Federal Court  Cour fédérale

Date: 20100415

Docket: IMM-3899-09

Citation: 2010 FC 411

Ottawa, Ontario, April 15, 2010

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

JAIRO ARIAS BRAVO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Jairo Arias Bravo seeks judicial review of the decision rejecting his application for a work permit. The applicant, a citizen of Costa Rica, first came to Canada on October 21, 2002 as a visitor. He overstayed his three-day visa. Several months later, on August 18, 2003, he made a refugee claim, which gave him the ability to work in Canada. He worked for Bryson Farms, an organic farm outside Shawville, Québec. His refugee claim was rejected on June 8, 2004. He sought judicial review in the Federal Court, but leave was denied on September 15, 2004. On November 27, 2004 he left Canada. His plane ticket was purchased by Bryson Farms.

[2] Even though his departure was voluntary, s. 240 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*) deems the removal order against him to have been enforced. This means that, under s. 52(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), he requires an Authorization to Return to Canada (ARC).

[3] In 2006, he applied for a work permit, and was rejected because he worked illegally for the employer who was now offering him work and the officer was not convinced that he would go back to Costa Rica at the end of the period. However, Bryson Farms has continued to want to employ him. It appears that his combination of farming experience and language skills is unique. Accordingly, in late April 2009, Mr. Arias Bravo, with the assistance of a legal representative, made another application for a work permit.

[4] Among other documents, he submitted to the Canadian Embassy in Guatemala[1] a covering letter from his lawyer relating to the work permit, a form IMM-1295 (Application for a Work Permit), a Labour Market Opinion confirmation, as well as another letter from his legal representative applying for an ARC. It is notable that the fee for the work permit application was included in the package, whereas the fee for the ARC application was not.

[1] It seems that the file was treated in Guatemala although the letters were also addressed to the Embassy in Costa Rica.

[5] The processing of the application for the work permit started shortly after the dispatch of the package for it appears that by May 14, 2009 Mr. Arias Bravo had been asked for a copy of some further documents.[2]

[6] Also, according to a CAIPS notes entry on May 21, 2009, it appears that the applicant provided some verbal explanations as to why he applied for refugee status and that his intentions were to work for periods of seven months per year and return to Costa Rica. He needs to earn money to pay for private university. It is not clear if this information was divulged in the context of a formal interview or not. On May 19, 2009 a receipt for the $150 fee was issued to him. There is no indication that the applicant referred to the ARC application or that he offered to pay the fees related to said application.

[7] The immigration officer at the Canadian Embassy denied Mr. Arias Bravo's application. On the one-page refusal letter a box stating "You have not demonstrated that your stay in Canada will only be temporary and that you will return to your country at the end of your temporary employment" was checked.

[8] The applicant argues that the immigration officer failed to consider all the relevant evidence, particularly the information contained in his ARC application that could support his work permit application. He also says that the reasons given for the refusal are insufficient and constitute a breach of the officer's duty of procedural fairness. Finally, he submits that the decision was

[2] Facts dated May 14, 2009 (C.R., p. 15); documents dated May 12, 2009 (C.R., p. 25); letter of May 15, 2009 (C.R., p. 20) and various documents date May 11, 2009 (C.R. pp. 88-98).

unreasonable because the officer only focused on the negative aspects of his immigration history rather than the fact that he voluntarily left Canada after the decision rejecting his application for leave to seek judicial review of the decision rejecting his refugee claim was issued. Also, there is no discussion of his expertise and the urgent need of Bryson Farms.

[9] The standard of review of decisions of immigration officers reviewing temporary work permit applications is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.CR. 190 (*Dunsmuir*); *Kachmazov v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 53 at para 8; *Li v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 1284, 76 Imm. L.R. (3d) 265 (*Li*) at para. 14). Questions of procedural fairness are reviewed on a standard of correctness (*Li*, at para. 17; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at para. 65).

[10] With respect to his first argument, the applicant initially relied on the fact that the CAIPS notes do not mention the ARC application to support his view that said submissions were not considered at all. However, when the certified record was filed, it became apparent that the officer had the said application in the file before him or her.

[11] I do not need to decide whether, in the case of other applicants, the work permit or the ARC application should be considered first if the two said applications are duly completed and the fees paid in accordance with s. 294 of the *Regulations*. Certainly, it would be inappropriate to reject someone’s work permit application on the basis that they are not allowed to return to Canada under

subs. 52(1) of *IRPA* if they simultaneously filed an ARC application. That, however, was not the case here; as mentioned, although the CAIPS notes indicate that Mr. Arias Bravo was deemed deported and not admissible to Canada, the reason for rejecting his application was that there were concerns about him being a *bona fide* "visitor".

[12] There was a fundamental problem with the ARC application in this case. The $400 fee was not sent with the documentation. Instead, the legal representative was seeking directions from the Embassy on how to pay it. It would seem that, in the absence of more specific instructions on the Embassy web site, or elsewhere, her client could have paid the fee in the same way that the work permit fee was paid. This is especially so when one considers that in his written representations, the applicant states that he personally delivered both applications to the Embassy. That said, given that the fee for the ARC application was not paid, it seems that the Embassy had little choice but to process the work permit application first and they cannot be faulted for adopting this course of action.

[13] There is no affidavit from the immigration officer as to what he or she did or did not do. However, there is a presumption that the decision maker reviewed all the evidence before him or her. Whether the officer should have referred to this application specifically in the reasons will be discussed when looking at the second argument put forth by Mr. Arias Bravo.

[14] However, even if the Court were to assume that the presumption was rebutted here, the Court is not convinced that, in the particular circumstances of this case, the officer had to consider

the information contained in the ARC application for the applicant failed to indicate that the said representations were relevant to his work permit application per se.

[15] The covering letter to the work permit application does not make any reference to the ARC application. As mentioned, there is no indication that the applicant referred to said application when he spoke with an officer on May 19, 2009. Although his ARC application does mention that he has submitted an application for a work permit (presumably the context for requesting the ARC), it does not mention that its contents should be considered in assessing the work permit application. In addition, on his IMM-1295 form, when asked to provide details about whether he'd been "refused admission to, or ordered to leave Canada," the applicant gave a cursory, two-sentence answer (in Spanish) referring to his failed refugee claim in 2005 and his first request for a work permit in 2006. Again, there was no reference to the ARC application or to the fact that it contained explanations relevant to the refusal of his first work permit in 2006.

[16] Moreover, as noted by the respondent, the immigration officers authorized to review work permit applications abroad do not necessarily have the authority to grant an ARC. In effect, in the international region, only an immigration program manager is vested with such authority. The fact that a limited number of people can review such applications as opposed to issue work permits is clearly mentioned at s. 6.5 of Chapter 1 of the Overseas Processing Operational Manual filed by the applicant (p. 27). Thus, it may be that the officer assessing the work permit application saw the ARC application on file and, knowing that he or she had no authority to decide it, set it aside to be forwarded to the appropriate person if he or she decided that the applicant was otherwise eligible for

a work permit. Again, in the absence of some indication that the ARC submissions were directly relevant to his or her task in assessing the work permit application, the Court is not prepared to conclude that this would constitute a reviewable error.

[17] Turning now to the argument that the reasons justifying the refusal were insufficient, it is well-established that the degree of procedural fairness required in the context of a work permit application from abroad is minimal:[3] *Qin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815 at para. 5; *da Silva v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1138, 161 A.C.W.S. (3d) 974. This reflects the fact that Mr. Arias Bravo, like similar applicants, is free to apply for another work permit, on the basis of improved information and documentation, at any time.

[18] The CAIPS notes, which are part of the reasons (see, e.g., *Kalra v. Canada (Minister of Citizenship and Immigration*), 2003 FC 941, 29 Imm. L.R. (3d) 208 at para. 5), contain a summary of the application as well as information received from Mr. Arias Bravo. The officer certainly was concise and not perfectly informed given that he or she refers to the fact that the applicant made a PRRA application whereas it is evident from p. 74 of the certified record that the applicant had indeed waived that right before leaving Canada in 2004. That said, his or her reasoning is clear enough, he or she looked at the immigration history of Mr. Arias Bravo and was not satisfied that he met the criteria set out at para. 200(1)(b) of the *Regulations*.

[3] The case of a live-in caregiver may fall in a special category in that respect.

[19] To obtain his work permit pursuant to s. 200 of the *Regulations*, the applicant had the burden of establishing not only that he had a genuine job offer and a positive Labour Market Opinion, but also that he would leave Canada by the end of the authorized period of his stay. The good faith and intention of Bryson Farms are not at issue here. They are simply not relevant.

[20] Given the minimal duty of fairness owed in this case, I find that the decision does meet the requirement to provide reasons even if barely.

[21] The case of *Hara v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 263, 79 Imm. L.R. (3d) 27 is distinguishable on its facts. Moreover, there was nothing of such significance in the ARC application that it would require specific mention in the decision. In cases such as this, the officer simply does not have to explain how he or she dealt with the positive aspects of the application, he or she only needs to explain why the permit is not granted so that the matter can be judicially reviewed, if need be.

[22] Finally, Mr. Arias Bravo maintains that the decision is unreasonable. It is trite law that on judicial review, when assessing the validity of a decision, the Court must confine itself to the evidence before the original decision maker: see, e.g., *McNabb v. Canada Post Corp.*, 2006 FC 1130, at para. 51.

[23] The applicant submitted an affidavit from Ronalee Carey, a legal assistant, in which she states: “[Bryson Farms] wished to support Mr. Bravo’s application for permanent residence to

Canada, but Mr. Bravo indicated that he preferred to return to Costa Rica every year in order to assist in his family's farming operation. In addition, he did not want to spend winters in Canada."

[24] If Bryson Farms was willing to assist him with an application for permanent residence in the skilled worker class, and Mr. Arias Bravo would have had the requisite number of points (something that was not argued before me) to qualify, then it seems that his decision not to pursue permanent residence strongly suggests that he intends to return to Costa Rica at the end of every growing season. However, as far as I can tell, this relevant evidence was not before the officer: it is not in the letters from the applicant's legal representative, nor was the affidavit of Ms. Carey or, ideally, one from the owners of Bryson, submitted with the work permit application.

[25] It is well-established that one's past history with Canadian immigration officials is one of the best indicators of their likelihood of future compliance (*Murai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 186, 53 IMM. L.R. (3d) 218 at para. 12). In Mr. Arias Bravo's case, his history is at best ambiguous, if not troubling: in 2002-2003, he first misrepresented his intentions in order to obtain a visitor visa (see p. 103 of the certified record), then made a refugee claim only to acquire a work permit (see p. 4 entry for May 21, 2009). That certainly distinguished his case from others referred to by his counsel. It may (or may not) be that he has since learned from his mistakes, but this was what he had to show.

[26] The applicant is single, he has few assets in Costa Rica (bank balance of $1,894.71 (USD)) and his only tie to Costa Rica appears to be his parents' farm.[4] Thus, having reviewed the record before the officer, and considered particularly the representations made in the ARC application, the Court cannot come to the conclusion that the decision falls outside the "range of possible, acceptable outcomes which are defensible with respect to the facts and law" (*Dunsmuir*, at para. 47).

[27] The application for judicial review is therefore dismissed. Mr. Arias Bravo, naturally, is free to make another application for a work permit including the kind of new information put before the Court (see para. 24, above).

[28] The parties did not submit any questions for certification and the Court is satisfied that this case turns on its own facts.

[4] It is unclear from the documents provided whether this farm was acquired in June 2002 or after the applicant's arrival in Canada in October 2002.

ORDER

THIS COURT ORDERS that:

1. The application is dismissed.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3899-09
STYLE OF CAUSE:	JAIRO ARIAS BRAVO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 13, 2010
REASONS FOR ORDER AND ORDER:	GAUTHIER J.
DATED:	April 15, 2010

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