights, while at the same time indicating that he was not ready to invest his own money to pay for legal representation for [TRANSLATION] ''someone he barely knew''.

[12] It is true that this Court has an inherent discretion allowing it to authorize a party to be represented by someone who is not a solicitor, when it is necessary in the interests of justice. However, such is not the case here. Although Ms. Doret cannot enter Canada, she could have retained and instructed legal counsel so as to have her case heard before the Federal Court. She could also have looked into the possibility of having her case heard by conference call.

[13] On the contrary, and as was previously mentioned, Ms. Doret's appearances before this Court have been very few. The application for judicial review is signed solely by Mr. Savard, and the only affidavit filed in support of this application is also Mr. Savard's. The same holds true for the notice of motion filed against the prothonotary's decision, as well as the affidavit filed in support of that motion. The only documents apparently bearing Ms. Doret's signature consist of a very brief affidavit, filed as an exhibit to Mr. Savard's affidavit (in which Ms. Doret simply states that she is one of the applicants in the application for leave and that all of the facts alleged in the application are true), and a document entitled ''Applicants' Request for a Hearing'' (in which she argues that Mr. Savard has the required standing to act as a co-applicant, following the motion for directions filed by the respondent).

[14] Moreover, the notice of motion filed by Mr. Savard for authorization to represent Ms. Doret is not properly signed by Ms. Doret. On it there is only Ms. Doret's name written in block letters, beside which is written ''(e-signature) Original to follow'', and Ms. Doret's e-mail address. Three weeks after the hearing, Mr. Savard also sent the Court a letter that Ms. Doret had apparently tried -

unsuccessfully- to send to the Court by e-mail, in which she stated that she was unable to retain counsel due to a lack of financial resources, and that she understood I would be rendering a decision on her application for judicial review on the basis of the records already submitted. She added that, if the Court were to allow the respondent to make additional submissions, she wished that Mr. Savard would be allowed to represent her.

[15] While I am not able to speculate on Ms. Doret's true intentions or on the veracity of Mr. Savard's statements to the effect that Ms. Doret was unable to communicate directly with the Court by e-mail, I must conclude that there is very little evidence in the record attesting to Ms. Doret's willingness to pursue her application for judicial review before this Court. In any event, and regardless of this question, in my opinion, Mr. Savard has not succeeded in showing that exceptional circumstances call for departing from the principles established by section 119 of the *Federal Courts Rules*.

[16] A lack of funds, in and of itself, cannot justify circumventing Rule 119, especially given the fact that other solutions were available to the applicant. Not only could she have represented herself, which she seems to have done (with the help of Mr. Savard) in building her case, and which she could have chosen to do so (via conference call) at the hearing, she could also have counted on the financial support of her two sisters living in Canada as well as Mr. Savard. While I am able to understand the reasons why Mr. Savard decided not to use his own financial resources to cover the costs of a solicitor, the fact remains that this was his own choice. Therefore, we are very far from any exceptional situation whereby only a departure from the Court Rules could ensure that justice is

done. Finally, I would add that, as a result of my agreeing to rule on the application for judicial review be on the basis of the record and without submissions by the parties, there is no prejudice to Ms. Doret and she finds herself essentially on equal terms with the respondent. Even if the memorandum in Ms. Doret's record was signed only by Mr. Savard, I agreed to consider it as hers.

ISSUE

[17] Ms. Doret raised two arguments in her written submissions. The first is that the visa officer had erred by refusing to issue a temporary resident permit to the applicant. The second is that there was a breach of the rules of natural justice when the officer refused to meet with her or interview her.

ANALYSIS

[18] Individuals requesting authorization for a temporary stay in Canada must show that they will comply with the requirement to leave the country at the end of the period authorized for the stay. The statutory framework applicable to the case at bar can be found in subsection 11(1), in paragraph 20(1)(*b*) and in subsection 22(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*Rules*") as well as in sections 179, 191 and 193 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. For easier reference, these provisions are reproduced here:

Part 9	**Partie 9**
Temporary Resident	**Résidents temporaires**
Division 1	**Section 1**
Temporary Resident Visa	**Visa de résident temporaire**

179. An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national

(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;

(b) will leave Canada by the end of the period authorized for their stay under Division 2;

(c) holds a passport or other document that they may use to enter the country that issued it or another country;

(d) meets the requirements applicable to that class;

(e) is not inadmissible; and

(f) meets the requirements of section 30.

179. L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;

b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;

c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;

d) il se conforme aux exigences applicables à cette catégorie;

e) il n'est pas interdit de territoire;

f) il satisfait aux exigences prévues à l'article 30.

PART 10

VISITORS

Class

191. The visitor class is prescribed as a class of persons

PARTIE 10

VISITEURS

Catégorie

191. La catégorie des visiteurs est une catégorie réglementaire de personnes qui peuvent

who may become temporary residents.	devenir résidents temporaires.
Conditions	**Conditions**
193. A visitor is subject to the conditions imposed under Part 9.	**193.** Les visiteurs sont assujettis aux conditions prévues à la partie 9.

[19] The visa officer's decision to issue a temporary resident visa is discretionary in nature. For this reason the Court must show considerable deference in a judicial review. In this case, the applicant is challenging the visa officer's finding that she was not convinced the applicant would leave Canada at the end of her stay as a temporary resident. That is an eminently factual question, to which the standard of reasonableness must apply. This is to say that the Court must not intervene unless the decision does not fall within a ''range of possible, acceptable outcomes which are defensible in respect of the facts and law'' (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47).

[20] As for the argument based on the lack of an interview, it must be reviewed on a standard of correctness. In fact, it is well established that a breach of the principles of natural justice or procedural fairness normally results in the decision being set aside: see, in particular, *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404.

[21] The visa officer needed to be satisfied that the applicant would leave Canada at the end of the authorized period before issuing her a temporary resident visa. The onus was on the applicant to prove that she would leave Canada at the end of the period for which she was authorized to stay in Canada. As Justice Lagacé recently noted in *Obeng v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 754, at paragraph 20:

> There is a legal presumption that a foreign national seeking to enter Canada is presumed to be an immigrant, and it is up to him to rebut this presumption. It was therefore up to the applicant, in the present instance, to prove to the visa officer that he is not an immigrant and that he would leave Canada at the end of the authorized period that he requested. (*Danioko v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 578, 2006 FC 479, *Li v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 791, [2001] F.C.J. No. 1144, paragraph 37).

[22] The visa officer examined the applicant's financial situation and employment history, her family ties in Canada and in her home country, and her previous lack of travel, in order to determine if the evidence in the record was sufficient to establish, on a balance of probabilities, that the applicant would leave Canada at the end of the period authorized for the stay. Her decision appears to me to be entirely reasonable and certainty does not seem to be based on any erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before her (*Federal Courts Act*, paragraph 18.1(4)(*d*)).

[23] Regarding the applicant's financial situation, the visa officer noted that she had little money. According to the case law, a visa applicant's poor financial means is a significant and relevant factor which the visa officer may take into account when assessing the probability of a visa applicant returning to his or her country when his or her visa expires (see, among others: *Duong v.*

Canada (Minister of Citizenship and Immigration), 2003 FC 834; *Toor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 573). If we add this to the fact that the applicant was not working and that she had been studying since 2006, it was certainly not unreasonable for the officer to find as she did.

[24] The second factor taken into consideration by the visa officer was the applicant's family ties, both in Canada and her country of origin. The visa officer was obliged to verify whether the applicant's family ties in her country of origin were strong enough to ensure that she would have the motivation to return home after her visit to Canada. While noting that some of Ms. Doret's family lived in Haiti, the officer was of the view that her ties to Canada, given that her fiancé and two of her sisters lived here, were strong enough for the officer to determine that she would not leave Canada at the end of her stay. While this inference might be disputed, it does not strike me as being unreasonable, given the facts that were brought to the officer's attention.

[25] Finally, I do not find it unreasonable to consider that the fact that the applicant had never left her country before could be a relevant factor. As the visa officer explained in her affidavit, the fact of having previously travelled and returned to her country could be an indication that the applicant would act the same way on her subsequent trips.

[26] Of course none of these factors, taken in isolation, would be determinative. However, taken together, they were certainly likely to lead the officer to arrive at the finding she did. Neither the applicant's brief affidavit nor the memorandum prepared by Mr. Savard would point to any error in

the visa officer's assessment of the case. Simply being in disagreement with the assessment of a case is clearly not sufficient to demonstrate that the visa officer erred or acted unreasonably.

[27] Lastly, the officer was under no obligation to grant the applicant an interview. The visa officer explained in her affidavit that she had not called the applicant for an interview because all the elements she needed to reach a decision were on hand. Moreover, the applicant had not asked her to do this. Given the information provided by the applicant in support of her visa application, the officer could effectively reach a decision without needing to obtain additional information through an interview. In this respect I agree with the reasoning of my colleague Justice Kelen when he wrote the following in *Berganovic v. Canada (Minister of Citizenship and Immigration),* 2004 FC 359, at paragraph 18:

> […] It would be an unfair advantage to schedule interviews for persons who have failed to complete their applications, and a waste of time and resources to attempt to assess an application on eligibility grounds, based on incomplete information.
>
> See also, in a similar vein:*Dardic v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 150, [2001] F.C.J. No. 326; *Lam* v. *Canada (Minister of Citizenship and Immigration),* (1998), 152 F.T.R. 316.

[28] For all these reasons, I am of the view that this application for judicial review must be dismissed.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed.

''Yves de Montigny''
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1857-08
STYLE OF CAUSE:	**MIMOSE DORET v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 18, 2009
REASONS FOR ORDER AND ORDER:	de MONTIGNY J.
DATED:	May 4, 2009

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