Date: 20060519

Docket: IMM-4212-05

Citation: 2006 FC 625

OTTAWA, ONTARIO, May 19, 2006

PRESENT: The Honourable Mr. Justice von Finckenstein

BETWEEN:

WEI WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Wei Wang, is a citizen of China who previously came to Canada for study purposes. On June 8, 2005, the Applicant arrived at Pearson Airport with a valid Canadian temporary resident visa and a valid study permit. He provided the Immigration Officer at the airport (the Officer) with a letter on Centennial College letterhead stating that he had already studied at the institution for four months and had paid fees for three years (the Letter).

[2] The Officer asked the Applicant where he was currently studying and how long he had been studying. His answers matched those of the Letter. The Officer then asked the Applicant further

questions because Centennial College denied signing the Letter and denied that the Applicant was a student at the institution. The Applicant thereupon admitted that he had paid an acquaintance, Sean, to obtain the Letter.

[3] As a result of this admission, the Applicant was detained.

[4] An admissibility hearing was held on June 29, 2005 at the Immigration Holding Centre in Etobicoke, Ontario by an Immigration Division Member (the Member). As a result of that hearing, a Deportation Order, pursuant to s. 36(2)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended (the Act) and an Exclusion Order pursuant to s. 40(1)(c) of the Act were issued on June 29, 2005.

[5] The Applicant seeks judicial review of the issuance of the Deportation Order.

[6] During the judicial review hearing, it came to the attention of the Court that the Applicant voluntarily left Canada on August 30, 2005 after his Pre-Removal Risk Assessment (PRRA) application, filed August 3, 2005, was denied.

[7] Following a request from the Court, the parties made written submissions on whether the issues before the Court are moot. In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Supreme Court of Canada stated at paragraph 16 that "a case is moot if it fails to meet the 'live controversy' test".

[8] The question is thus whether the application of Rule 166 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) and the issue of whether the Member erred in finding the Applicant was a person described in s. 36(2)(d) of the Act are live issues. Due to the consequences of the issuance of the Deportation Order, being that the Applicant cannot return to Canada in the future, there is a live issue in this case and the case is not moot.

[9] The following issues arise in this case:

> (a) Was there a breach of natural justice in denying the adjournment to enable the Applicant to make a PRRA application pursuant to Rule 166?
>
> (b) Did the Member err is deciding the Applicant was a person described in s. 36(2)(d) of the Act?
>
> (c) Was there a breach of natural justice for failing to provide written reasons for denying the adjournment?

STANDARD OF REVIEW

[10] A pragmatic and functional analysis must be conducted to determine the applicable standard of review of the Member's decision to decide the Applicant was a person described in s. 36(2)(d) of the Act. Four contextual factors must be considered in such an analysis: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purpose of the legislation; and the nature of the question.

[11] Decisions of Members are not protected by a strong privative clause; see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. The Board has relative expertise in assessing foreign nationals at admissibility hearings. The purpose of the legislation

regarding deportation and exclusion orders is to not allow certain individuals to stay within Canada in order to guarantee Canada's security. The nature of the question is one of mixed fact and law as the Member must apply the Applicant's factual situation to the provisions in the Act.

[12] The appropriate standard of review for the Member's decision to issue the Deportation Order is reasonableness simpliciter.

Was there a breach of natural justice in denying the adjournment to enable the Applicant to make a PRRA application pursuant to Rule 166?

[13] The Applicant submits that Rule 166 states that the PRRA application should be received as soon as the removal order is made. Thus, an adjournment of the admissibility hearing should have been granted so that the Applicant would have sufficient time to prepare the PRRA application.

[14] Rule 166 of the Regulations state:

> An application for protection by a foreign national against whom a removal order is made **at a port of entry** as a result of a determination of inadmissibility on entry into Canada must, if the order is in force, be received as soon as the removal order is made. Written submissions, if any, must accompany the application. For greater certainty, the application does not result in a stay of the removal order.

[15] Port of Entry is defined in section 2 of the Regulations to be:

> "a port of entry" means
>
> (a) a place set out in Schedule 1; and
>
> (b) a place designated by the Minister under section 26 as a port of entry, on the dates and during the hours of operation designated for that place by the Minister.

[16] Schedule 1 of the Regulations sets out numerous locations which are considered points of entry. Pearson airport is not listed on Schedule 1. Neither is the Immigration Holding Centre in Etobicoke, Ontario, where the Admissibility Hearing was held, listed on Schedule 1.

[17] Therefore, when the removal and exclusion orders were issued against the Applicant, he was not at a port of entry. Thus, Rule 166 does not apply.

[18] Accordingly, there was no breach of natural justice in the Member deciding not to grant the adjournment.

Did the Member err is deciding the Applicant was a person described in s. 36(2)(d) of the Act?

[19] The Applicant submits that as no criminal conviction was made, nor criminal charges laid, against the Applicant, it was improper to find that the Applicant had committed a criminal act.

[20] The analysis by Justice Blais in *Magtibay v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 397 at paragraph 10 is useful here:

> It should be made clear that paragraph 36(1)(c) of the Act does not require a conviction for the accused crime, but simply its commission. In contrast, paragraph 36(1)(b) of the Act requires a conviction, not simply its commission. It is therefore clear that Parliament intended to differentiate the two scenarios, and allow for the inadmissibility of a permanent resident or foreign national not only on a conviction, but also on the mere commission of certain acts.

[21] The applicable section in that case, section 36(1) of the Act, is similar to s. 36(2). Those sections state:

> 36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
>
> (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
>
> (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.
>
> 36(2) A foreign national is inadmissible on grounds of criminality for
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;
>
> (b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;
>
> (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or
>
> (d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.
>
> **(Underlining Added)**

[22] Both sub-sections refer to either a conviction or the commission of the offence. It is reasonable to assume that Parliament used the different terms in order to differentiate the requirements for each section.

[23] In this case, the Applicant admitted that he had never attended or paid tuition to Centennial College, that he intended to use the Letter to prove he had a school to attend in Canada. His testimony was that even though he had not completed an application or registered himself at Centennial College, he believed that the person he met at a coffee shop had registered for him. He was also aware that the Letter stated he had been studying at the university since January 2005, and that he had paid tuition fees. The Applicant was aware the he had never paid tuition fees or attended the university.

[24] There was sufficient evidence before the Member to believe that the Applicant had committed an offence by uttering a forged document to the Officer in the hopes that the Officer would rely upon it in order to grant the Applicant entry into Canada.

[25] Therefore, it was reasonable for the Member to decide to issue the Deportation Order pursuant to s. 36(2)(d) given the Applicant's actions.

Was there a breach of natural justice for failing to provide written reasons for denying the adjournment?

[26] At the Admissibility Hearing, the Applicant requested written reasons be provided. The Applicant relies on *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 to support its argument that written reasons should have been provided.

[27] Rule 7(4) of the *Immigration Division Rules*, SOR/2002-229, upon which the Applicant relies, states how the request for written reasons is to be made. It does not put an onus on the Member to actually provide the written reasons.

[28] In *Baker, supra*, the Supreme Court of Canada held that the Member's notes would suffice as reasons. In this case, there is no reason why the transcript should not suffice. The transcript clearly shows the reasons for why the decision was made, and what the Member relied upon to render that decision. The Applicant was fully informed of the reason why the request for an adjournment was denied. Given this, there was no requirement on the Member to provide written reasons for the decision and no breach of natural justice arose.

[29] Given the above findings, this application for judicial review is denied.

ORDER

THIS COURT ORDERS that application for judicial review is denied.

"Konrad W. von Finckenstein"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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