Date: 20071022

Docket: IMM-3790-06

Citation: 2007 FC 1092

Ottawa, Ontario, October 22, 2007

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

OSARENREN KELVIN JESUOROBO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant in this matter, Mr. Osarenren Kelvin Jesuorobo, had planned to visit his brother, an immigration lawyer in Toronto, for about three weeks in the summer of 2006. He was unable to go through with his trip, as his visa application was denied by an officer at the Canadian High Commission in London, England. Mr. Jesuorobo now seeks judicial review of the officer's decision.

[2] The Court has reviewed the material filed by the parties and considered their counsels' representations. The applicant raises two main issues:

i) a breach of procedural fairness because he was not provided with an opportunity to comment on extrinsic information obtained by the visa officer when he consulted the FOSS database, viz.: firstly, that contrary to what was stated on his visa application with respect to his civil status (single), he had indicated in an earlier application that he was in the process of getting engaged; and secondly, that there was a "watch for" issued in reference to his brother because the latter would have been formally warned in 2003 re: employing persons without a valid and subsisting work permit in his law practice.

ii) the decision was made without consideration of all of the evidence provided by the applicant. Particularly, the officer did not consider the documentation pertaining to his brother's financial ability to pay for all his expenses during his visit to Canada.

[3] He also argues that in this case, as the officer filed a misleading affidavit which required extensive cross-examination, there are special circumstances justifying the awarding of costs against the respondent, in order to sanction the grave injustice and expense to the applicant.

[4] There is directly conflicting evidence before the Court as to whether or not an interview took place in London. On the one hand, the applicant swore an affidavit on September 8, 2006 indicating that since he was not interviewed by the officer, he was not given an opportunity to explain that his fiancé had ended his relationship before he left for the U.K a year prior; nor was he given an opportunity to rectify the notation in respect of

his brother, who denies having ever been warned as noted. In his affidavit, the applicant provides extensive documentation in respect of the only employee in his brother's law firm to which such statement could potentially refer.

[5] On the other hand, the visa officer swore an affidavit on May 2, 2007 (about ten months after the events) stating that he had in fact conducted a brief interview (twenty minutes), in which the issue of the applicant's marital status was specifically raised.

[6] The CAIPS notes in this matter do not indicate, either explicitly or implicitly, that such an interview was carried out. The special box to that effect was not used. Rather, the officer relies on his recollection of an interview; he testified that he recalls the file very well "because it was appealed quickly after the decision and it has been on [his] desk for a long time so [he] remembers what's in the file."

[7] The Court also notes that the certified record produced pursuant to Rule 317 of the *Immigration Act*, R.S.C. 1985, c. I-2, does not contain the bank statements provided by the applicant's brother in support of his offer to finance the visit. In his affidavit, the applicant swears that this information was filed with his application; it is included in the application record and there was no cross-examination of the applicant on this point.

[8] The Citizenship and Immigration Canada Operating Manual ("the Manual") specifies that the CAIPS notes are of critical importance for several reasons, notably as a record in the event of a Court challenge. Officers are directed to ensure that their CAIPS

notes clearly reflect the process followed in the making of each decision. Officers are also directed to ensure that "irrelevant...comments" do not form part of these notes.

[9] Similar directions are found in numerous other sections of the Manual, including under the heading "Procedure for Refusal" (OP 11, section 14) wherein it is stated that officers should "outline the process followed in coming to or making the decision" and "ensure that case notes in CAIPS are complete and accurate". Under the heading "Procedural Fairness" (OP 1, section 8), it is noted that officers must consider all the evidence and record (in CAIPS) the basis of their assessments, and their reasons for not considering particular evidence. With respect to visitor visa applicants, officers are advised "to express their own concerns and record the applicant's response in the case notes." The Manual also states: "The applicant must be made aware of the case to be met (…) For example, if an officer relies on extrinsic evidence (i.e. evidence received from sources other than the applicant), they must give the applicant an opportunity to respond to such evidence."

[10] In respect of the information and documentation required in support of a temporary residence visa application (OP 11, section 7), which applies to the applicant's situation, the Manual states that in assessing the adequacy of a visitor's financial resources, officers may exercise discretion in requesting documentation: "Officers may choose to limit or waive routine requirements for documentary evidence (...)when warranted, officers may consider a combination of any of the following documents as evidence of ability to support an intended visit." The list which follows includes "host's

or family member in Canada's evidence of income". As it can be appreciated from these guidelines, the financial information in respect of the applicant's brother, who was his sponsor for the proposed visit, and who, according to the letter written to Immigration Canada in support of his application, was to pay for all of the expenses, was relevant and could potentially have influenced the officer's assessment of the adequacy of the applicant's finances.

[11] Given that there is no reference to the applicant's brother's financial information in the CAIPS notes, and that this information is not contained in the certified record, the Court can only conclude that the aforesaid information was not considered by the officer. It is clear from the refusal letter and the CAIPS notes that one of the reasons for the refusal was the inadequacy of the applicant's financial means ("no personal funds seen"). Keeping in mind the information contained in the Manual (OP 11, section 7), the Court is thus satisfied that the officer did not consider material evidence in this case.

[12] It is important to note that the respondent cannot now rely on new evidence from the visa officer to change, explain or add to the refusal letter and the CAIPS notes, particularly with respect to the weight the officer accorded to each individual factor referred to therein. This is exactly why the Manual suggest that all relevant information must be included in the CAIPS notes and that irrelevant information should be excluded. See also *bin Abdullah v. Canada (MCI)*, [2006] F.C.J. No.1482, paragraphs 12 to 15, which explains why courts will generally give little weight to evidence an

officer gives months after the events in question, and with the knowledge that the decision is being challenged.

[13] Thus, insofar as the "watch for" notation is concerned, the Court can reasonably infer from its presence in the CAIPS notes that this information was relevant to the officer's decision. This makes good sense, as the officer was called upon to assess whether the applicant will respect Canada's immigration law and leave the country at the expiration of his temporary visa.

[14] It is trite law that a temporary visa applicant has no statutory right to an interview, and that visa officers are not required to interview applicants with regard to concerns raised by information provided by the applicant himself: see *Toor v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J No.733, at par. 17. As noted during the hearing, the duty of fairness is a variable standard, the content of which depends on the particular circumstances of the case: see *Baker v. Canada*, [1999] 2 S.C.R 817, at paragraphs 21-28. In the present case, the duty of procedural fairness incumbent on the visa officer was minimal. Nevertheless, it encompassed the obligation to give the applicant an opportunity to rectify or address any concern raised by extrinsic evidence; see *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 637 at para. 51.

[15] In light of the foregoing, the Court concludes that the visa officer breached his duty of procedural fairness. As stated by the Federal Court of Appeal in *Sketchley v.*

Canada, [2005] F.C.J. No. 2056, violations of procedural fairness are reviewable as questions of law on a correctness standard, independent of the pragmatic and functional considerations which would otherwise be germane.

[16] The Court therefore considers that the officer's decision should be set aside. In the circumstances, it is not necessary for the Court to determine which affiant is more credible and whether in fact an interview took place, for even if one did take place it is clear that the "watch for" notation was not discussed.

[17] As noted at the hearing, it would not be appropriate to send this application back for re-determination given the time which has elapsed since the visa was denied and the obvious change of circumstances since then. However, given that the applicant has paid the application fees, he should be given a credit in that respect, should he wish to present a new application for a temporary visa within the next twelve (12) months.

[18] It also bears explicit mention that as the decision is declared null and void, it should not be afforded any consideration in the treatment of any future applications for a temporary or permanent residence visa that Mr. Jesuorobo might make. Appropriate notes to this effect should be included in the FOSS and CAIPS systems.

[19] The parties confirmed that this matter does not raise any question that warrants certification. The Court agrees that this case turns on its own facts.

[20] In respect of costs, the Court is not satisfied that any exception should be made to the general principle set out in Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/2002-232, s. 11.

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ORDER

THIS COURT ORDERS that:

1. This Application is granted. The decision of the visa officer is set aside.
2. The respondent shall give effect to the directions of the Court set out at paragraphs 17 and 18 of the reasons.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3790-06
STYLE OF CAUSE:	Osarenren Kelvin Jesuorobo and The Minister of Citizenship and Immigration
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 19, 2007
REASONS FOR ORDER AND ORDER	The Honourable Justice Johanne Gauthier
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