Federal Court Cour fédérale

Date: 20160927

Docket: IMM-4714-15

Citation: 2016 FC 1088

Ottawa, Ontario, September 27, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CARLOS RICARDO ALVAREZ RUEDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Carlos Ricardo Alvarez Rueda, is a citizen of Mexico who seeks judicial review of a decision of an immigration officer, refusing his application for an open work permit. His application was based on what he describes as a common law relationship with another Mexican citizen, Edenis Solis Sanchez, who holds a valid study permit in Canada.

[2] For the reasons explained in greater detail below, this application is dismissed. The officer was not satisfied that Mr. Rueda would leave Canada by the end of the period authorized for his stay. Based on the evidence before the officer, that conclusion was not unreasonable. Mr. Rueda argues that the officer's conclusion that there was a discrepancy between Mr. Rueda's evidence and that of Ms. Sanchez, as to whether they were in a common-law relationship, ignored relevant evidence, was based on an erroneous finding of fact, and was made in breach of the officer's obligations of procedural fairness. However, any of these alleged errors would not be material to the officer's decision as a whole. The officer's conclusion, that Mr. Rueda had not established he would leave Canada by the end of the period authorized for his stay, was a determinative finding which precluded Mr. Rueda from succeeding in his application for an open work permit.

II. Background

[3] Mr. Rueda first came to Canada as a visitor on January 14, 2013 and was authorized to stay until July 14, 2013. Prior to the expiration of his stay in Canada, he went to the United States, returning to Canada as a visitor in July 2013, when he was authorized to stay until January 17, 2014. He made an application to extend further his period of stay in Canada but returned to Mexico in February 2014 before a decision was made on this extension. In March 2014, Mr. Rueda again returned to Canada as a visitor and was authorized to stay until September 5, 2014.

[4] The Certified Tribunal Record indicates that Mr. Rueda's application to extend his period of stay in Canada was refused on September 11, 2014. However, it appears that he did not

receive the refusal letter. This letter was resent to Mr. Rueda on May 27, 2015. He then applied for judicial review of the decision, and that application was dismissed at the leave stage by the Federal Court on October 5, 2015. Mr. Rueda applied for restoration of his status on August 6, 2015.

[5] In the meantime, on July 11, 2015, Mr. Rueda submitted the application for an open work permit that is the subject of this judicial review. That application was based on a common-law relationship with Ms. Sanchez, which he alleges began on or about April 25, 2014. In a decision dated October 23, 2015, an immigration officer refused Mr. Rueda’s application, based on two key considerations.

[6] First, the officer noted that Mr. Rueda was seeking an open work permit to accompany a common law partner with whom he had been in a relationship since April 2014. However, the common law partner did not declare that she was in a common law relationship on her application for a study permit in April 2015. The officer found this contradictory evidence to be relevant notwithstanding evidence of cohabitation.

[7] Second, the officer was not satisfied that Mr. Rueda would leave Canada at the end of any period authorized for his stay. The officer’s decision indicates consideration of the length of the proposed stay in Canada and the employment prospects in Mr. Rueda’s country of residence. The officer noted that Mr. Rueda had first come to Canada on a Temporary Resident Visa issued in 2012, that he had applied twice for Visitor Record extensions to remain to complete studies for which he did not require a study permit, and that he had already remained in Canada well

past his intended stay. The decision states that the officer was not satisfied that Mr. Rueda had demonstrated any ties to his home country that would warrant his return there.

III. Issues and Standard of Review

[8] Mr. Rueda identifies the issues for the Court's consideration to be as follows:

> A. Did the officer breach the principles of fairness and natural justice by failing to provide Mr. Rueda with an opportunity to respond to the extrinsic evidence significantly used by the officer in refusing his open work permit application?
>
> B. Did the officer base the decision on erroneous findings of fact?
>
> C. Did the officer ignore relevant evidence in making his decision?

[9] The issue of procedural fairness is to be reviewed on a standard of correctness, and the other issues raised by Mr. Rueda are to be reviewed on a standard of reasonableness.

IV. Analysis

[10] In challenging the second consideration underlying the refusal of his application, the officer not being satisfied that Mr. Rueda would leave Canada at the end of any period authorized for his stay, Mr. Rueda argues that the officer ignored the evidence that he had repeatedly come to Canada and departed in compliance with the law before the end of his permitted period of stay. Mr. Rueda submits that he has at all times attempted to comply with

Canadian immigration law, applying for extensions of his permitted periods of stay. He recognizes that there was an anomaly following September 2014, when he was out of status, but explains that this was because he had not received the decision refusing his application for an extension. He notes that he applied for restoration of his status once that decision was received.

[11] The officer is assumed to have weighed and considered all the evidence presented unless the contrary is shown (see *Rahman v Canada (Minister of Citizenship and Immigration)*, 2016 FC 793 at para 10, referring to *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). Mr. Rueda relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998) 157 FTR 35, at para 17, for the principle that the more important the evidence that is not mentioned specifically and analysed in an agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact without regard to the evidence. I do not consider this principle to apply on the facts of the present case. The facts on which Mr. Rueda relies do not contradict the officer's finding that Mr. Rueda had remained in Canada well past his intended stay. As noted by the Respondent, the Minister of Citizenship and Immigration, Mr. Rueda remained in Canada without status for over a year, between September 2014 when his status expired and October 2015 when his work permit application was refused. I do not regard the absence of a detailed analysis of Mr. Rueda's departures from and returns to Canada, or his applications for extensions of his status, to render the decision unreasonable.

[12] Mr. Rueda also challenges the officer's finding that he has remained in Canada well past his intended stay, relying on the decisions in *Stanislavsky v Canada (Minister of Citizenship and*

Immigration), 2003 FC 835 [*Stanislavsky*] and *Patel v Canada (Minister of Citizenship and Immigration)*, 2006 FC 224, to the effect that a person's initial intentions can change. Those decisions held that remaining in Canada during the processing of an application for permanent residence can constitute an intention of staying in Canada for a temporary purpose, notwithstanding that the applicant may have initially entered Canada for a different temporary purpose. They are accordingly distinguishable from the present case. The officer in the present case did not reach conclusions based on an erroneous analysis that remaining in Canada during the processing of a more permanent application cannot constitute a temporary purpose. Nor did the officer conclude, as did the officer in *Stanislavsky*, that the original purpose for coming to Canada had been satisfied. The officer's analysis in the present case is not premised on Mr. Rueda's purpose for being in Canada but rather the fact that he has remained in Canada past his intended stay. Again, I find no basis to conclude that the officer's decision is unreasonable.

[13] Mr. Rueda also notes that the officer's decision refers to employment prospects in his country of residence and concludes that Mr. Rueda had not shown any ties to his home country that would warrant his return. Mr. Rueda argues that there is no evidence, or analysis in the officer's decision, supporting this conclusion. However, it is trite law that an applicant for a temporary resident visa bears the onus of establishing that he or she will leave at the end of the authorized period (see *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 614 at para 41). The Applicant has not referred Court to any evidence that was before the officer as to his employment prospects in Mexico. Accordingly, there is no basis to find this aspect of the officer's analysis or decision to be unreasonable.

[14] Turning to the officer's concerns about conflict in Mr. Rueda's evidence and that of Ms. Sanchez as to whether they were in a common-law relationship, Mr. Rueda raises arguments about procedural fairness, and submits that the officer ignored evidence and made the decision based on erroneous findings of fact. In support of his procedural fairness argument, he submits that Ms. Sanchez's study permit application was extrinsic evidence to which Mr. Rueda should have been afforded an opportunity to respond. The Minister takes the position that this application for judicial review should fail in any event because, even if the Court were to accept the procedural fairness argument, it would not have affected the outcome of Mr. Rueda's application, as he had not satisfied the officer that he would leave Canada at the end of the authorized stay.

[15] Mr. Rueda responds that, if he were to succeed on his procedural fairness argument, this should warrant success on judicial review, even if he were to fail in challenging the finding that he would not depart Canada when required. He relies on *Baybazarov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 665 [*Baybazarov*]. That case involved a rejection of an application for permanent residence based on information in a Canada Border Services Agency [CBSA] report, related to the applicant's inadmissibility to Canada, that had not been disclosed to him. In response to the applicant's arguments challenging the procedural fairness of that process, the respondent argued that, regardless of whether the CBSA report had been disclosed, the applicant would still have been found inadmissible to Canada. The Court held that the failure to disclose the CBSA report amounted to a breach of procedural fairness and allowed the application for judicial review.

[16] In my view, *Baybazarov* does not assist Mr. Rueda. In that case, the sole issue was the applicant's inadmissibility based on involvement in illegal transactions, and the Court held that disclosure of the CBSA report was necessary for the applicant to have a meaningful way of responding to the officer's concerns that his source of income was legitimate. It is therefore distinguishable from the present case. Providing Mr. Rueda with opportunity to respond to the officer's concerns about the legitimacy of his common-law relationship may have addressed that concern. However, that result would have had no impact upon the other finding, that the officer was not satisfied that Mr. Rueda would leave Canada at the end of any authorized stay.

[17] I note that the Minister relies on *Mobil Oil Canada Ltd. v Canada – Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 [*Mobil Oil*] in support of its position that the actual effect of a breach of procedural fairness must be considered. In *Canada (Minister of Citizenship and Immigration) v. Patel*, 2002 FCA 55, the Federal Court of Appeal relied on *Mobil Oil* in concluding that, even if the officer in that case had committed a breach of procedural fairness in making her assessment of a permanent residence application, that breach was immaterial to the result.

[18] In the present case, the officer's conclusion, that Mr. Rueda had not satisfied the officer that he would depart Canada at the end of any authorized stay, is a determinative finding. I see no relationship between that finding and the arguments or findings related to Mr. Rueda's common law relationship. In the absence of a reviewable error in the finding related to departure at the end of the authorized stay, this application for judicial review must be dismissed. Success on any of Mr. Rueda's arguments related to his common law relationship, including the

procedural fairness argument, would not alter the result of this judicial review. It is accordingly unnecessary for the Court to consider the merits of those arguments.

V. Certified Question

[19] Related to the issue canvassed immediately above, Mr. Rueda proposes the following question for certification for appeal:

> "Whether a decision made by an immigration officer who fails to provide an opportunity to address extrinsic evidence still stands if the result of the application could otherwise be the same?"

[20] The Minister opposes certification on the basis that this proposed question does not meet the test for certification, being a question of general importance which transcends the interests of the parties to the litigation and contemplates issues of broad significance or general application, as well as being a question dispositive of the appeal (see *Liyanagamage v Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4). The Minister argues that the proposed question is not one of general importance, because the law is settled on the issue the question raises. The Minister refers to the decision in *Hashi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 154 [*Hashi*], in which a similar question was proposed for certification. In declining to certify the question, Justice Mosley held as follows at paragraphs 31 to 32:

> [31] The applicant has proposed the following question for certification:
>
> > Where a visa officer, when deciding an application for membership in the Convention refugee abroad class or humanitarian protected persons abroad designated class, breaches the duty of fairness owed the applicant,

> a) must the decision be quashed even where the remedy would be apparently futile as long as the visa officer is not bound in law to reject the application on reconsideration or,
>
> b) can the decision be sustained as long as the breach of the duty of fairness is not material to the decision and the decision as a whole, removing from consideration any elements affected by the breach, is reasonable?
>
> [32] The respondent opposes certification of the proposed question on the ground that it is not a serious question of general importance. Not every breach of procedural fairness is a reviewable error. The applicant's question can only be answered on a case by case basis. I agree.

[21] Mr. Rueda argues that *Hashi* is distinguishable, because the respondent in that case contended that the non-disclosure of extrinsic evidence was not material to the outcome of the decision. Mr. Rueda submits that, in the case at hand, the Minister has not contended that the non-disclosure was immaterial to the outcome. It is Mr. Rueda's position that the officer relied heavily on Ms. Sanchez's declaration in reaching the decision.

[22] While I agree that the inconsistency the officer found between Mr. Rueda's application and Ms. Sanchez's declaration was material to the decision, it was material only to the finding related to the common law relationship. The Minister has argued, and the Court has concluded, that this finding was not material to the other, equally determinative finding, that Mr. Rueda had not satisfied the officer that he would depart Canada at the end of any authorized stay. This illustrates, as concluded by Justice Mosley in *Hashi*, that whether a breach of procedural fairness is a reviewable error can only be answered on a case by case basis. The question proposed by Mr. Rueda for certification is one on which the law is settled, through the jurisprudence in and

following *Mobil Oil*, requiring analysis on the facts of each individual case. I therefore find that it is not a question of general importance and is not appropriate for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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