Federal Court  Cour fédérale

Date: 20090722

Docket: IMM-4723-08

Citation: 2009 FC 742

Ottawa, Ontario, July 22, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CHRISTOPHER P. CALMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an Officer of Citizenship and Immigration Canada stationed at Makati City, Philippines (Officer), dated August 11, 2008 (Decision), refusing the Applicant's application for a work permit.

BACKGROUND

[2] The Applicant is a 33-year-old married man who is a citizen of the Philippines. He has four daughters, one in grade five, one in grade four, one in grade one and the youngest who was born on March 18, 2007. His wife is currently unemployed.

[3] The Applicant has elderly parents and all of his family members live in the Philippines. He also has a job in the Philippines to return to after his contract in Canada is finished.

[4] The Applicant has a Bachelor of Commerce degree and has worked as a Credit Investor with Filcorp Lending Corporation in Angeles City since 1998. He draws a monthly salary equivalent to $275 CDN.

[5] The Applicant indicates that he would like to come to Canada because “this is a temporary opportunity and this would allow the Applicant to build a better financial future for himself and his family.”

[6] The Applicant was offered employment with Grand Hale, a fish processing plant in Richmond, British Columbia as a fish processor where he would be responsible to cut, clean and pack fish and other sea food products. The Applicant would make $12 per hour CDN. The Applicant also received a positive Labour Market Opinion from Service Canada.

DECISION UNDER REVIEW

[7] The Officer held that the Applicant was required to establish that he met all of the requirements under Part 11 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations): (1) that he would not contravene the conditions of admission; (2) that he does not belong in a category of persons inadmissible to Canada under the Act; (3) that his intentions were *bona fide*; and (4) that he would leave Canada by the end of the period authorized for the Applicant's stay.

[8] The Officer concluded that the Applicant had not satisfied him that he would leave Canada by the end of the period authorized for his stay because he "h[ad] not demonstrated ties that would satisfy [the Officer] of [the Applicant's] intention to return."

[9] The Officer indicated that the Applicant did not meet the requirements of the Act and the Regulations and his application was refused.

ISSUES

[10] The Applicant submits the following issue on this application:

a. Should the Officer's Decision be quashed and the matter be referred back for a fresh decision by another Officer on the basis that it is unreasonable in law?

STATUTORY PROVISIONS

[11] The following provisions of the Act are applicable in this proceeding:

20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
…	…
(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	*b*) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

STANDARD OF REVIEW

[12] The Applicant submits that the standard of review of a decision of a visa officer is the standard applicable to the Immigration of Refugee Board which, in the Applicant's view, is correctness: *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.

[13] The Respondent submits that the Officer's assessment of the application for a work permit involves an exercise of statutory discretion which should be given a high degree of deference.

Therefore, the appropriate standard of review is reasonableness: *Dunsmuir*. The Respondent also submits that this Court defer to an officer's decision if his or her findings are justified, transparent and intelligible, and fall within the range of possible outcomes given the evidence as a whole. See: *Dunsmuir* and *Choi v. Canada (Minister of Citizenship and Immigration)* 2008 FC 577. The Respondent says that the standard of review is not correctness as the Applicant asserts.

[14] The standard of review for decisions of a visa officer has been reasonableness *simpliciter*: *Castro v. Canada (Minister of Citizenship and Immigration)* 2005 FC 659 at paragraph 6 and *Ram v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 855. When a visa officer refuses a work permit solely on statutory interpretation, the standard of review is correctness: *Singh v. Canada (Minister of Citizenship and Immigration)* 2006 FC 684 at paragraph 8 and *Hamid v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1632 at paragraph 4.

[15] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[16] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the

particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[17] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the stated issue is reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[18] In written argument, the Applicant also raises procedural fairness issues. The standard of review for procedural fairness issues is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENTS

The Applicant

[19] The Applicant submits that the Officer's Decision should be quashed and the matter referred back for a fresh decision by another officer on the basis that it is unreasonable in law. The Applicant says that he meets the requirements of section 20 of the Act and that the Officer's Decision was unreasonable since relevant evidence was ignored and unwarranted assumptions drawn.

[20] The Applicant submits that the Officer made assumptions that he was not economically established and would not return to the Philippines on the expiry of his work permit. The Applicant states that this is "without foundation, irrational and untenable because his wife and children lives in the Philippines, and his elderly parents and all his siblings reside in the Philippines."

[21] As well, the Applicant states that the Officer ignored that the Applicant:

a. Has an active working history and he will be resuming his job in the Philippines once his contract in Canada has ended;

b. Has a wife and four daughters in the Philippines;

c. Owns and will also inherit property in the Philippines;

d. Has customs and traditions which are consistent with him returning to his homeland upon the expiration of the work permit; and

e. Deposed in his affidavit that he is aware that this employment contract is not extendable.

[22] The Applicant states that, even in applying the most stringent standard of review, the Officer erred if he relied on a single fact to outweigh all the other relevant facts provided by the Applicant.

See: *Guo v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1353; *Yuan v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1356 and *Malhi v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1120.

[23] The Applicant submits that the Officer's "purported personal experiences or knowledge cannot be the primary basis of his decision. The decision must be based primarily on the merits of the case." See: *Wang v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 365.

[24] The Applicant also says that he was not given an opportunity to respond to any of the concerns the Officer may have had. The Officer made unsupportable assumptions when refusing the Applicant's work permit application. The Applicant says he must be given an opportunity to provide an explanation for perceived or apparent deficiencies and respond to the Officer's concerns. See: *Vandi v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 515 and *Chow v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 996.

Respondent

[25] The Respondent submits that the Officer considered all of the evidence, particularly since the Officer's CAIPS notes indicate that the Applicant:

a. Has a two-year offer of employment in Canada;

b. Is a married male with three dependants;

c. Has been employed as a credit investigator from 1998-present;

d. Has a low monthly salary in the Philippines; and

e. Has a wife who is unemployed.

[26] The Respondent submits that the Officer reasonably considered the Applicant's specific circumstances. The Respondent concedes that the Officer erred in determining that the Applicant has three children when he indicated four in his affidavit, but there is no indication when the fourth child was born. It may have been born after the application was considered. Even in the event that this was an error, the Respondent submits it was not material.

[27] The Respondent submits that the onus was on the Applicant to satisfy the Officer that he would depart Canada at the end of the period authorized for any temporary work in Canada and that the Officer was entitled to examine the totality of the circumstances relating to the Applicant's case. The Applicant's financial and other ties to the Philippines, age, family circumstances, and employment were all relevant factors for the Officer to consider. When an applicant has an incentive to remain in Canada, this is part of the "broader picture" that an officer ought to consider in assessing whether an applicant will leave Canada at the end of the period authorized for any temporary stay. The weight to be assigned to each factor is a matter for an officer's discretion and is not a basis for judicial review. See: *Wang v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1298 at paragraphs 9-10; *Nguyen v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1087; *Skoruk v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1220 and *Ayatollahi v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 248 at paragraph 23.

[28] In relation to the Applicant's argument that he should have been granted an interview, the Respondent submits that the duty of fairness prescribes minimum standards of procedural decency and that the content of the duty varies according to context. Several factors tend to reduce the content of the duty of fairness owed to visa applicants, some of which are considered in *Chiau v. Canada (Minister of Citizenship and Immigration),* [2001] 2 F.C. 297 (F.C.A.) at paragraphs 35-36. The factors tending to limit the content of the duty in the case at bar include: the absence of a legal right to a visa; the imposition on the applicant of the burden of establishing eligibility for a visa; and the less serious impact on the individual that the refusal of a visa typically has. See also: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at paragraphs 21-28 and *Ha v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 49 at paragraph 37.

[29] The Respondent says that, when dealing with the duty of fairness for determining visa applications, the Court must guard against imposing a level of procedural formality that, given the volume of applications that officers are required to process, would unduly encumber efficient administration. The public interest in containing administrative costs and in not hindering expeditious decision-making must be weighted against the benefits of participation in the process by the person directly affected. See: *Khan v. Canada (Minister of Citizenship and Immigration),* [2002] 2 F.C. 413 (F.C.A.) and *Fargoodarzi v. Canada (Minister of Citizenship and Immigration)* 2008 FC 90.

[30] The Respondent concludes that the Applicant's application should be dismissed.

ANALYSIS

[31] The assessment of an application for a work permit involves an exercise of statutory discretion and attracts a high degree of deference from the Court. Apart from the procedural fairness issues raised, the applicable standard of review in this case is reasonableness. See *Dunsmuir* and *Choi*.

[32] The Applicant complains that the Officer's assessment was unreasonable because the Officer ignored evidence and drew unwarranted inferences.

[33] The CAIPS notes reveal that the Officer based his Decision on findings that the Applicant:

a) Seemed to have weak economic ties in the Philippines; and

b) The Applicant was not sufficiently well-established to ensure his return.

[34] There was really no evidence before the Officer to support either of these conclusions. The Applicant was born in the Philippines, he has always lived there, he has a wife and four children there, and he has been employed in the same job for 10 years that he can go back to. It is difficult to see how anyone could be more established than this, or why this means he has weak economic ties. The Officer's Decision just cannot be reconciled with the evidence presented by the Applicant. That evidence was either entirely overlooked or the Decision is just unreasonable.

[35] The Applicant also claims that he was not given an interview or an opportunity to respond to the Officer's concerns and that this raises a procedural fairness issue. There is no need for me to consider this issue because I have already concluded that the Decision is unreasonable and should be returned for reconsideration.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed and the matter is returned for reconsideration by a different officer.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4723-08
STYLE OF CAUSE:	**CHRISTOPHER P. CALMA** **Applicant** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION** **Respondent**
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 16, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	JUSTICE RUSSELL
DATED:	July 22, 2009

APPEARANCES:

Mr. Lee Cowley	FOR THE APPLICANT
Sumandeep Singh	
Mr. Edward Burnet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cowley & Company Barristers and Solicitors Surrey, BC	FOR THE APPLICANT
JOHN H.SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT