Federal Court  Cour fédérale

Date: 20190627

Docket: IMM-4996-18

Citation: 2019 FC 872

Ottawa, Ontario, June 27, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

AHMED ISMAIL OSMANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review by the Applicant, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of the refusal by an immigration officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC], to issue the Applicant a temporary resident permit [TRP]. The Decision is dated September 25, 2018 [Decision].

II. Facts

[2] The Applicant is a 40 year old citizen of Pakistan. The facts below are from the Applicant's affidavit [affidavit], which was before the Officer.

[3] The Applicant began working in the United Arab Emirates [UAE] in 2002. He later married his wife and they had two children (born in 2006 and 2011).

[4] He became employed at a new company in late 2014. The Applicant issued personal cheques to investors in the company in the amount of their investment in the event they did not receive certain dividends from the company. When the company began delaying the payment of dividends to its investors, one of the investors attempted to cash the Applicant's personal cheque, but there were insufficient funds. As a result, under UAE law and at the request of that investor, in 2015 the Applicant was arrested and detained. In the UAE, matters that would normally be considered a civil dispute between two individuals such as this are treated as criminal matters. The Applicant settled with this investor and was released from detention. He had a clean record after the amount was paid back to the investor. He resigned from the company in May 2015 because it was clear to him that the company was not honest in their dealings.

[5] The Applicant's family travelled to Canada in August 2015 to visit their families. His wife applied for a study permit to study culinary arts in Toronto and was approved. He and their children applied as her dependents, which applications were approved in 2016. He obtained an open work permit. UAE had given him a police clearance certificate attesting he had no criminality. He did not mention the previous arrest and detention.

[6] Canada Border Services Agency [CBSA] arrested the Applicant on September 1, 2016 on the basis of a criminal conviction in UAE, notwithstanding that UAE had given him a police clearance certificate attesting he had no criminality. The Applicant was shocked to discover another investor had made a complaint against him such that the Applicant had been convicted *in absentia* in the UAE of writing an unfunded cheque and sentenced to two years' imprisonment. He knew nothing of this conviction because he had not given the second complainant a personal cheque.

[7] The Applicant was convoked for and attended an admissibility hearing at the Immigration Division [ID] in June, 2016. He conceded he failed to advise immigration officials of his previous arrest and detention in May 2015, although UAE had given him a police clearance certificate attesting he had no criminality. He did not concede a failure to report the conviction because he did not know of it. Therefore the ID issued an exclusion Order against the Applicant based on misrepresentation (not criminality), pursuant to paragraph 40(1)(a) of *IRPA*:

***Immigration and Refugee Protection Act,* SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés,* LC 2001, ch 27**
Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur

administration of this Act;	dans l'application de la présente loi;
…	…

[8] Based on the exclusion Order, the Applicant was asked to meet with CBSA regarding his removal from Canada, which he did. He was offered a pre-removal risk assessment [PRRA] to avoid removal, and made a PRRA application accordingly based on the basis of risk of extradition to UAE by Pakistan. A month later he applied for a TRP.

III. Decision under review

[9] The Officer refused the TRP application on September 25, 2018. The Officer's notes in the GCMS simply state:

> After reviewing all the information presented I have determined that insufficient compelling grounds exist to warrant the issuance of a temporary resident permit. Client is requesting a TRP because he in inadmissible under A40 for misrepresentation. By operation of the legislation client has an open pre removal risk assessment (PRAA [*sic*]) file that the status is open. PRAA [*sic*] cases must be disposed of prior to any removal action commencing against a client. An applicant with an open PRAA [*sic*] does not require a TRP to remain in Canada. In addition the applicant is also eligible for an open work permit while in Canada with an open PRAA [*sic*] application.
>
> A TRP is issued in limited numbers and under exceptional circumstances. While they can be used to remedy an inadmissibility the factors presented to support their issuance must be compelling. After considering all of the information presented I have determined that insufficient compelling grounds exist to warrant the issuance of a TRP and therefore this application is refused.

IV. Issue

[10] At issue is whether the Officer's assessment of the Applicant's TRP application is unreasonable.

V. Standard of review

[11] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57 and 62 [*Dunsmuir*], the Supreme Court of Canada holds that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." "A decision regarding the issuance of a TRP involves the exercise of discretion and is reviewable on the standard of reasonableness": *Sellappah v Canada (Minister of Citizenship and Immigration)*, 2018 FC 198, per Heneghan J at para 5. In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [*CHRC*] at para 55, the Supreme Court of Canada explains what is required of a court reviewing on the reasonableness standard of review:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple

> possible outcomes, even where they are not the court's preferred solution.

[12] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Law

[13] Section 24 of *IRPA* details the conditions for a TRP:

***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27**
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.
...	...

Instructions of Minister	**Instructions**
(3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.	(3) L'agent est tenu de se conformer aux instructions que le ministre peut donner pour l'application du paragraphe (1).
...	...

VII. Analysis

[14] The Applicant submits the Decision is unreasonable because the Officer failed to engage in the required analysis set out in the Immigration Manual and decided the matter based solely on on the Applicant's open PRRA application and work permit.

[15] The basic rationale for the issuance of a TRP is set out in the oft-quoted decision in *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275, per Shore J [*Farhat*] at para 22:

> [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).)

[16] The IRCC policy dealing with TRPs, which the Applicant submits was formerly found at chapter OP 20, is available at https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-

residents/permits/eligibility-assessment.html [policy]. This Court and the Supreme Court of Canada have held guidelines are not binding in law, but are nonetheless useful aids in determining how to apply discretionary powers: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 60 and 85; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 32.

[17] Notably, the policy provides the officer "will" engage in weighing the following when determining whether a TRP should issue:

> **Who is eligible for a temporary resident permit (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 the *Immigration and Refugee Protection Act* (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
> - the need for the foreign national's presence in Canada outweighs any risk to Canadians or Canadian society.

[18] The policy sets out factors the officer "must" consider when determining whether issuance of the TRP is warranted under the circumstances. It does not appear the Officer considered any of these:

> **Evaluating compelling reasons vs. risks**
>
> Officers must consider the factors that make the person's presence in Canada necessary and the intent of the legislation to maintain program integrity and protect public health and safety.

...

Risk assessment factors

- History: Is there a pattern of non-compliance [A41] with the Act or Regulations? Is the violation inadvertent and accidental or the result of careless or flagrant disregard for the law?

- Credibility: Credibility should be assessed during an interview. The task is to weigh the facts in a fair and impartial manner, considering both positive and negative elements. Officers must determine which facts are most important, which evidence is the most persuasive and which argument is the most compelling or convincing, and explain why.

- Previous removal: Have the original grounds for removal been overcome or diminished? Are there any statutory bars remaining against the person, other than the removal order?

- Controversy: Are there high-profile, complex or sensitive elements to the case that warrant referral or consultation with the Case Management Branch?

- Social assistance: If there is a possibility that the foreign national intends to become a permanent resident, is there any risk that the person will require social assistance?

The following considerations and examples are not exhaustive but illustrate the scope and spirit in which discretion to issue a TRP should be applied:

- the reason for the person's presence in Canada and the factors that make their presence in Canada necessary (e.g., family ties, job qualifications, economic contribution, attendance at an event);

- the intention of the legislation (e.g., protecting public health or the health care system);

- the type/class of application and family composition, both in the home country and in Canada;

- if medical treatment is involved, whether the treatment is reasonably available in Canada or elsewhere (comments on the relative costs and accessibility may be helpful), and the anticipated effectiveness of treatment;

- the benefits to the person concerned and to others;

- the identity of the sponsor, host or employer.

[19] I agree a TRP officer must assess whether an applicant's "compelling need" to enter Canada outweighs any risk to Canada, and that this exercise lies "at the heart of a TRP analysis": *Shabdeen v Canada (Citizenship and Immigration)*, 2014 FC 303, per Tremblay-Lamer J at para 23.

[20] However, a failure to review an applicant's submissions and conduct an analysis to determine justification to issue the TRP renders the decision unreasonable: *Mousa v Canada (Minister of Immigration, Refugees and Citizenship)*, 2016 FC 1358, per Strickland J [*Mousa*] at para 9. In my respectful view the law regarding the assessment of TRPs is well set out by Justice Strickland in *Mousa*; therefore, I intend to apply it in this case.

[21] The Applicant submits, and I agree, that on the basis of *Mousa*, the Officer's assessment is unreasonable because there does not appear to have been any meaningful engagement or analysis of the compelling reasons the Applicant presented to the Officer. To recall, the Applicant's alleged compelling reasons were: maintaining his family unit in Canada, providing economic, practical, and emotional support to his wife and children, most fundamentally, and enabling the Applicant to make a meaningful contribution to his Canadian employer's business.

[22] In my respectful view, this case bears a striking resemblance to *Mousa*, where the officer basically disposed of a TRP application by stating there were insufficient compelling grounds to warrant the TRP. The only material point of difference is that the Officer in the case at bar referred to the pending PRRA and work permit, which I will discuss later.

[23] Justice Strickland found the absence of any acknowledgement, let alone any analysis of the compelling reasons alleged by an applicant, constituted a reviewable error: *Mousa* at paras 12 to 14 and 19:

> [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. …
>
> ...
>
> [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.

[24] The reasoning of Justice Strickland in *Mousa* is supported by Justice Barnes's reasons in *Gallegos v Canada (Minister of Citizenship and Immigration)*, 79 Imm LR (3d) 62 (Fed Ct) at para 3, who called for a principled analysis with appropriate consideration for all relevant matters:

> [3] … I am satisfied that the Applicant has met the burden for establishing a serious issue. While I accept that the purpose of a Temporary Resident Permit (TRP) is to allow for exceptional situations and, therefore, must be issued cautiously, the decisionmaker must still examine each request in a principled way with appropriate consideration for all relevant matters. Here the Officer appears to have speculated about the potential impact of a TRP on health or social services resources. The Officer also declined the request for a TRP because of Mr. Gallegos' outstanding PRRA application. It is arguable that the consideration of the stay of removal pending the determination of the PRRA application was not relevant to the TRP application and failed to take appropriate account of Mr. Gallegos' situation if his PRRA application was refused. In the face of that recent PRRA refusal Mr. Gallegos is left in the situation of an imminent deportation with his TRP application seemingly never determined on the merits.

[25] In the case at bar, the Officer's reasons are essentially conclusory. They provide no explanation as to why the circumstances of the Applicant were rejected as not compelling, except in the second paragraph where reference is made to the PRRA and work permit.

[26] I turn now to the Officer's reliance on the PRRA. In my view the Officer was not permitted to rely solely on the open PRRA and work permit to the exclusion of all other circumstances. I say this because in this case, the PRRA was offered by CBSA as a means to

delay removal which was then taking place. In addition, a PRRA is the last stage in an immigrant's removal from Canada and focusses on as yet unassessed risk in his or her home country. A TRP on the other hand is designed to serve a very different purpose, namely "to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments" as Justice Shore noted in *Farhat* at para 22. The availability of one (a PRRA) does not and may not be used to exclude availability of the other (TRP) because they serve such different purposes. In my view, while reliance on a PRRA may in some cases be relevant, a PRRA may not be the determinative factor in refusing a TRP where other material circumstances are advanced.

[27] In addition, it was common ground that the PRRA decision could be negative and could also rendered at any time. A negative PRRA would immediately expose the Applicant to removal from Canada under CBSA's duty to remove "as soon as possible" under *IRPA*. I note that a TRP may be cancelled at any time also.

[28] The Respondent took the position that the Officer acted reasonably in relying solely and exclusively on the availability of the PRRA and open work permit to reject the TRP. Minister's counsel argued it was not necessary for the Officer to consider anything else. This broad assertion is no at all consistent with Justice Strickland's decision in *Mousa*, which I have adopted as applicable to a case such as this.

[29] The Respondent offered various alternative immigration processes available to the Applicant in the event the PRRA was turned down. I will note and briefly discuss each:

1. The Applicant could seek leave and judicial review of a PRRA refusal. In my view this has no merit; this Court should not be burdened with more requests for judicial review because TRP officers fail to adequately assess the compelling reasons advanced by the parties as *Mousa* holds them duty-bound to do;

2. The Applicant could bring a motion to stay any future scheduled removal; this has no merit for the same reason;

3. The Applicant could make a humanitarian and compassionate [H&C] application. There is no merit to this submission; H&C requires a full blown assessment of all relevant factors and are quite often made in the context of a permanent residence application, which the Applicant may or may not want. It seems to me a TRP application is more carefully tailored to deal with an inadmissibility finding such as that made in the case at bar;

4. The Respondent argued the Applicant could make a request to CBSA to defer removal if the PRRA was negative. I do not see this as having merit; CBSA officers have very limited discretion to grant short-term relief; the jurisprudence is clear that they may not grant long-term or indeterminate deferrals. See e.g. *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, per Nadon JA at para 49: “It is trite law that an enforcement officer’s discretion to defer removal is limited”; *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130, per Gleason JA at para 54: “Deferral requests are typically the last application made by those who are not entitled to remain in Canada. In light of this and of the language used by Parliament in section 48 of the IRPA, directing that removal orders be enforced as soon as possible

(or formerly as soon as is reasonably practicable), this Court and the Federal Court have long held that the discretion that an enforcement officer may exercise is very limited;"

5. Then it was submitted that the Applicant could bring a motion to stay removal based on the refusal of a request to defer. Such a motion would have to be brought in the course of a request for judicial review; this has no more merit than the first and second alternatives discussed above;

6. The Respondent points to the possibility that the Applicant could make a second application for a TRP. There is no merit in this suggestion for several reasons. First it will take time to obtain a decision. In the case at bar, it took over a year to obtain the TRP Decision. Moreover, and with respect, I see little value in engaging a second senior officer to review material that was already before an earlier senior officer who should have but did not give it the consideration required by *Mousa*. This approach could also lead to an undesirable, inefficient, piecemeal assessment by various officers, with the possibility of inconsistent results. This approach simply creates more problems, expense and delay, than it solves. All of this is be avoided by such Officers following the Court's approach set out in *Mousa*.

[30] I understand that in outlining these alternatives the Respondent is not indicating any would result in success. However, they all offend the law regarding TRPs already set out by this Court which – rather unremarkably in my view – simply requires immigration officers to assess the merits of the TRP application before them. This was not done in this case. I do not say the assessment needs to be a full blown assessment such as that which *Kanthasamy* requires. But it must be more than the conclusory finding here.

[31] The Respondent relied several times on *Rodgers v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1093, per von Finckenstein J. It seems to me this case is very unusual on the facts, and thus readily distinguishable. There, the applicant remained in Canada for fifteen (15) years without status, was denied permanent residence on H&C grounds due to having made a false claim, then denied refugee protection because he was not credible, he was subsequently denied a second H&C application, at which point he applied for but was refused a TRP. In these circumstances his request for judicial review was reasonably dismissed.

[32] The case at hand turns on the adequacy of the Officer's reasons in support of the Decision. I adopt the following comments by Justice Strickland on the insufficiency of reasons given by the officer in *Mousa*, and will apply them to the case at bar:

> [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). [Emphasis added]

[33] Likewise here, I am unable to determine why the Applicant's circumstances were found not compelling. Therefore I have concluded that the Decision is not reasonable, such that judicial review must be granted.

VIII. Question to certify

[34] Neither party proposed a question of general importance to certify, and none arises in this case.

JUDGMENT in IMM-4996-18

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision below is set aside, the matter is remanded to a different-decision maker for redetermination, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4996-18
STYLE OF CAUSE:	AHMED ISMAIL OSMANI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 20, 2019
JUDGMENT AND REASONS:	BROWN J.
DATED:	JUNE 27, 2019

APPEARANCES:

Natalie Domazet	FOR THE APPLICANT
Asha Gafar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell LLP	Migration Law Chambers Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario		FOR THE RESPONDENT