Federal Court  Cour fédérale

Date: 20130228

Docket: IMM-4106-12

Citation: 2013 FC 211

Ottawa, Ontario, February 28, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

EPHRAIM TIANGHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 72(1), of a decision by an Immigration Officer to refuse the applicant's request for permanent residence under the Live-In Caregiver Class. While Mr. Tiangha had met the eligibility requirements, he had also undertaken additional work without authorization and did not satisfy the officer that an exemption on humanitarian and compassionate grounds should be granted.

[2] For the reasons that follow, the application is granted

BACKGROUND:

[3] Mr. Tiangha came to Canada from the Philippines on September 30, 2006 under the live-in caregiver program. He is a registered nurse. Upon arrival, he discovered that his employer in Toronto was no longer able to hire him. His agency found him an alternate employer in Calgary, for whom he worked for the next 22 months. After his employer passed away at the age of one hundred in November 2008, Mr. Tiangha spent a further two months in Calgary assisting to wrap up the estate, time which Citizenship and Immigration Canada (CIC) agreed to count towards his required work experience hours.

[4] Mr. Tiangha then applied for permanent residence and began searching for another employer. This was difficult as most employers prefer to hire a female caregiver. From February 2009 to January 2010, Mr. Tiangha drew unemployment insurance. He briefly found a new employer in January 2010 but the job fell through after a month. Mr. Tiangha was then unemployed again from February 2010 to October 2010.

[5] In early February 2010 Mr. Tiangha learned that his father was gravely ill. To help defray the $10,000 cost of hospitalization and surgeries in the Philippines, Mr. Tiangha began working without a permit, first caring for a client and then working as a farm labourer. His father died on October 11, 2010 and he returned to the Philippines for two months. Before departing, he had found

a new position as a caregiver, so he was able to leave Canada having secured a temporary residence permit and a work permit. Unfortunately, when he got back to Canada in December 2010, his prospective employer had passed away.

[6] Mr. Tiangha was then without work again in December 2010. He started working without permission again, taking jobs as a gardener and house cleaner to support himself and to continue paying for his father's final illness and funeral. In August 2011, he finally landed another caregiver job for an elderly person. A work permit was granted on November 22, 2011.

DECISION UNDER REVIEW:

[7] On April 19, 2012, CIC Calgary refused Mr. Tiangha's application for permanent residence. The decision letter explains that Mr. Tiangha had met the eligibility requirements for permanent residence as a member of the caregiver class, having worked 4,162 eligible hours by September 2010, the conclusion of the four-year period during which he had to accumulate 3,900 hours. However, he was found to be inadmissible to Canada under s 41 of the IRPA for having violated s 30 of the IRPA and para 185(*b*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] by working without authorization on multiple occasions. The immigration officer also found that he had not provided sufficient evidence to justify an H&C exemption under s 25(1) of the IRPA. The circumstances leading to his inadmissibility had not been unusual and undeserved, and refusing to grant the exemption would not result in disproportionate hardship.

[8] The officer assessed that Mr. Tiangha could have found authorized work if he had tried harder and could have lived off friends and family in Canada while searching for jobs. The officer also noted that he had not provided enough evidence of establishment in Canada despite a lengthy stay in the country, that no children were affected, and that he had provided insufficient evidence of disproportionate hardship if he had to leave. In addition, he had demonstrated that he wanted to work in other fields than caregiving.

ISSUES:

[9] The issues raised by this application are:

1. Did the Immigration Officer err in law in finding that the applicant was inadmissible to Canada for having engaged in unauthorized work?
2. Did the Immigration Officer make an unreasonable H&C decision given the evidence?

ANALYSIS:

Standard of Review;

[10] The standard of review for the issues noted above has been satisfactorily established by the jurisprudence: *Dunsmuir v New Brunswick*, 2008 CSC 9 [*Dunsmuir*] at para 57. An administrative decision-maker's interpretation of its own statute is owed significant deference (*Dunsmuir* at para 54; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 28; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30). Furthermore, an immigration officer's decision with respect to an H&C application involves questions of mixed fact

and law: *Russom v Canada (MCI)*, 2012 FC 1311 at paras 11-13. Both issues are therefore reviewable on the reasonableness standard. Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law: *Dunsmuir* at para 47.

> *Did the Immigration Officer err in law in finding that the applicant was inadmissible to Canada for having engaged in unauthorized work?*

[11] The applicant argued that when he received a new work permit in November 2011, this cured his previous inadmissibility pursuant to s 200 (3) (*e*) of the IRPR. Paragraph 200 (3) (*e*) (ii) of the IRPR states that a foreign national can obtain another work permit if the work was only unauthorized because it did not comply with conditions imposed under 185 (*a*), (*b*), or (*c*). The applicant had breached 185 (b) by engaging in the wrong type of work, for the wrong type of employer, but this did not create a permanent bar, and in fact he did subsequently obtain another work permit. The moment at which the inadmissibility had to be determined, the applicant submitted, was when the decision was made on permanent residence, in April 2012, and that by that point he was no longer inadmissible.

[12] The respondent contended that when the applicant was given a temporary residence permit (TRP) on December 6, 2010, there is no evidence that he advised officials that he had contravened the conditions of his initial work permit by engaging in unauthorized work. The TRP was thus not issued to overcome the fact that he had engaged in unauthorized work and could not cure the

applicant's previous inadmissibility. By extension, the new work permit could not cure his previous inadmissibility either. No authority was cited in support of this proposition.

[13] There is little jurisprudence on s 200 (3) (*e*) (ii) of the IRPR. Neither party was able to assist the Court with decisions which address the question of whether a new work permit may, or may not, cure a previous breach as of the time the application is considered. The fact that s 200 (3) (*e*) (i) prevents a foreign national who has engaged in unauthorized work from getting a new work permit until six months have elapsed indicates that the bar is not indefinite and that a new permit may be obtained after that time period. Further, the fact that s 200 (3) (*e*) (ii) provides that a new permit can be issued if the work was only unauthorized under s 185 (*b*) due to being the wrong type of work and/or for the wrong employer suggests that such breaches are curable.

[14] Mr. Tiangha did get a new permit, which was valid at the moment when the officer made the decision on his application for permanent residence.

[15] In *Ozawa v Canada (MCI)*, 2010 FC 444 at para 15, this Court dealt with the legal effect of a restoration of temporary resident status, explaining that "The Regulations provide that a restoration of one's temporary resident status has the legal effect of curing any breach of the length of stay requirement inherent in the original temporary resident visa." I find that the issuance of a new work permit similarly cured the previous breach and that Mr. Tiangha was admissible to Canada by the date when the immigration officer assessed his application. The officer could therefore have used his previous unauthorized work to found conclusions about credibility, but could not use it to find him inadmissible.

Did the Immigration Officer make an unreasonable H&C decision given the evidence before her?

[16] The applicant submits that the Immigration Officer made numerous errors of fact in her reasons for decision, repeatedly misinterpreted the evidence, lacked empathy, and failed entirely to appreciate the reality of the applicant's situation. Her assessment of the H&C factors was therefore unreasonable. In *Damte v Canada (MCI)*, 2011 FC 1212 [*Damte*] at para 34 this Court commented that "the decision-maker's heart, as well as analytical mind, must be engaged."

[17] The respondent argues that a section 25(1) H&C exemption is not designed to be used as an alternate method of immigration into Canada. It is an exceptional and discretionary remedy. The person applying for it has the onus of satisfying the officer that his personal circumstances are such that the hardship of obtaining a visa from outside Canada would be unusual and undeserved or disproportionate. The Court's comments at para 34 of *Damte* were *obiter* and did not form part of the reasons for that decision; furthermore, the facts in *Damte* are distinguishable from the present case. The IRPA and IRPR do not oblige an officer to express a requisite level of empathy in response to the facts of H&C applications. The obligation is to properly weigh and assess the evidence and make a reasonable decision.

[18] The respondent proposed that the immigration officer properly considered the applicant's stated reasons for engaging in unauthorized work and found that they were self-serving, conflicting, and unsubstantiated. The officer also properly found that either the applicant's brother, friends or other family members would have been able to support him at no cost while he sought authorized

employment. It was up to him to maintain his status until processing of his permanent residence application was complete.

[19] I find that the officer made no attempt to appreciate the difficulties Mr. Tiangha was faced with and drew unreasonable inferences about the options that were open to him. The record shows that after completing all the requirements of the caregiver program and submitting his application for permanent residence, he continually sought more jobs as a nurse-caregiver and only turned to manual labour to pay the unexpected and substantial expenses incurred by his father's illness and funeral when he was unsuccessful in this search. He worked hard at a series of low-wage unskilled jobs which did not call for his nursing qualifications. It was not reasonable of the officer to have speculated that the applicant could draw on unlimited funding and free accommodation from presumed friends and relatives in Canada instead of working, or to fail to understand that the debts resulting from his father's final illness did not cease to exist upon his father's death.

[20] Despite the deference which is due, I find that the officer's conclusions in this case do not represent a possible, acceptable outcome.

[21] The parties were given time to propose questions for certification on the question of mixed fact and law which arose in this matter.

[22] The applicant has proposed the following question:

> By virtue of s 200 (3) (e) (i) and (ii) of the Immigration and Refugee Protection Regulations, is a foreign national who is no longer inadmissible for obtaining a work permit because of past

> unauthorized work also no longer inadmissible for purposes of a permanent residence application based on the same provisions?

[23] The respondent suggests that the Court certify this question:

> Is an applicant's inadmissibility arising from his unauthorized work in Canada cured due to the fact that, subsequent to the unauthorized work but prior to the determination of the applicant's application for permanent residence, a previous officer has issued a work permit to the applicant pursuant to s 200 (3) (e) IRPR?

[24] As I have found that the applicant succeeds on both grounds, an answer to either of the proposed questions would not be dispositive of an appeal. I, therefore, decline to certify a question.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. the application for judicial review is allowed;
2. the April 19, 2012 decision by Citizenship and Immigration Canada determining that the applicant was inadmissible to Canada is set aside and the matter is returned for redetermination by a different officer in accordance with these reasons; and
3. no question is certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4106-12
STYLE OF CAUSE:	EPHRAIM TIANGHA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	February 13, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	February 28, 2013

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