

Date: 20071107

Docket: IMM-1554-07

Citation: 2007 FC 1154

Ottawa, Ontario, November 7, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

IHEANYI VICTOR IHEJIETO

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 of an Immigration Officer (the Officer), dated March 23, 2007, refusing an application for restoration of visitor status, made pursuant to the *Immigration and Refugee Protection Act*, 2001, c. 27 (the Act) and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The visa officer was not satisfied that the applicant would leave Canada at the end of his authorized stay.

ISSUES

[2] The only issue before the Court is whether the Officer committed a reviewable error by refusing the application to restore the applicant's visitor status.

FACTUAL BACKGROUND

[3] The applicant is a citizen of Nigeria, born on November 21, 1982. He came to Canada as a visitor with a temporary resident visa on November 3, 2004, valid for two weeks, with the intent of attending a seminar. He applied to have his visitor status extended until November 2, 2005, and then again until May 2, 2006. Both applications were granted.

[4] On January 8, 2005, the applicant married a Canadian citizen by the name of Jennie Phillip, and shortly thereafter submitted an application for permanent residence under the Spouse or Common-Law Partner in Canada class (SCLPC class). The application was refused in January 2006, and it was found that the marriage was not genuine and had been entered into for the purposes of facilitating the applicant's immigration to Canada. Ms. Phillip withdrew her sponsorship on February 20, 2006, stating she intended to file for divorce as soon as possible.

[5] On February 15, 2006, the applicant began a common-law relationship with his current spouse, Ms. Nicole Bors, who is also a Canadian citizen. He filed another application for permanent residence that was refused in August 2006 because the relationship had not been in effect for a year, and they did not qualify as common-law spouses.

[6] On April 27, 2006, the applicant sought to extend his visitor's visa for a third time. In support of his application, he submitted a note from his doctor that he required surgery, a follow-up to further correct an undescended testicle, for which he was required to wait at least six months. However, the application was refused in August 2006, because the officer was not satisfied that the applicant would leave the country at the end of his stay.

[7] On October 14, 2006, the applicant married Nicole Bors, and subsequently submitted a third application for permanent residence as a member of the SCLPC class.

[8] On October 31, 2006, the applicant made an application to restore his visitor's status. The decision resulting from this application is the subject of the present judicial review. He applied to remain in Canada until November 1, 2007. He alleged that he needed his status restored in order to set up an appointment for follow-up surgery, and because he is now married to a Canadian citizen and his application for permanent residence is pending.

DECISION UNDER REVIEW

[9] The negative decision was rendered in the form of a letter, dated March 23, 2007. The Free and Open-Source Software (FOSS) notes made by the Officer serve as the reasons for the decision. The entry dated March 23, 2007 sets out two reasons for the refusal:

- a) The Officer was not satisfied that the applicant was a *bona fide* visitor who would leave the country at the end of his authorized stay. The officer noted that counsel for

the applicant stated that the applicant had no return ticket and hoped that his spousal sponsorship would be evaluated prior to his required departure.

- b) The Officer further found that the applicant did not submit sufficient documents to satisfy him that the surgery was scheduled and would be completed in a reasonable timeframe. The applicant submitted a note dated March 16, 2007, by an attending physician containing the following two handwritten notes: “scheduled for nerve testing in coming months” and “surgery pending by urology” (Tribunal record, page 9).

RELEVANT LEGISLATION

[10] Section 182 of the Regulations provides that the officer shall restore the visitor status of a foreign national if the foreign national establishes that the initial requirements for the stay have been met. In the present case, the officer was not satisfied that the applicant would leave Canada by the end of the authorized period. This is a requirement imposed upon all temporary residents pursuant to section 183(1)(a) of the Regulations.

182. On application made by a visitor, worker or student within 90 days after losing temporary resident status as a result of failing to comply with a condition imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c), an officer shall restore that status if, following an examination, it is established that the visitor, worker or student meets the initial requirements for their

182. Sur demande faite par le visiteur, le travailleur ou l'étudiant dans les quatre-vingt-dix jours suivant la perte de son statut de résident temporaire parce qu'il ne s'est pas conformé à l'une des conditions prévues à l'alinéa 185a), aux sous-alinéas 185b)(i) à (iii) ou à l'alinéa 185c), l'agent rétablit ce statut si, à l'issue d'un contrôle, il est établi que l'intéressé satisfait aux exigences initiales de sa période

stay and has not failed to comply with any other conditions imposed.

de séjour et qu'il s'est conformé à toute autre condition imposée à cette occasion.

183. (1) Subject to section 185, the following conditions are imposed on all temporary residents:

183. (1) Sous réserve de l'article 185, les conditions ci-après sont imposées à tout résident temporaire :

(a) to leave Canada by the end of the period authorized for their stay;

a) il doit quitter le Canada à la fin de la période de séjour autorisée;

ANALYSIS

Standard of Review

[11] The applicant asks the Court to judicially review the decision of the Officer on the grounds that it is patently unreasonable. The respondent agrees with the applicant's standard of review. In a recent decision of this Court, *Patel v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 224, [2006] F.C.J. No. 295 (QL), at paragraph 12, Justice Luc Martineau wrote:

[...] It is therefore necessary to examine the merits of the present application. In this regard, I am satisfied that the standard of review applicable to a decision refusing restoration of status is that of reasonableness simpliciter: *Lim v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 810 at para. 5 (F.C.) (QL), 2005 FC 657, per von Finckenstein J.; *Novak v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 307 at para. 17 (F.C.) (QL), 2004 FC 243, per Mactavish J.

[emphasis added]

[12] In the present case, I do not find there is reviewable error regardless of the standard applied.

Did the Officer err by refusing to restore the applicant's visitor status?

[13] The applicant submits that the decision of the Officer is unreasonable for two reasons. First, the applicant argues that the Officer's decision is unreasonable because she refused the applicant's visitor status on the basis that the applicant hoped to avail himself of the SCLPC class and the Minister's Spousal Policy. Second, the applicant contends that it was unreasonable for the Officer to require that surgery be scheduled; the note from the doctor stating that surgery is pending the results of the urological tests should have been sufficient to convince the officer that the surgery would take place within a reasonable timeframe.

[14] The spousal policy established under section 25 of the Act creates a special exemption from the requirement that members of the SCLPC class must have lawful temporary resident status in Canada. Appendix H of the *Public Policy Under 25(1) of IRPA to Facilitate Processing in accordance with the Regulations of the Spouse or Common-law Partner in Canada Class* states the following:

The effect of the policy is to exempt applicants from the requirement under R124(b) to be in status and the requirements under A21(1) and R72(1)(e)(i) to not be inadmissible due to a lack of status; however, all other requirements of the class apply and applicants will be processed based on guidelines in IP2 and IP8.

[emphasis added]

[15] It is the applicant's visitor status restoration application which is in contention here. The Officer properly considered the totality of the applicant's circumstances whether he met the test for restoration as set out in section 182 of *Immigration and Refugee Protection Regulations*. The

Officer did not err when she determined that the applicant did not satisfy her that he would indeed leave at the end of the authorized stay.

[16] With regard to the applicant's second submission, it was reasonable for the Officer to conclude that there was no foreseen timeframe in which the follow-up surgery would proceed. The note from the doctor stating that surgery is pending the results of the urological tests does not give any indication of the time of its anticipated completion. Nothing in the evidence suggested that the applicant would be ready to leave by November 1, 2007, the last day of the requested extension, much less that the surgery would be completed at that time.

[17] Further, the Officer's decision was based on the totality of the evidence. In order to find a reviewable error, the whole of the decision must be unreasonable. A single finding of the Officer cannot be isolated from the other reasons in such a way as to render the entirety of the decision unreasonable. The applicant provided no evidence of his intention to return to Nigeria on or before November 1, 2007. An assessment of the whole file, including the evidence provided for the application for restoration, his immigration history, and particularly his previous marriage, would tend to suggest that the applicant's intent is to stay in Canada.

[18] No question for certification was proposed and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1554-07

STYLE OF CAUSE: **IHEANYI VICTOR IHEJIETO and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 24, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: November 7, 2007

APPEARANCES:

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|---|----------------|
| Martin Bauer | FOR APPLICANT |
| Lisa Laird | FOR RESPONDENT |
| <u>SOLICITORS OF RECORD:</u> | |
| Bauer & Company Law Offices Burnaby, British Columbia | FOR APPLICANT |
| John Sims, Q.C. Deputy Attorney General of Canada Vancouver, British Columbia | FOR RESPONDENT |