Date: 20070625

Docket: IMM-6155-06

Citation: 2007 FC 670

Ottawa, Ontario, June 25, 2007

Present: The Honourable Mr. Justice Beaudry

BETWEEN:

OSIRIS GOMEZ GARRO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision by Jérôme Lapierre, Immigration Officer (the officer), dated October 26, 2006, refusing the application for a work permit for the applicant and visitor status for his family. The applicant failed to meet the conditions required to obtain investor status under the North American Free Trade Agreement (the NAFTA).

ISSUES

[2] Did the officer comply with the principles of procedural fairness in this case:

(a) in rendering a decision without reasons?

(b) in failing to offer the applicant an interpreter at the interview?

(c) in not informing the applicant about his concerns relating to the information he had provided?

[3] For the following reasons, the application for judicial review will be allowed.

FACTUAL CONTEXT

[4] A business man and citizen of Mexico, the applicant incorporated a publishing company for educational books, Éditions Gnostiques Canada Inc., in Ottawa on April 21, 2001. He subsequently came to Canada each year to ensure that the business in which he had invested an initial amount of $20,000 was operating effectively.

[5] In July 2005, he settled in Gatineau, Quebec, with his wife and their four children. On September 12, 2005, he filed an application for trader or investor status (work permit) under the NAFTA.

[6] Since he speaks neither French nor English, he filed his application using the IMM 5476 form entitled “Use of a Representative” and designated lawyer Pablo Fernandez-Davila as his representative (representative) for his dealings with the Department of Citizenship and Immigration.

[7] According to the applicant, the interview with the officer took place on November 23, 2006, in the presence of his representative, with no interpreter. The applicant says that the interview lasted only 30 minutes and that all the questions were addressed only to his representative. He understands that the discussion afterwards dealt with his business in Mexico, the Antonio Rosales 165-167, Jalisco, Mexico, which he purchased in 2000 for $175,000 and which has no mortgage.

[8] According to the applicant, the officer did not ask him any direct questions about his personal life or his investments in Canada. According to the evidence in the docket, the applicant's investments in Canada are substantial: besides the Ottawa publishing house, this is a list of his properties in Quebec and Ontario:

(1) Family home at 129 Galène Street, Gatineau, Quebec, purchased in 2005 for $313,000 with a mortgage of $150,000;

(2) An income property at 7722 St-Denis Street, Montréal, Quebec, purchased in 2001 for $175,000, current value $250,000;

(3) Vacant land in Aylmer, Quebec, purchased in 2004 for $73,000, current value $80,000;

(4) Vacant land in Peterborough, Ontario, purchased in 2000 for $37,500, current value $50,000;

(5) A property at 50 Noël Street, Gatineau, Quebec, purchased in 2002 for $78,000, current value $200,000, with a mortgage of $55,000.

Total value of property in Mexico	$200,000
Total value of properties in Canada	893,000
Total value of properties	1,093,000
Mortgages	205,000
Net value of properties	$888,000

[9] On October 26, 2006, the application for a work permit as an investor was refused, which is the basis of this application for judicial review.

IMPUGNED DECISION

[10] The decision is short. The relevant passages are as follows:

> . . .
> This letter refers to your application for a work permit and visitor documents for your accompanying family members received on January 11th 2006.
>
> After a careful review of your file, we have determined that you do not meet the requirements to be considered as an investor under the North American Free Trade Agreement (NAFTA).
>
> The application for visitor records for your accompanying family members have been refused as well.
> . . .

RELEVANT LEGISLATION

[11] The Foreign Worker Manual contains information about temporary admission under the NAFTA. Section 6.1of Appendix G provides as follows:

6 INVESTORS	**6 INVESTISSEURS**
6.1 What requirements apply to investors?	**6.1 Quelles exigences s'appliquent à l'investisseur?**
The following requirements apply:	Les exigences suivantes s'appliquent:
• applicant has American or Mexican citizenship; • enterprise has American or Mexican nationality;	• le demandeur a la citoyenneté américaine ou mexicaine; • l'entreprise est de nationalité américaine ou mexicaine;
• substantial investment has been made, or is actively being made;	• un investissement important a été fait ou est en voie d'être fait;
. . .	[...]

[12] The requisite factors for granting a temporary work permit in the investor category are set out in section 6.3 of Appendix G:

6.3 What criteria must be met?	**6.3 Quels critères faut-il respecter?**
...	[...]
There is no minimum dollar figure established for meeting the requirement of "substantial" investment. Substantiality is normally determined by using a "proportionality test" in which the amount invested is weighed against one of the following factors:	Aucun montant minimal n'a été fixé relativement à l'importance de l'investissement. Celle-ci est normalement déterminée par l'application d'un « critère de proportionnalité ». Il s'agit de comparer la somme investie à l'une des sommes suivantes:
• the total value of the particular enterprise in question (determining proportion is a largely straightforward calculation involving the weighing of evidence of the actual value of an established business, i.e., purchase price or tax valuation, against the evidence of the amount invested by the applicant); or	• la valeur totale de l'entreprise en question [pour déterminer la valeur totale, il suffira de comparer une preuve de la valeur réelle d'une entreprise établie (soit le prix d'achat ou l'évaluation fiscale) avec celle de la somme investie par le demandeur];
• the amount normally considered necessary to establish a viable enterprise of the nature contemplated. (This may be a less straightforward calculation. Officers will have to base the decision on reliable information on the Canadian business scene to determine whether the amount of the intended investment is reasonable for the type of business involved. Letters from	• le montant qui serait normalement jugé nécessaire pour lancer une entreprise viable du genre envisagé. (Dans ce cas-ci, la comparaison peut se révéler plus délicate. L'agent devra fonder sa décision quant au caractère raisonnable de l'investissement projeté sur des renseignements sûrs touchant les entreprises du même genre au Canada. Des lettres de chambres de commerce ou des

chambers of commerce or statistics from trade associations may be reliable for this purpose.)	statistiques provenant d'associations commerciales pourraient constituer des sources sûres.)

ANALYSIS

[13] Since the issue is whether there has been a breach of procedural fairness, it is not necessary to undertake a pragmatic and functional analysis (*Dr. Q v. College of Physicians and Surgeons of British Columbia)*, [2003] 1 S.C.R. 226.

[14] If the Court finds that there has been a breach of procedural fairness, the application for judicial review will be allowed (*Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195 (F.C.A.); *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

(a) *Lack of Reasons*

[15] As the applicant points out, the letter of refusal that the officer sent contains no reasons explaining why his application was denied. I must therefore rely on the officer's notes in the docket to try to understand the reasons behind her decision (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[16] The notes in the computer system (FOSS) state:

> 23OCT2006. WORK PERMIT REFUSED AFTER CONSULTATION WITH FOREIGN WORKER UNIT AT CIC MONTREAL. CLIENT WAS APPLYING AS AN INVESTOR UNDER NAFTA (EXEMPTION T22). CLIENT IS REQUESTING A WORK PERMIT IN ORDER TO ESTABLISH A BUSINESS NAMED "LES EDITIONS GNOSTIQUES". AS PER INFORMATION CLIENT PROVIDED ON FILE, CLIENT ONLY INVESTED 20 000$ IN THE BUSINESS. CLIENT CAME FOR

> AN INTERVIEW ON 19SEP2006 ACCOMPANIED BY HIS LAWYER PABLO FERNANDEZ DAVILA WHO WAS ALSO ACTING AS TRANSLATOR. CLIENT CONFIRMED DURING THE INTERVIEW THAT HE DID NOT INVEST MORE MONEY IN THE COMPANY AS HE IS WAITING FOR US TO ISSUE HIM A WORK PERMIT BEFORE HE DECIDES TO INVEST MORE MONEY IN THE COMPANY. CLIENT HAS ALMOST 1 000 00$ IN REAL ESTATE IN CANADA BUT NONE OF IT IS RELATED TO THE COMPANY HE IS PLANNING TO START. NOT SATISFIED CLIENT MEETS THE REQUIREMENT OF AN INVESTOR UNDER NAFTA. APPENDIX G SECTION 6.1 OF THE FOREIGN WORKER MANUAL STATES THAT ONE OF THE REQUIREMENT TO BE CONSIDERED AN INVESTOR UNDER NAFTA IS TO HAVE MADE A "SUBSTANTIAL INVESTMENT OR IS ACTIVELY BEING MADE". 20 000$ DOES NOT CONSTITUTE A SUBSTANTIAL INVESTMENT. APPLICATION REFUSED. REFUSAL LETTER AND VOLONTARY DEPARTURE ORDER GIVEN TO CLIENT.

[17] According to these notes, it seems that the officer did not consider the initial sum of $20,000 to be a substantial investment for purposes of granting the applicant a permit. However, the evidence in the record shows that the applicant invested $166,000 in commercial premises for the company, $67,000 in book stocks to sell and thousands of dollars in equipment (applicant's affidavit, paragraphs 28 and 29).

[18] The officer did not file an affidavit. The Court also reviewed the notes of the interview with the applicant and his representative (pages 12 to 14 of the tribunal record), but it is impossible to understand the basis for the impugned decision by combining the officer's notes in the file with her interview notes.

[19] Given that the applicant's evidence was so compelling, the Court can only conclude that there is absolutely no reason for the officer's decision. On this ground alone, the application for judicial review must be allowed.

(ii) right to an interpreter

[20] The applicant complains that the officer did not inform him of his right to have an interpreter during the interview.

[21] Relying on the decision of Mr. Justice Pierre Blais in *Lasin v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1655 (QL), the respondent maintains that procedural fairness did not impose a duty on the officer to inform the applicant of his right to an interpreter. The respondent refers the Court to paragraphs 11 and 12 of this decision:

> The applicant also claims that the failure on the part of the immigration officer to provide him with notice of the right to a qualified interpreter during the proceeding was a breach of procedural fairness. I agree with the respondent's submissions that there does not exist a positive obligation on the immigration officer to inform the applicant of his right to an interpreter in the present matter, particularly when taking into consideration that the immigration officer illustrated that the applicant comprehended the proceedings. In support of this position, the respondent mentions the findings of Justice Blanchard in *Umba v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 582, [2001] F.C.J. No. 870, at paragraph 19:
>
> - As to the argument that the senior immigration officer had a duty to inform the plaintiff of his right to an interpreter and the possible consequences of the interview before the latter began, I have concluded after thinking about the matter that the plaintiffs simply cannot advance such arguments. A review of the notes taken by the immigration officer on May 9, 2000 indicates that the plaintiffs fully understood all the events

> and did not show any sign that they did not understand.
>
> In the immigration officer's affidavit, it is clearly noted that the applicant understood the questions being asked and gave coherent answers. Further, the applicant did not request an interpreter, had previously requested that immigration proceedings be held in English and was represented by counsel at the proceeding who did not raise any issue regarding the need for interpretation. The evidence illustrates that the applicant comprehended the proceeding and as such no breach of procedural fairness occurred for the failure on the part of the immigration officer to mention the right to an interpreter.

[22] In the proceeding before us, I do not believe that the officer was required to inform the applicant that he had the right to an interpreter because on the one hand, he was represented by counsel who, according to the notes in the file, acted as an interpreter. On the other hand, at no time during the interview did the applicant or his representative show any concerns about the interview being conducted in English without the assistance of an interpreter (*Khan v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1778 (QL)).

(iii) right to be informed of the officer’s concerns

[23] It is unnecessary for me to deal with this issue given my finding about the lack of reasons in the decision.

[24] No question for certification was proposed and there is none in the docket.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. This application for judicial review be allowed and the matter be remitted for reconsideration by a different officer.
2. There is no question to be certified.

"Michel Beaudry"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-6155-06**
STYLE OF CAUSE:	**OSIRIS GOMEZ GARRO v. MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 14, 2007
REASONS FOR JUDGMENT AND JUDGMENT BY:	The Honourable Mr. Justice Beaudry
DATED:	June 25, 2007

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