Federal Court  Cour fédérale

Date: 20150212

Docket: IMM-5323-13

Citation: 2015 FC 172

Ottawa, Ontario, February 12, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

RAJIB BARUA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] A delegate of the Minister of Public Safety and Emergency Preparedness [the Minister] ordered Mr. Barua [the Applicant] excluded from Canada pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*] and subparagraph 228(1)(c)(iii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the

Regulations]. Under subsection 72(1) of the *Act*, the Applicant now applies for judicial review. He asks the Court to set aside the exclusion order and return the matter for re-determination.

[2] The Applicant is now a 30 year-old citizen of Bangladesh. He first came to Canada in 2004 as a student, and most recently had a work permit that was valid until October 19, 2013. However, he left his job at a Petro Canada station in British Columbia in March, 2013, and returned to Bangladesh to get married. When he returned to Canada on June 22, 2013, he secured entry by presenting his still valid work permit.

[3] He soon obtained an offer of employment at another Petro Canada station in the Yukon, and so attended at a port of entry to apply for a new work permit on August 1, 2013. He was interviewed by Border Services Officer [BSO] McGlenn, who prepared a subsection 44(1) report, which recommended that he be excluded from Canada. BSO McGlenn indicated in the report that she had concerns the Applicant would not present himself for removal.

II. Decision under Review

[4] The matter then went to BSO Thompson, to whom the Minister has delegated the authority to issue exclusion orders under subsection 44(2) of the *Act*.

[5] BSO Thompson interviewed the Applicant in the waning hours of August 1, 2013, and set out his account of the interview in a declaration. According to BSO Thompson, the Applicant admitted using his work visa to enter Canada in June even knowing that there was no job to which he was returning. Furthermore, the Applicant said that he intended to reside permanently

in Canada, and that he would not return to Bangladesh even if a return ticket were purchased for him, as it would be harder to find employment there and he had limited resources.

[6] This was consistent with the details recorded by BSO McGlenn in the subsection 44(1) report, so BSO Thompson concurred with her report. Paragraph 20(1)(a) of the *Act* requires a foreign national who seeks to enter or remain in Canada with the intention of becoming a permanent resident to have a visa to that effect, and paragraph 41(a) makes a foreign national inadmissible for committing any "act or omission which contravenes, directly or indirectly, a provision of this Act." BSO Thompson therefore issued an exclusion order against the Applicant in the early morning of August 2, 2013. He also arrested the Applicant on the basis that it was unlikely that he would voluntarily appear for removal.

III. The Parties' Submissions

A. *The Applicant's Arguments*

[7] The Applicant says the primary issue is whether the BSOs properly considered subsection 22(2) of the *Act*, which permits people who intend to permanently immigrate to Canada to nevertheless become temporary residents so long as they also intend to abide by the law respecting temporary entry. According to the Applicant, the exclusion order should not have been issued because there is no evidence that either BSO considered the requisite dual intent.

[8] The Applicant says that he fit within that provision. Although he intended to permanently reside in Canada, that intent was down the road once he had complied with the requirements of

the *Act* and *Regulations*. The Applicant says that there is strong evidence to support that position, as he was attending the port of entry precisely to obtain a valid work permit and had obeyed the rules for nine years before the exclusion order was made. The Applicant says that it was unreasonable for the BSOs not to consider this favourable history of compliance, which far outweighs any of the comments that he made after he was refused entry to Canada.

[9] The Applicant submits that this case is like *Sibomana v Canada (Citizenship and Immigration)*, 2012 FC 853, 13 Imm LR (4th) 61 [*Sibomana*], where Mr. Justice Simon Noël allowed an application for judicial review on similar facts. Indeed, the Applicant notes that he has been complying with the rules for even longer than the applicants in *Sibomana*. Moreover, as in *Sibomana*, the Applicant says that the BSOs here should have relied upon section 22 of the *Act*, rather than paragraph 20(1)(a).

[10] In addition, the Applicant points out that the affidavits filed by the BSOs prior to this hearing do not mention that they considered the requirement of dual intent under section 22 of the *Act*, and so infers that it was not even considered.

B. *The Respondent's Arguments*

[11] The Respondent notes that only the exclusion order has been challenged in this judicial review application. The decision to deny the work permit was not challenged and the old work permit has long since expired. The Respondent also points out that the Applicant was given an opportunity to withdraw his application to enter Canada, but he instead said he intended to remain in Canada permanently.

[12] The Respondent states that the decision before the Court needs to be looked at in context. The Applicant had re-entered Canada with his old work permit when the job associated with that work permit had been terminated, and the Applicant told BSO McGlenn that he was travelling alone but then his friend showed up. These facts raised concerns about the Applicant's honesty.

[13] In light of this, the Respondent argues that the decision to issue the exclusion order was reasonable and well within the range of acceptable and possible outcomes. The Respondent submits that both BSOs asked the Applicant directly about his intention to leave if ordered to and he answered that he had no such intention, and that it was reasonable for them to rely on that statement. While the Applicant has a slightly different story, the Respondent says that the BSOs' notes should be preferred since they were recorded contemporaneously, unlike the evidence in the Applicant's affidavit which was only sworn some time after he was refused entry (*Muthui v Canada (Citizenship and Immigration)*, 2014 FC 105 at para 49 [*Muthui*]).

[14] As to the Applicant's argument that the BSOs do not refer to the requirement for dual intent in their affidavits, the Respondent states that stating such would have been inappropriate since they are not permitted to supplement the reasons in the tribunal record.

IV. Issues and Analysis

A. *Standard of Review*

[15] In *Sibomana* at para 18, Justice Noël applied the standard of reasonableness with respect to an exclusion order issued under section 44(2) of the *Act*. Accordingly, the Court should not

interfere if BSO Thompson's decision is intelligible, transparent, justifiable, and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. This Court can neither reweigh the evidence that was before the BSO, nor substitute its own view of a preferable outcome: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339.

B. *Was the Border Services Officer's Decision Reasonable?*

[16] The Applicant attempted to buttress his arguments by providing some evidence in his affidavit filed as part of his application record. For its part, the Respondent filed affidavits of the two BSOs in this case. The general rule in this regard is that the evidentiary record for purposes of a judicial review application is restricted to that which was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20, 428 NR 297). Although there are some exceptions to this general rule, none apply to the present case. Accordingly, the additional evidence adduced by the Applicant and by the Respondent subsequent to the date of the decision to issue the exclusion order should not and will not be considered by the Court in reviewing such decision.

[17] That said, some of the Applicant's evidence was about what he said at the interview, which is admissible because it was purportedly before the decision-maker (see e.g. *Vancouver Wharves Ltd v Canada (Attorney General)*, 137 FTR 65 at para 5, 3 Admin LR (3d) 159 (TD);

Muthui at paras 48-49). However, where it conflicts with the notes of the two BSOs, I prefer their notes because they were recorded contemporaneously (*Muthui* at para 49).

[18] The Applicant's essential argument is that the decision to issue the exclusion order was unreasonable since neither of the BSOs properly assessed the Applicant's dual intent under section 22 of the *Act*. The Applicant further suggests that issuance of the exclusion order on the basis of paragraph 20(1)(a) of the *Act* was not reasonable.

[19] I disagree with the Applicant that the factual circumstances of this case are identical to those in *Sibomana*. In *Sibomana* (as in this case), the applicants had sought entry on the basis of a temporary work permit. However, unlike the Applicant here, the applicants in *Sibomana* had stated that "although they considered the possibility of obtaining permanent resident status, they intended to leave the country when the temporary status expired" (at para 28, emphasis added).

[20] In view of this express intention to leave the country, Mr. Justice Noël determined in *Sibomana* that the delegate's decision to issue the exclusion order under section 41 of the *Act* could not be justified or maintained under paragraph 20(1)(a), as that paragraph applies only to entry to become a permanent resident. Accordingly, since the exclusion order should have been issued with reference to section 22, which applies to a temporary resident, the exclusion order under review in *Sibomana* did not fall within a range of possible, acceptable outcomes defensible in respect of the facts and law.

[21] In this case, the record before the Court shows that the Applicant had no intention to leave the country upon expiry of a temporary work permit. The notes of BSO McGlenn dated August 1, 2013 state as follows:

> Subject was asked if he was allowed into Canada would he depart Canada, subject replied "No Maam" Subject stataed [*sic*] he has no money to buy a ticket, subject was asked if a ticket was bought for him if he would get on the airplane and return to Bangladesh, subject replied "no maam there is no jobs for me in Bangladesh. Subject was asked if he intended to remain in Canada permanently? He replied "yes"

The notes of BSO Thompson dated August 2, 2013, are to similar effect:

> BARUA was asked why he has not yet applied for PR status in Canada, he responded because he had not met the ILETS [*sic*] requirement
> BARUA was asked if the Work Permit application was refused would he leave Canada on his own, BARUA responded "no sir, because I don't have the ticket fare."
> BARUA was asked if a ticket were purchased for him, would he leave. BARUA responded, "probably not sir, the situation back home is not the same."
> BARUA went on to say there are no jobs there, his family depends on him and if he does not send money there is no food
>
> …
>
> BARUA was arrested because he is unlikely to appear for removal because:
> 1) BARUA has stated he will not leave Canada
> 2) BARUA has stated even is [*sic*] an airline ticket were ourchased [*sic*] for him he will not leave Canada…

[22] In view of the foregoing, it can hardly be said that the Applicant here had the same intention as the applicants in *Sibomana* as noted above. If anything, the BSOs' notes show that the Applicant's intention here was to enter on the basis that he would be staying permanently, and this being so issuance of the exclusion order with reference to paragraph 20(1)(a) was appropriate and reasonable. This section provides as follows:

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,	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
(a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; …	*a)* pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;

[23] The fact that the Applicant had re-entered Canada on June 22, 2013 with his old work permit, knowing his job associated with that work permit had been terminated, and that he told BSO McGlenn that he was travelling alone but then his friend showed up, in all likelihood heightened the BSOs' concerns about the Applicant's intentions upon being allowed entry. Indeed, BSO McGlenn's notes state that the Applicant had been "dishonest during exam, withholding information," and that the Applicant had been afforded the opportunity to withdraw his application for entry.

[24] In view of the foregoing, the decision to issue the exclusion order was reasonable in the circumstances of this case. The reasons for such decision are intelligible, transparent, and justifiable and the outcome falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

V. Conclusion

[25] In the result, the Applicant's application for judicial review should be and is hereby dismissed. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and that no serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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