Federal Court  Cour fédérale

Date: 20101202

Docket: IMM-5694-09

Citation: 2010 FC 1217

Ottawa, Ontario, December 2, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

TING-YAO HUANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant, a student from Taiwan, has been in Canada since he arrived at the age of 12 in 1997. His most recent request for an extension of his Temporary Resident Permit (TRP) and Study Permit (SP) was denied. This is the judicial review of that denial decision.

II. FACTUAL BACKGROUND

[2] Having arrived in Canada in 1997 to study under the permission of a SP, the Applicant was granted an extension of that SP until July 15, 2005 when his Taiwanese passport expired. At that time he was studying at York University.

[3] The first SP extension was denied on October 7, 2005. The Applicant then applied for a TRP and SP extension in the hopes that he would not have to leave Canada to apply for a new SP. That application was refused.

[4] A third attempt was made and again refused. This time the Applicant sought judicial review and, upon agreement, the matter was sent back for a re-determination. On May 13, 2008, the extension of the SP and TRP was granted until October 24, 2008. The Respondent claims that the Applicant was advised that when the permits expired, he would have to leave Canada and apply again. There is insufficient evidence of this "caution", a point which the Respondent does not dispute.

[5] The Applicant was granted a further extension until August 31, 2009. In the January 12, 2009 letter confirming the extension, the Respondent said:

> Please note that this is the final extension of your Temporary Resident Permit. This Temporary Resident Permit has been granted to 31 August 2009 to allow you to complete your school year. At that time, it is expected that you will leave Canada and regularize your status by applying for a Temporary Resident Visa and Study Permit at a Canadian Visa office abroad.
>
> Should it be necessary to extend the validity of your permit, you MUST ensure that your application for such an extension reaches the Case Processing Centre (if in Canada) or a Visa Office (if abroad) at

> least four weeks before the expiry date on the document in order to enable us to process your application in a timely manner.

[6] The Applicant's extension request of July 30, 2009 was refused for the following stated reasons:

> (i) Client requesting TRP extension and Study Permit.
> (ii) Client has been counselled with last two applications that he must leave Canada and regular [*sic*] status.
> (iii) Client has not complied.
> (iv) Letter from counsel does not address reason why client has not regularized his status.
> (v) I am not satisfied that there are compelling reasons to issue TRP.
> (vi) Application for TRP extension is refused; therefore, application for study permit is refused.
> (vii) Letter sent to client advising leave, included voluntary departure confirmation.

[7] The Applicant argues that the decision to refuse the TRP was unreasonable and that the Officer breached the principles of procedural fairness in failing to provide adequate reasons.

III. ANALYSIS

[8] TRPs are issued pursuant to a broad discretionary power and as exceptional relief from the general provisions of the *Immigration and Refugee Protection Act* (IRPA).

> The objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of IRPA which surfaces in cases where there may be "compelling reasons" to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA. Basically, the TRPs allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments.
>
> *Farhat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275, para. 22.

[9] The specific provisions governing TRPs set out the discretion given to a CIC officer as well as the requirement to act in accordance with Ministerial direction.

[10] The discretion and directions are found in s. 24(1) and (3) of IRPA:

24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.	**24.** (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.
…	…
(3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.	(3) L'agent est tenu de se conformer aux instructions que le ministre peut donner pour l'application du paragraphe (1).

[11] The Ministerial directions are found in the CIC Inland Processing Manual IP-1. Unlike simple policies which are non-binding, these directions have the force of law by virtue of s. 24(3). The relevant directions are found at paragraph 12.1:

> 12.1. **Needs assessment**
>
> An inadmissible person's need to enter or remain in Canada must be compelling and sufficient enough to overcome the health or safety risks to Canadian society. The degree of need is relative to the type of case.
>
> The following includes points and examples that are **not** exhaustive, but they illustrate the scope and spirit in which discretion to issue a permit is to be applied.

Officers must consider:

- the factors that make the person's presence in Canada necessary (e.g. family ties, job qualifications, economic contribution, temporary attendance at an event);
- the intention of the legislation (e.g. protecting public health or the health care system).

The assessment may involve:

- the essential purpose of the person's presence in Canada;
- the type/class of application and pertinent family composition, both in the home country and in Canada;
- if medical treatment is involved, whether or not the treatment is reasonably available in Canada or elsewhere (comments on the relative costs/accessibility may be helpful), and anticipated effectiveness of treatment;
- the tangible or intangible benefits which may accrue to the person concerned and to others; and
- the identity of the sponsor (in a foreign national case) or host or employer (in a temporary resident case).

[12] Given the highly discretionary and exceptional nature of s. 24 relief, the standard of review is reasonableness with deference accorded to factual findings and the weighing of factors (*Farhat*, above).

Issues of procedural fairness generally and in this case in particular are reviewed on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

[13] The reasons in this case are inadequate because of a) factual error, and b) non disclosure of a key rationale for the decision.

[14] In the Officer's reasons, he places considerable emphasis on the fact that the Applicant had been cautioned twice that no further extensions would be granted and that he would have to leave Canada and apply again from outside the country.

[15] However, the facts established are that the "first" caution could not be established and the "second" caution is of dubious nature.

[16] The only established caution was at best equivocal. As set forth in paragraph 5, the Applicant is cautioned that the extension is final and in the next paragraph the Respondent goes on to discuss how to proceed with any necessary extension.

[17] Whether the error is an issue of legitimate expectation or adequacy of reasons or failure to consider material facts is of little importance here. It is a breach of procedural fairness.

[18] Further, the "reasons" advanced by the Respondent were said to be contained in the FOSS notes. However, in reply to the Applicant's affidavit in this matter, the Respondent filed an affidavit of the Officer which in part further explains the reasons for decision. This alone is improper but the Applicant was prepared to live with this procedural *faux pas*.

[19] The reason for the Applicant's position is that the affidavit contains further reasons for the decision not previously disclosed. The most critical of which is the Officer's assumption that the Applicant could leave Canada and reapply from another country – the U.S.

[20] Not only was this assumption or rationale not part of the “reasons”, it ignored the restriction on entry into the U.S. imposed on citizens of Taiwan, particularly those with no status in the outgoing country. This is not a simple case of swinging by Buffalo and dropping off one’s application. The Officer failed to consider that the Applicant would have to return to Taiwan and the consequences thereof.

[21] Given these errors of procedural fairness, it is unnecessary and potentially unhelpful to comment on the reasonableness of the decision.

IV. CONCLUSION

[22] For these reasons, this judicial review will be granted, the decision quashed and the Applicant may file a new application to be dealt with before a different officer.

[23] The Applicant has requested costs because of the history of this file. At this point, I fail to see that the Respondent’s conduct has yet reached the level justifying costs.

[24] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the Applicant may file a new application to be dealt with before a different officer. There is no order awarding costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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