Federal Court  Cour fédérale

Date: 20110609

Docket: IMM-4362-10

Citation: 2011 FC 667

Ottawa, Ontario, June 9, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MARIO EDGARDO VAGUEDANO ALVAREZ

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 Immigration Officer Catherine Demers (the Officer) dated July 12, 2010, wherein the Officer refused the Applicant's request for a Temporary Resident Permit (TRP). The Officer determined that there were insufficient grounds to merit the issuance of a TRP in the Applicant's case.

[2] Based on the reasons that follow, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, Mario Edgardo Vaguedano Alvarez, is a citizen of El Salvador. He is an ordained pastor. He was issued a temporary resident entry visa in December 2004 by the Canadian visa mission in Guatemala to work at the First Hispanic Baptist Church in London Ontario. He arrived in Canada along with his family in January 2005.

[4] The Applicant and his family subsequently applied for and received multiple extensions to their visitor records, the last of which was set to expire on December 31, 2009. Accordingly, they applied for a further extension on July 23, 2009.

[5] While the decision to extend the family's temporary resident status was pending, on November 23, 2009, the Applicant was convicted of operation of a motor vehicle while impaired, contrary to paragraph 253(1)(a) of the *Criminal Code*, RSC, 1985, c C-46. He had been charged with the infraction in December 2008.

[6] According to the Field Operations Support System (FOSS) notes, the Applicant was contacted by an immigration officer with the local office of Citizenship and Immigration (CIC) in Niagara Falls on December 7, 2009. He was asked to provide information regarding his recent

conviction. The Applicant expressed regret and stated that he would not do it again. The next day, December 8, 2009, the Applicant's request for an extension of his visitor's record was refused. The refusal letter advised the Applicant that he must leave Canada on or before the expiry of his current document, as failure to do so could result in enforcement actions being taken against him.

[7] On December 22, 2009 the Applicant submitted an application to CIC for a TRP under section 24 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[8] While the TRP decision was pending, in March 2010 the Applicant was informed by Canada Border Services Agency (CBSA) that a report had been prepared under section 44(1) of the IRPA based on reasonable grounds to believe that he was inadmissible to Canada. The Applicant provided submissions in response and attended an interview.

[9] By letter dated July 12, 2010 the Applicant's request for a TRP was rejected. This decision is the subject matter of this judicial review.

[10] Subsequently, on July 21, 2010, a section 44(1) report was signed and the matter was referred to a Minister's Delegate. On August 12, 2010 the Applicant was found inadmissible pursuant to paragraph 36(2)(1) of the IRPA, for having been convicted in Canada of an offence punishable by way of indictment, and ordered deported. On the same day, the Applicant's wife and daughter were also ordered deported. There is no indication that the Applicant has filed an application for leave and judicial review of any of these other decisions.

B. *Impugned Decision*

[11] The decision was communicated to the Applicant by way of letter dated July 12, 2010. The relevant paragraph reads:

> Your case has been examined with reference to the possibility of issuing a temporary resident permit. After a careful and sympathetic review, it has been determined that there are insufficient grounds to merit the issuance of a permit in your case.

[12] After filing this application for judicial review, the Applicant also obtained certified copies of the decision pursuant to Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules*, (SOR/93-22). The notes prepared by the Officer were attached as reasons for the decision.

[13] In the Officer's reasons, she listed the factors that she considered. She remarked that the Applicant had a pending application for permanent residence at the Canadian mission in Buffalo and that the Applicant had already failed to leave Canada as directed. She was not satisfied that the Applicant would leave at the end of his authorized stay. She noted that she had considered the best interests of the children and that the Applicant's spouse and daughter had not applied to extend their status. Ultimately, she was not satisfied that there were sufficient grounds to merit the issuance of a permit. Accordingly, the application was refused.

II. Legislative Scheme

[14] Subsection 24(1) of the IRPA provides that a foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of the Act becomes a temporary resident

if the officer is of the opinion that it is justified in the circumstances and issues a TRP. The TRP may be cancelled at any time.

[15] Justice Michel Shore elaborated upon the nature and objectives of the TRP scheme in *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275, 302 FTR 54 at para 22:

> [22] 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. (Immigration Manual, c. OP 20, section 2; Exhibit "B" of Affidavit of Alexander Lukie; *Canada (Minister of Manpower and Immigration) v. Hardayal*, 1977 CanLII 162 (S.C.C.), [1978] 1 S.C.R. 470 (QL).)

[16] Justice Shore went on to note that TRPs must be issued cautiously, as they grant their bearers more privileges than other temporary statuses. In fact, due to the exceptional nature of TRPs, the Minister remains accountable for the use of this authority and annually reports to Parliament the number of TRPs granted under section 24 of the IRPA, categorized by the grounds of inadmissibility (*Farhat*, above, at para 24; Immigration Manual, OP 20, s 5.22).

III. Issues

[17] The Applicant raises the following issues:

(a) Did the Officer make errors of fact in rendering the decision?

  (i) Did she err in basing her decision on the fact that the Applicant had already failed to leave Canada as directed?

(ii) Did she err in relying on the fact of the Applicant's inadmissibility?

(b) Were the reasons adequate?

IV. Standard of Review

[18] As TRPs are considered to be an exceptional regime, the decision to grant one is highly discretionary. As a result, this Court has held that considerable deference should be accorded to the judgment of the officer. The appropriate standard is reasonableness (*Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 784, 73 Imm LR (3d) 258 at para 9).

[19] Judicial deference to the decision is appropriate where the decision demonstrates justification, transparency and intelligibility within the decision making process, and where the outcome falls within a range of possible, acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[20] The issue of adequacy of law and other questions of law, generally and in this case, are reviewed on the correctness standard (*Dunsmuir*, above).

V. Argument and Analysis

A. *Did the Officer Err in Fact?*

[21] The Applicant submits that in rendering the decision the Officer made factual and legal errors. The reasons suggest to the Applicant that the Officer largely based her decision on the Applicant's past refusal to leave the country when directed to do so and his criminal inadmissibility. The Applicant takes issue with both findings of fact.

(i) Did the Officer Err in Finding That the Applicant Had Failed to Leave the Country?

[22] The Applicant argues that subsection 183(5) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] allows a temporary resident who submits an application for extension prior to the expiry of his status to maintain status until the application for an extension is decided. As such, the Applicant believes that he had status in Canada until the TRP refusal was communicated to him on July 12, 2010. Thus, he maintains that he never failed to leave Canada as directed.

[23] The Respondent submits that the Applicant's belief that his application for a TRP triggered the preserving effect of subsection 183(5) is in error. I must agree with the Respondent on this point. As argued by the Respondent, the Applicant's temporary status as a visitor expired December 31, 2009 because his request to extend his status was denied on December 8, 2009. The

letter that the Applicant received to this effect made it clear that would have no status in Canada after the expiry date of his visitor record on December 31, 2009.

[24] Subsection 183(5) reads:

Extension of period authorized for stay	Prolongation de la période de séjour
(5) If a temporary resident has applied for an extension of the period authorized for their stay and a decision is not made on the application by the end of the period authorized for their stay, the period is extended until	(5) Si le résident temporaire demande la prolongation de sa période de séjour et qu'il n'est pas statué sur la demande avant l'expiration de la période, celle-ci est prolongée :
(a) the day on which a decision is made, if the application is refused; or	a) jusqu'au moment de la décision, dans le cas où il est décidé de ne pas la prolonger;
(b) the end of the new period authorized for their stay, if the application is allowed.	b) jusqu'à l'expiration de la période de prolongation accordée.

[25] Since the Applicant was not already a holder of a TRP, applying for a TRP could not operate to extend a status that the Applicant had never been granted. Subsection 183(5) did not apply to the Applicant's circumstances after December 31, 2009. Rather, as suggested by the Respondent, paragraph 183(1)(a) of the IRPR did. Paragraph 183(1)(a) provides that subject to the variances permitted under section 185, all temporary residents must leave Canada by the end of the period authorized for their stay. Obviously, the Applicant did not leave Canada by December 31, 2009. It can not be said that the Officer erred in relying on this fact.

(ii) Did the Officer Err in Relying on the Fact of the Applicant's Inadmissibility?

[26] The Applicant submits that the Officer erred in noting that his application to extend his temporary resident status was refused on December 8, 2009 because he was inadmissible. The Applicant takes the position that he was not found inadmissible to Canada until the section 44(1) report was signed on July 21, 2010 and so the Officer, once again, erred in fact. Alternatively, if the Officer was correct in relying on his inadmissibility in making her decision, the Applicant submits that he was neither informed of this finding, nor invited to make submissions prior to the refusal and so the Officer erred in law in that the Applicant's right to procedural fairness was violated.

[27] The Respondent squarely counters the Applicant's submissions, pointing out that the record shows that the Applicant was contacted regarding his criminal conviction prior to both refusal decisions (December 2009 and July 2010). Immigration Officer A. Longval contacted the Applicant on December 7, 2009 before refusing to extend his visitor's record on December 8, 2009. Equally, the record shows that the Officer in the present matter received documents relating to his conviction by fax on July 9, 2010. I agree with the Respondent that the Applicant had a chance to make submissions regarding his inadmissibility.

[28] Further, as argued by the Respondent, the Applicant conflates separate immigration processes. Many things happen simultaneously and seemingly in parallel in immigration files. Understandably, it may be confusing for people interacting with the immigration system to follow which agency is responsible for what and when. However, the Applicant demonstrates a flawed understanding of the processing of his file. Subsection 24(1) of the IRPA requires an immigration

officer to formulate an opinion as to whether a foreign national is inadmissible. The Officer was entitled to do so for the purpose of assessing whether issuing a TRP was justified. This is a process separate and apart from the decision to make the Applicant subject to a section 44(1) report, or to issue a removal order.

[29] The Officer was not only entitled to consider the Applicant's inadmissibility, but was required to do so. Moreover, despite the Applicant's unfortunate misunderstanding of the regulations, it is clear that his status expired in December 31, 2009 and he should have left the country at that time. The Officer did not make any factual errors in her decision.

B. *Were the Reasons Adequate?*

[30] The Applicant submits that the decision is not supported by adequate reasons. The Applicant takes the view that the Officer merely sets out the history of the Applicant's dealings with CIC followed by a short paragraph which does not serve to justify or explain the refusal. The Applicant cites *Beyer v Canada (Minister of Citizenship and Immigration)*, 2009 FC 823, for the proposition that the reasons should reflect the considerations and criteria specified for the assessment of TRP applications in CIC Inland Processing Manual 1, Temporary Resident Permits. This manual indicates that officers must weigh the need and risk factors in each case, and it is not clear that the Officer did this in the present matter.

[31] The Respondent submits that it is trite law that the adequacy of reasons depends on the circumstances of each individual case, and that reasons may be brief as long as they demonstrate

that the relevant factors were considered (*Shahid v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1607, 266 FTR 109 at para 15). Consideration under section 24 is not a full-scale humanitarian and compassionate (H&C) consideration as mandated under section 25 of the IRPA and so it does not require the same degree of consideration (*Rodgers v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1093, 56 Imm LR (3d) 63 at para 10).

[32] The Respondent also argues that a person seeking a TRP must have the intention of staying in Canada for a temporary purpose, and that it was clear that the Officer was not satisfied that the Applicant would leave upon the expiry of the status. This is set out in the IRPA in subsections 20(1)(b) and 29(1) and (2) (*Farhat*, above, paras 32-33). This explanation for refusal is more than adequate in the circumstances of this case in the eyes of the Respondent.

[33] The Officer listed, in bullet points, the factors she considered. It is true that this largely amounts to a rewriting of the Applicant's immigration history. The submissions he made with regard to the services he provides as a pastor to his church and community, are summarized as:

- Client is an ordained and recognized Pastor in the Baptist Convention of Ontario and Quebec for the First Hispanic Baptist Church congregation in London Ontario
- He provides ministry to the Hispanic community

[34] The "Decision" paragraph reads:

> The client is seeking a Temporary Resident Permit to overcome his inadmissibility to Canada. The client has a pending application for permanent resident at the Canadian mission in Buffalo. The client has failed to leave as directed. I am not satisfied that client will leave at the end of this authorized stay. The best interest of the children has been taken into consideration. The client spouse and daughter have not applied to extend their status in Canada. Upon reviewing all

> documents submitted with the Temporary Resident Permit application, I am not satisfied that there are sufficient grounds to merit the issuance of a permit. The application is refused.

[35] I agree with the Applicant that it the Officer's risk of the Applicant remaining in Canada vs. his purported need to stay in the country analysis was not detailed in the reasons so as to list all possible considerations laid out in the criminal inadmissibility section of the Manual. Surely, this is perplexing for the Applicant. However, it has been repeatedly held that guidelines such as the Manual are not law, are not binding on the Minister or his agents, and do not create any legal entitlement. While they can be of assistance to the Court, they cannot fetter the discretion of an officer (*Lee v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1152 at para 29).

[36] As sympathetically as the Applicant pleads his case, the level of procedural fairness required in this context is rather low. The Officer listed the appropriate factors as set out in the guidelines – the infraction, that the Applicant was enrolled in the back-on-track program, that he provided ministry to the Hispanic community -- and found nonetheless that there were not sufficient grounds to merit the issuance of a permit. Clearly the Officer did not consider the need of the Applicant to remain in Canada to be so compelling as to outweigh any risk he presented. A detailed written analysis is not required.

[37] Although the Officer's reasons are brief, there is a chain of reasoning, and it is implicit that she put more weight on the Applicant's failure to leave Canada than the contribution he makes to the community as the reference letters attest. That he failed to leave Canada because he misunderstood the provisions of the IRPR is unfortunate, but does not raise a breach of procedural fairness in the context of sufficiency of reasons.

[38] Furthermore, the Respondent distinguishes *Beyer*, above, on the facts. While I would not focus as much as the Respondent did on the fact that exceptional circumstances had been identified in that case, namely, the immobility of the applicant, it is of note that the only reasons provided in that decision were in the form of a three paragraph form letter. Deputy Justice Max Teitelbaum found at para 81, "…in light of the circumstances and the facts of this case, the absence of written reasons in the Minister's delegate's decision to refuse to extend the TRPs gives the appearance of an arbitrary decision." The same cannot be said of the present matter.

[39] A large part of the Applicant's remaining submissions duplicate the material that was put before the Officer in an attempt to highlight the compelling nature of the Applicant's claim. However, due to the exceptional nature of TRPs and the discretion with which they are granted, this Court is unable to substitute another conclusion for that reached by the Officer; a conclusion that the Applicant cannot show to be unreasonable.

VI. Conclusion

[40] No question was proposed for certification and none arises.

[41] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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