Federal Court  Cour fédérale

Date: 20110331

Docket: IMM-4412-10

Citation: 2011 FC 399

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, March 31, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

SALIM YOUSSEF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review submitted by the applicant, Salim Youssef, in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision by a visa officer to deny his work permit application.

I. Background

[2] The applicant is a businessman who was born in and is a citizen of Syria. He received an offer to be the Middle East region purchasing director for Basse Alimentation inc., a Canadian company that produces and exports nuts and dried fruit. The applicant entered Canada on September 30, 2009, to meet the company president and discuss this offer of employment. After the applicant and the company president came to an agreement on the employment contract, the company president appointed a lawyer around the month of October 2009 to prepare the applicant's work permit application. The applicant received the confirmation of employment from Service Canada on January 22, 2010, and he received his certificate of acceptance from Quebec on February 1, 2010.

[3] The lawyer sent the work permit application to the Canadian consulate in New York around March 17, 2010. This application was accompanied by an application to extend his stay with multiple entry. The file was returned to him several weeks later because of an error in the fees.

[4] In the meantime, the applicant stayed in Canada. He alleges that he had wanted to return to Syria, but that his lawyer had advised him to stay here because his original passport would be required in re-submitting the visa application. On his lawyer's advice, the applicant therefore stayed in the country after the expiry of his resident permit.

[5] On May 24, 2010, the lawyer went in person to the Canadian consulate in New York to re-submit the applicant's work permit application and, this time, included the exact fees and an

application to extend his stay. She returned there on June 3, 2010, to get the answer to the application.

[6] The visa officer refused to issue the work permit. He cited the following reasons in support of his decision:

> I am not satisfied that you would leave Canada by the end of the authorized period of your stay. To reach this conclusion, I have considered the fact that you have remained in Canada beyond the period authorized by your temporary resident visa (you entered Canada on 30 September, 2010 …). I also considered the fact that you provided little evidence with your application that you have strong and significant ties to your home country. I also considered the fact that according to our record, you had originally told the immigration officer in our Embassy in Damascus who gave you a temporary resident visa, that you only stay for one month in Canada.

II. Issues

[7] The following two issues arise from this judicial review:

1) Did the visa officer err by failing to ask for additional explanations or to call the applicant to an interview?
2) Do the reasons for the visa officer's decision contain errors that warrant the intervention of this Court?

III. Applicable standards of review

[8] The first issue raises concerns of procedural fairness and natural justice, that is, those relating to the applicant's right to be heard or to respond to the visa officer's concerns. In the case at bar, the standard of correctness applies when assessing the process the visa officer followed to arrive at the decision that is the subject of this judicial review (*Canada (Citizenship and*

Immigration) v. Khosa, 2009 SCC 12, at paragraph 43; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at paragraph 53; *Li v. Canada (Minister of Citizenship and Immigration*), 2008 FC 1284, at paragraph 17; *Gu v. Canada* (*Minister of Citizenship and Immigration*), 2010 FC 522, at paragraph 15).

[9] The standard of review that generally applies to the assessment of a visa officer's decision is reasonableness.

Did the visa officer breach the principles of natural justice by failing to ask for additional explanations or to call the applicant to an interview?

[10] The applicant submits that the visa officer breached his obligation of procedural fairness in not giving him the opportunity to provide additional information or in not calling him to an interview before denying his work permit application. In doing so, he rendered his decision by disregarding the evidence in the record that demonstrated that he had presented an application to extend his temporary resident visa twice.

[11] The respondent is claiming that procedural fairness did not require the visa officer to give the applicant the opportunity to undergo an interview or to respond to his concerns as the requirement to ask for additional information exists, for example, when the visa officer is relying on extrinsic evidence, which is not the situation here. He assessed the documents of the application and exercised his discretionary authority as required by the Act.

[12] In *Hara v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 263, at paragraph 23, Justice Russell determined that, even though there is no statutory obligation to grant an interview, procedural fairness nevertheless requires the officer to allow the applicant to respond to his concerns under certain circumstances:

> 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.

[13] In *Gu*, above, at paragraph 25, the Court determined that a visa officer who had doubts as to the past temporary permit applications of an applicant should have obtained information from her to address his concerns:

> This is not a case where the officer had concerns with the application which was submitted. Rather the concerns related to past permits and past applications. In light of these circumstances, the Applicant was entitled to be provided with an opportunity to answer these concerns which she could not have reasonably foreseen as being of interest to the officer. Since the application will be returned to another Non-Immigrant Officer for redetermination, the Applicant is now well advised that she must address these concerns with this new officer.

[14] In *Bonilla v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 20, the Court found that an officer who had come to the subjective conclusion that the applicant would not be returning to her country of origin after her studies should have given her the opportunity to address his concerns.

[15] In this case, in support of his refusal, the visa officer indicated that he was not convinced that the applicant would leave Canada after his stay. He relied mainly on the fact that the applicant had not respected the validity of his visitor's visa:

> Given that subj has remained beyond the validity period of his initial visitor status, given that he originally declares he wanted to stay one month only in Canada to visit his cousin and that he has been in Cda over 8 months, given that I have very little evidence on file of his ties to his home country, given his previous travel history which is very limited, I am not satisfied subject would depart at the end of the authorized stay. (Notes STIDI)

[16] However, it is apparent from the evidence in the record that this criticism was unfounded as the applicant had always intended to respect the conditions of his visitor's visa. The work permit application had originally been sent to the consulate in New York on March 17, 2010, while the applicant was still within the rules and had a valid status in Canada. This first submission had been accompanied by the form "Application for Temporary Resident Visa Made Outside of Canada" for renewal of his visitor's visa and on which it was clearly marked: "M. Youssef must travel abroad for work and therefore needs to renew his visitor visa with multiple entry". Instead of being processed immediately, this renewal application was sent back to the applicant along with the entire file for the rectification of fees.

[17] The applicant also re-submitted a work permit application accompanied by the exact fees on May 24, 2010. In the list of documents submitted (Document Checklist-Worker), also filed in evidence, the form "Application to Change Conditions, Extend My Stay or Remain in Canada" was checked as being part of the application.

[18] This information is essential as it demonstrates that the applicant never intended to exceed the period of validity of his temporary resident permit. The presence of these documents should have at least raised a doubt in the mind of the visa officer that the applicant never intended to exceed the period of validity of his visitor's visa and, therefore, that he also never necessarily intended to exceed the period of validity of his work permit.

[19] Thus, the visa officer should have at least provided the applicant with the opportunity to provide explanations as to his intention to remain in Canada after his stay, which would have allowed him to address his concerns. The applicant should not be penalized as he always intended to act in accordance with Canada's immigration laws. Given the facts in this case, this failure constituted a breach of the principles of natural justice.

[20] In such a case, it is therefore unnecessary to determine whether the visa officer's decision was reasonable.

[21] For these reasons, the application for judicial review is allowed and the matter is returned to another visa officer for redetermination.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be allowed and that the matter be returned to another visa officer for redetermination.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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