Federal Court  Cour fédérale

Date: 20101222

Docket: IMM-1498-10

Citation: 2010 FC 1321

Ottawa, Ontario, December 22, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

KWAKU AMAKYE BANFUL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an immigration officer in Windsor, Ontario, dated January 12, 2010, refusing the applicant's request for restoration of a study permit under section 182 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) because the applicant is not a "*bona fide* student".

FACTS

Background

[2] The applicant is a 26-year-old citizen of Ghana. He entered Canada on August 13, 2004, and was issued a study permit valid until May 20, 2005. His study permit was twice extended, and last expired on September 30, 2009. On November 2, 2009, the applicant applied for a restoration of his study permit. It is the officer's refusal, on January 12, 2010, to restore the study permit that is the subject of this judicial review application.

[3] After arriving in Canada, the applicant first attended Columbia International College. He then registered at the University of Windsor (the University), in the Honours Bachelor of Arts program in International Relations and Development Studies. After his second year, the applicant was placed on academic probation and attended St. Clair College for three remedial semesters, from the fall of 2007 to the fall of 2008, before returning to the University.

[4] Since entering Canada, the applicant has had several encounters with the law:

1. On November 24, 2008, the applicant was a passenger in a friend's motor vehicle in which police found under the driver's seat, on a routine stop and search, approximately 1 ounce of cocaine. Charges against the applicant were stayed by the Crown.

2. In April of 2009, the applicant was again stopped by police while driving. The applicant did not consent to a vehicle search, but accepted a ride home in the police vehicle after the police towed the applicant's vehicle due to suspicions regarding the validity of his license. Prior to entering the police vehicle, the applicant submitted to a search of his person and backpack, during which the police found approximately 4 ounces of marijuana. The applicant was arrested for possession, and released on recognizance with conditions. One of the conditions was that 24 hours in advance of any change in his address he had to notify the Ontario Provincial Police. The Crown later withdrew charges against the applicant for possession of marijuana on July 30, 2009.

3. In June of 2009 the applicant was attacked with a machete. At his interview, he told the immigration officer that he did not report this incident to the police because he knew that there was an outstanding warrant for his arrest.

4. On September 20, 2009, the applicant's former roommate was shot outside a residence. The shooter asked the roommate if he knew the applicant before the shooter shot the roommate. The shooter was the same person who had previously attacked the applicant with a machete in June of 2009. When police attended the scene, they discovered that the residence was the applicant's residence, and that it was a different address from the one on his recognizance. The applicant was therefore arrested and charged with failure to comply with his recognizance.

5. At his interview with the immigration officer, the applicant admitted that he had missed a court date on October 20, 2009, in relation to his breach of recognizance. He notified the immigration officer that he would turn himself in the day following his interview. There is no evidence regarding whether the applicant did, in fact, turn himself in to the police following the interview.

Decision under Review

[5] On January 12, 2009, the immigration officer rejected the applicant's request for restoration of his study permit because the officer did not believe that the applicant was a "*bona fide* student". In her reasons, the officer considered the applicant's responses to the questions at the interview, which was held on November 19, 2009.

[6] The officer stated:

1. that the applicant is supported by his family in Ghana, who pay for his studies and daily needs in Canada;

2. that although the applicant is not himself associated with any criminal gang, the officer stated that the applicant associated with his former roommate's cousin, Tian, who the applicant knew was a member of a gang; and

3. that the applicant admitted at the interview that he smokes marijuana, and that his friend "Stones," grows marijuana.

[7] The applicant initially dishonestly answered in the negative the written question on the application form for the visa of "whether he had ever been convicted of or charged with a crime or offence in any country". The officer found subsequent questions revealed the charges described

above – namely, the 2008 charge for cocaine possession, the April 2009 charge for marijuana possession, the September 2009 charge for failure to comply with his recognizance, and the bench warrant issued following his failure to attend at his October 2009 court date.

[8] The officer also interviewed the applicant regarding statements that he had made at an interview on September 21, 2009, with a different immigration officer, regarding the June 2009 attack made on him by a person with a machete. The officer stated that the applicant explained the nature of the attack and "stated that he did not report this to the police as he knew there was a warrant out for him and his injuries were not life threatening."

[9] The officer reviewed the applicant's academic history. The officer noted that the applicant's grades at the University were consistently low.

[10] After reviewing the applicant's explanations for the encounters with law enforcement authorities and for his poor academic performance, the officer concluded that the applicant's study permit should not be restored. The officer provided three bases for this conclusion – (1) the applicant's academic history does not demonstrate that his studies are a priority; (2) the applicant's admissions at the interview suggest he will not comply with relevant legislation; and (3) the applicant was not credible with regard to his explanations for his admitted misdeeds. The officer stated at page 5 of the decision:

> I am not satisfied that the applicant is a bona fide student. His marks and the fact that he previously failed out of his program and has remained on academic probation, in my opinion, indicate either that his studies are not his first priority, or that the course of study is too difficult for him. The applicant states he attended summer session to

> bring up his marks, however, I am not satisfied that his effort illustrates that he is a bona fide student.
>
> I am not satisfied that the applicant will comply with Immigration legislation or Canadian laws for that matter. He self-admitted illegal activity (being a pot smoker) to me at interview, as well as knowing and affiliating with criminals (Tian, an alleged Crips member, and Stones his friend who grows pot).
>
> I am also not satisfied that the applicant is credible. Many of his responses to me at interview did not appear credible. For instance, his statement that he did not notify the O.P.P. of his change of address as required by his release order due to the fact that he couldn't get a hold of his lawyer. I question the credibility of other statements, for instance, that he was never threatened prior to the shooting that occurred in his home, but then later admitted to being attacked at his previous apartment by a man with a machete. The applicant also misrepresented the fact that he had criminal charges on his application for restoration.
>
> The applicant is also subject to a bench warrant because he failed to attend his court date, and had breached his order of recognizance.
>
> As I am not satisfied that the applicant is a bona fide student, and that he will comply with Immigration laws and regulations, the applicant cannot be restored pursuant to Regulation 182 of the Immigration and Refugee Protection Regulations. Therefore, the application is refused.

LEGISLATION

[11] Section 182 of the Regulations provides that a visa officer may restore a temporary resident's visitor, worker or student status under certain conditions:

182. On application made by a visitor, worker or student within 90 days after losing temporary resident status as a result of failing to comply with a condition imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c), an officer	182. Sur demande faite par le visiteur, le travailleur ou l'étudiant dans les quatre-vingt-dix jours suivant la perte de son statut de résident temporaire parce qu'il ne s'est pas conformé à l'une des conditions prévues à l'alinéa 185a), aux sous-alinéas 185b)(i) à (iii) ou à

shall restore that status if, following an examination, it is established that the visitor, worker or student meets the initial requirements for their stay and has not failed to comply with any other conditions imposed.	l'alinéa 185c), l'agent rétablit ce statut si, à l'issue d'un contrôle, il est établi que l'intéressé satisfait aux exigences initiales de sa période de séjour et qu'il s'est conformé à toute autre condition imposée à cette occasion.

ISSUE

[12] The applicant submits that the immigration officer's decision raises the following issue:

1. Did the visa officer err in law by basing her decision or order on an erroneous finding of fact that she made in a perverse and capricious manner or without regard to the material before her when she found that the applicant did not satisfy the requirement of a bona fide student leading to the refusal of his application for restoration of status as an international student?

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at para. 53.

[14] Post-*Dunsmuir* jurisprudence has established that the appropriate standard of review applicable to factual determinations is reasonableness: see also, for example, *Saleem v. Canada (Citizenship and Immigration)*, 2008 FC 389, at para. 13; *Malveda v. Canada (Citizenship and Immigration)*, 2008 FC 447 at paras. 17-20; *Khokhar v. Canada (Citizenship and Immigration)*, 2008 FC 449 at paras. 17-20, and my decision in *Dong v. Canada (Citizenship and Immigration)*, 2010 FC 55, at para. 17.

[15] In reviewing an officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra*, at paragraph 47; *Khosa*, *supra*, at para. 59.

ANALYSIS

<u>Issue No. 1</u>: Did the officer err by basing her decision or order on an erroneous finding of fact made in a perverse and capricious manner or without regard to the material before her when she found that the applicant did not satisfy the requirement of a bona fide student leading to the refusal of his application for restoration of status as an international student?

[16] The applicant submits that the visa officer based her decision upon two erroneous factual findings:

1. the applicant submits that the officer was mistaken when the officer stated that the applicant "previously failed out of his program and has remained on academic probation . . . ." To the contrary, the applicant submits that he rehabilitated his status by attending the three remedial semesters, and is eligible to continue his studies once his immigration status is restored; and

2. The officer was also mistaken when the officer stated that the applicant had pleaded guilty to the charge of possession of cocaine, whereas the charge had in fact been stayed by the Crown.

[17] Although the immigration officer may not have used the correct terminology when referring to the applicant's academic history, it is clear that the officer's assessment of the applicant's *bona fides* as a student was based upon a consideration of his poor academic performance since his arrival in Canada. The applicant has provided no evidence to suggest that the facts stated by the officer with regard to the applicant's marks or his time in remedial courses were mistaken. The officer's conclusion that this history does not support a finding that the applicant is a bona fide student was reasonably open to the officer on those facts.

[18] With regard to the officer's erroneous statement that the applicant pleaded guilty to the cocaine charges, the Court finds that this did not materially impact the decision. That statement was made in the officer's review of the facts but did not form a basis for the decision. Instead, the officer's conclusion regarding the applicant's likelihood to comply with Canadian laws was based upon the officer's findings regarding the applicant's admitted marijuana smoking and his affiliation with known criminals:

> He self-admitted illegal activity (being a pot smoker) to me at interview, as well as knowing and affiliating with criminals (Tian, an alleged Crips member, and Stones his friend who grows pot).

[19] In order to constitute a reviewable error, the officer's erroneous factual finding would have to have materially affected the decision, or would have had to have been made in a perverse or capricious manner, without regard to the material before her: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d). In this case, it is clear that the officer thoroughly reviewed the applicant's evidence

and gave him an opportunity to respond to all of her concerns. Her decision to reject his application was based upon three sound reasons set out above in paragraph 10 of this Judgment that are justifiable, transparent, and intelligible, and fall within the range of possible outcomes acceptable in light of the facts and the law.

CONCLUSION

[20] The Court concludes that the officer's decision regarding the applicant's *bona fides* as a student in Canada and willingness to comply with Canadian legislation was reasonably open to the officer based upon the evidence. The officer considered the applicant's explanations, but was not ultimately persuaded on a balance of probabilities. As the findings were reasonable, this Court has no basis for interfering with the officer's decision.

CERTIFIED QUESTION

[21] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	*Kwaku Amakye Banful v. The Minister of Citizenship and Immigration*
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