Federal Court Cour fédérale

Date: 20181022

Docket: IMM-526-18

Citation: 2018 FC 1058

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 22, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

GHADIE EL RAHY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is Lebanese. Aside from a brief period in 2010 when she returned to Lebanon, the applicant has been living in Canada since 2006 on study permits that were issued to her and renewed, sometimes in the context of applications for restoration of status. However, the last valid permit expired on March 31, 2015. She has therefore been without status in Canada

since that time and is inadmissible for not having left the country upon expiry of her authorized period of stay.

[2] On July 31, 2017, in order to regularize her status, the applicant filed an application for a temporary resident permit with Citizenship and Immigration Canada. In it, she explained why she was unable to complete her studies, citing the illness of her brother, who also lives in Canada, as well as the delays in obtaining her study permits, delays attributed in part, she says, to the negligence of her immigration consultant. She also explained why she wants to stay in Canada, citing the fact that she and her brother run two restaurants in Sherbrooke, that she wants to open a third one and that she pays her taxes. Thus, she said she is contributing positively to Canada's economy. She also said that she is actively involved in integrating immigrants, as she employs a few and volunteers with Syrian refugees in her region. She therefore concludes that she is not a burden on Canadian society, but rather an asset.

[3] On January 18, 2018, the applicant's application for a temporary resident permit was refused. The officer who issued the decision on behalf of the respondent minister deemed that the applicant failed to demonstrate that there are compelling reasons that overcome her inadmissibility, noting that the main reason for the applicant's presence in Canada is to pursue her studies here, which, according to him, she never did. While acknowledging that the refusal to grant the requested resident permit could result in costs and difficulties for the applicant, he deemed that she, in a way, was the author of her own misfortune due to her inaction; he also pointed out that she could still regularize her status by submitting the appropriate applications from outside Canada.

[4] It is that decision that is the subject of this judicial review.

[5] Firstly, the applicant complains that the minister's officer placed an undue burden on her by requiring proof, to offset her inadmissibility, that she is in "a unique circumstance with compelling reasons that overcome the inadmissibility." She believes that the officer, in requiring such proof, adopted the wrong test in law since there is nothing in the wording of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), that imposes such a burden. The applicant also complains that the officer failed to adequately analyze the evidence submitted in support of her temporary resident application. More specifically, she complains that he was silent about what prevented her from pursuing her studies and about her contribution to the Canadian economy.

[6] In her submission, the applicant also alleges that the officer violated the rules of procedural fairness and natural justice against her. However, she did not focus on this point at the hearing, and rightly so, because her complaint in that regard—about the insufficiency of the reasons for decision and the failure to consider part of the evidence—reflects concerns about the reasonableness of the officer's decision, not about the rules of procedural fairness and natural justice (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 19–22, [2011] 3 SCR 708 [*Newfoundland Nurses*]).

[7] In this context, the applicant acknowledges that the officer's decision must be reviewed by the Court based on the reasonableness standard of review (*Lorenzo v Canada (Citizenship and Immigration)*, 2016 FC 37 at para 22 [*Lorenzo*]; *Chaudhary v Canada (Immigration, Refugees*

and Citizenship), 2018 FC 128 at para 19). This means enquiring into "the existence of justification, transparency and intelligibility within the decision-making process and . . . whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[8] The issuance of a temporary resident permit is governed by subsection 24(1) of the Act:

Temporary resident permit	**Permis de séjour temporaire**
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.	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.

[9] According to the case law of this Court, the objective of this provision is "to soften the sometimes harsh consequences of the strict application of [the Act] 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 Act]" (*Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 22 [*Farhat*]). This Court has always interpreted the authority to grant a temporary resident permit as "highly discretionary and exceptional in nature" (*Dhaliwal v Canada (Citizenship and Immigration)*, 2015 FC 762 at para 32). The case law cited by the applicant is no exception (*Lorenzo* at para 23; *Palmero v Canada (Citizenship and Immigration)* 2016 FC 1128 at paras 12 and 14; *Krasniqi v Canada*

(Citizenship and Immigration), 2018 FC 743 at paras 14 and 27; *Mousa v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1358 at paras 8 and 12; *Martin v Canada (Citizenship and Immigration)*, 2015 FC 422 at para 23).

[10] Justice Marie-Josée Bédard, a judge of this Court at the time, summarized the law well on this issue, in my view, in *César Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 880 (*Nguesso*), in which the applicant argued—just as the applicant in this case is arguing—that the minister's officer had imposed too heavy of a burden on him in requiring that he justify the issuance of a temporary resident permit by demonstrating the presence of exceptional circumstances and sufficient and compelling reasons:

> [92] First, [the applicant] suggests that the Deputy Minister imposed an overly strict standard of proof by requiring that the applicant show "exceptional circumstances" and "sufficient and compelling reasons" to justify issuing a TRP, while the text of section 24 of the IRPA simply indicates that a TRP is issued if the officer "is of the opinion that it is justified in the circumstances." The applicant cites *Rodgers v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1093 at para 10, [2006] FCJ No 1378 [*Rodgers*]. The applicant therefore argues that the Deputy Minister imposed a higher burden on him that [*sic*] that required by the wording of the statute.
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> [93] The wording of subsection 24(1) of the IRPA clearly states that this is an exceptional regime, and, as I mentioned above, it is well established that the issuance of a TRP is a highly discretionary decision (*Afridi*, at para 16; *Stordock v Canada (Minister of Citizenship and Immigration)*, 2013 FC 16 at para 9, [2013] FCJ No 7 [*Stordock*]; *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 16, [2006] FCJ No 1593 [*Farhat*]).
>
> [94] I am of the view that *Rodgers* cannot serve as a precedent for the applicable standard for determining whether the circumstances justify the issuance of a TRP, as the comments of Justice von Finckenstein at paragraph 10 of the judgment are limited to distinguishing between the analysis of the circumstances justifying the issuance of a TRP and the deeper analysis of the

humanitarian and compassionate considerations required by section 25 of the IRPA.

[95] Also, the case law has clearly recognized that applying the exceptional and compelling circumstances test is consistent with the objectives of section 24 of the IRPA and does not constitute a reviewable error.

[96] At paragraph 22 of *Farhat*, Justice Shore wrote the following about the objectives of the TRP regime:

> [22] The objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of 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 IRPA. Basically, the TRPs allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments. (Immigration Manual, c. OP 20, section 2; Exhibit "B" of Affidavit of Alexander Lukie; *Canada (Minister of Manpower and Immigration) v. Hardayal*, [1978] 1 S.C.R. 470 (QL).)

[97] The "compelling reasons" test has since been upheld by the case law of this Court, particularly in *Nasso* at paras 13–15 and *Stordock* at para 9. In *Nasso*, Justice Zinn addressed the very argument raised by the applicant—that this standard is too high given the wording of subsection 24(1) of the IRPA—and he concluded that the officer had applied the proper test:

> [13] Mr. Nasso submits that the officer erred in his interpretation of section 24(1) of the Act by reading in a requirement that there be a "compelling need" shown by an applicant before the exemption is warranted. . . .
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> [14] It is submitted that while the officer's interpretation is consistent within the policy guideline, IP1 – Temporary Resident Permits, it imposes on section 24(1) of the Act a condition greater than the requirement specified in that section that the permit be "justified in the circumstances".

> [15] I am not convinced that there is any misinterpretation of section 24(1), as alleged. As is noted by Justice Shore in *Farhat*, section 24 of the Act allows officers to soften the harsh consequences of a strict application of the Act in "exceptional circumstances". It seems to me that an applicant who cannot satisfy an officer that he has a requirement or, to use the words of the decision under review, a compelling need to enter Canada, cannot establish that a permit is justified in the circumstances. In other words, to be granted a TRP in these exceptional circumstances requires more than showing that one has a wish or desire to enter Canada – it requires much more – otherwise, it is not an exceptional circumstance. When the Applicant claims that he needs to enter Canada for business purposes, then he ought to be able to establish that those purposes cannot be met or satisfied from his own country but require his presence in Canada. That, to my mind, is a compelling need. Accordingly, I find that the officer did not misinterpret the requirements in section 24(1) of the Act.
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> [Emphasis added.]

[98] In fact, this is still the test set out in Immigration Manual OP 20 – Temporary Resident Permits (TRPs), available online at http://www.cic.gc.ca/english/resources/tools/temp/permits/eligibility.asp:

> **Who is eligible for a TRP?**
>
> A TRP can be issued to a foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of IRPA (A24(1)).
>
> The TRP is always issued at the discretion of the delegated authority and may be cancelled at any time. The delegated authority will determine whether the need for the:
>
> •foreign national to enter or remain in Canada is compelling; and
>
> •foreign national's presence in Canada outweighs any risk to Canadians or Canadian society.

> [Emphasis added.]
>
> [99] These manuals have no force of law, but they may be useful (*Afridi*, at para 18; *Martin*, at para 28; *Shabdeen*, at paras 16–17).

[11] Furthermore, as reiterated by Justice David Near—now Federal Court of Appeal judge—in *Vaguedano Alvarez v Canada (Citizenship and Immigration)*, 2011 FC 667 at para 16 (*Alvarez*), temporary resident permits must be "issued cautiously, as they grant their bearers more privileges than other temporary statuses."

[12] This is sufficient, in my view, to dispose of the applicant's argument that the minister's officer had placed an undue burden on her. The presence, as we have just seen, of exceptional and compelling circumstances is clearly required to justify the issuance of a temporary resident permit. While it would have certainly been preferable, to avoid any possible confusion, for the minister's officer to refer to exceptional rather than unique circumstances, this is, in my view, purely a matter of style. Both terms, in the context of the application of section 24 of the Act, speak to the same idea, in my view.

[13] The question now is whether the officer exercised his discretion in a reasonable manner. Here, the situation is less clear. As is evident, the minister's officer refused to see the applicant's desire to remain in Canada to continue running her two restaurants as an exceptional and compelling circumstance that justified her being allowed to remain in Canada despite her inadmissibility. In that regard, contrary to what the applicant argued at this judicial review hearing, the officer was not required to factor in and discuss in his decision the assessment factors provided in the Departmental Manual on processing temporary resident applications, such

as economic contribution, protecting public health or job qualifications, because, as pointed out by Justice Bédard following his analysis of the applicable case law, this Manual, although useful, has no force of law (*Nguesso* at para 99). However, I would like to specify, regarding the non-binding nature of this Manual, that this is not the case when it translates the state of the law. This is the case of the "exceptional and compelling circumstances" test, which stems from this Court's interpretation of section 24 of the Act and which is therefore a requirement on the minister's officers.

[14] However, two other considerations seem to have influenced the minister's officer's decision: firstly, that, since the applicant's arrival in Canada, she had never done what she had been authorized to enter and remain in Canada for—that is, to study—–and secondly, that her inadmissibility was the fruit of her own inaction.

[15] Although it is true that, for all sorts of reasons, the applicant's educational pursuits in Canada did not work out as planned, it is not accurate to say, as the officer did, that she never studied, even if I accept the reading of the decision offered to me by respondent's counsel, who would have it that the officer apparently drew this conclusion based not on the applicant's entire immigration history, but based solely on the evidence he had before him. Yet that evidence showed that although the applicant was not able to study in 2013 or in the fall of 2014, that is not the case for the winter sessions of 2013 and 2014, when she took 6 and 5 courses respectively at Bishop's University. The officer's conclusion that the applicant never studied is therefore contradicted by the evidence.

[16] Furthermore, the evidence submitted by the applicant also shows that she took steps with both Quebec and federal authorities until at least 2016 to secure her migratory status until December 2017. In the narrative she presented in support of her application for a temporary resident permit, the applicant indicated that her immigration consultant was not diligent in the processing of her most recent study permit application with Quebec authorities, which would explain how she ended up without status. In my view, this evidence could hardly justify a general finding of inaction without, at the very least, the officer addressing it and explaining why he could not give it weight.

[17] In my view, in both cases, it is a matter of the intelligibility of the decision.

[18] Although the officer's reasons for decision did not have to be perfect (*Newfoundland Nurses* at para 18) and could be brief (*Alvarez* at para 37), they did have to adequately explain the basis of his decision (*Newfoundland Nurses* at para 18). In my opinion, they do not.

[19] I am aware that I must show deference to the officer's decision and that this situation is borderline. However, in the presence of these two problematic considerations, which most likely influenced the officer's decision, I believe it would be preferable to set aside the officer's decision and refer the matter to another officer for a new decision.

[20] Neither party proposed certification of a question for appeal. I am also of the opinion that there is no question for certification arising.

JUDGMENT in IMM-526-18

THE COURT ORDERS that:

1. The application for judicial review is allowed;
2. The Minister of Citizenship and Immigration officer's decision dated January 18, 2018, refusing the issuance of a temporary resident permit to the applicant is set aside and the matter is referred to another officer of the minister for judgment;
3. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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