Federal Court  Cour fédérale

Date: 20161208

Docket: IMM-2641-16

Citation: 2016 FC 1358

Toronto, Ontario, December 8, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GHADEER YAHYA MOHAMMED MOUSA AND HAWRA ABDULQUDOS YAHYA AL-KEBSI

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a Deputy Immigration Program Manager ("Visa Officer") of the Immigration Section of the High Commission of Canada in Singapore, dated June 6, 2016, denying the Applicants' request for temporary resident permits.

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

Background

[3] The Applicants are both citizens of Yemen, they are Ms. Ghadeer Yahya Mohammed Mousa and her daughter, Hawra Abdulqudos Yahya Al-Kebsi ("Hawra"), who is currently seven years old.

[4] Ms. Mousa is married to Mr. Al-Kebsi, Hawra's father. In June 2011, Mr. Al-Kebsi was falsely accused of being involved in a political plot in Yemen. Ultimately, he was forced into hiding and later fled to Canada where his refugee claim was accepted in June 2014. He applied for permanent residence in Canada as a protected person in August 2014 and included his wife and daughter as dependants in his application. The Applicants had intended to remain in Yemen while their applications were being processed, however, in March 2015, civil war broke out there. The Applicants travelled to Malaysia in September 2015. In that same month they applied for temporary resident visas ("TRV") or, in the alternative, early admission temporary resident permits ("TRP"), these were rejected in February 2016. In May 2016 the Applicants re-applied and on June 6, 2016 their applications were again rejected.

Decisions Under Review

[5] On June 6, 2016 the Visa Officer issued two nearly identical decisions, one to each of the Applicants, concerning their applications for TRPs. The salient paragraph in each states:

> I have reviewed the information submitted with your application and have concluded that there do not exist sufficient compelling grounds for issuance of a Temporary Resident Permit. You have indicated that you may remain in Malaysia while your application for permanent residence is being processed.

> In the absence of any compelling reasons for issuance, I am refusing this application.

[6] In response to a request made pursuant to Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the Global Case Management System ("GCMS") notes were provided, these form a part of the decisions (*De Hoedt Daniel v Canada (Citizenship and Immigration)*, 2012 FC 1391 at para 51; *Afridi v Canada (Citizenship and Immigration*), 2014 FC 193 at para 20 ("*Afridi*")). The sole relevant entry for both Applicants is virtually identical, the entry relating to Ms. Mousa is as follows:

> Applicant is overseas dependant of inland refugee claimant being processed for PR status. Applicant is clearly not an intending visitor but an intending immigrant. She has case in progress as overseas dependant which can be finalized once spouse has obtained PR status. Submission clearly indicates that applicant may continue to reside in Malaysia and await processing. Not satisfied that a TRV or TRP is warranted.

[7] I note that the Applicants had made an application for TRPs or TRVs. In this application for judicial review, only the decisions refusing TRP applications are at issue. However, the Visa Officer also issued, on June 6, 2016, a standard form letter to Ms. Mousa advising that her TRV application had been refused. The letter stated, to help her understand the decision, the reasons were provided on the following page. This comprised of a standard form upon which the basis for the refusal can be checked off. In Ms. Mousa's case this was that she had not satisfied the Visa Officer that she would leave Canada at the end of her stay as a temporary resident. Several factors were checked off as having been considered in that regard: the purpose of the visit; employment prospects in country of residence; and, current employment situation. An identical letter was issued to Hawra, however, the attached form was left blank.

Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c 27 ("IRPA")

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	…
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 :
(a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and	a) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;
(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.
…	…

Temporary resident

22 (1) A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(b), is not inadmissible and is not the subject of a declaration made under subsection 22.1(1).

Résident temporaire

22 (1) Devient résident temporaire l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)b), n'est pas interdit de territoire et ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1).

Dual intent

(2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.

Double intention

(2) L'intention qu'il a de s'établir au Canada n'empêche pas l'étranger de devenir résident temporaire sur preuve qu'il aura quitté le Canada à la fin de la période de séjour autorisée.

…

…

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.

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.

2. Program objectives

Normally, persons who do not meet the requirements of the *Immigration and Refugee Protection Act* are refused permanent resident or temporary resident visas abroad, denied entry at a port of entry, or refused processing within Canada. In some cases, however, there may be compelling reasons for an officer to issue a temporary resident permit to allow a person who does not meet the requirements of the Act to enter or remain in Canada.

Temporary resident permits allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments.

5.8. Assessment of need and risk

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

Officers may issue a permit if:

- the need to enter or remain in Canada is compelling and sufficient to overcome the risk;
- the risk to Canadians or Canadian society is minimal and the need for the presence in Canada outweighs the risk. See sections 8, 9, 10, and 11 below for criteria to consider when making a decision about recommending a permit. Restoration of status is not an option.

…

5.15. Early admission

The Minister's delegates may issue a permit to allow foreign nationals to enter Canada before they satisfy the requirements for permanent residence. The officer must be certain this action is essential.

…

8. Procedure: Decision criteria

To determine whether favourable consideration is warranted to overcome inadmissibility, officers must weigh the need and risk factors in each case. Officers must consider:

- the factors which 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 or the security of Canada and Canadians).

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);
- the anticipated effectiveness of treatment;
- the tangible or intangible benefits which may accrue to the person concerned and to others; and
- the *bona fides* of the sponsor, host, or employer (e.g., an ad hoc committee that exists solely to invite an inadmissible individual as a speaker may not be *bona fide*).

…

Issue and Standard of Review

[8] In my view the sole issue in this matter is whether the Visa Officer's decision was reasonable. Both parties submit, and I agree, that the decision to issue a TRP is highly

discretionary and is reviewable on the reasonableness standard of review (*Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 24 ("*Farhat*"); *Shabdeen v Canada (Citizenship and Immigration)*, 2014 FC 303 at para 13 ("*Shabdeen*"); *Betesh v Canada (Citizenship and Immigration)*, 2008 FC 1374 at para 23).

Analysis

[9] The Applicants submit that the Visa Officer erred by failing to undertake a balancing analysis of the Applicants' compelling need to enter Canada with any potential health and safety risks associated with their entry. They submit that while it was open to the Visa Officer to reach a negative decision, the analysis cannot be circumvented where the Applicant has put forward compelling reasons for consideration. The legislation, case law, and the Minister's own guidelines make it clear that the evaluation of whether an applicant has a compelling need to enter Canada goes to the heart of the TRP analysis and a fulsome analysis of the reasons put forward by the applicant is required (*Shabdeen* at para 23; *Martin v Canada (Citizenship and Immigration)*, 2015 FC 422 at para 30 ("*Martin*"); *Zlydnev v Canada (Citizenship and Immigration)*, 2015 FC 604 at para 20; Overseas Processing Manual – Temporary Resident Permits, OP 20 ("OP Manual"), s 8; IRPA, s 24(1)). The Applicants submit that the failure to do so in this case also included a failure to consider Hawra's interests, which were a relevant factor in considering the TRP request (*Ali v Canada (Citizenship and Immigration)*, 2008 FC 784 at paras 12-13 ("*Ali*")).

[10] Further, the Applicants submit that the Visa Officer's reasons simply make no sense in light of the evidence and the compelling reasons that were before him or her. While the

Visa Officer had broad discretion to assess and weigh the relevant factors and the duty to provide reasons was low, this Court has consistently held that discretion has its limits and that reasons, at a minimum, must demonstrate a clear reasoning process. Here, however, the Visa Officer failed to reasonably exercise his or her discretion by failing to provide any indication of the required balancing that led to the imputed refusal.

[11] It is clear from the relevant provisions of the IRPA that visa officers considering TRP applications are afforded broad discretion, a TRP can be issued if an officer is of the opinion that it is justified in the circumstances (s 24(1)). And, as indicated in the OP Manual, in some cases there may be compelling reasons to issue a TRP. In that regard, an applicant's need to enter Canada must be compelling and sufficient to overcome any health or safety risks to Canadian society, the degree of need is also relative to the type of case. The OP Manual states that to determine whether favourable consideration is warranted, officers must weigh the need and risk factors in each case and must consider factors which make the person's presence in Canada necessary, such as family ties. It also sets out what that assessment may involve, which includes the essential purpose of the person's presence in Canada, the type/class of application and pertinent family compositions, the tangible or intangible benefits which may accrue to the person and to others as well as other considerations. While guidelines such as the OP Manual are not law and are not binding, this Court has held that they offer guidance on the background, purpose, meaning, and reasonable interpretation of legislation (*Farhat* at para 28; *Lorenzo v Canada (Citizenship and Immigration)*, 2016 FC 37 at para 25).

[12] In short, the Visa Officer was required to review the submissions of the Applicants and conduct an analysis to determine if the issuance of TRPs was justified based on exceptional and compelling circumstances. While the Respondent submits that TRPs should be recommended and issued cautiously (*Farhat* at para 24), in my view this does not mean that the required analysis can be foregone as the evaluation of whether the Applicants have a compelling need to enter Canada is at the heart of the TRP analysis (*Martin* at para 30).

[13] In this matter the Applicants' TRP application included submissions from counsel which summarized the compelling need and exceptional circumstances relied upon by the Applicants. The submissions described the false accusation against Mr. Al-Kebsi which forced the family into hiding and eventually required Mr. Al-Kebsi to flee leaving his wife and daughter alone; the war in Yemen which included daily airstrikes near the Applicants' home; the lack of basic needs like electricity, water, gas, medicine, food and communications; the flight to Malaysia by the Applicants where they are alone in a foreign country and separated from Mr. Al-Kebsi; and, the difficulty this causes the family members. These circumstances were supported by letters from Mr. Al-Kebsi and Ms. Mousa.

[14] However, the Visa Officer does not mention the existence of the submissions and his or her reasons are devoid of even the barest analysis of them. The refusal letter states only that there do not exist sufficient compelling grounds for the issuance of a TRP. The GCMS notes address both the TRV and TRP applications with the only apparent considerations being that the Applicants were not intending visitors but intending immigrants and that they could remain in Malaysia while Mr. Al-Kebsi's application for permanent residence is being processed. And,

while the Respondent initially submitted that the Visa Officer was not required to consider the best interests of the child in the context of the compelling reasons analysis, in the case it relied upon for that proposition, *Farhat*, the applicant did not present any compelling reasons in regard to his spouse and child which would allow him to be granted a TRP but merely noted that those persons existed.

[15] That is not the factual circumstance in this matter (*Palmero v Canada (Citizenship and Immigration)*, 2016 FC 1128 at para 11 ("*Palmero*")). Moreover, as acknowledged by the Respondent when appearing before me, subsequent jurisprudence of this Court has found that where a child's best interests form part of the compelling reasons under s 24(1), the visa officer's reasons must demonstrate that those interests have been acknowledged. In *Ali*, Justice Phelan found that the visa officer erred in law by failing to address the existence of a minor child (at para 13) and, that the visa officer's highly discretionary power was exercised improperly when the interests of the applicant's minor child were not addressed:

> 12 Section 24 requires an officer to decide whether a TRP is justified "in the circumstances". That phrase must mean the relevant circumstances. Both the CIC Policy Manual and the Immigration Officer's own analysis (as well as the Applicant's submission) made family ties and the existence and interests of children a relevant circumstance. The evidence of the minor child's interest was material to the case.

[16] In *Palmero* Justice Harrington applied *Ali* and found the visa officer's decision to be unreasonable in several respects, including that the officer's notes did not mention the minor child whose interests were engaged on the facts of that case (also see *Martin* at paras 31-33).

[17] And while the Respondent relied on *Afridi*, which held that a visa officer is not compelled to look at the best interests of a child in a TRP application, Justice Boivin noted that in that case the officer's decision demonstrated that she understood the best interests of the child, more specifically, the separation from his adoptive father, the security situation in Pakistan and the child's ties with his biological mother and siblings. This can be contrasted to the situation under consideration in this matter in which the Visa Officer acknowledged the existence of Hawra only to the extent of addressing his or her refusal letter to her and did not consider her interests in the context of the TRP applications.

[18] The Respondent also submits that the Visa Officer was not satisfied that the Applicants would leave Canada if required to do so and that this was the basis of the decision. I am not persuaded that this is so. The refusal letter makes no mention of this as a basis for the decision. The GCMS notes are unclear in this regard as they respond to both the TRV and TRP requests. And, to the extent that the Visa Officer's statement in the notes that the Applicants are clearly not intending visitors but intending immigrants pertained to the TRP requests, I agree with the Applicants that the Visa Officer does not seem to have appreciated the s 22(2) dual intent provision of the IRPA, which specifically contemplates the granting of temporary residence even where the applicant intends to become a permanent resident.

[19] In conclusion, the absence of even an acknowledgment of the compelling reasons as submitted for consideration by the Applicants, the absence of any balancing of these reasons and the failure to address the existence and interests of the minor child render the decision unreasonable. I am not satisfied that the Visa Officer's decision was made with regard to the

evidence before him or her and the applicable factors required to be considered when balancing a TRP request.

[20] It is true that a Visa Officer's duty to provide reasons when evaluating a TRP is minimal (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 21; *Singh v Canada (Citizenship and Immigration)*, 2009 FC 621 at para 9) and that an administrative tribunal's reasons are sufficient if they 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 (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). However, in this case, the Visa Officer's reasons, when considered in the face of the record that was before him or her, are unintelligible as I cannot determine why the submitted circumstances were rejected or found not to be compelling and, therefore, whether his or her decision to refuse the applications fell within the range of acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2641-16
STYLE OF CAUSE:	GHADEER YAHYA MOHAMMED MOUSA ET AL v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 7, 2016
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	DECEMBER 8, 2016

APPEARANCES:

Ian Sonshine	FOR THE APPLICANTS
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ian Sonshine Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT