Date: 20081110

Docket: IMM-1592-08

Citation: 2008 FC 1253

Ottawa, Ontario, November 10, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

CHENG DONG LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Cheng Dong Liu applied to the Canadian Embassy in Beijing for a two-year work permit. He was one of 99 applicants seeking jobs at a meat processing plant in Alberta called XL Foods Inc. A visa officer denied Mr. Liu the work permit. The other applicants were turned down, too.

[2] The officer discovered, through anonymous tips and an ensuing investigation, that the applicants were part of an illegal recruitment scheme which required them to pay heavy fees to intermediate parties (*e.g.* recruiters, agents and managers). In addition, the officer learned that some of the applicants did not really have the required experience to carry out the jobs they were seeking

in Canada. Apparently, the applicants were told to deny knowledge of the scheme if asked. In the officer's view, these circumstances made it unlikely that Mr. Liu would return to China when his permit expired.

[3] The sole issue is whether Mr. Liu was treated unfairly. Mr. Liu argues that it was unfair for the officer to deny him an opportunity to respond to the information about the recruitment scheme that the officer had received from outside sources. Mr. Liu argues that the officer's decision should be overturned. I agree that Mr. Liu was treated unfairly and must, therefore, allow this application for judicial review.

I. Factual Background

[4] Mr. Liu filed his application for a temporary work permit in October 2007. The following month, the officer received two anonymous letters providing detailed information relating to the group of applicants seeking temporary work permits in Canada. The letters alleged that applicants were paying fees to various parties to assist them in gaining entry to Canada. The fees were substantial – as much as $3,000 up front, and up to $15,000 on issuance of a visa. Employers were getting kick-backs for providing workers with some basic skills, which applicants overstated in their applications. The letters gave the names of the agencies and meat processing plants involved.

[5] The officer consulted with colleagues at the Australian Embassy because Australia was also admitting workers under a similar program. Officials from both embassies investigated the situation

by visiting companies allegedly providing workers. They questioned employees and managers and discovered that the information they had previously received was substantially accurate.

[6] In turn, twelve of the applicants were interviewed at the Canadian Embassy. They confirmed that fees were paid, although the amounts they mentioned were substantially lower than those reported by others. They did confirm, however, that their experience as butchers simply involved the use of knives, while the prospective Alberta employer required experience with power tools.

II. The Officer's Decision

[7] The officer noted that the applicants would earn a salary of about $19,700 to $22,300 at their desired jobs in Alberta. He questioned why they would pay up to $15,000 to recruiters and agents, just for the chance of earning such a modest salary for two years in Canada. They would expend most of their take-home pay in the first year just repaying their debt. The officer also noted that Mr. Liu had few opportunities to advance his prospects in China. Accordingly, he was not satisfied that Mr. Liu would return there after two years.

[8] In the end, the officer concluded that the purpose of the recruitment scheme was to provide applicants entry to Canada with a view to long-term or permanent residence, not just a two-year stint at an Alberta abattoir.

III. Did the Officer Treat Mr. Liu Unfairly?

[9] The Minister concedes that, generally speaking, decision-makers cannot rely on extrinsic evidence without providing the persons affected with an opportunity to respond to it. However, the Minister argues that, in the circumstances of this case, Mr. Liu can be assumed to have known what the officer's concerns were. Given that all of the applicants were represented by the same immigration consultant and the same recruiting agency, news of the investigation by Canadian and Australian officials probably spread quickly among the applicants.

[10] Further, the Minister argues that providing Mr. Liu with an opportunity to respond would have been pointless because he could not have said anything that would have allayed the officer's concerns. The results of the investigation were clear. In the same vein, the Minister argues that sending Mr. Liu's application back for reconsideration would be a futile exercise since the result would inevitably be the same.

[11] I think that the Minister is correct in pointing out that the applicants, including Mr. Liu, probably knew about the investigation, and were aware that Canadian officials were concerned about the illegal recruitment scheme and the applicants' qualifications for the Alberta jobs. But, if this is so, Mr. Liu can also be assumed to have known that several applicants were given interviews at which they would have had a chance to address those concerns. In the circumstances, he would not have realized that it was incumbent on him to respond on his own. As Justice Marshall Rothstein has observed, the "question is whether the applicant had the opportunity of dealing with

the evidence" (*Dasent* v. *Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1902, at para. 21). Mr. Liu did not have that opportunity.

[12] As for the question whether a response would have been pointless and, therefore, a reconsideration of Mr. Liu's application would be futile, I cannot agree with the Minister's position. The investigation disclosed a range of recruitment fees. The officer acknowledges that the initial amount was between $300 and $3,000. Yet, the officer states that he would not have "accorded much weight to any Applicants' denial that he had not paid an inordinately high recruitment fee" and "would have expected the applicant to deny this high recruitment fee in order to disguise his real purpose for coming to Canada".

[13] Of course, it is open to an officer to disbelieve an applicant, but only after giving the applicant a fair chance to respond to concerns arising from extrinsic sources. The Minister cited case law to the effect that there is no unfairness in circumstances where there is no way that the applicant could satisfactorily respond to the officer's concern: *Talwar* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 702; *Lord's Evangelical Church of Deliverance and Prayer of Toronto* v. *Canada*, 2004 FCA 397. In *Talwar*, the question was whether the applicant could respond to a legal restriction on the amount of money he could take out of India. Justice Carolyn Layden-Stevenson concluded that the applicant could not respond to something he was powerless to change. In the *Lord's Evangelical Church* case, the Federal Court of Appeal held that, even if the appellant had been treated unfairly, there was no point setting aside the decision because the outcome would inevitably have been the same given there were other grounds to support it. In my view, these cases

do not assist the Minister. It is not clear to me that Mr. Liu was powerless to address the officer's concerns. And the officer's decision was based solely on the question whether Mr. Liu would return to Canada after two years. Given that the officer's conclusion on that point was based primarily on concerns that Mr. Liu had no chance to address, it is not clear to me that the result would inevitably be the same.

IV. Conclusion and Disposition

[14] Mr. Liu was treated unfairly because he had no chance to respond to the extrinsic information on which the officer's decision was based. Accordingly, I will grant this application for judicial review and order a reconsideration of Mr. Liu's application for a temporary work permit by another officer. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. Mr. Liu's application for a temporary work permit is referred back to another officer for reconsideration.
3. No questions of general importance are stated.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1592-08
STYLE OF CAUSE:	LIU v. MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	November 3, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	O'REILLY J.
DATED:	November 10, 2008

APPEARANCES:

Krassina Kostadinov	FOR THE APPLICANT
Jamie Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WALDMAN & ASSOCIATES Toronto, ON	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, ON	FOR THE RESPONDENT