Federal Court  Cour fédérale

Date: 20100426

Docket: IMM-5104-09

Citation: 2010 FC 444

Ottawa, Ontario, April 26, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JUNJI OZAWA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, of a decision by a Visa Officer rejecting Junji Ozawa's application for a work permit. For the reasons that follow this application is dismissed

Background

[2] Junji Ozawa is a citizen of Japan. He is a hair stylist and also a shareholder in Hack Enterprises Inc. d.b.a. Hive Hair Spa, which is incorporated in the province of British Columbia.

[3] Mr. Ozawa came to Canada on February 2, 2007 on a working holiday visa and worked as a hair salon manager and stylist. This visa expired on February 1, 2008. Mr. Ozawa overstayed this visa, but applied for restoration of status on April 24, 2008. On July 21, 2008, he was issued a visitor visa valid until August 1, 2008. Mr. Ozawa again overstayed his visa, which was again restored, this time until March 15, 2009. He left Canada on March 13, 2009 and returned on April 3, 2009. He was granted a 6 month visitor visa (valid to October 3, 2009) at the Vancouver International Airport.

[4] Mr. Ozawa attempted to obtain a Labour Market Opinion to work as a salon manager for his business, but this application was rejected on the basis that he, the applicant, was effectively self-employed. Mr. Ozawa was instructed to apply directly to the visa office.

[5] On June 10, 2009, a section 44 Report was issued against Mr. Ozawa on the basis that he had been observed working at his business without a valid work permit. This report was never challenged by the applicant. An admissibility hearing was never held because Mr. Ozawa departed voluntarily from Canada on July 13, 2009. Before leaving, Mr. Ozawa submitted a work permit application to the Canadian Embassy in Tokyo, Japan.

[6] On July 21, 2009, the officer rejected Mr. Ozawa's application for a work permit. The officer determined that "based on a careful review of the information" provided, the applicant did "not meet the requirements of [*sic*] for a work permit."

[7] The officer determined that the applicant was unlikely to leave Canada at the end of his temporary stay because he had a history of overstaying and contravening the Act and because he had poor employment prospects in Japan. Further, the officer determined that the applicant had not "answered all questions truthfully" as is required by subsection 16(1) of the Act. In particular, the officer questioned how the applicant could list his current employment in Japan as having a duration of 12 months when he was in Vancouver within that period.

[8] The officer also determined that the applicant had engaged in unauthorized work in Canada and had overstayed his visa. The officer concluded, on the basis of subsection 200(3)(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, that the applicant was therefore barred from being issued a work permit until January 13, 2010.

[9] Consequently, the officer rejected the applicant's application for a work permit. It is this decision that the applicant asks this Court to set aside.

Issues

[10] The applicant raises the following issues:

1. What is the standard of review;
2. Whether the officer err in law because she ignored or misconstrued key evidence; and
3. Whether the officer breached the principles of natural justice.

Analysis

1. What is the standard of review?

[11] Both parties agree, as do I, that questions of natural justice are reviewed on the correctness standard: *Level v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 227, and factual determinations are reviewed on the reasonableness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9. Accordingly, the standard of review for the second issue above is reasonableness and the standard for the third issue above is correctness.

2. Whether the officer err in law because she ignored or misconstrued key evidence.

[12] The applicant submits that the officer's decision was unreasonable because his temporary resident status was restored and he therefore did not overstay his visa as the officer determined. The applicant further submits that the officer's decision was unreasonable because she failed to consider the requirements of the departmental guidelines that require more flexibility for self-employed applicants, such as Mr. Ozawa. The applicant contends that it is not clear on what basis the officer determined that he would not leave Canada because the subcategory boxes were not checked. The applicant argues that communication issues with the immigration officer impugn the section 44 Report that was issued.

[13] The respondent submits that any mistakes the officer made do not impugn the determinative aspects of his decision. The respondent contends that the applicant cannot, at this stage, challenge the section 44 Report issued against him and, in any event, it was properly issued. The respondent submits that the following conclusions were reasonably made: that the applicant had contravened

conditions of his admission by working without a work permit and that he had been untruthful on his application. The respondent submits that these findings are determinative of the application.

[14] It is evident to me that the officer made a number of errors in assessing the applicant's application for a work permit.

[15] The officer incorrectly stated that the applicant had previously overstayed his temporary resident visas. The Regulations provide that a restoration of one's temporary resident status has the legal effect of curing any breach of the length of stay requirement inherent in the original temporary resident visa. Thus, where an applicant, such as Mr. Ozawa, successfully restores his or her temporary resident status, it cannot be said, as this officer did, that they overstayed.

[16] The officer's error in this regard undermines much of her determination that the applicant would not leave after the expiration of his work permit.

[17] Where the officer did not err was in her assessment of the applicant's credibility and prior violation of his temporary resident status conditions. The officer drew reasonable negative inferences based on the applicant's misrepresentation on his application and based on inconsistencies in that application. The applicant states that his mistakes are explainable, but he provided the officer with no such explanation. It was reasonable for the officer to base her decision, in part, on these negative credibility inferences.

[18] More importantly, the officer's reliance on the section 44 Report on Inadmissibility that was issued against the applicant was both valid and determinative of the underlying application. A section 44 Report was issued because a different officer observed the applicant "cutting hair" at the business without a work permit. He told the officer who attended at his premises that he did 3 to 4 hair cuts each day he is at the salon. The applicant argues either that that officer made a mistake in her assessment or that he was not in law "working" because he was not an employee of the business.

[19] The applicant never challenged the validity of the section 44 Report because he voluntarily left Canada. Because he left Canada, an admissibility hearing was never conducted by the Immigration Division of the Immigration and Refugee Board. As a result, a formal finding of inadmissibility was never made against the applicant and a removal order was never issued. The applicant provided an affidavit in which he attests that "At no point [was] I served by [*sic*] any document by the Canadian Border Services Agency (CBSA) or signed any document to the effect that I was found engaged in unauthorized work in Canada." However, the record contains a copy of the section 44 Report together with a direction to attend at an interview. The applicant quickly obtained legal counsel who thereafter communicated with the respondent. In such circumstances, it cannot be reasonably maintained that he was unaware of the content of the section 44 Report.

[20] The section 44 Report was made on the basis that the applicant had worked without a work permit in violation of the Act and Regulations.

[21] "Work" is defined in section 2 of the Regulations as follows:

"work" means an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.	« travail » Activité qui donne lieu au paiement d'un salaire ou d'une commission, ou qui est en concurrence directe avec les activités des citoyens canadiens ou des résidents permanents sur le marché du travail au Canada.

[22] *Juneja v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 301, which is relied on by the respondent for the proposition that the applicant was engaged in work, is distinguishable from the facts at hand. In *Juneja*, the applicant entered into a contingent wage agreement with a car dealership whereby he began working but was not paid wages. The agreement between the parties was that the applicant would be paid in the future, for his unpaid hours, if and when he obtained a work permit. The Board determined that this was "work" within the meaning of the Regulations. Justice Barnes upheld this determination on judicial review.

[23] In this case, there was no contingent wage agreement. It is not clear at all whether the applicant may be considered to be an employee of the business. What is clear is that he is both a shareholder and director of the corporation. In my view, the definition of "work" in the Regulations may not capture the normal activities of shareholders or directors where they are not paid wages or commissions for these activities. However, as soon as a shareholder or director provides a service to the corporation that is outside the normal role of a shareholder or director, that person "is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market" and is therefore "working" within the meaning of the Regulations. Such service provided

by the shareholder or director could have been purchased by the corporation from a Canadian citizen or permanent resident and its provision therefore constitutes work.

[24] The officer observed the applicant cutting hair. This activity would constitute "work". In any event, the applicant did not seek judicial review of the section 44 Report, and therefore it was reasonably open to the officer in this case to rely on that report's conclusion that the applicant had been observed working without a permit in contravention of the Act and Regulations.

[25] Subsection 200(3)(e) of the Regulations states:

(e) the foreign national has engaged in unauthorized study or work in Canada or has failed to comply with a condition of a previous permit or authorization unless	e) il a poursuivi des études ou exercé un emploi au Canada sans autorisation ou permis ou a enfreint les conditions de l'autorisation ou du permis qui lui a été délivré, sauf dans les cas suivants :
(i) a period of six months has elapsed since the cessation of the unauthorized work or study or failure to comply with a condition,	(i) une période de six mois s'est écoulée depuis les faits reprochés,
(ii) the study or work was unauthorized by reason only that the foreign national did not comply with conditions imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c);	(ii) ses études ou son travail n'ont pas été autorisés pour la seule raison que les conditions visées à l'alinéa 185a), aux sous-alinéas 185b)(i) à (iii) ou à l'alinéa 185c) n'ont pas été respectées,
(iii) section 206 applies to them; or	(iii) il est visé par l'article 206,

(iv) the foreign national was subsequently issued a temporary resident permit under subsection 24(1) of the Act.	(iv) il s'est subséquemment vu délivrer un permis de séjour temporaire au titre du paragraphe 24(1) de la Loi.

[26] Relying on the section 44 Report as evidence that the applicant had engaged in unauthorized work, the officer determined that the Regulations prevented her from issuing a work permit until January 13, 2010. Implicit in this determination is a finding that subsections (ii)-(iv) did not apply to the applicant and that the applicant did not cease his unauthorized work until the date he left Canada on July 13, 2009. The applicant does not raise any challenge to the implicit application of subsections (ii)-(iv), and I can see no reason why he would be captured by these subsections. Giving the applicant the benefit of the doubt, and presuming that he ceased working without authorization as of the date of the section 44 Report, on June 10, 2009, the officer was legally barred from issuing him a work permit until after December 10, 2009.

[27] The officer's decision was rendered July 21, 2009 and therefore no result other than a rejection was legally permissible. Not only was the officer's decision reasonable, it was the *only* decision that she could have reached. On this basis, this application for judicial review must be dismissed.

3. Whether the officer breached the principles of natural justice.

[28] The applicant submits that the officer breached natural justice by failing to give him an opportunity to respond to his concerns and by signing the refusal letter as a "visa officer" when in fact she was a "non-immigrant officer".

[29] I agree with the respondent that the officer was not relying on information that was not in the possession of the applicant; she was relying on the applicant's own submissions. As this Court has stated in *Arwinder Singh v. Canada (Minister of Citizenship and Immigration),* 2009 FC 621, a visa officer is only obligated to conduct an interview where she has information of which the applicant is not aware. Not only was the applicant aware of these facts, they were within his own submissions. The onus was on the applicant to explain the apparent inconsistencies in his application and he must bear the risk of rejection when he fails to do so. Natural justice did not require the officer to conduct an interview of the applicant in the circumstances of this case.

[30] The submission with respect to the title used by the officer in the decision is also without merit. How the officer signed the refusal letter has no impact on the fairness provided to the applicant. The case relied on by the applicant, *Valentinov v. Canada (Minister of Citizenship and Immigration)* (1998), 143 F.T.R. 46 (T.D.), was decided under the old Act and is not applicable to the current Act. The respondent is correct that "visa officer" is not a defined term under the Act or Regulations, and that a "non-immigrant officer" has the jurisdiction to issue the decision under review in this application.

Conclusion

[31] The applicant acknowledged at the hearing that the section 44 Report barred the officer from issuing the applicant a work permit for a period of six months. Counsel stated that the applicant's concern was the finding that he had overstayed his temporary resident visa, and that this finding would colour any subsequent application. Counsel for the respondent conceded that the officer erred in that respect and that the actions taken by the applicant meant that he had not, in law, overstayed the visa. I have agreed with that characterization and thus, the applicant ought not to have this false finding adversely affect any future application.

[32] However, the applicant was found to have worked without authorization. He was also found to have provided inconsistent and untruthful answers on his application. These findings were reasonably made and support the officer's refusal of the applicant's work permit application even though the officer erred in finding that the applicant had previously overstayed his visas. It cannot be said that the decision on his visa application was unreasonable.

[33] In the circumstances of this case, the officer was not obligated to conduct an interview to provide the applicant an opportunity to explain the apparent inconsistencies in his application material. If an explanation was available, as the applicant now asserts, the onus was on him to provide it with his application materials. The officer did not breach the applicant's right to natural justice.

[34] This application for judicial review is dismissed. Neither party proposed a question for certification; no question meets the test for certification on the facts disclosed in the record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application for judicial review is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-5104-09**
STYLE OF CAUSE:	**OZAWA v. MCI**
PLACE OF HEARING:	**VANCOUVER**
DATE OF HEARING:	**APRIL 15, 2010**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**ZINN J.**
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APPEARANCES:

Sawsan Habbal	FOR THE APPLICANT
Kimberly Shane	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sawsan Habbal Barrister & Solicitor Vancouver, BC	FOR THE APPLICANT
Myles J Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT