

Federal Court



Cour fédérale

Date: 20190327

**Docket: IMM-3479-18
IMM-3481-18**

Citation: 2019 FC 376

Ottawa, Ontario, March 27, 2019

PRESENT: The Honourable Mr. Justice Mosley

Docket: IMM-3479-18

BETWEEN:

ARADA BUNSATHITKUL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-3481-18

AND BETWEEN:

NONTHAGORN SANGCHAI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] These two applications for judicial review were heard together as they involve similar facts and issues. The Applicants are half-siblings and they seek essentially the same relief in the nature of mandamus orders directing that the Respondent minister revisit the refusal of Temporary Resident Visas (TRVs) to allow them to attend a summer camp in the Temagami region of Ontario in July and August 2018.

[2] As the applications concern requests for TRVs for a period of time that has now passed, they are moot. I am satisfied, however, that the Court should rule on the issues raised by the parties applying the principles set out by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. Although the concrete dispute regarding the 2018 summer term has disappeared, there is a continuing controversy between the parties as the Applicants wish to take advantage of offers of fully paid scholarships to attend the camp in the summer of 2019. They will, therefore, renew their applications for TRVs this year. The parties attended the hearing on March 19, 2019 prepared to argue the issues and there was no advantage to be gained in terms of judicial economy by refusing to hear the applications.

[3] For the reasons that follow, I find that the decisions were unreasonable.

II. Background

[4] The Applicant in Court file IMM-3479-18, Arada Bunsathitkul, is a 12 year old citizen of Thailand. Her half-brother, Nonthagorn Sangchai, also a citizen of Thailand and the Applicant in Court file IMM-3481-18, is 11 years old. They reside with their maternal grandmother and attend school in Lopburi, a city about 150 kilometres northeast of Bangkok. Their mother, Ms. Naruemol Bunsathitkul, submitted affidavit evidence that she lives and works in Bangkok and visits the children when she can.

[5] The Applicants applied for TRVs in January 2018 in order to attend the Canadian Adventure Camp [CAC] in Temagami, Ontario from July 2, 2018 to August 26, 2018. The applications were initially refused on March 1, 2018. Applications for judicial review of those decisions were resolved by settlement. The Respondent agreed to remit the decisions to another officer for reconsideration.

[6] Arada had initially applied for a TRV in 2016 to attend the same summer camp but her application was refused. She did not make another application in 2017 because she was informed that the application would not be processed until after the end of the camping season.

[7] The invitations to attend CAC had been extended by Mr. Brian Connett, Senior Director of CAC, who met the family through his adopted daughter, McKenzie, who is also from Thailand. Mr. Connett also has an adopted son from Thailand. He had offered the Applicants full

scholarships to attend the camp, which included round trip travel. The value of the scholarships is approximately \$12,000 each.

[8] In their applications for reconsideration, the Applicants submitted letters from the CAC and Mr. Connett confirming that there remained space for them in the 2018 program. They provided updated financial information from the CAC and Mr. Connett, a letter of continued enrollment from the Applicant's school in Thailand and affidavits of the Applicants' mother and Mr. Connett.

[9] In her affidavit evidence, Ms. Bunsathitkul says that she saw the invitations as opportunities that her children would not enjoy in Thailand. Attending a summer camp and learning English would be valuable to their future employment prospects in their own country.

[10] Ms. Bunsathitkul submitted additional affidavits for these judicial review applications. While the fresh affidavits were not before the officer who made the reconsideration decision, the content is nearly identical to the affidavits previously submitted. To the extent that they differ, I am satisfied that they fall within the exceptions to the general rule that fresh evidence is not admissible on judicial review as they provide context regarding the Applicants' guardianship and are filed to support an allegation of a lack of procedural fairness: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19–20.

III. **Decisions under review**

[11] The Officer refused the applications on June 27, 2018. The Officer was not satisfied that the Applicants would leave Canada at the end of their stay. The Officer found that they had insufficient family or economic ties to Thailand to motivate their departure from Canada. The Officer was also not satisfied that the Applicants intended on coming to Canada to learn English at the camp because they had not previously attended summer camp or taken English as a Second Language [ESL] classes, which are widely available in Thailand.

[12] While satisfied with the evidence of the sufficiency of funds provided by CAC and Mr. Connett, the Officer was concerned that the Applicants were not coming to Canada solely to attend the camp, as Mr. Connett had previously sponsored and adopted two children who attended the same camp. The Officer further noted that the Applicants, despite being minors, had no travel history and hence no history of demonstrated compliance with immigration regulations.

IV. **Issues**

[13] Having considered the issues identified by the parties in their written arguments and oral submissions, I am satisfied that the only issue that I need to address is whether the Officer made unreasonable assessments of the various factors in the applications for TRVs based on:

- i. the Applicants' lack of family ties and economic establishment in Thailand;
- ii. the Applicants' school enrollment in Thailand;

- iii. the Applicants' lack of prior summer camp attendance and ESL course enrolment;
- iv. the Applicants' lack of travel history and immigration compliance; and
- v. Mr. Connett's history of having previously adopted two Thai children.

[14] While the Applicants argued that there was a lack of procedural fairness in the processing of their requests, on the ground that the Officer made negative credibility findings and failed to provide them with an opportunity to respond, in my view, they have failed to demonstrate a sufficient evidentiary foundation for the issue to be considered.

V. **Relevant Legislation**

[15] *Immigration and Refugee Protection Act*, SC 2001, c 27, subsections 11(1) and 20(1) and *Immigration and Refugee Protection Regulations*, SOR/2002-227, section 179 and subsections 183(1)–(2) are relevant:

**Application before entering
Canada**

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.

Visa et documents

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

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,

(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

(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.

Temporary Resident Visa

Issuance

179 An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national

(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;

Obligation à l'entrée au Canada

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) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;

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.

Visa de résident temporaire

Délivrance

179 L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;

(b) will leave Canada by the end of the period authorized for their stay under Division 2;

(c) holds a passport or other document that they may use to enter the country that issued it or another country;

(d) meets the requirements applicable to that class;

(e) is not inadmissible;

(f) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and

(g) is not the subject of a declaration made under subsection 22.1(1) of the Act.

b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;

c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;

d) il se conforme aux exigences applicables à cette catégorie;

e) il n'est pas interdit de territoire;

f) s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);

g) il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

Conditions on Temporary Residents

General conditions

183 (1) Subject to section 185, the following conditions are imposed on all temporary residents:

(a) to leave Canada by the end of the period authorized for their stay;

Conditions liées au statut

Conditions d'application générale

183 (1) Sous réserve de l'article 185, les conditions ci-après sont imposées à tout résident temporaire :

a) il doit quitter le Canada à la fin de la période de séjour autorisée;

(b) to not work, unless authorized by this Part or Part 11;

b) il ne doit pas travailler, sauf en conformité avec la présente partie ou la partie 11;

(b.1) if authorized to work by this Part or Part 11, to not enter into an employment agreement, or extend the term of an employment agreement, with an employer who, on a regular basis, offers striptease, erotic dance, escort services or erotic massages;

b.1) même s'il peut travailler en conformité avec la présente partie ou la partie 11, il ne peut conclure de contrat d'emploi — ni prolonger la durée d'un tel contrat — avec un employeur qui offre, sur une base régulière, des activités de danse nue ou érotique, des services d'escorte ou des massages érotiques;

(b.2) if authorized to work by this Part or Part 11, to not enter into an employment agreement, or extend the term of an employment agreement, with an employer referred to in any of subparagraphs 200(3)(h)(i) to (iii); and

b.2) même s'il peut travailler en conformité avec la présente partie ou la partie 11, il ne peut conclure de contrat d'emploi — ni prolonger la durée d'un tel contrat — avec un employeur visé à l'un des sous-alinéas 200(3)h(i) à (iii);

(c) to not study, unless authorized by the Act, this Part or Part 12.

c) il ne doit pas étudier sans y être autorisé par la Loi, la présente partie ou la partie 12.

Authorized period of stay

Période de séjour autorisée

(2) Subject to subsections (3) to (5), the period authorized for the stay of a temporary resident is six months or any other period that is fixed by an officer on the basis of

(2) Sous réserve des paragraphes (3) à (5), la période de séjour autorisée du résident temporaire est de six mois ou de toute autre durée que l'agent fixe en se fondant sur les critères suivants :

(a) the temporary resident's means of

a) les moyens de subsistance du résident

support in Canada;	temporaire au Canada;
(b) the period for which the temporary resident applies to stay; and	b) la période de séjour que l'étranger demande;
(c) the expiry of the temporary resident's passport or other travel document.	c) la durée de validité de son passeport ou autre titre de voyage.

VI. Analysis

A. *Standard of Review*

[16] This is not a case in which I would consider it necessary to conduct a standard of review analysis as required by *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. The standard for review of a visa officer's decision on whether to issue a temporary resident visa has been satisfactorily determined by the post-*Dunsmuir* jurisprudence. It involves questions of fact and is reviewable on a reasonableness standard. The decision is discretionary and afforded considerable deference: *Ngalamulume v Canada (MCI)*, 2009 FC 1268 at para 16; *Ajeigbe v Canada (MCI)*, 2015 FC 534 at para 12.

[17] As stated by the Supreme Court in *Dunsmuir* at para 47, a court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But the Court is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

B. *Were the decisions reasonable?*

[18] The Applicants do not dispute that in seeking to enter Canada, they bore the onus of rebutting the presumption that they are immigrants and seek to rely on the temporary permits as a back door means to achieve that end: *Rahman v Canada (MCI)*, 2016 FC 793 at para 16; *Abdulateef v Canada (MCI)*, 2012 FC 400 at para 10; *Oyita v Canada (MCI)*, 2017 FC 770 at para 4; *Obeng v Canada (MCI)*, 2008 FC 754 at para 20.

[19] For a TRV application under paragraph 179(b) of the *Immigration and Refugee Protection Regulations*, the Officer assesses various factors, including the purpose of the visit, family ties in Canada and in the country of residence, the economic and employment situation abroad, past attempts to emigrate to Canada (or elsewhere), any absence of prior travel history and the capacity and willingness to leave Canada at the end of the stay: *Kheradpazhooh v Canada (MCI)*, 2018 FC 1097 at para 4.

[20] The difficulty with the application of these factors in the present case is that they do not readily fit the circumstances that were presented to the Officer for consideration. The Applicants are children, their family ties are exclusively in Thailand, they were evidently not seeking employment in Canada and they had no history of attempts to immigrate to Canada – aside from Arada’s prior application for a TRV, if it could be characterized as such.

[21] As children, the absence of a prior travel history should have been considered as, at most, a neutral factor: *Dhanoa v Canada (Citizenship and Immigration)*, 2009 FC 729 at para 12. The

Respondent argues that the Officer did not find that this was a negative factor. It is difficult to see how that can be accepted in light of the Officer's remark in the file notes that "...the fact of being minors does not preclude them from international travel."

[22] The evidence before the Officer regarding the capacity and willingness to leave Canada at the end of the stay was the Applicants' expressed intent to return home to their "friends, family and community [in Thailand] when the camp ends" and the fact that their travel costs were guaranteed. There was no evidence to the contrary. It was unreasonable for the Officer to not consider that the Applicants, two pre-adolescent children, would be abandoning their mother, other family, friends and schooling if they were to seek to remain in Canada.

[23] The TRV application requires that an applicant submit "proof that you can support yourself and any family members accompanying you while you are in Canada." There is no dispute that the question of support was completely answered by the evidence of the CAC scholarships.

[24] In the circumstances, it was unreasonable for the Officer to want the same type of evidence of establishment in Thailand that might normally be expected of an adult applying for a TRV. It was unreasonable for the Officer to conclude that the Applicants had weak family ties in Thailand because they did not live with their mother, a single parent working as a hairdresser, or submit proof of their mother's income or evidence of the family's assets. They had provided evidence of their enrollment in school in Lopburi and that their mother had the sole right of guardianship over them. It was unreasonable, in my view, for the officer to discount the evidence

of school enrollment on the ground that it could be cancelled at any time. That would be true of any applicant attending an educational institution in their home country.

[25] The lack of evidence that the Applicants had previously attended ESL programs, which the Officer believed to be widely available in Thailand, or had previously attended summer camps, should not have been difficult to assess given the circumstances of the children of a single parent who reside with their grandmother. There is no evidence in the record to suggest that they had the means to afford such opportunities. The evidence of the scholarships they were offered suggests otherwise. It was the purpose of the scholarships to grant them the opportunities which, implicitly, they would not have had at home in Thailand. It was unreasonable for the Officer to discount the applications for these reasons.

[26] An inescapable inference from reading the Officer's reasons is that Mr. Connett's history of having previously adopted two Thai children, a boy and a girl, was a major consideration in refusing these applications. The prior adoptions in question occurred more than a decade earlier and, the Court was assured, both were compliant with immigration regulations. There is no evidence in the record of a pattern of similar behaviour that would be sufficient to support a finding that the Applicants' attendance at the summer camp was for the oblique purpose of facilitating their immigration to Canada. The evidence is that the camp, funded by the attendance of fees paying children, supports scholarships for less privileged children each year. Moreover, the offer of the scholarships was made by Mr. Connett. Neither the Applicants nor their mother sought it out on their own.

[27] As a result, I find that the Officer's reasoning lacked justification, transparency and intelligibility and the decisions are not defensible in respect of the facts and the law.

[28] The parties agreed that this is not a case that calls for the certification of a serious question of general importance. It has been determined on its somewhat unique facts. That said, there are no special reasons to award costs in this matter.

VII. Remedies

[29] As discussed above, the requests for TRVs in 2018 are now moot. The Court was advised at the hearing that the Applicants wish to have their updated applications considered again for the 2019 camp season. It would be appropriate then for the Court to direct that the applications be reconsidered for 2019 in light of the reasons given above.

[30] A copy of these reasons and the judgment will be placed on each file.

JUDGMENT IN IMM-3479-18 and IMM-3481-18

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in Court files IMM-3479-18 and IMM-3481-18 are granted;
2. The Applicants' updated requests for Temporary Resident Visas to attend the Canadian Adventure Camp are remitted for reconsideration by a different officer and shall be considered in accordance with the Reasons provided herein for the 2019 camp season;
3. An original of the Judgment and Reasons herein shall be placed on each file; and
4. No serious question of general importance is certified and no costs are awarded.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3479-18

STYLE OF CAUSE: ARADA BUNSATHITKUL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

AND DOCKET: IMM-3481-18

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APPEARANCES:

Mario Bellissimo FOR THE APPLICANT

David Cranton FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bellissimo Law Group FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario