Federal Court  Cour fédérale

Date: 20141118

Docket: IMM-8426-13

Citation: 2014 FC 1086

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, November 18, 2014

Present: The Honourable Mr. Justice Shore

BETWEEN:

ABOUBACAR LASSIDY TOURE

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), with respect to an exclusion order issued on December 18, 2013, by an officer of the Canada Border Services Agency (CBSA).

II. Facts

[2] The applicant, a citizen of the Republic of Guinea, 21 years old, arrived in Canada on December 12, 2010, with temporary resident status, as an international student. The applicant's study permit expired on August 31, 2013.

[3] Having failed to submit an application for the renewal of a student permit within 90 days before the expiry of his study permit, as provided in section 217 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), the applicant applied for a renewal of his Certificat d'acceptation du Québec with the Ministère de l'immigration et des communautés culturelles du Québec, on October 28, 2013, and an application for restoration of status and study permit, on November 29, 2013.

[4] On December 3, 2013, when he was refused entry by U.S. customs, the applicant was subject to screening by the CBSA at the Canada–United States border. In the absence of a valid status, because of his expired student permit, a report under subsection 44(1) of the IRPA was written regarding the applicant. On December 4, 2013, following a second screening by the CBSA, resulting from being refused entry to the United States at the Montréal airport, the applicant consented to voluntarily leave Canada by withdrawing his request for admission to Canada. Therefore, no exclusion order was issued against him.

[5] The day scheduled for his departure to Guinea, December 18, 2013, the applicant told the authorities of his intention that he no longer wanted to voluntarily leave Canada, such that an

exclusion order was issued against him the same day. This decision to exclude the applicant is impugned before the Court.

III. Impugned decision

[6] The impugned decision is that of the exclusion order and the inadmissibility report issued under subsection 44(1) of the IRPA against the applicant, including the officer's notes recorded in the related Global Case Management System.

[7] The exclusion order against the applicant indicated that the applicant is inadmissible for "failing to comply with [the IRPA] in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of [the IRPA]; and in the case of a permanent resident, through failing to comply", under section 41 of the IRPA.

[8] In particular, the report indicated that the applicant allegedly violated paragraph 20(1)(*b*) of the IRPR according to which "a foreign national … who seeks to enter or remain in Canada must establish, to become a permanent resident, that they hold the visa or other document required under the regulations", and section 9 of the IRPR according to which "A foreign national may not enter Canada to study without first obtaining a study permit" (Applicant's Record, at p 6).

[9] The report written by the officer under subsection 44(1) is based on the following information, according to which the applicant:

- is not a citizen of Canada or a permanent resident of Canada;

- stated that he was studying at the Université du Québec à Montréal during the fall 2013 term. Therefore, the applicant stated that he was going to miss final examinations;
- did not apply for renewal of his study permit before the expiration date, i.e. August 31, 2013;
- stated that he submitted an application for restoration dated November 29, 2013, and that, despite this application, he was not entitled to attend an educational institution.

(Applicant's Record, at p 10).

IV. Analysis

[10] The question before the Court is whether the exclusion order issued against the applicant under subsection 44(1) is reviewable.

[11] According to the applicant, the officer allegedly breached procedural fairness by issuing an exclusion order against him. The applicant relied on the inadequacy of the reasons of the officer and the arbitrariness of his decision. The applicant argued that the officer's decision does not consider the entire record, in particular his application for restoration of his study permit under subsection 182(1) of the IRPR.

[12] So as to enable the Court to decide the application, it is appropriate to give particular attention to the relevant statutory and regulatory provisions.

[13] First, the officer's decision to exclude the applicant under section 41 of the IRPA is based on an "act or omission" committed by the applicant, specifically contrary to paragraph 20(1)(*b*) and section 9 of the IRPR.

[14] The respondent argued that the applicant is a foreign national who [TRANSLATION] "sought to enter and remain in Canada" since he was refouled on two occasions by U.S. customs, which engages paragraph 20(1)(*b*) with respect to the applicant. The respondent argued that the applicant is a "person seeking to enter Canada" under subsection 27(3) of the IRPR. The relevant provisions are as follows:

Obligation on entry	**Obligation à l'entrée au Canada**
20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20**. (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
…	[…]
(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	*b*) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.
Obligation on entry	**Obligation**
27. (1) Unless these Regulations provide otherwise, for the purpose of the examination required by subsection 18(1) of the Act, a person must appear without delay before an officer at a port of entry.	**27**. (1) Sauf disposition contraire du présent règlement, la personne qui cherche à entrer au Canada doit sans délai, pour se soumettre au contrôle prévu au paragraphe 18(1) de la Loi, se présenter à un agent à un point d'entrée.
Refused entry elsewhere	**Admission refusée par un**

	pays tiers
(3) For the purposes of section 18 of the Act, every person who has been returned to Canada as a result of the refusal of another country to allow that person entry is a person seeking to enter Canada.	(3) Pour l'application de l'article 18 de la Loi, toute personne retournée au Canada du fait qu'un autre pays lui a refusé l'entrée est une personne cherchant à entrer au Canada.
Study permit	**Permis d'études**
9. (1) A foreign national may not enter Canada to study without first obtaining a study permit.	**9**. (1) L'étranger ne peut entrer au Canada pour y étudier que s'il a préalablement obtenu un permis d'études.

[15] The Court noted that the applicant attempted on several occasions to obstruct the law and the mandate of the CBSA officers. In particular, the applicant failed to file an application for renewal of his study permit within the deadline set under subsection 217(1) du IRPR. In addition, it was only on the day of his scheduled departure that the applicant stated that he no longer wanted to comply with his consent prior to December 4, 2013, to leave Canada, in accordance with the formal withdrawal of his application to enter Canada.

[16] Further, the Court considered that the purpose of the IRPA in facilitating the entry of students and temporary workers to Canada must also be balanced with the need to maintain the integrity of Citizenship and Immigration Canada (CIC) programs and to promote due compliance with the various obligations set out in the IRPA (*Sui v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1314 at para 51 (*Sui*); *Adroh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 393 at para 10 (*Adroh*)).

[17] Despite the reprehensible nature and his conduct, the Court noted that the applicant is entitled to have his application for restoration of his status, filed within the prescribed time, considered by the CBSA's officer.

[18] In particular, the officer is required to consider whether the applicant's application for restoration complies with the conditions set out in subsection 182(1) of the IRPR:

Restoration	**Rétablissement**
182. (1) 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**. (1) 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.

[19] The wording of subsection 182(1) of the IRPR established that the officer must restore status for which an application for restoration was submitted within the prescribed time, if the specified conditions are met. Specifically, subsection 182(1) of the IRPR grants the right to restore a student's status on an application made "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*)" and "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".

[20] In this case, the applicant made his application for restoration within the prescribed time, i.e. within 90 jours after his study permit expired. Regarding this, Justice Danièle Tremblay-Lamer stated in *Adroh*, above:

> [7] Justice Gauthier emphasized the following in *Sui v Canada* (*Minister of Public Safety and Emergency Preparedness*), 2006 FC 1314, [2006] FCJ No 1659 at paragraphs 33-34 (*Sui*):
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> > In order to apply for restoration, a visitor worker or student must not have lost his temporary resident status for longer than ninety days . . . The officer reviewing such an application has no discretion. He must restore the status of the applicant if following an examination, he is satisfied that the applicant meets the initial requirements for [her] stay. . . .

[21] As appears in the applicant's study permit, the initial requirements related to it are the following: (1) the applicant must leave Canada at the latest by August 31, 2013; (2) he cannot perform a job in Canada without authorization (Applicant's Record, at p 41).

[22] Accordingly, the Court noted that the breach of the requirement to leave Canada when his study permit expired cannot alone form the basis of the exclusion order against the applicant, since an individual making an application for restoration of status is found to be implausible without a valid status. It should be noted that the application for restoration submitted by the applicant on November 29, 2013, would not give him any extension of status, contrary to the retention of status granted under an application for renewal by subsection 183(5) of the IRPR

until the final disposition of such an application. Thus, relying on the applicant's lack of a valid status as a ground for exclusion is not consistent with the logic of a mechanism of restoration of status provided under subsection 182(1). In this regard, Justice Johanne Gauthier noted in *Sui* that:

> [35] Section 179 of the Regulations sets out the initial requirements for the issuance of a temporary resident visa (see *Radics v. Canada* (*Minister of Citizenship and Immigration*), 2004 FC 1590, [2004] F.C.J. No. 1932, (QL) para 10). Pursuant to paragraph 179(*e*), the foreign resident must establish that he is not inadmissible. If one was to construe this as meaning that an officer can consider that an applicant does not meet the initial requirements for his stay simply because he has not left Canada at the end of the authorized period, it would render section 182 of the Regulations meaningless. An officer could always reject an application on that basis. An applicant would have no chance whatsoever of being restored because it is clear in my view that pending a decision on the restoration application, an applicant such as Tao Sui is and remains without status. This would be contrary to the intention of Parliament. It is also not what is represented to the public including Tao Sui in the CIC *Inland Processing Policy Manual*, particularly the section quoted at paragraph 21 for Tao Sui was not the subject of any s. 44(1) report when he filed his application.
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> [Emphasis added.]

[23] Further, Justice Gauthier stated, again in *Sui*, the obligation of a minister's delegate to consider an application for restoration properly made:

> [55] The fact that Parliament has assigned to the Minister (and his delegates) the final responsibility of ensuring that enforcement officers have properly exercised their power within the subsection 44(1) report is made on the basis of sections 41 and 29(2) of IRPA does not mean that the Minister does not have to consider if and how an application for restoration properly made under section 182 of the *Regulations* have been considered by such enforcement officers.
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> …

> [59] "Considering that a statutory provision must be read in its entire context, taking into consideration not only the ordinary and grammatical sense of the words, but also the scheme and object of the statute and the intention of legislature" (*Glykis v. Hydro-Québec*, [2004] 3 S.C.R. 285 at paragraph 5), I have come to the conclusion that in this case, the Minister's delegate had the discretion and even the duty to consider the fact that Tao Sui had applied for restoration well before a subsection 44(1) report was issued against him in respect of his failure to leave Canada at the end of his authorized stay.

[24] From this point of view, it appears from the statutory, regulatory and jurisprudential framework of the IRPA that the officer was required to consider the applicant's application for restoration so as to issue the exclusion order against him, which he did not do. The reasons in support of the exclusion order issued against the applicant had to be based on grounds other than the applicant's mere lack of a valid study permit.

V. Conclusion

[25] Considering the above, the Court finds that the application must be allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed;

2. There is no question to certify.

"Michel M.J. Shore"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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