Federal Court  Cour fédérale

Date: 20140307

Docket: IMM-3567-13

Citation: 2014 FC 228

Ottawa, Ontario, March 7, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ELENDU GEOFFREY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, for a review of a decision rendered by Pre-Removal Risk Assessment Officer L. St-Martin (the Officer) of Citizenship and Immigration Canada (CIC) on May 6, 2013 denying the Applicant's application to be sponsored by his spouse. For the following reasons, the application is allowed.

I. Background

[2] The Applicant, Geoffrey Elendu, is a citizen of Nigeria. He left Nigeria and arrived in Canada on August 5, 2005 where he claimed refugee status. On February 23, 2006, CIC rendered a negative decision on his claim. On March 14, 2006, the Federal Court dismissed his application for leave and judicial review of the negative decision.

[3] On August 28, 2005, the Applicant met Diaby Nakadidjata, and they started living together on June 1, 2006. They had a first child together on June 19, 2006, and a second child on July 15, 2008.

[4] The couple were married on August 19, 2006. On March 19, 2009, the Applicant applied for permanent residence under the Spouse or Common-Law Partner in Canada Class.

[5] On August 10, 2010, CIC completed a security check on the Applicant, as is indicated in its analysis document from the Certified Tribunal Record, which appears to refer to the Field Operations Support System (FOSS) notes. It should be noted at this juncture that the Respondents did not submit a copy of the FOSS notes from the file to the Court, and as a result the only information available was the analysis of the notes made after the fact.

[6] In a document dated October 18, 2011, Officer Carline Médée of CIC summoned the Applicant for an interview "to finalize the processing of [his] application." On October 26, 2011, Officer Médée conducted an interview with the Applicant and his wife for an eligibility assessment of the sponsorship application. According to the testimony provided by the Applicant in his

affidavit, which was uncontradicted by the Respondents, Officer Médée congratulated the Applicant and his wife and declared that she was accepting the sponsorship application. She issued a work permit for the Applicant. The analysis document states that on that date, Officer Médée confirmed that she intended to approve the application after the interview.

[7] Because of the lack of evidence in the file, in particular the absence of the FOSS notes, it is unknown what occurred in regards to the Applicant's file between October 26, 2011 and April 26, 2013. The Respondents acknowledge that the Applicant should have received a written confirmation of his approval by mail, but that Officer Médée did not send that letter, for reasons which were never explained.

[8] According to CIC's analysis document, which was submitted as part of the Certified Tribunal Record, Ms. Nakadidjata reported a change of address on November 8, 2012.

[9] On April 26, 2013, Officer St-Martin took action on the file, as indicated by Officer St-Martin's affidavit as well as the analysis document. Officer St-Martin contacted Ms. Nakadidjata, who confirmed that she was no longer living with the Applicant. The couple had separated in July 2012.

[10] On April 29, 2013, Officer St-Martin issued a decision refusing the sponsorship application.

[11] On May 21, an application for leave was filed with the Federal Court.

II. Decision

[12] On June 11, 2013, Officer St-Martin rendered a decision refusing the Applicant's application for permanent residence under the Spouse or Common-Law Partner in Canada Class on the basis that he had not demonstrated that he was the spouse or common-law partner of a sponsor and that he cohabited with his sponsor in Canada.

III. Issues

[13] The Applicant presents the issues as follows:

1. How could Officer St-Martin render a decision when the same decision had already been rendered by another officer?

2. Did the Officer breach the Applicant's right to procedural fairness by rendering a decision when the former officer had conducted the hearing with the Applicant?

3. Did the Officer breach the Applicant's right to procedural fairness by waiting a long time before issuing a decision?

4. Did the Officer err by missing a specific entry?

[14] The Respondents characterize the issues as follows:

1. Did Officer St-Martin have jurisdiction to process the Applicant's application for permanent residence at step 2?

2. Did Officer St-Martin commit an unreasonable error by rejecting the Applicant's application at stage 2?

[15] The Court characterizes the issue as the following:

1. In consideration of the evidence in the record, was a decision made on October 26, 2011 in regards to the Applicant's sponsorship application in accordance with CIC's decision-making process?

IV. Parties' submissions

Applicant

[16] The Applicant contends that the interview with the first CIC officer constituted the finalization of the sponsorship process, and that Officer Médée's statements and behaviour at the interview (congratulating the couple, stating that the marriage had been entered into in good faith, and assisting with the renewal of the Applicant's work permit) indicated approval of the sponsorship application.

[17] The Applicant contends that because the issue had already been decided by Officer Médée, *res judicata* and issue estoppel mean that the issue could not be re-visited by Officer St-Martin.

[18] The Applicant also contends that a year and a half had passed since the first interview without a permanent resident card being issued, which was an unreasonable delay. He argues that

18 months after the interview was conducted, the only valid reasons for which he could be refused are those tied to inadmissibility.

[19] The Applicant contends that the mention in the analysis of the FOSS notes that the Applicant had a pending criminal case constitutes an error because the accusations of assault brought against him were dismissed on September 25, 2012.

[20] The Applicant also alleges that Officer St-Martin committed an error by failing to enter the reason for which he did not meet the spousal requirements in the appropriate blank on the relevant form. He claims that this is a fatal error, and should invalidate the decision.

Respondents

[21] The Respondents provide an explanation for the series of events preceding the refusal of the Applicant's application: that the application was approved at stage 1 by Officer Médée, and then was transferred to Officer St-Martin for a stage 2 analysis because of concerns that the Applicant was inadmissible on security grounds. It was at this moment that Officer St-Martin learned that the Applicant was no longer living with his wife, and therefore could not grant the application since the Applicant no longer met all the criteria of section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[22] The Respondents argue that the application was delayed for two reasons: the Applicant's statement that he was a member of the Movement for the Actualization of the Sovereign State of

Biafra (MASSOB) from November 2002 to August 2005, and the criminal charge of assault against him that was filed on April 20, 2012.

[23] The Respondents emphasize that the Applicant's arguments are based on the false premise that his application for permanent residence was granted on October 26, 2011, when it was only approved "in principle", pending the outcome of the second part of the assessment.

[24] Appendix A of the Operational Guideline IP 8 – Spouse or Common-Law Partner in Canada Class, which was filed by the Applicant in his written submissions, makes it clear that all in-Canada applications for permanent residence have two stages. The first stage serves to verify the Applicant's eligibility; that is, whether the Applicant is in a *bona fides* marriage, and whether the sponsor is eligible to submit an undertaking. If the Applicant meets the criteria, he is considered a member of the spousal class. The Applicant met all the necessary criteria at this stage, and as a result Officer Médée told the Applicant and his wife that their application had been approved in principle, which did not mean that his application had been granted and that he would be granted permanent resident status in Canada.

[25] The Respondents admit that the Applicant should have received a written confirmation of his stage 1 approval, which he did not, for reasons which remain unknown. The Respondents explain that the second part of the assessment of an in-Canada permanent residence application is to verify that all other statutory requirements are met, such as determining whether the Applicant is inadmissible for medical, security or criminality grounds and verifying that he has a valid passport from his country of origin. The Respondents argue that at this second stage, the Applicant must still

meet the other criteria for membership in the spousal class provided by section 124 of *IRPR*, which is confirmed by section 5.15 of the Operational Guideline IP 8 – Spouse or Common-Law Partner in Canada Class.

[26] The Respondents go on to explain that once it was discovered that the Applicant might be inadmissible on security grounds due to his involvement with MASSOB and the pending criminal charges, his file was transferred to Officer St-Martin, an officer with special expertise in security issues, which is common practice for CIC. This, the Respondents explain, is why the Applicant's application was not processed before April 2013, at which time it was determined that there was insufficient evidence to conclude that he was inadmissible on security grounds.

[27] The Respondents also set forth that the application was delayed because of the criminal charges brought against the Applicant on April 20, 2012, as per section 11.1 of the Operational Guideline IP 8 – Spouse or Common-Law Partner in Canada Class, which states that officers should delay scheduling an appointment for confirmation of permanent residence until there is a final disposition of criminal charges. Officer St-Martin testified in her affidavit that she noticed that the Applicant had been criminally charged on April 26, 2013, when she took over the file.

[28] When Officer St-Martin discovered that the Applicant had separated from his wife, she proceeded with the processing of the application, and rendered a negative decision because the Applicant no longer met all the criteria to be considered in the spousal class. She did not render a decision that had already been taken by Officer Médée.

[29] The fact that the criminal charges brought against the Applicant were dismissed is irrelevant, since it was not before the decision-maker (*Isomi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1394 at paras 6-11; *Paul-Laforest v Canada (Minister of Citizenship and Immigration)*, 2012 FC 815 at para 16). If the information that the charges had been dismissed was not in the system, this was because the Applicant had failed to discharge his burden to update his application by advising the officer that he had been acquitted (*Dios v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1322; *Matheen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 395 at para 17). In any case, this fact had no impact on the final decision.

V. Analysis

[30] The issue in this file turns on whether Officer Médée took a decision in light of the interview she conducted with the Applicant and his wife on October 26, 2011 in accordance with CIC's decision-making processes. Section 5.15 of CIC's Operational Guideline IP 8 – Spouse or Common-Law Partner in Canada Class states that the requirements for spousal sponsorship have to be met when a decision on permanent residence is entered into FOSS. This would appear to indicate that a decision is taken by CIC on a sponsorship application when an entry to that effect is made in FOSS.

[31] Furthermore, the analysis document, which makes reference to the FOSS notes, cannot be given too much weight, as the entries appear out of chronological order, and were subject to amendments after the fact.

[32] Accordingly, the best evidence as to whether a decision was made on October 26, 2011 would have been the FOSS records. On the basis of the failure of the Respondents to provide the FOSS records, or any other evidence that could be relied upon to contradict the Applicant's evidence that the decision was made on that date, the Court finds that a decision was, in fact, made on October 26, 2011 to accept the Applicant's application and grant him permanent resident status.

[33] In arriving at this conclusion, a significant factor was the lack of FOSS notes. FOSS notes are considered reliable and acceptable business records evidence, as it is the Court's understanding that they cannot be altered after the fact. As a result, if an action turns on an entry made in FOSS, it is essential that FOSS notes be filed as evidence. In this case, the Respondents did not do so, and as such, an adverse inference can be drawn from this failure to provide essential evidence.

[34] The Applicant testified that the October 26, 2011 interview did, in fact, constitute a final acceptance of his application, basing this contention on various factors.

[35] This is supported by the letter calling the Applicant in for the interview with Officer Médée, which stated that the interview was "essential to finalize the processing of [his] application."

[36] The Applicant also stated in his affidavit that Officer Médée indicated at the October 26, 2011 interview that she was accepting the application. This evidence was uncontradicted by the Respondents. If Officer Médée's intention had been something other than approval of the application, an affidavit on her part was required. Officer Médée did not provide an affidavit. Officer St-Martin stated in her affidavit that this was because Officer Médée was on vacation.

However, Officer Médée remained a member of CIC and could have and should have filed an affidavit, particularly in light of the absence of the FOSS notes.

[37] The only evidence of Officer Médée's actions and intent are contained in the analysis document, which was created after the fact, and in Officer St-Martin's affidavit.

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[38] Rule 81(2) of the *Federal Courts Rules*, SOR/98-106, states:

Federal Courts Rules, SOR/98-106	*Règles des Cours fédérales*, DORS/98-106
81. (2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.	81. (2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

[39] In these circumstances, where the FOSS notes have not been provided, I am prepared to draw an adverse inference from the fact that Officer Médée failed to provide an affidavit, which would have served as a first-hand account of the actions taken as a result of the October 26, 2011 interview with the Applicant in place of the FOSS notes.

[40] In effect, the Respondents are asking the Court to rely upon hearsay evidence based upon hearsay evidence. The FOSS records, had they been entered into evidence, would have been entered as a form of business records, and most likely relied upon by Officer Médée as a form of past

recollection recorded (in effect, relying upon a document created by the witness as opposed to her memory) (see David M. Paciocco & Lee Stuesser, The Law of Evidence, 6th ed (Toronto: Irwin Law Inc. 2011) at 422). Not only were they not introduced into evidence, we do not have first-hand evidence explaining why there was no note of the interview with the Applicant as the Respondents allege. Secondly, Officer St-Martin presented Officer Médée's hearsay evidence as a second level of hearsay evidence. There is simply no reliable evidence to counter the Applicant's evidence that approval was accorded to him by Officer Médée and therefore entered into FOSS.

[41] Furthermore, as the Respondents conceded, Officer Médée failed to send a written confirmation in the form of a letter of the Applicant's approval at stage 1, which is CIC's standard practice. This failure was not explained in any way.

[42] In addition, there is no explanation for the significant delay between the interview and CIC's ultimate refusal of the Applicant's application, which is entirely attributable to CIC's actions, as there is no record of the actions taken for the year and a half following the October 26, 2011 interview. The only reference in the evidence to that time period is a note regarding Ms. Nakadidjata's advisement to CIC of her change of address on November 8, 2012.

[43] The Respondents attempted to justify the delay with the Applicant's admission of involvement with MASSOB and the criminal charges laid against him on April 20, 2012. This explanation is unsatisfactory. The Certified Tribunal Record shows that the Applicant revealed his involvement with MASSOB to the Respondents when he first filled out the In-Canada Application for Permanent Resident Status form on March 3, 2009, and as already mentioned, the analysis of the

FOSS notes shows that a security check was completed in August 2010, which concluded that there was insufficient evidence against the Applicant. It is unclear, then, why a security check would have taken an additional year and a half after the October 26, 2011 interview if one had already been completed.

[44] As for the criminal charges, although irrelevant at this stage, they do not explain the delay, as they were laid against the application on April 20, 2012, but did not come to CIC's attention until Officer St-Martin proceeded with the processing of the application on April 26, 2013.

[45] As a result, based on the Applicant's evidence that a decision was made accepting his application on October 26, 2011, as well as the Respondents' failure to provide the FOSS notes, Officer Médée's failure to provide an affidavit, the failure to send the letter advising of first stage approval, and the adverse inferences arising therefrom, rendering the hearsay affidavit evidence of Officer St-Martin of no weight, the Court finds on a balance of probabilities that the acceptance of the Applicant's application was made on the day of the interview, October 26, 2011.

[46] The only evidence provided indicates that Officer Médée's intention at the interview was to finalize the application, and because this evidence is uncontradicted, it must be accepted that an appropriate entry was made in the FOSS notes, thereby constituting the decision on the Applicant's permanent residence.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT the application is allowed.

« Peter Annis »

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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