Federal Court  Cour fédérale

Date: 20190416

Docket: IMM-4401-18

Citation: 2019 FC 463

Ottawa, Ontario, April 16, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ALPAY BARAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Alpay Baran [the "Applicant"] in respect of the decision ["Decision"] of an officer with the Visa Section of the Canadian Embassy in Ankara, Turkey ["Officer"] that refused the Applicant's work permit application.

[2] The Officer refused the Application on the basis that the Applicant would not leave Canada at the conclusion of his work permit, in conjunction with the fact that the Applicant had not applied for an Authorization to Return to Canada [“ARC”], which was needed because of a past deportation order.

[3] The Applicant is a Turkish citizen who was born on February 4, 1979. The Applicant was trained as an ironmaster in Turkey. The Applicant has a wife, children, and parents who reside in Turkey, as well as a brother in Canada.

[4] The Applicant was issued a work permit for Canada in April 2007. In May 2008, the work permit was extended for a period of two years authorizing him to stay in Canada until April 17, 2010.

[5] While working in Canada, the Applicant applied for permanent residence. His application was refused. The Applicant did not leave Canada on or before April 17, 2010, as required by his May 2008 work permit.

[6] After the refusal, the Applicant made a refugee claim. On the basis of that refugee claim, he was issued a further work permit on November 1, 2011. The Applicant’s claim for refugee protection was ultimately refused.

[7] The Applicant's next application was for humanitarian and compassionate ["H&C"] relief, which was also refused. As well, the Applicant was included as a dependant in his parents' application for permanent residence, although he was well beyond the age of dependency.

[8] In total, the Applicant made four separate kinds of applications to stay in Canada (a work permit extension, a refugee claim, an H&C application, and sponsorship as a dependant).

[9] The Applicant was issued a departure order, which then became a deportation order pursuant to section 224(2) and section 240 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 ["IRPR"]. He left Canada on September 20, 2012.

[10] Five years later, after working as an ironmaster in Turkey, the Applicant sought to return to Canada to work for his brother's company, Baran Reinforcing Rebar.

[11] On September 7, 2017, Baran Reinforcing Rebar received a positive Labour Market Impact Assessment ["LMIA"] to hire a NOC 7236 (Ironworkers). Once Baran Reinforcing Rebar had secured this positive LMIA, the Applicant applied for a work permit.

[12] The Applicant's first application for a work permit was rejected. The Applicant applied a second time with supporting documentation. He was rejected again on January 10, 2018. This second rejection stated that the Applicant did not have the appropriate qualifications for the work in Canada. The Applicant filed to review the decision, and by consent the matter was re-determined by another officer.

[13] Upon re-determination, the Officer refused the application on September 4, 2018.

II. Issues

[14] The issues are:

A. Did the Officer come to an unreasonable conclusion in finding that the Applicant would likely not leave Canada at the end of his stay?

B. Did the Officer err in drawing a negative inference that an ARC application had not been filed?

III. Standard of Review

[15] The standard of review applicable to the Officer's decision to refuse a work permit application is reviewable on the standard of reasonableness, as per *Dunsmuir v New Brunswick*, 2008 SCC 9 and *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at paragraph 7 ["*Sulce*"]. Any procedural fairness issues are reviewable on a correctness standard.

[16] However, I note that as work permit applications do not raise substantive rights since visa applicants do not have an unqualified right to enter Canada, the level of procedural fairness is low, as per *Sulce*, above, at paragraph 10.

IV. Relevant Provisions

[17] Relevant provisions are attached as Annex A.

V. Analysis

A. *Did the Officer come to an unreasonable conclusion in finding that the Applicant would likely not leave Canada at the end of his stay?*

[18] First, the Applicant submitted that the Officer erred in making a decision that was not transparent or intelligible in denying the application.

[19] The Applicant argues that the Officer erred in checking off the box "personal assets and financial status" as a basis to refuse the application. The Applicant notes that the Officer did not further explain this "check-off" in the notes. The Applicant provided bank statements, a letter confirming his salary from his employer in Turkey, and a sworn statement from his prospective employer. Yet nothing relating to these documents was mentioned in the notes. Therefore, the Applicant pleads that there is no transparency in checking off this box, as the Applicant is unable to understand the basis for the decision.

[20] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 ["*Newfoundland Nurses*"], makes it clear that insufficiency of reasons is not in of itself enough to grant a judicial review. While it is true that there are no reasons provided as to the refusal on the question of financial status, it is also true that visa officers are under a minimal duty to provide reasons in such circumstances as per *Junusmin v Canada (Citizenship and Immigration)*, 2009 FC 673.

[21] In any case, even if the reasons given were insufficient, I may draw on the record, as per paragraph 12 of *Newfoundland Nurses*, above, to examine the reasonableness of the Officer's decision.

[22] According to a letter from the Applicant's Turkish employer, the Applicant earns approximately 2400 Turkish Lira ["TL"] a month. The only financial information concerning his establishment in Turkey is that his wife does not work and a Service Scheme document from the Turkish government. Considering the Applicant's family status and multiple dependents, this represents a modest earning.

[23] His personal statement does not discuss his finances in any way. Curiously, there is no personal financial information (other than what is stated in para 22 above) in the Certified Tribunal Record ["CTR"] but attached to the Applicant's Record is what appears to be a bank statement of Alpay Baran from the Garanti Bank showing nine transactions from 19/09/17 to 25/09/17. The starting balance was 838.74 TL and the end balance was 15,651.74 TL. There is no mention of this document in the letters of submission, or how this short bank statement relates to his establishment in Turkey or why it is not found in the CTR.

[24] This Officer's decision considered the entire record, including the Applicant's personal and financial status. On that basis, it was reasonable to conclude that the Applicant was not sufficiently financially connected to Turkey.

[25] In *Gao v Canada (Citizenship and Immigration)*, 2014 FC 821, Justice Rennie held at paragraph 7, in interpreting *Newfoundland Nurses*, that "there is a substantive difference in resorting to the record to complete, or, in the language of the Supreme Court of Canada, to supplement an otherwise deficient decision, and resorting to the record to override or negate patent error on the face of the decision in respect of a critical element". In this case, supplementing the deficiency on the basis of the record seems appropriate, and is not overriding an error on the face of the decision.

[26] The CTR does include financial information regarding the Canadian company Baran Reinforcing Rebar. However, this information largely speaks to the validity of the job offer, rather than to the Applicant's personal financial status in Turkey. The letter of guarantee from his brother (again, who is also the prospective employer) states: "(2) I will ensure that he does not overstay the duration of his work permit and I guarantee covering all his return travel, living and medical expenses in case of emergency, such as unforeseen work shortage". However, this guarantee is in relation to his stay in Canada, and not related to his financial means and establishment in Turkey. The personal assets of the Applicant and his ties to Turkey were the relevant issues for the Officer regarding whether he would leave Canada at the end of his stay.

[27] The Applicant's further argument is that the Officer erred by not canvassing moments when the Applicant did indeed comply with Canada's immigration rules, such as when the Applicant had a valid work permit from 2011 to 2014, and when the Applicant voluntarily left in September 2012 on the deportation order. The Applicant says it is to his credit that he did not try

to live underground in Canada, but rather made numerous applications with immigration authorities in order to remain legally in the Canada.

[28] The Applicant also specifically focuses on where the Officer stated that there is "no guaranty" as to whether the Applicant would comply with the conditions of his work permit. The Applicant argues that the Officer here imposed a requirement of an absolute guarantee, which is an unreasonable standard that is impossible to meet.

[29] The Government Case Management System notes read [*sic*]:

> client was issued a work permit in April 2007. The work permit was extended by CPC Veg in May 2008 for a validity of 2 yrs. While he was still working in Canada, he applied for: permanent residence under CEI category but was refused by Mission Angeles. Then he made a refugee claim that was denied. Then he tried again by submitting an H&C application which was denied. He was included in his parents' FC4 application as a dependent child, even though he was well beyond the age of dependency. He's married with 2 children but wife is not working. Does not appear to be well established in home country.
>
> client tried all the means to remain in Canada and still show strong desire to go and remain in Canada. As a previous deported person, he requires an ARC to go return to Canada, but has not applied for one.
>
> Client was previously given the opportunity to enter and work in Canada but failed to comply with the terms and condition of his admission to Canada. There is no guaranty that he would comply this time. Although he has been received a job offer in Canada, that does not constitute a compelling reasons for the client to be allowed to return to Canada given the severity of the violations of the immigration legislation.

[30] The Officer relied on the following germane evidence in the record:

- The Applicant has a history of staying past his stay under the relevant permits;

- The Applicant has tried virtually every available avenue to stay in Canada;
- The Applicant put next to nothing in front of the decision maker to even acknowledge these past issues; and
- The Applicant has minimal assets back in Turkey.

[31] The Officer fairly assessed the strengths of the Applicant's submissions, including the presence of family members in Turkey.

[32] It is true that the Applicant left Canada when the departure order became a deportation order on September 20, 2010. The Officer duly noted all the facts of this situation, and I do not find any error. I defer to the officers in their role of weighing the various factors in the case of a work permit application.

[33] Finally, I do not think that we can reasonably read the Officer's notation that there is "no guaranty" that the Applicant will return as actually imposing that bar as the legal test. As the Respondent notes, judicial review is not "a line by line treasure hunt for error". In *Truong v Canada (Citizenship and Immigration),* 2017 FC 422, Justice Gascon held that:

> [40] Reasons are to be read as a whole, in conjunction with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII) at para 53; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 (CanLII) at para 3). A judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 (CanLII) at para 54). The Court should instead approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151 (CanLII) at para 15).

[34] Reading the decision in its totality, I do not find that a requirement of absolute certainty was being imposed on the Applicant. Rather, a more coherent reading of the notes is to suggest that the Officer was not satisfied that the Applicant would return at the expiry of his work permit.

[35] Though I find that these reasons are lacking the germane question for me is: are they so lacking that *Newfoundland Nurses* cannot save them?

[36] When the record is reviewed as a whole, the matter is reasonable. However, I caution the decision maker in this situation that they are writing the decision for the Applicant, and a decision maker should expect that the Applicant would like more detail. However, on a review of the record, the decision is reasonable, transparent and discernable.

B. *Did the Officer err in drawing a negative inference that an ARC application had not been filed?*

[37] The Applicant's position is that the Officer erred when he stated that, "As a previous deported person, he requires an ARC to go return to Canada, but has not applied for one."

[38] The Applicant suggests that the Officer failed to properly assess the ARC application because:

i. The Applicant not filing an ARC fee is not a basis for refusal. The Applicant argues, rather, that the ARC is not required for a work permit to be issued, but rather that the ARC is required to be able to re-enter Canada.

ii. Secondly, there is no specific application form for an ARC, but there is a $400 processing fee. The Applicant argues that the Officer's decision requires the Applicant to have to pay the processing fee even though the Applicant did not know whether the work permit would be approved.

iii. The direction is contrary to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ["IRPA"] online guidelines ["guidelines"], which state: "Before you apply: If you are applying to come to Canada for any reason (visiting, studying, working or immigrating), you should not submit a separate application for an ARC. If your application is approved, the ARC will be dealt within the context of that application. You will simply be asked to submit the fee." The Applicant argues that this clearly means that he cannot be faulted for not having paid the ARC fee when the guidelines instruct applicants not to do this until notified by the decision maker. The allegedly misleading guidelines, in the Applicant's submission, form a breach of procedural fairness. To make this argument, the Applicant relies on Justice Phelan's decision in *Jalota v Canada (Citizenship and Immigration),* 2013 FC 1176 ["*Jalota*"], and Justice von Finckenstein in *Lim v Canada (Minister of Citizenship and Immigration),* 2005 FC 657 ["*Lim*"].

[39] The Applicant argued that the guidelines were unclear and because he followed those guidelines, it cannot be held against him by the decision maker as a negative finding given that he simply followed the vague guidelines.

[40] In my assessment, this argument must fail.

[41] The Applicant in this case clearly requires an ARC, as per paragraph 21 of *Parra Andujo v Canada (Citizenship and Immigration)*, 2011 FC 730 "…a visa may be issued only if an applicant is not inadmissible and meets the requirements of the IRPA. A person, who required an ARC, does not meet the requirements of the IRPA, unless this person obtains such an authorization."

[42] Both the Applicant and the Respondent concede that there is no ARC application "form". Rather, the guidelines make clear that the Applicant must address the ARC issue by way of a letter with the work permit application. If accepted, then the fee must be paid.

[43] It was confirmed at the hearing that the Applicant did not include a letter requesting an ARC in his work permit application.

[44] In other words, the ARC cannot be issued unless the Applicant is able to satisfy the Officer that he should be appropriately authorized to return to Canada, and that there are compelling reasons to do so.

[45] In addition to that, the language of the IRPR is quite clear that visa officers must assess, in granting a work permit, as to whether the Applicant will leave upon the conclusion of their work permit. There is no error in the Officer canvassing the Applicant's travel history to make that determination.

[46] The Officer makes no reference whatsoever to the fee. The guidelines set out clearly that the fee must be paid when specifically asked for, and as such the Applicant should have put submissions in front of the Officer as to why his past immigration history is no longer a deciding factor. I find that that the Officer made no unreasonable error in finding that the Applicant should have made an ARC application.

[47] As the Applicant concedes that he has not thus far applied for an ARC, we need not consider whether an ARC should have been granted.

[48] In conclusion, as I do not agree that the guidelines were unclear, I find that there are no issues of procedural fairness. The Officer did not err by assessing the Applicant's past history of compliance in determining whether the Applicant would leave at the expiry of his work permit.

[49] I see no conflict between the guidelines and the legislation, or that the guidelines were unclear. Therefore, I find no error.

[50] I will dismiss this application.

[51] No question is presented for certification and none arose from the hearing.

JUDGMENT in IMM-4401-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Glennys L. McVeigh"
Judge

Annex A

Immigration and Refugee Protection Act (S.C. 2001, c. 27)

No return without prescribed authorization

52 (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

Interdiction de retour

52 (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.

Immigration and Refugee Protection Regulations (SOR/2002-227)

Issuance of Work Permits

Work permits

200 (1) Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act — an officer shall issue a work permit to a foreign national if, following an examination, it is established that

(a) the foreign national applied for it in accordance with Division 2;

(b) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

(…)

Délivrance du permis de travail

Permis de travail — demande préalable à l'entrée au Canada

200 (1) Sous réserve des paragraphes (2) et (3), et de l'article 87.3 de la Loi dans le cas de l'étranger qui fait la demande préalablement à son entrée au Canada, l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments ci-après sont établis :

a) l'étranger a demandé un permis de travail conformément à la section 2;

b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;

(…)

Departure order

224 (1) For the purposes of subsection 52(1) of the Act, an enforced departure order is a

Mesure d'interdiction de séjour

224 (1) Pour l'application du paragraphe 52(1) de la Loi, l'exécution d'une mesure d'interdiction de séjour à l'égard d'un

circumstance in which the foreign national is exempt from the requirement to obtain an authorization in order to return to Canada.

Requirement

(2) A foreign national who is issued a departure order must meet the requirements set out in paragraphs 240(1)(a) to (c) within 30 days after the order becomes enforceable, failing which the departure order becomes a deportation order.

When removal order is enforced

240 (1) A removal order against a foreign national, whether it is enforced by voluntary compliance or by the Minister, is enforced when the foreign national

(a) appears before an officer at a port of entry to verify their departure from Canada;

(b) obtains a certificate of departure from the Canada Border Services Agency;

(c) departs from Canada; and

(d) is authorized to enter, other than for purposes of transit, their country of destination.

étranger constitue un cas dans lequel l'étranger est dispensé de l'obligation d'obtenir l'autorisation pour revenir au Canada.

Exigence

(2) L'étranger visé par une mesure d'interdiction de séjour doit satisfaire aux exigences prévues aux alinéas 240(1)a) à c) au plus tard trente jours après que la mesure devient exécutoire, à défaut de quoi la mesure devient une mesure d'expulsion.

Mesure de renvoi exécutée

240 (1) Que l'étranger se conforme volontairement à la mesure de renvoi ou que le ministre exécute celle-ci, la mesure de renvoi n'est exécutée que si l'étranger, à la fois :

a) comparaît devant un agent au point d'entrée pour confirmer son départ du Canada;

b) a obtenu de l'Agence des services frontaliers du Canada l'attestation de départ;

c) quitte le Canada;

d) est autorisé à entrer, à d'autres fins qu'un simple transit, dans son pays de destination.

Government of Canada, Authorization to return to Canada, https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/reasons/authorization-return-canada.html

Before you apply

(…)

If you are applying to come to Canada for any reason, (visiting, studying, working or immigrating), you should not submit a separate application for an ARC. If your application is approved, the ARC will be dealt within the context of that application. You will simply be asked to submit the fee.

Avant de présenter une demande

(…)

Si vous présentez une demande pour venir au Canada, notamment en tant que visiteur, étudiant, travailleur ou résident permanent, vous ne devez pas présenter une demande d'ARC distincte. Si votre demande est approuvée, la question de l'ARC sera réglée dans le cadre de cette demande. Vous n'aurez qu'à payer les frais relatifs à l'ARC.

FEDERAL COURT

SOLICITORS OF RECORD

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