Federal Court  Cour fédérale

Date: 20150917

Docket: IMM-1334-15

Citation: 2015 FC 1086

Montréal, Quebec, September 17, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

NITISH GUPTA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision by a Minister's Delegate of the Canada Border Services Agency (CBSA) dated March 17, 2015, issuing the applicant an Exclusion Order pursuant to paragraph 41(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for failing to comply with paragraph 20(1)(b) thereof. This provision requires that a foreign national seeking entry into Canada establish that s/he hold the visa or other document

required by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. In this case, the Minister's Delegate determined that the applicant was entering Canada to work without first obtaining a work permit, contrary to subsection 8(1) of the IRPR.

[2] For the reasons that follow, I conclude that the Exclusion Order should be quashed.

II. Facts

[3] The applicant, Mr. Gupta, is a 23-year-old citizen of India. On May 16, 2013, he received a two-year work permit from Citizenship and Immigration Canada to work as a server for a Preeceville, Saskatchewan restaurant, RN Motel Ltd. O/A Chris' Place (the Employer). Mr. Gupta was nominated for permanent residence under the Saskatchewan Immigration Nominee Program on the basis of this employment.

[4] In January 2015, the applicant travelled to British Columbia to visit his girlfriend and, while there, underwent training in bread baking at a Surrey, BC restaurant affiliated with the Employer. He also worked in other roles at the Surrey, BC restaurant. In March 2015, the applicant and his girlfriend traveled to the United States for tourism. On March 17, the applicant tried to re-enter Canada and was interviewed by the CBSA. As part of this interview, he provided a signed Declaration to the CBSA. This Declaration states that the Employer asked the applicant to work at the Surrey, BC restaurant to learn how to make bread; that the applicant would receive pay from the Employer as if he was still working in Saskatchewan; and that the applicant would return to Saskatchewan on April 3, 2015.

[5] Border Services Officer Trainee Joseph Briffa prepared a report under subsection 44(1) of the IRPA following his interview of the applicant. He recommended that the applicant be issued a one-year exclusion order on the basis that he had engaged in work without authorization. This report was referred to the Minister's Delegate, Officer Richard Wakelam, who reviewed Officer Trainee Briffa's report and spoke to the applicant. In this interview, the applicant stated, contrary to his Declaration, that he was not yet scheduled to return to Saskatchewan from British Colombia. He also stated that he was aware of the conditions of his Canadian work permit and chose not to abide by them. The Minister's Delegate subsequently issued the one-year Exclusion Order.

III. Decision

[6] The Minister's Delegate issued the applicant the Exclusion Order on the basis of the following factors:

1. The applicant was aware of the following conditions that appear on his work permit, but chose not to abide by them:
    a. Must not work in any other location than specified (Preeceville, Saskatchewan);
    b. Must not work for any other employer (Chris' Place);
    c. Must not work in any other occupation (server).
2. The applicant is seeking a provincial nomination for Saskatchewan to expedite his permanent resident application under the premise that he is employed and contributing in a positive manner to the province of Saskatchewan.
3. The applicant has no immediate family in Canada and no Canadian children.

[7] The Minister's Delegate also considered in his decision his discussions with, and the report of, Officer Trainee Briffa, who had also interviewed the applicant.

IV. Issues

[8] The applicant argues that the decision to issue the Exclusion Order was erroneous in two respects, both of which concern the interpretation of provisions of the IRPR:

1. Section 8 of the IRPR is inapplicable in the circumstances of this case.
2. The proper procedure for dealing with concerns about violation of a work permit, per subsection 218(1) of the IRPR, was not followed.

V. Standard of Review

[9] Since the issues in dispute concern the interpretation of regulatory provisions under the decision-maker's home statute (the IRPA) which are not of central importance to the legal system and are not outside the specialized area of expertise of the decision-maker, the standard of reasonableness applies to my review of the Minister's Delegate's interpretation of the IRPR and the procedures contemplated therein: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 55 [*Dunsmuir*]. Per para 47 of *Dunsmuir*:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] However, there is authority for the proposition that the range of possible, acceptable outcomes may be narrower on questions of law: *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 at para 72; *Canada (Attorney General) v Abraham*, 2012 FCA 266 at para 45.

VI. Analysis

A. *Whether section 8 of the IRPR applies in the present circumstances*

[11] As indicated above, the Exclusion Order was issued under paragraph 41(a) of the IRPA. This paragraph provides that a foreign national "is inadmissible for failing to comply with" the IRPA "through an act or omission which contravenes, directly or indirectly, a provision of this Act."

[12] The specific contravened provision of the IRPA cited in the Exclusion Order is paragraph 20(1)(b), which requires every foreign national (with exceptions not applicable here) who seeks to enter Canada as a temporary resident to establish "that they hold the visa or other document required under the regulations."

[13] The "regulations" referred to here are the IRPR, and the pertinent provision thereof cited in the Exclusion Order is section 8, which provides that "[a] foreign national may not enter Canada to work without first obtaining a work permit." Accordingly, the accusation against the applicant is that he entered Canada to work "without first obtaining a work permit."

[14] There is no doubt that the applicant did hold a valid work permit. It appears that the Minister's Delegate's concern was rather that the conditions of the applicant's work permit were not respected.

[15] The applicant argues that he did not contravene section 8 of the IRPR because he had a work permit, and therefore did first obtain a work permit before entering Canada.

[16] The respondent responds that the applicant's work permit related to work in Saskatchewan, which is quite distinct from the work he was doing in BC and therefore insufficient to constitute a valid work permit for the purposes of section 8 of the IRPR. In this sense, the applicant entered Canada without a work permit. The respondent adds that the applicant even acknowledged that he was working in violation of the conditions of his work permit. The respondent submits that it must have the ability to control the entry into Canada of a worker who intends to ignore the conditions of his or her work permit.

[17] On this point, the applicant argues that the Exclusion Order was not based on a concern that the applicant would work in violation of the work permit upon entering Canada. Rather, the applicant asserts, the Exclusion Order was based on alleged violations of his work permit that took place before he left. The respondent disagrees, citing the applicant's own statement that he intended to work in BC (in alleged violation of his work permit) the very next day. However, a review of the Declaration by the Minister's Delegate in relation to the Exclusion Order and Officer Trainee Briffa's s.44 Report reveals clearly that the concern was with regard to past violations of the work permit. There is no expression in those documents of a concern that there

would be further violations. The closest the Minister's Delegate comes on this point is the following statement in his Declaration: "GUPTA states that he was planning to stay longer in BC and was not yet scheduled to return to Saskatchewan." But even this does not indicate that the applicant plans to work in BC after entry.

[18] Regardless of whether the Exclusion Order was based on past violation of the work permit, or concern about possible future violations, one key issue in the present application is whether a person can be found to have entered Canada without first obtaining a work permit (in contravention of section 8 of the IRPR) where they have a work permit, but intended to work in violation of its conditions. It appears that there is no jurisprudence directly on point.

[19] At this point, it is useful to cite the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21, on the proper approach to statutory interpretation:

> […] Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[20] Section 8 of the IRPR is short and not ambiguous. I find it easy to understand. It simply requires that a foreign national who enters Canada to work must first obtain a work permit. The Minister's Delegate's decision, as well as the respondent's position, essentially reads in a

requirement that is not included in section 8: that the work to be done under the work permit be in compliance with the conditions thereof.

[21] Certainly, violations of the terms of a work permit are of concern, and there are measures that can be taken against the holder of a work permit who ignores the conditions of the permit. However, there is no indication that section 8 was intended to address such a situation. A reading of section 8 in its grammatical and ordinary sense harmoniously with the scheme and object of the IRPA and the intention of Parliament does not permit this.

[22] In my view, it was unreasonable for the Minister's Delegate to read in a requirement, especially in view of the important consequences for the applicant of the Exclusion Order. In order to conclude that violation of the conditions of a work permit could lead to an exclusion order under section 8 of the IRPR, that provision would have to be more explicit. I note that the Minister's Delegate did not explore why he concluded that work in violation of a work permit equated to absence of a work permit. This lacuna on such an important threshold issue leads me to conclude that the decision-making process on this crucial point lacked justification, transparency and intelligibility, per *Dunsmuir*.

B. *Whether proper procedure was followed*

[23] The applicant also argues that an exclusion order is not the appropriate sanction in these circumstances. He asserts that concerns about alleged violation of a work permit should instead be referred to the Immigration Division for consideration and, if necessary, sanction. The applicant points to subsection 228(1) of the IRPR which provides for various grounds of

inadmissibility. Some grounds of inadmissibility can lead to an exclusion order, whereas others cannot and must instead be referred to the Immigration Division. The applicant notes that the list of grounds in paragraph 228(1)(c) (which concern inadmissibility under section 41 of the IRPA and which can lead to an exclusion order) is limited to matters that are quite straightforward to determine, *e.g.* whether a person failed to appear, failed to leave Canada, or failed to obtain an authorization. Other matters are not dealt with by an exclusion order. The applicant notes also that this list of grounds that can lead to an exclusion order includes subparagraph 228(1)(c)(iii) which refers to "failing to establish that they hold the visa or other document as required under section 20 of the Act." The applicability of this provision in the present situation is at the center of this section of my analysis.

[24] The applicant argues that the determination of whether the holder of a work permit has contravened or will contravene the terms of that permit is far from the kind of straightforward determination that is contemplated in the rest of paragraph 228(1)(c) of the IRPR. For example, there may be issues of doubt as to the meaning of certain conditions, as discussed in *Singh Brar v Canada (Citizenship and Immigration)*, 2006 FC 1502. In the absence of any jurisprudence on this question, and recognizing the important consequences the Exclusion Order would have for the applicant, I am inclined to agree with the applicant. I do not conclude that any issues of doubt about the applicant's contravention of the conditions of his work permit necessarily exist in the present case, but the possibility of such issues does serve to demonstrate that this type of situation (concern about alleged violation of a work permit) should be referred to the Immigration Division, and was not intended to be dealt with by means of an exclusion order. It is certainly possible, based on the facts on the record, that the applicant knowingly acted in

violation of his work permit (and even that he intended to continue working in violation of his work permit), but that is a matter that should be addressed in a forum other than a decision leading to an exclusion order.

VII. Conclusion

[25] I conclude that both of the grounds argued by the applicant have merit. The Minister's Delegate's decision was unreasonable in both respects and the Exclusion Order should be quashed.

[26] The respondent takes the position that this matter is too fact-specific to merit certification of a serious question of general importance. At the respondent's suggestion, I will not certify a question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application is granted and the decision of the Minister's Delegate is quashed.

2. There is no order of costs.

3. No serious question of general importance is certified.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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