

Federal Court



Cour fédérale

Date: 20150507

Docket: IMM-1209-14

Citation: 2015 FC 604

Toronto, Ontario, May 7, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

VIKTOR ZLYDNEV

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Judgment rendered on the bench)

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a visa officer's decision wherein the Applicant's Temporary Residence Permit [TRP] application was rejected.

II. Factual Background

[2] The Applicant is an 81-year-old citizen of Ukraine who seeks to gain permanent residence status in Canada and lives with his family and his daughter, who immigrated to Canada in 2002.

[3] The Applicant was left in the care of his son in Ukraine, who was diagnosed with alcoholism and mental health issues related to his addiction. The Applicant, who shared an apartment with his son, lived under stressful conditions, causing him to show signs of depression deriving from his son's aggressive and abusive behavior.

[4] In 2008, following the Applicant's multiple unsuccessful attempts since 2004 to obtain a visitor visa to Canada, the Applicant's daughter applied to sponsor the Applicant under the family class program; the Applicant's daughter was found eligible as a sponsor.

[5] In November 2011, the Applicant was issued a multiple entry visitor visa, which expired on May 24, 2013, and he traveled to Canada on January 10, 2012 with an expressed dual intent.

[6] Believing that his visa authorized him to remain in Canada until its expiration date of May 24, 2013, the Applicant applied for an extension of his visitor visa in April 2013. Around that time, a Citizenship and Immigration officer notified the Applicant that he had overstayed his visa.

[7] The Applicant's application for an extension of his visa and his daughter's sponsorship application were rejected on June 17, 2013, on the basis that the Applicant remained in Canada beyond the permitted six-month duration, thus failing to comply with the requirements of the IRPA.

[8] Meanwhile, the Applicant's daughter submitted an appeal of the decision refusing her sponsorship application to the Immigration Appeal Division [IAD].

[9] In August 2013, as the Applicant was no longer eligible for restoration of his temporary status and due to his inadmissibility to Canada, the Applicant submitted a TRP application, pending the outcome of his daughter's sponsorship application.

[10] In support of his application, the Applicant provided submissions and evidence demonstrating that:

- a) He would suffer hardship were he to return to Ukraine;
- b) He does not have any family, support, or access to social services in Ukraine;
- c) He has established himself with his family in Canada, who provide for his needs;
- d) The best interests of his grandchildren and great-grandchildren living in Canada favour allowing the Applicant to remain temporarily in Canada.

(Application for TRP dated August 20, 2013, Certified Tribunal Record, at pp 67-73, with attachments)

[11] In a letter dated February 11, 2014, the visa officer rejected the Applicant's TRP application (Letter from visa officer at the Case Processing Centre Vegreville, dated February 11, 2013, Certified Tribunal Record, at pp 19-20).

III. Decision under Review

[12] The officer's notes, as contained in the Global Case Management System provides the following reasons in support of the impugned decision:

- The Applicant believed that he had valid status until May 24, 2013, and sought to extend his visa in April 2013, which was refused in June 2013;
- The Applicant is applying for a two-year TRP pending the outcome of the decision in his daughter's sponsorship application appeal before the IAD; however, no hearing date has been scheduled and the Applicant's presence in these proceedings is not required;
- The Applicant was issued a temporary visa on the premise that he had dual intent and that he would return to Ukraine after his authorized stay; however, the officer has "little faith" that the Applicant would leave Canada if the appeal in his daughter's sponsorship appeal was refused;
- The current conditions in Ukraine have deteriorated since the Applicant submitted his application; however, the Applicant would not be personally affected, as his former residence is approximately 700 km from Kyiv, the centre of the unrest;
- The Applicant was living in a two-bedroom apartment with his mentally-challenged son, who has been in treatment for addiction and who treated the Applicant poorly;

however, it is reasonable to expect that the Applicant's family will help the Applicant avoid some of the "problems that are particular to the elderly";

- The Applicant has a desire to continue to visit his family in Canada, including his great-grandchildren; however, the Applicant could "only expect it to be a temporary arrangement until he obtained permanent residence".

(Officer's GMCS Notes, Certified Tribunal Record)

IV. Legislative Provisions

[13] Section 24 of the IRPA provides the following provisions in respect of the issuance of TRPs:

Temporary resident permit

24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

Exception

(2) A foreign national referred to in subsection (1) to whom an officer issues a temporary resident permit outside Canada does not become a temporary resident until they have been examined upon arrival in Canada.

Instruction of Minister

(3) In applying subsection (1),

Permis de séjour temporaire

24. (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

Cas particulier

(2) L'étranger visé au paragraphe (1) à qui l'agent délivre hors du Canada un permis de séjour temporaire ne devient résident temporaire qu'après s'être soumis au contrôle à son arrivée au Canada.

Instructions

(3) L'agent est tenu de se

the officer shall act in accordance with any instructions that the Minister may make.

conformer aux instructions que le ministre peut donner pour l'application du paragraphe (1).

V. Issue

[14] The determinative issue is whether the visa officer's decision denying the Applicant's TRP is reasonable.

VI. Standard of Review

[15] The highly discretionary nature of the impugned decision requires considerable deference from this Court. In accordance with the jurisprudence, the standard of review applicable to a decision in respect of the issuance of a TRP is that of reasonableness (*Betesh v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ 1749 at para 23; *Shabdeen v Canada (Minister of Citizenship and Immigration)*, 2014 FC 303 at para 13 [*Shabdeen*]; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 667 at para 18; *Ali v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ 985 at para 9 [*Ali*]).

[16] In this view, the Court must determine whether the officer's decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

VII. Analysis

[17] The language of subsection 24(1) of the IRPA provides that a visa officer must determine whether relevant “circumstances” justify the issuance of a TRP (*Ali*, above at para 12).

[18] This Court has found that the purpose of TRPs is to “soften the sometimes harsh consequences of the strict application of [the] 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 [the] IRPA”. The onus of demonstrating reasons lies with the Applicant (*Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at paras 22 and 32 [*Farhat*]; and para 5.1 of the *Citizenship and Immigration Canada Inland Processing Manual IP-1: Temporary Resident Permits Operational Manual* [CIC Manual]).

[19] Paragraph 12.1 of the CIC Manual, below, provides a series of non-exhaustive guidelines in the form of “needs and risks factors” to assist visa officers in assessing TRP applications. Although such guidelines promote consistency in the decision-making process, they do not have the force of law and each application must be determined on a case-by-case basis (*Kanthisamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at paras 52 and 53; *Farhat*, above at paras 22 and 28; *Shabdeen*, above at paras 15 and 16; *Afridi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 193 at para 18).

12.1. Needs assessment

An inadmissible person’s need to enter or remain in Canada must be compelling and sufficient enough to overcome the health or safety risks to Canadian society. The degree of need is relative to the type of case. The following includes points and examples that

are not exhaustive, but they illustrate the scope and spirit in which discretion to issue a permit is to be applied.

Officers must consider:

- the factors that make the person's presence in Canada necessary (e.g., family ties, job qualifications, economic contribution, temporary attendance at an event);
- the intention of the legislation (e.g., protecting public health or the health care system).

The assessment may involve:

- the essential purpose of the person's presence in Canada;
- the type/class of application and pertinent family composition, both in the home country and in Canada;
- if medical treatment is involved, whether or not the treatment is reasonably available in Canada or elsewhere (comments on the relative costs/accessibility may be helpful), and anticipated effectiveness of treatment;
- the tangible or intangible benefits which may accrue to the person concerned and to others; and
- the identity of the sponsor (in a foreign national case) or host or employer (in a temporary resident case).

[20] The Court considers that the Applicant's particular circumstances and the compelling reasons put forward by the Applicant have not been given a fulsome assessment. The evidentiary record demonstrates that this is a case which turns on its facts (*cas d'espèce*) and that a more in-depth consideration of the evidence on file is required.

[21] The Applicant offered submissions and evidence addressing the relevant "needs and risks" factors and compelling reasons which favour the granting of a TRP, such as his daughter's pending appeal of a sponsorship application in respect of the Applicant; the Applicant's

recognition and explanations for his initial non-compliance, which is attributed to his sponsor's mistaken belief that the Applicant's visa expired in May 2013, and the Applicant's attempt to rectify the error in order to comply with the requirements of the IRPA; the Applicant's need for support from his family in Canada, and his family's willingness and ability to provide such financial and emotional support; the Applicant's degree of establishment in Canada within his family and his community; the disproportionate hardship the Applicant would face upon return to Ukraine, considering his advanced age and the country conditions evidence demonstrating a lack of resources or support available to him; the physical and psychological consequences related to potential resettlement in Ukraine and the risk of homelessness faced by the Applicant; the best interests of the Applicant's grandchildren and great-grandchildren, to whom he is the only representative of the older generation, and the impact the separation would have on their wellbeing and education – this includes the Applicant's relationship with his great-granddaughter, to whom he teaches the Russian language and traditions.

VIII. Conclusion

[22] The evidence, when read carefully and as a whole, demonstrates that the Applicant's establishment with his family and members of the community in Canada, the evidence of potential hardship faced upon return to Ukraine, as well as the best interests of his grandchildren and great-grandchildren, require further in-depth examination.

[23] In light of the above, the application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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