Federal Court

Cour fédérale

Date: 20180209

Docket: IMM-2962-17

Citation: 2018 FC 158

Ottawa, Ontario, February 9, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SERHII PARANYCH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] A delegate of the Minister of Public Safety and Emergency Preparedness issued an exclusion order to Mr. Paranych pursuant to section 228 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 for attempting to enter Canada to work without first obtaining a work permit.

[2] For the reasons that follow, this application for judicial review is allowed and the exclusion order is set aside.

[3] Mr. Paranych is a 23 year old citizen of the Ukraine. He first came in Canada in October 2015, on a study permit and a work permit, valid until December 2016. He subsequently obtained a further study permit valid until March 2017. He studied English from November 2015 to December 2015, and later studied at Greystone College of Business from January 2016 to December 2016.

[4] On June 14, 2017, he was issued a visitor permit valid until June 25, 2017. The permit noted that his temporary resident status was restored pursuant to subsection 182(1) of the *Regulations*, which allows an officer to restore the status of a visitor, worker, or student if they apply within 90 days of losing their temporary resident status.

[5] On June 19, 2017, because his permit was about to expire, and because Mr. Paranych wanted a work permit, he engaged in "flagpoling" at the port of entry in Surrey, British Columbia. Flagpoling is a process whereby one applies for the renewal of a work or study permit by leaving Canada at a border crossing with the U.S.A., and re-entering, usually immediately. Apparently, this process is commonly used as it saves a lot of time when compared to the process of making an application in writing or electronically.

[6] Upon re-entry to Canada, Mr. Paranych made an application for a work permit and was interviewed by Border Service Officer Trainee Leone [BSOT Leone] and Border Service Officer

Arkwright. The duration of the interview is in dispute, but the result was that Mr. Paranych was required to return for further examination on June 26, 2017, as BSOT Leone suspected that he had worked without authorization at the Coquitlam Milestone Restaurant from March 2017 to June 2017.

[7] On June 26, 2017 after a further interview, BSOT Leone created a "Report Under Subsection 44(1)" of the *Act* stating his belief that Mr. Paranych was inadmissible to Canada. The Minister's delegate Officer Antonio [the Officer] reviewed the report, interviewed Mr. Paranych, and issued an exclusion order pursuant to section 228 of the *Regulations*. The order states that the Officer was satisfied that on the balance of probabilities Mr. Paranych was a foreign national described of the subsection 41(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and was thus inadmissible for failing to comply with the *Act*.

[8] Specifically the Officer references paragraph 20(1)(b) of the *Act*, which requires "[e]very foreign national … who seeks to enter or remain in Canada must establish … to become a temporary resident, that they hold the visa or other document required under the regulations". The Officer also observed that section 8 of the *Regulations* states that a "foreign national may not enter Canada to work without first obtaining a work permit."

[9] Following the issuance of the exclusion order, Mr. Paranych returned to the Ukraine on July 6, 2017.

[10] The application raises two issues. The first relates to the reasonableness of the decision, and the second is a question of procedural fairness.

[11] The procedural fairness issue rests on the affidavit evidence of Mr. Paranych. He submits that the statements he made that he had been working without a valid permit were not voluntary, and thus should not have been relied on by the Officer. He says that he suffers from type 1 diabetes, and was held and questioned for approximately 7 hours. He did not have his medication on him as he did not anticipate he would be held for questions for such a long period of time. He swears that four to five hours into the interview he began to suffer from hypoglycemia and advised BSOT Leone that he required insulin. He swears that BSOT Leone responded that it was “not my problem if you didn’t bring your insulin with you” and that he was not offered food or a sugary drink. The statement that he had been working without a valid permit was made after the refusal to provide him with medical assistance.

[12] The others involved in the two interviews dispute the evidence offered, both as to the duration of the interviews, and the request for medical assistance. However, in light of my finding on the first issue, these differences need not be reconciled.

[13] As to the first issue, it is submitted that the decision was unreasonable because the Officer was not authorized to make an exclusion order for the reasons, and on the basis, that he did.

[14] Mr. Paranych submits he was not in violation of paragraph 20(1)(b) of the *Act* or section 8 of the *Regulations* as he had temporary resident status as a visitor to Canada. He submits he was not seeking to enter to Canada to work without a permit, but rather presented himself at the border in order to apply for a work permit. He submits this is the same error this Court recognized in *Yang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 383 [*Yang*].

[15] The Minister submits that the Officer was authorized to make the exclusion order because Mr. Paranych contravened the *Act* by failing to obtain a work permit before he started working at Milestones in March 2017.

[16] I have concluded that Mr. Paranych's position is correct. He was not in violation of paragraph 20(1)(b) of the *Act* or section 8 of the *Regulations*. Moreover, the Officer was without authorization to make an exclusion order for the alleged violation of working without authorization.

[17] The Officer relied on section 228 of the *Regulations* to issue the exclusion order. That section provides a limited number of grounds on which the Minister may make a removal order rather than referring a report to the Immigration Division, as set out in subsection 44(2) of the *Act*. Although the Officer does not state which specific ground he relies on, the Officer references both sections 20 and 41 of the *Act*, indicating he is relying on sub-paragraph 228(1)(c)(iii) of the *Regulations*. That provision provides that an officer may issue a removal order, and need not refer the matter to the Immigration Division, if the inadmissibility is under

section 41 of the *Act* on grounds of "failing to establish that they hold the visa or other document as required under section 20 of the *Act*."

[18] In the circumstances of this case, the document required of Mr. Paranych under section 20 of the *Act* was "the visa or other document required under the regulations." Mr. Paranych, when he first approached the border, was in possession of a valid visitor's permit. Pursuant to that permit, he had every right to enter Canada.

[19] At the hearing, counsel for the Minister took the position that Mr. Paranych's exit from Canada to the U.S.A. created a situation such that he could no longer validly enter Canada under his visitor permit. I note that this was not the basis on which the removal order was made. In any event, I agree with counsel for Mr. Paranych that he was authorized to travel to the U.S.A. and return to Canada. This is permitted pursuant to 190(3)(f) of the *Regulations*, which provides as follows:

> 190 (3) A foreign national is exempt from the requirement to obtain a temporary resident visa if they are seeking to enter and remain in Canada solely
>
> …
>
> (f) to re-enter Canada following a visit solely to the United States or St. Pierre and Miquelon, if they
>
> - (i) held a study permit or a work permit that was issued before they left Canada on such a visit or were authorized to enter and remain in Canada as a temporary resident, and
> - (ii) return to Canada by the end of the period initially authorized for their stay or any extension to it.

[20] The visitor's permit authorized Mr. Paranych to enter and remain in Canada as a temporary resident, and he returned to Canada before the end of the period it authorized.

[21] The Minister further submitted that the Officer's exclusion order was reasonable as Mr. Paranych had overstayed his permit by June 26th when he returned for a second interview and the order was issued. I agree that had he arrived at the border for the first time on June 26th, it would have been open to the Officer to issue such an exclusion order under subparagraph 228(1)(c)(iv) of the *Regulations*.

[22] However, that is not the case before the Court. Rather he returned on June 26 th as required by the Officer. It would be manifestly unreasonable for an officer to require an individual to return after the expiry of their permit, and then use that as the grounds to issue an exclusion order. In any event, as noted, this is not the provision the Minister's delegate relied on to issue the exclusion order. The record is clear that reason for the exclusion order was for working without authorization.

[23] Because Mr. Paranych did have the documents required by section 20 of the *Act*, namely a visitor's permit valid until June 25, 2017, when he arrived at the border, he was not attempting to enter Canada to work without a work permit, as the Officer stated. Rather, rather he appeared at the border for the purposes of obtaining a work permit. This case is analogous to *Yang*, where this Court held at paragraphs 19-20:

> As for s. 20 of IRPA, it was necessary that Ms. Yang held the required visa or other document. She held a study permit. Counsel for the Minister makes much of the fact that the permit did not allow her to leave Canada and return. However, that was not the

> reason she was written up. Furthermore, a great deal of evidence would have to be led with respect to the practice of "flagpoling" before it could be said that Ms. Yang was in violation of s. 20.
>
> Regulation 8 provides that "A foreign national may not enter Canada to work without first obtaining a work permit." The officers completely mischaracterized the situation. She was at the border in order to apply for a work permit, not to enter Canada to work without a work permit.

[24] As in *Yang*, the actual alleged violation was not seeking to enter Canada to work without a work permit, but rather previously working without a permit while already in Canada. This Court in *Yang* did not provide further analysis of the appropriate mechanism for dealing with this alleged violation. However, this issue was considered by Justice Locke in *Gupta v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 1086 at paras 23-24:

> 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.
>
> 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 *Brar v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1502 (F.C.). 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. [emphasis added]

[25] I agree with Justice Locke’s analysis. Working without a permit is not a breach of the *Act* or *Regulations* for which the Officer had authorization to issue a removal order. The Officer was instead required to refer a report to the Immigration Division, as set out in subsection 44(2) of the *Act*.

[26] As the Officer was without authority to issue an exclusion order in these circumstances, there is no need to determine whether Mr. Paranych’s right to procedural fairness was violated.

[27] What does require a determination is the use that might be made of the alleged admissions made by Mr. Paranych and others, both in this case, and in the future. Because the actions of the officers were without foundation, Mr. Paranych’s application for a work permit ought to have been properly processed when he first appeared at the border crossing. There was no requirement that he return, and that is especially so after the expiry of his visitor’s permit, as

happened in this case. In light of my findings, I shall issue an order that nothing stated by Mr. Paranych or others may be used in any future application he may bring or proceeding relating to him.

[28] Given that he has returned to the Ukraine, the appropriate remedy is to quash the exclusion order.

[29] Counsel proposed that the Court certify as a question of general importance, dispositive of this matter, the question of whether the definition or “work” under section 2 of the *Regulations* includes unpaid work. I agree with the Respondent that this question is not appropriate for certification given the basis for my decision.

JUDGMENT in IMM-2962-17

THIS COURT'S JUDGMENT IS that:

1. This application is allowed;

2. The exclusion order issued against Serhii Paranych is quashed;

3. No statement made by Serhii Paranych, during his interviews with border officers on June 19, 2017 and June 26, 2017, or any statement made as a consequence of questioning him regarding his work activities during his period of residence in Canada may be considered or used against him in any future application or proceeding; and

4. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2962-17
STYLE OF CAUSE:	SERHII PARANYCH v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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