Federal Court  Cour fédérale

Date: 20140716

Docket: IMM-1850-13

Citation: 2014 FC 706

Ottawa, Ontario, July 16, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

CLARE HERNANDEZ LINGAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] **UPON** an application for judicial review of the decision of an Immigration Officer [the Officer] dated March 8, 2013, which concluded that an exclusion order had to be issued concerning the applicant;

[2] **AND UPON** considering carefully the motion record prepared in this case, as well as the arguments of the parties which were heard on June 18, 2014;

[3] For the reasons that follow, the judicial review application made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], must be dismissed.

[4] The applicant entered Canada in August 2011 with a temporary authorization to work as a live-in caregiver for her sister-in-law in the Metropolitan Toronto Area. However, less than five months later, she was also working in a different capacity, with a different employer. This was clearly in violation of the work permit that authorized her arrival in Canada. The applicant declared in her Further Memorandum of Argument filed on her behalf on May 20 last that she "is not disputing the fact that she worked for an employer other than that named in her Live-in Caregiver Program (LCP) work permit."

[5] The exclusion order was issued pursuant to subsection 30(1) and paragraph 41(a) of the IRPA. These provisions read as follow:

Work and study in Canada 30. (1) A foreign national may not work or study in Canada unless authorized to do so under this Act. …	**Études et emploi** 30. (1) L'étranger ne peut exercer un emploi au Canada ou y étudier que sous le régime de la présente loi. …
Non-compliance with Act 41. A person is inadmissible for failing to comply with this Act	**Manquement à la loi** 41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

> (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and
> …

[6] The applicant argues three issues:

a) the Immigration Division would have violated procedural fairness by failing to properly consider the law in ignoring relevant evidence;

b) the Immigration Division would have erred in refusing to consider humanitarian and compassionate factors;

c) the Immigration Division violated procedural fairness by failing to provide adequate and meaningful reasons.

[7] The Immigration Division found on March 8, after an administrative hearing held that same day, that the allegation made that the applicant is inadmissible to Canada because of the application of paragraph 41(a) of the IRPA was demonstrated to the satisfaction of the panel. It was made clear that when the applicant arrived in Canada on August 29, 2011, it was under the Live-in Caregiver Program and it was shown that the applicant did not abide by the conditions of that program by working in a different capacity in Canada. That finding resulted in an exclusion order that was made pursuant to paragraph 45(d) of the IRPA.

[8] Counsel for the applicant artfully attempted to turn this matter into something that it is not. This is not a humanitarian and compassionate application and it was not the remit of the Immigration Division to consider evidence that would be relevant to such an application

(*Wajaras v Canada (Citizenship and Immigration)*, 2009 FC 200). To put it bluntly, once the conditions of paragraph 41(a) have been met, the Immigration Division has little choice but to issue the removal order. Paragraph 45(d) of the IRPA reads as follows:

Decision	**Décision**
45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:	45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :
…	…
(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

[9] As is well known, the use of the word "shall" has a technical meaning. The *Interpretation Act*, RSC, 1985, c I-21, provides specifically at section 11:

"Shall" and "may"	**Expression des notions**
11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.	11. L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

[10] Accordingly, there was no procedural failure or mistake in not considering humanitarian and compassionate factors. Furthermore, the reasons given were amply sufficient for a reviewing court to understand why the decision was made (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708):

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> …
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[11] The applicant sought to, somehow, discount the effect of the combination of subsection 30(1) and paragraphs 41(a) and 45(d) of the IRPA by arguing that an application for restoration of her temporary resident status, in accordance with section 182 of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 [the Regulations], was not considered by the decision-maker in this case. The section reads:

Restoration	**Rétablissement**
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 shall restore that status if, following an examination, it is established that the visitor, worker or student meets the initial requirements for their stay, has not failed to comply with any other conditions imposed and is not the subject of a declaration made under subsection 22.1(1) of the Act.	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 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, qu'il s'est conformé à toute autre condition imposée à cette occasion et qu'il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

[12] The argument seems to be that the decision-maker, in spite of the clear language of section 45 of the IRPA, had to consider section 182 of the Regulations because section 182's effect is to cure the inadmissibility.

[13] In the case at hand, the work permit would have expired on December 1, 2012. Indeed, the renewal of the permit had been denied already on November 2, 2012. Without saying so specifically, the applicant suggests that the effect of section 182 would be to have a retroactive effect. Not only does the applicant in fact suggest that subordinate legislation such as the

Regulations ought to be treated on the same basis as the Act itself, but she also reads in section 182 of the Regulations something that is not there.

[14] It is useful to refer to the sequence of events. The applicant was found in breach of the IRPA by performing unauthorized work on September 26, 2012. She was advised on October 22, 2012 that an admissibility hearing would be held pursuant to section 44 of the IRPA. On November 2, 2012, the applicant's renewal of her work permit, set to expire on December 1, 2012, was rejected. Three days before the said work permit was to expire, on November 28, 2012, a request to restore the work permit was made; such a request was made in accordance to section 182 of the Regulations which provides for the restoration of the temporary resident status.

[15] The effect of a successful application under section 182 is to restore status (the form filled out by the applicant speaks of restoration of work permit under live-in caregiver), that is that, going forward, what was lost (the status) is given back. *The Canadian Oxford Dictionary* (*The Canadian Oxford Dictionary*, 2001, *sub verbo*, "restore") speaks of "bring back", "reinstate" and "put back", for the word "restore", which is in line with the French word used in section 182 ("rétablir" is defined in *Le Petit Robert* (*Le Nouveau Petit Robert*, 1993, *sub verbo* "rétablir") as "établir de nouveau", "faire exister de nouveau", "remettre en vigueur", literally translated as "establish anew", "to make to exist anew", "put back in effect"). It does not have a retroactive effect. It does not cure and it does not cure retroactively. In the case at hand, the work permit was not renewed, which means that in the best circumstances the status would have been restored from November 28, 2012 to December 1, 2012, date on which the original work permit

was to expire if not renewed (section 47 of the IRPA), had the application under section 182 been successful. I fail to see how, and why, the decision-maker, on the facts of this case, ought to have waited for the outcome of a restoration application that could have restored a temporary resident status for three more days.

[16] Furthermore, the applicant never explained what impact seeing her status restored as a temporary resident by an immigration officer could have had on the decision of the Immigration Division whose jurisdiction is simply to conclude on inadmissibility because of a contravention of the IRPA, in this case the prohibition on a foreign national to work unless authorized to do so. Being restored as a temporary resident by one immigration officer does not change the fact that there was contravention of the IRPA, which brings with it a finding of inadmissibility by the Immigration Division. Basically, the two operate independently of each other and are not in opposition.

[17] As a result, the application for judicial review is dismissed. There is no question for certification.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed. There is no question for certification.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1850-13
STYLE OF CAUSE:	CLARE HERNANDEZ LINGAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 18, 2014
ORDER AND REASONS:	ROY J.
DATED:	JULY 16, 2014

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