**Date: 20090316**

**Docket: IMM-3035-08**

**Citation: 2009 FC 263**

**Ottawa, Ontario, March 16, 2009**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**ELISSA CAMPBELL HARA**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a visa officer (Officer) dated June 20, 2008 (Decision) refusing the Applicant's application for a work permit.

## BACKGROUND

[2] The Applicant was born and raised in Japan. She studied at an International School from fourth grade onwards. She holds dual Japanese and British citizenship. After completing high school, she obtained a Canadian study permit allowing her to attend George Brown College in

Toronto where she studied full-time from September 2005 until April 2007, earning a two-year diploma in Early Childhood Education.

[3] As her academic program was to end on April 20, 2007, the Applicant went to a Citizenship and Immigration Canada (CIC) office in March 2007 for help filling out an application form for a work permit. The person on duty at the CIC office advised the Applicant to check the "Visitor" box on the application. The Applicant would later learn that this was a mistake, and that in checking the "Visitor" box she was in fact giving up her student status instead of extending it.

[4] The Applicant was subsequently issued a Visitor Record valid from May 7 to July 19, 2007. After receiving an offer of work, she submitted an application for a work permit on July 10, 2007 to CPC-Vegreville, not realizing that she could not apply from within Canada for a work permit while on visitor status.

[5] While preparing the work permit application, she became concerned that her Visitor Record was about to expire. The CIC office told her she could stay during the time that her application was pending because she was in "implied status."

[6] On September 10, 2007, the Applicant received a letter rejecting her work permit application because she had applied from within Canada while on visitor status (CPC-Vegreville Refusal). This was the first time the Applicant realized her mistake and that her visa status was not as it should be.

[7] The Applicant retained a lawyer who advised her that applying to have her student status restored would be a lengthy process and that if it was not successful she would have to leave the country. She took the lawyer's advice to apply to work as a live-in caregiver. The Applicant claims that she did not leave Canada at this point despite the expiry of her visitor status and receipt of the CPC-Vegreville Refusal because her lawyer informed her that she could apply to work as a live-in caregiver without leaving Canada. Moreover, the CPC-Vegreville Refusal did not order her to leave the country.

[8] The Applicant's prospective employers signed an employment contract on October 10, 2007. They received a positive Labour Market Opinion dated November 30, 2007, which was valid until November 30, 2008. The Applicant's lawyer prepared the application for a work permit and submitted it to the Canadian Embassy in Tokyo (Embassy) on December 19, 2007 (First Application).

[9] The First Application was rejected on January 3, 2008 because the visa officer was not satisfied that the Applicant would leave Canada at the end of the period of her authorized stay. The visa officer was also not satisfied that the Applicant had answered Question 19 of the IMM 1295 form truthfully regarding previous refusals. It was also rejected because the Applicant cannot apply for such a permit from within Canada.

[10] After learning that she had to apply for a work permit from outside Canada, the Applicant left for Tokyo on January 19, 2008. She submitted another application on January 22, 2008 to the

Embassy in Tokyo, enclosing a covering letter that attempted to explain the reasons for her over-stay (Second Application). This application was refused on February 28, 2008 because the Applicant had failed to provide a new employment contract with her employer in Canada. The Applicant had provided the same employment contract that was included in her work permit application in December 2007. Further, the visa officer was not satisfied that the Applicant would leave Canada at the end of her authorized stay. The Applicant had overstayed in Canada in the past and she had not declared her past refusal for a work permit on her application.

**DECISION UNDER REVIEW**

[11] On June 16, 2008, the Applicant submitted a third application for a work permit as a live-in caregiver. This application was refused on June 20, 2008 (Decision). The reasons for refusal were that the Applicant had failed to provide a new employment contract with her employer in Canada and the Officer was not satisfied that the Applicant would leave Canada at the end of her authorized stay. The Officer noted in the Computer Assisted Immigration Processing System (CAIPS Notes) that the Applicant had overstayed in Canada, had failed to mention her refusals for work permits in her previous applications, and had weak connections to Japan.

**STATUTORY PROVISIONS**

[12] The following provisions of the Act are applicable in these proceedings:

| | |
|---|---|
| **Application before entering Canada** | **Visa et documents** |
| **11. (1)** A foreign national must, before entering Canada, apply | **11. (1)** L'étranger doit, préalablement à son entrée au |

| | |
|---|---|
| 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. | 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. |

[13] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) are applicable in these proceedings:

| | |
|---|---|
| **Work permits — requirements** | **Permis de travail : exigences** |
| **112.** A work permit shall not be issued to a foreign national who seeks to enter Canada as a live-in caregiver unless they | **112.** Le permis de travail ne peut être délivré à l'étranger qui cherche à entrer au Canada au titre de la catégorie des aides familiaux que si l'étranger se conforme aux exigences suivantes : |
| (*a*) applied for a work permit as a live-in caregiver before entering Canada; | *a*) il a fait une demande de permis de travail à titre d'aide familial avant d'entrer au Canada; |
| (*b*) have successfully completed a course of study that is equivalent to the successful completion of secondary school in Canada; | *b*) il a terminé avec succès des études d'un niveau équivalent à des études secondaires terminées avec succès au Canada; |
| (*c*) have the following training or experience, in a field or occupation related to the employment for which the work permit is sought, namely, | *c*) il a la formation ou l'expérience ci-après dans un domaine ou une catégorie d'emploi lié au travail pour lequel le permis de travail est demandé : |
| (i) successful completion of | (i) une formation à temps plein |

six months of full-time training in a classroom setting, or

de six mois en salle de classe, terminée avec succès,

(ii) completion of one year of full-time paid employment, including at least six months of continuous employment with one employer, in such a field or occupation within the three years immediately before the day on which they submit an application for a work permit;

(ii) une année d'emploi rémunéré à temps plein — dont au moins six mois d'emploi continu auprès d'un même employeur — dans ce domaine ou cette catégorie d'emploi au cours des trois années précédant la date de présentation de la demande de permis de travail;

(*d*) have the ability to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting; and

*d*) il peut parler, lire et écouter l'anglais ou le français suffisamment pour communiquer de façon efficace dans une situation non supervisée;

(*e*) have an employment contract with their future employer.

*e*) il a conclu un contrat d'emploi avec son futur employeur.

**Issuance**

**Délivrance**

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

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

*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

*b*) il quittera le Canada à la fin de la période de séjour

| | |
|---|---|
| for their stay under Division 2; | autorisée qui lui est applicable au titre de la section 2; |
| (*c*) holds a passport or other document that they may use to enter the country that issued it or another country; | *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*) meets the requirements applicable to that class; | *d*) il se conforme aux exigences applicables à cette catégorie; |
| (*e*) is not inadmissible; and | *e*) il n'est pas interdit de territoire; |
| (*f*) meets the requirements of section 30. | *f*) il satisfait aux exigences prévues à l'article 30. |

**ISSUES**

[14] The Applicant raises the following issues:

1) Did the Officer err in law by violating principles of procedural fairness and natural justice by:

   a. Failing to provide the Applicant with an opportunity to submit an updated employment contract?

   b. Failing to provide the Applicant with adequate reasons for dismissing her explanation for over-stay in Canada from September 10, 2007 until January 19, 2008?

2) Did the Officer err in his assessment of the Applicant's apparent failure to declare previous refusals?

3) Did the Officer err in his assessment of the Applicant's apparent lack of connection to Japan?

4) Did the Officer err in finding that the Applicant's "real intent was to remain in Canada?"

**STANDARD OF REVIEW**

[15] The Applicant has raised procedural fairness issues that are reviewable under a standard of correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraph 115, and *Hassani v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1283.

[16] A denial of the opportunity to respond to an officer's concerns is a procedural fairness issue: *Rukmangathan v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 317 at paragraph 22. As *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100 states, "it is for the courts, not the Minister, to provide the legal answer to procedural fairness questions."

[17] As held in *Canada (Minister of Citizenship and Immigration) v. Charles*, [2007] F.C.J. No. 1493 at paragraph 24, citing *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 the adequacy of reasons is an issue of procedural fairness and reviewable on a standard of correctness.

[18] In *Dunsmuir v. New Brunswick* 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review” *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[19] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the non-procedural fairness issues in this case to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

**ANALYSIS**

1) The Officer erred in law by violating principles of procedural fairness and natural justice by

a. Failing to provide the Applicants with the opportunity to submit an updated employment contract;

[21] One of the primary grounds for the Decision was the Applicant's failure to provide a new employment contract:

> I have determined that you do not meet the requirement of [the IRPR paragraph 112. e) because you failed to provide a new employment contract with your employer in Canada. The one you provided was a copy of the employment contract that was for your work permit application in December 2007. The application was refused in January 2008. You must provide a new employment contract with a new job validation for your new application.

[22] The Officer's CAIPS Notes refer to the continuing validity of the Labour Market Opinion:

> LMO SUBMITTED IS THE ONE DATED 30NOV2007, WHICH IS VALID TO NOV2008. COPY OF EMPLOYMENT AGREEMENT SUBMITTED.

[23] While there is no statutory right to an interview, procedural fairness requires that an applicant be given an opportunity to respond to an officer's concerns under certain circumstances (*Li v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1284 at paragraph 35. This duty may arise, for example, if an officer uses extrinsic evidence to form an opinion, or otherwise forms a subjective opinion that an applicant had no way of knowing would be used in an adverse way: *Li* at paragraph 36.

[24] In this case, however, the Applicant knew that the lack of a new employment contract could lead to a refusal because this is what motivated the Second Refusal of February 28, 2008. Thus, on the standard of correctness for questions of procedural fairness, the Officer did not err in law by not providing the Applicant with the opportunity to submit a new employment contract. The Applicant was on notice that the Embassy required one.

[25] Nevertheless, as a matter of law, it is my view that the Officer did err in finding that the Applicant had failed to meet the requirement of paragraph 112(e) of the Regulations. Paragraph 112(e) of the Regulations states that an applicant must "have an employment contract with their future employer." There is no mention in the Regulations that an applicant must submit a new employment contract with each application for a live-in caregiver work permit. Overseas Processing Manual 14, OP 14: Processing Applicants for the Live-in Caregiver Program (OP 14), states that new validations and a new employment contact are required only for a change of employers. Section 7.2 of the OP 14 directs that "If the 'valid to' date expires during processing, the officer should contact the HRCC to verify that the offer of employment is still valid."

[26] In the present case, the employment contract included in the application was valid. It had been executed on October 10, 2007, about eight months before the application was submitted to the Embassy in June 2008, and it contains no expiry date. Moreover, a letter from the prospective employer dated May 27, 2008 was before the Officer. This letter confirmed that the employer still wanted to hire the Applicant; it even made specific reference to the employment contract and the

employer's understanding that it was still valid. In my view, there was no requirement for an updated contract since there was no change in prospective employer. In fact, the Officer's CAIPS notes indicate that the Labour Market Opinion was still valid. The Applicant's lawyer's submissions on this point were not acknowledged in the Officer's Decision or reasons. Indeed, there is no mention of a lack of a new employment contract in the officer's CAIPs Notes despite this issue being prominent in the reasons given in the Decision letter.

[27] While an officer may inquire into the genuineness of an employment contract, in this case there is no allegation that the employment contract submitted was not genuine. In my view, then, the Officer's finding that the Applicant had failed to meet the requirement of having an employment contract is a mistake of law and is incorrect.

b. Failing to provide the Applicant with adequate reasons for dismissing her explanation for over-stay in Canada from September 10, 2007 until January 19, 2008?

[28] In refusing the application, the Officer relied, in part, on the Applicant's over-stay in Canada. The CAIPs notes read in part as follows:

> SUBJECT HAS A LONG HISTORY ON FOSS: […]
>
> -WORK PERMIT AND STUDY PERMIT REFUSED ON 05SEPT2007 BY CPC-VEGREVILLE.
>
> -SUBJECT OVERSTAYED IN CDA FROM SEP2007 TO JAN2008
>
> […]

> LETTER FROM IMMIGRATION LAWYER DATED 12JUN2008. I HAVE CAREFULLY REVIEWED THE LETTER. LAWYER EXPLAINED THE FOLLOWING:
>
> A) FIRST REASON FOR REFUSAL: OVERSTAY: LAWYER INDICATED THAT SUBJECT DID NOT WILLFULLY OVERSTAY HER VISA OR TRY TO EVADE THE PROPER PROCEDURES. IN THE DETAILED EXPLANATION, IT IS NOTED THAT LAWYER INDICATED THAT AFTER SUBJECT WAS INFORMED OF THE REFUSAL OF HER APPLICATION BY CPC-VEGREVILLE, SHE CONSIDERED UNDER THE ADVICE OF HER LAWYER AT THAT TIME TO HAVE HER STUDENT STATUS RESTORED, OR TO APPLY FOR WORKING HOLIDAY PROGRAM BUT FINALLY DECIDED TO APPLY FOR WORK PERMIT AS LIVE-IN CAREGIVER.
>
> […]
>
> THE FOLLOWING FACTS ARE TO BE CONSIDERED:
>
> - DESPITE THE FACT SUBJECT WAS INFORMED OF THE REFUSAL IN SEPT2007 OF HER APPLICATION TO CPC-VEGREVILLE, SHE REMAINED IN CDA.
>
> […]
>
> WHILE SHE KNEW HER APPLICATION TO CPC-VEGREVILLE WAS REFUSED, SHE REMAINED IN CDA UNTIL 19JAN2008, AFTER HER WORK PERMIT APPLICATION WAS SUBMITTED TO TOKYO ON 27DEC07 AND REFUSED ON 03JAN08.

[29] The Applicant submits that the Officer did not adequately address the explanation for her overstay in Canada. The Applicant submitted a letter with her Second Application explaining the misunderstandings that lead to her overstay from September 2007 to January 2008. In the Third Application, her counsel wrote an explanation letter on her behalf. Yet the Decision letter merely cites the over-stay without indicating why the Applicant’s explanation was insufficient.

[30] The Respondent submits that the Officer did address the Applicant's reasons for why she overstayed in Canada and that this is demonstrated by a specific reference to the Applicant's explanation. The Officer noted that the Applicant had provided a detailed explanation for her overstay. The Officer further noted that the Applicant's "lawyer indicated that she did not willfully overstay her visa or try to evade the proper procedures." Therefore, the Respondent argues that the Officer clearly considered the Applicant's explanation when making his Decision.

[31] The weighing of relevant factors is not the function of a court reviewing the exercise of an officer's discretion, even if the court would have weighed the factors differently: *Legault v. Canada (Minister of Citizenship and Immigration*), 2002 FCA 125 at paragraph 11. Visa officers, however, still may have a duty to at least consider and respond to new evidence in certain circumstances.

[32] In *Dhillon v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1446, Justice O'Reilly found that even though it may not be the role of the court to weigh the evidence, the visa officer in that case should have at least considered and responded to new evidence that specifically addressed a previous visa officer's concerns:

> [5] Obviously, Mr. Dhillon's application did receive some consideration by the Canadian High Commission in New Delhi. However, I am not satisfied that the evidence Mr. Dhillon put before the visa officer to show his ties to India was actually evaluated. None of it was referred to in the notes.
>
> [6] Mr. Dhillon's two previous applications were turned down because a visa officer found that he had "no ties in India". Mr. Dhillon went to considerable effort to address that concern in his third application. […]

> [7] This evidence still may not have been enough. It is not for me to say. However, the visa officer's reasons for turning Mr. Dhillon down do not mention or respond to any of the evidence of his ties to India or the likelihood of his timely return there. It must be remembered that Mr. Dhillon was addressing a very specific concern expressed to him by previous visa officers. Given that his application had been rejected twice for failure to show adequate ties to India, I believe the visa officer had a duty at least to consider and respond to the new evidence. If the evidence was still inadequate, Mr. Dhillon should have been told why.
>
> [8] In my view, the officer either failed to consider the relevant evidence or failed to explain adequately the basis on which Mr. Dhillon's application was refused. In either case, the decision is flawed to a degree warranting the Court's intervention.

[33] Similarly, in *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877, even though the officer referred to evidence submitted, he provided no analysis or comments as to why the evidence was rejected:

> [13] […] I am of the opinion that the visa officer failed to consider the applicant's explanation for having only this document as proof of his completion of study.
>
> […]
>
> [15] […] Even though the officer refers to that evaluation in his CAIPS notes, he makes no analysis or comments as to why he is rejecting that evidence.
>
> [16] In my opinion, in this particular case and with the evidence before him, the visa officer had a duty to investigate this point more thoroughly.

[34] In *Villagonzalo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1127 the failure to consider an applicant’s reasons for an overstay was also held to be unreasonable:

> [24] It appears that her failure to attend her brother's wedding and her failure to leave Canada between either May 17, 2005 or May 22,

> 2005 (the date she received the refusal) and June 1, 2005 caused the visa officer to believe that the applicant in the future, would not leave Canada by the end of any period authorized for her stay.
>
> [25] The visa officer stated other reasons in his affidavit for believing that the applicant would not leave at the appropriate time, however, I cannot find these other reasons stated in the refusal letter or the CAIPS notes.
>
> [26] I am of the opinion that the visa officer's decision was not reasonable. There should have been some consideration of the applicant's explanations.

[35] Knowing she had been previously twice refused on the ground that she had overstayed her visa, the Applicant presented detailed evidence to address these points on her Third Application. It is not for this Court to evaluate the weight to be given to the Applicant's explanation. The requirements of procedural fairness on these facts however, required the Officer to consider and comment on the Applicant's explanation.

[36] The Officer acknowledged the Applicant's explanation but did not evaluate it or explain why it was inadequate. In my view, then, the Officer breached his duty of procedural fairness in not explaining why the Applicant's detailed explanation of the over-stay, which was one of the reasons for her previous refusals, was insufficient.

2) Did the Officer err in his assessment of the Applicant's apparent failure to declare previous refusals?

[37] The Officer alleges that the Applicant did not declare previous refusals in her Second Live-in caregiver application of January 22, 2008. At issue are questions 19(d) and (f) from CIC

Form IMM 1295, Application for a Work Permit Made Outside Canada. The questions are as follows:

> Have you or any member of your family ever:
>
> d): Been refused admission to, or ordered to leave Canada?
> e): Applied for any Canadian Immigration visas?
> f): Been refused a visa to travel to Canada?

[38] The Officer's CAIPs notes read in relevant part as follows:

> LETTER FROM IMMIGRATION LAWYER DATED 12JUN2008. I HAVE CAREFULLY REVIEWED THE LETTER. LAWYER EXPLAINED THE FOLLOWING:
>
> […]
>
> B) SECOND REASON FOR REFUSAL – QUESTION 19 ANSWERED INCORRECTLY: WHILE LAWYER'S MENTIONED ANSWERS AT QUESTIONS 19(d) AND 19(e), SHE DID NOT MENTION THE ANSWER TO QUESTION 19(f), WHICH IS THE QUESTION SUBJECT DID NOT ANSWER PROPERLY IN BOTH PREVIOUS APPLICATIONS. QUESTION 19(f) ASKS IF SHE HAD BEEN REFUSED A VISA TO TRAVEL TO CDA, AND SUBJECT ANSWERED "NO", WHILE SHE KNEW CLEARLY ABOUT PREVIOUS REFUSAL. IT IS NOTED THAT SUBJECT ANSWERS CORRECTLY TO QUESTION 19(f) ON THE CURRENT WORK PERMIT APPLICATION.
>
> […]
>
> THE FOLLOWING FACTS ARE TO BE CONSIDERED:
>
> […]
>
> -DESPITE THE FACT SUBJECT WAS INFORMED OF THE REFUSAL IN SEPT2007 OF HER APPLICATION TO CPC-VEGREVILLE, SHE REMAINED IN CANADA.
>
> […]

> -THEN SHE SUBMITTED A NEW WORK PERMIT APPLICATION ON 22JAN08, NOT DECLARING PREVIOUS REFUSALS. THIS NEW APPLICATION WAS REFUSED ON 26FEB08.

Question 19(d) Have you "ever been refused admission to, or ordered to leave Canada?

[39] The Applicant argues that the wording of question 19(d) is such that the Applicant was correct to indicate she had never, in fact, been refused admission to, or ordered to leave, Canada. The Applicant states in her affidavit that "since I was in Canada at the time of the application for a work permit, I had not been 'refused admission,' and also never received anything 'ordering me to leave' the country." The Applicant argues that the two inland refusals by CPC-Vegreville did not result in any refusal of admission to, or order to leave, Canada. She argues that the Officer did not refer to her explanations in the Decision.

[40] In my view, the Applicant's contentions ignore that the Officer's reasons showed that he considered the Applicant's reasons for not answering correctly Question 19(d). While it may be that the Applicant misunderstood the meaning of "refused admission" as not being applicable to her situation, it was open for the Officer to find that the Applicant knew that she had been on implied status until the CPC-Vegreville Refusal in September 2007, and that the Applicant was in fact refused admission at that time.

Question 19(f) Have you "ever been refused a visa to Canada?"

[41] The Applicant submits that the Officer incorrectly determined that she had not declared being refused a visa to Canada in both the First and Second Applications.

[42] In my view, the Officer was mistaken in his reasoning that the Applicant had not declared being refused a visa to Canada on her First Application. The First Application was the Applicant's first refusal of a visa to Canada. The CPC-Vegreville Refusal is not a visa refusal to Canada or, in my view, analogous. The Applicant, however, did give an incorrect answer to Question 19(f) in her Second Application, when she indicated that she had not been refused a visa to Canada when, in fact, the First Refusal did constitute a refused visa to Canada. However, the Officer's mistaken reasoning as to the extent of the Applicant's misstatements is sufficient to hold that the Officer's finding on this point was unreasonable.

3) Did the Officer err in his assessment of the Applicant's apparent lack of connection to Japan?

[43] The CAIPS Notes summarize the Officer's response to the letter from the Applicant's lawyer that accompanied the Third Application:

> C) THIRD REASON FOR REFUSAL – WEAK TIES TO JAPAN: LAWYER INDICATED THAT SUBJECT WAS BORN AND GREW UP IN JAPAN AND THAT EXTENDED FAMILY IS LIVING IN JAPAN, AND THAT SHE IS THE ONLY CHILD

[44] The Officer also summarizes the Applicant's history of being in Canada:

> […] BASED ON THE SUBJECT'S HISTORY AND INTENT, SHE WOULD HAVE BEEN IN CDA FROM 2005 TO 2012,

> EXCEPT FOR A FEW MONTHS. THEREFORE I HAVE TO CONCLUDE THAT HER TIES IN JAPAN ARE WEAK.

[45] In fact, the lawyer's letter accompanying the Third Application makes it clear that it is the Applicant's extended family who reside in Canada and that it is her immediate family, including her parents, who reside in Japan. The Officer also does not address the claim that the Applicant, being an only child, will inherit her family home in Japan one day or the whole history of the Applicant's association with Canada and her returns to Japan.

[46] The Respondent does not dispute that the Officer made an error on this issue, but calls it a "minor error" that is immaterial considering the other factors cited in the Officer's reasons. In my view, however, this was not a minor error because it is certainly material to the Officer's conclusions. It is an unreasonable error.

4) Did the Officer err in finding that the Applicant's "real intent was to remain in Canada"?

[47] In the Decision letter, the Officer was not satisfied that the Applicant met the requirements of Regulation 179 that she would leave Canada at the end of the temporary period if she were authorized to stay: "In reaching this decision I considered your ties to your country of residence/citizenship balanced against factors which might motivate you to stay in Canada."

[48] In the CAIPS Notes, the Officer considered that the Applicant's canvassing of various options to remain in Canada with her attorney showed her "real intent":

> AS PER THE LETTER FROM THE LAWYER, SHE CONSIDERED VARIOUS OPTIONS IN ORDER TO REMAIN [IN] CDA, INCLUDING RESTORATION OF STUDENT STATUS, WORKING HOLIDAY PROGRAM AND THEN LIVE-IN CAREGIVER PROGRAM. THEREFORE THE REAL INTENT WAS TO REMAIN IN CDA, NO MATTER FOR WHICH PURPOSE.

[49] The CAIPS Notes also summarize the Applicant's history in Canada:

> NOW SHE WANTS TO RETURN TO CDA ASAP AND SHE DID NOT [INDICATE] ON APPLICATION FORM THE DATE THE EMPLOYMENT IS EXPECTED TO FINISH, HOWEVER SHE INDICATED ON HER PREVIOUS APPLICATION THAT EMPLOYMENT WAS EXPECTED TO BE UNTIL 15FEB2012. BASED ON SUBJECT'S HISTORY AND INTENT, SHE WOULD HAVE BEEN IN CDA FROM 2005 TO 2012, EXCEPT FOR A FEW MONTHS. THEREFORE I HAVE TO CONCLUDE THAT HER TIES IN JAPAN ARE WEAK.

[50] One of the objectives of the Live-in Caregiver Program is to provide an avenue for individuals to work and eventually apply for permanent residence from within Canada (OP 14, section 2). The Act itself, at subsection 22(2), recognizes that applicants for temporary residence can have an intention to reside permanently in Canada as long as they are likely to comply with the conditions of their temporary resident status. Thus, the note to section 8.4 of the OP 14 directs as follows:

> […] Insofar as possible, given the difficulty of establishing future intentions, officers should satisfy themselves that an applicant for the live-in caregiver program has the intention of leaving Canada should the application for permanent residence be refused. The question is not so much whether the applicant will seek permanent residence but whether the person will stay in Canada illegally.

[51] Justice de Montigny pointed out in *Ouafae v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 459 that a dual intention is actually necessary to apply for the Live-in Caregiver Program:

> […] the caregiver program specifically provides that these individuals can apply for permanent residence afterward. A candidate with no intention of applying for permanent residence would be ineligible for the program (see point 5.2 of the manual). The manual also points out that with these individuals, it is difficult to apply the normal requirement that temporary residents will leave Canada by the end of the authorized period (8.4 of the manual). The officer's determination was therefore clearly erroneous; he quite simply disregarded the type of program involved in this case.

[52] In *Murai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 186 Justice von Finckenstein noted that previous immigration encounters are the best evidence of whether an applicant intends to remain in Canada beyond the authorized period. The visa officer in that case was found to have erred in refusing an application for a work permit because of what previous encounters revealed:

> […] although she exhausted every possible means of staying in Canada, she left as required by law once she had exhausted all her legal options. She did not go underground or try to stay in Canada by illegal means. She obeyed her removal notice, appeared at the airport voluntarily, and departed.

[53] Having reviewed the entirety of the evidence before the Officer, this Court agrees with the Applicant that the Officer's finding that she would not leave Canada at the end of the authorized stay is not sufficiently supported by the evidence and is unreasonable. While the Applicant did not leave as required by law once she received the September 2007 CPC-Vegreville Refusal, possibly for the reasons she attests too, she nevertheless did leave Canada

once she became aware that she had to apply for the Live-in Caregiver Program from outside Canada. Having received no notice to leave Canada, she claims to have only later learned after reviewing the CAIPS Notes that she should have left Canada after receiving the CPC-Vegreville Refusal. The Applicant “did not go underground.” As discussed above, the Officer also breached the duty of procedural fairness by not providing adequate reasons why he rejected the Applicant’s detailed explanation of her over-stay in Canada. The whole history of the Applicant’s relationship with Canada and her repeated comings and goings is directly against the Officer’s conclusions on this point.

[54] Moreover, it was unreasonable for the Officer to believe that the Applicant would not leave Canada at the end of her authorized stay just because the Applicant had canvassed several options to remain in Canada after the CPC-Vegreville Refusal. There is nothing in the Act or Regulations that prevents someone from consulting with a lawyer as to the legal means to remain in Canada. The fact that the Applicant has a two-year degree from a Canadian college in early childhood education is evidence that her interest in the Live-in Caregiver Program was not simply a utilitarian move to remain in Canada “no matter for which purpose.”

**CONCLUSION**

[55] I conclude that the Officer erred on several grounds, any one of which would warrant re-consideration.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES THAT**

1. The Officer's Decision dated June 20, 2008 refusing the Applicant's application is set aside.
2. The matter is returned for consideration by a different officer in accordance with this decision;
3. There is no question for certification.

"James Russell"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-3035-08 |
| **STYLE OF CAUSE:** | ELISSA CAMPBELL HARA<br>- and -<br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | January 28, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | HON. MR. JUSTICE RUSSELL |
| **DATED:** | March 16, 2009 |

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| | |
|---|---|
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| **Tessa Anne Kroeker** | RESPONDENT |

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