Federal Court  Cour fédérale

Date: 20111220

Docket: IMM-2339-11

Citation: 2011 FC 1494

Ottawa, Ontario, December 20, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

EDWIN CALAUNAN

Applicant

and

THE 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*, SC 2001, c 27 (the Act) for judicial review of the decision of an Immigration Officer at the Canadian Embassy in Manila, Philippines, dated March 28, 2011, wherein the applicant's application for a temporary work permit and accompanying visa to Canada was refused.

[2] The applicant requests that the decision of the Officer be set aside and the matter referred back for redetermination by a different officer.

Factual Background

[3] Mr. Edwin Calaunan (the applicant) is a thirty-two (32) year old citizen of the Philippines.

[4] The applicant received a temporary job offer through a Labour Market Opinion (LMO) from Service Canada dated February 25, 2011 to work in New Brunswick, Canada as a fish processor for a period of ten (10) months.

[5] The position of fish processor is described in the National Occupation Classification (NOC) under occupation #9463 with skill level "C", which is considered as part of the Pilot Project for Hiring Foreign Workers in Occupations that require lower levels of formal training.

[6] On March 17, 2011, the applicant applied for a work permit at the Canadian Embassy in Manila, Philippines. No personal interview was conducted.

[7] The applicant's application was refused by the Immigration Officer on March 28, 2011.

Decision under Review

[8] In the present case, the Computer Assisted Immigration Processing System (CAIPS) notes form the decision. Specifically, the CAIPS notes state the following:

> On paper. No FOSS hit. Wants to work as fish processor. College grad. Also presents training certificates in automotive servicing. Worked as market guard, inventory clerk and now bakery owner. Also states he was operator manager of a fish production business from 2002 to 2005 but did not present any documentary evidence to this effect. Therefore not willing to consider this claimed experience as bona fide. Parents and two of two siblings all reside in Canada. After careful consideration of all docs and info presented, I am not satisfied that subj is a bona fide temp foreign worker to Canada. Aside from education and experience that are inconsistent with intended occupation, I am not satisfied that subj has sufficient ties to home country to ensure incentive to leave Canada by end of auth stay. Refused as per A20(1)(b) and R200(1)(b).

[9] Thus, the Officer concluded that the applicant had not met the requirements for the work permit on two grounds: i) the applicant's education and work history were inconsistent with the position of fish processor; and ii) the officer was not satisfied that the applicant would leave Canada at the end of his authorized period of stay in light of his family ties in Canada and his lack of ties to the Philippines.

Issue

[10] The only issue is whether the Officer erred in refusing the applicant's application for a temporary work permit.

Statutory Provisions

[11] The applicable provisions of the *Immigration and Refugee Protection Act* are the following:

Requirements Before Entering Canada	*Formalités préalables à l'entrée*
Application before entering Canada	Visa et documents
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis

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.	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.
…	[…]
Obligation on entry	Obligation à l'entrée au Canada
20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
(*a*) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and	*a*) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;
(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	*b*) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.
…	[…]

[12] Provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) also apply in the case at hand:

APPLICATION FOR WORK PERMIT	DEMANDE DE PERMIS DE TRAVAIL
Application before entry	Demande avant l'entrée au Canada

197. A foreign national may apply for a work permit at any time before entering Canada.

197. L’étranger peut, en tout temps avant son entrée au Canada, faire une demande de permis de travail.

ISSUANCE OF WORK PERMITS

DÉLIVRANCE DU PERMIS DE TRAVAIL

Work permits

Permis de travail — demande préalable à l’entrée au Canada

200. (1) Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act — an officer shall issue a work permit to a foreign national if, following an examination, it is established that

(*a*) the foreign national applied for it in accordance with Division 2;

(*b*) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

200. (1) Sous réserve des paragraphes (2) et (3), et de l’article 87.3 de la Loi dans le cas de l’étranger qui fait la demande préalablement à son entrée au Canada, l’agent délivre un permis de travail à l’étranger si, à l’issue d’un contrôle, les éléments ci-après sont établis :

a) l’étranger a demandé un permis de travail conformément à la section 2;

b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;

…

[…]

Exceptions

Exceptions

200. (3) An officer shall not issue a work permit to a foreign national if

(*a*) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;

200. (3) Le permis de travail ne peut être délivré à l’étranger dans les cas suivants :

a) l’agent a des motifs raisonnables de croire que l’étranger est incapable d’exercer l’emploi pour lequel le permis de travail est demandé;

…

[…]

Standard of Review

[13] The established case law has demonstrated that in light of their discretionary nature, the decisions of visa officers regarding temporary work permits are reviewable according to the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Baylon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 938, [2009] FCJ No 1147 [*Baylon*]; *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 614, [2009] FCJ No 794). As such, the decisions issued by visa officers are entitled to a high level of deference.

Applicant's Arguments

[14] The applicant challenges the Officer's factual analysis for a number of reasons. The applicant notes that the Officer's decision was based on three facts: i) that he has family in Canada; ii) that his education and work experience were inconsistent with the intended position; iii) that he did not demonstrate that he had sufficient ties to the Philippines.

[15] Firstly, with regards to the fact that he has family in Canada, the applicant argues that as he disclosed this information in an "honest and trustworthy" manner, he ought to have benefited from the presumption that he "was law-abiding and would continue to comply with the rules in the future" (Applicant's Memorandum of Facts and Law, para 8) pursuant to the case of *Murai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 186, [2006] FCJ No 230 [*Murai*]. In his affidavit, the applicant affirms that he has never visited Canada or violated any Canadian immigration laws or that of any other country. Consequently, the applicant alleges that the Officer's

failure to apply the presumption renders his findings unreasonable and reviewable on a standard of reasonableness.

[16] Secondly, the applicant contends that the Officer erred in her analysis of his education and work experience. The applicant maintains that his education and work experience were entirely consistent with the position. At hearing, the applicant conceded that this argument was no longer at the heart of the present matter.

[17] Thirdly, on the issue of his ties to Canada and to his native country, the applicant advances that the Officer ignored or discounted the fact that he owns a bakery business, he lives in his family's residential property and he owns a small farm in the Philippines. The applicant submits that all of these facts are relevant in the present case and clearly demonstrates the existence of his ties to the Philippines and thus that the applicant would leave Canada at the end of his stay.

Respondent's Arguments

[18] The respondent contends that the Officer's decision to deny the applicant's application for a temporary work permit was entirely reasonable and "falls within a range of possible acceptable outcomes".

[19] The respondent disagrees with the applicant's analysis of the Officer's decision and submits that the Officer actually did conclude that the applicant had met the job requirements for the fish processor position. Thus, the respondent advances that the present case is not based on the applicant's inability to perform the occupation in question, but rather it revolves around his failure

to satisfy the Officer that he would leave Canada at the end of his authorized stay and return to the Philippines pursuant to subsection 20(1)(*b*) of the Act and subsection 200(1)(*b*) of the Regulations.

[20] On the issue of the applicant's education and work experience, the respondent submits that the applicant's desire to work as a fish processor in Canada is inconsistent with his education and work history.

[21] On the subject of the applicant's ties to his native country, the respondent submits that it was entirely reasonable for the Officer, considering the evidence submitted by the applicant, to conclude that the applicant had not established that he would return to the Philippines at the end of his ten (10) month contract as a fish processor and that the applicant had stronger ties to Canada.

Analysis

[22] Upon reviewing the Officer's decision in the CAIPS notes, the Court observes that pursuant to subsection 20(1)(*b*) of the Act and subsection 200(1)(*b*) of the Regulations, the Officer refused the application on two grounds: 1) the applicant's education and work experience were inconsistent with the intended occupation, and 2) the Officer was not satisfied that the applicant had sufficient ties to his home country to demonstrate an incentive to leave Canada at the end of his authorized stay.

[23] The Court will begin by considering the applicant's argument that the Officer erred in her analysis of his education and work experience. The applicant has advanced that the occupation of fish processor did not require any educational qualifications or any similar work experience, aside

from an oral English language requirement. For its part, the respondent affirms that the Visa Officer's decision focused solely on the applicant's incentive to leave Canada upon the expiry of his visa rather than on whether the applicant had satisfied the job requirements of the occupation in question. In her affidavit that was submitted in the respondent's Memorandum of Argument, the Officer provides a clarification of her decision and states the following:

> 7. I did not refuse this application on the basis that the Applicant could not perform the duties of a Fish Plant Worker or Fish Processor under National Occupational Classification 9463.
>
> 8. My refusal was based on the conclusion that the Applicant had not established that he would leave Canada at the end of the period authorized for his stay.
>
> 9. To this end, I considered his ties to Canada and his ties with the Philippines, his education and work history, including his stated monthly salary, and his intended occupation in Canada.

[24] Upon reading the decision in the CAIPS notes and the affidavit of the Officer, the Court is of the opinion that the Officer did not refuse the applicant's application merely on the basis that he could not perform the occupation of fish processor, but rather due to the perceived inconsistencies between his education and work experience with the position and his lack of ties to the Philippines. The Court finds that the Officer had sufficient objective evidence – or lack of evidence in some respects – to conclude that the applicant could not be considered a *bona fide* temporary foreign worker.

[25] More particularly, the Court notes that the applicant is a college graduate with a bachelor's degree in computer information science and with training certificates in automotive servicing. The

applicant has worked in the bakery business, as an inventory clerk, as a market guard in a human resources management office, and as a Fish (tilapia) Production Operator from 2002-2005.

[26] However, the applicant failed to provide documentary evidence indicating his experience as a fish production operator. It was incumbent on the applicant to provide evidence in support of this alleged experience. Considering the lack of evidence on record, it was reasonable for the Officer to question the applicant's experience.

[27] With regard to the applicant's incentive to leave Canada at the end of his authorized stay, though the Court takes note of the applicant's argument that he should have benefited from the presumption highlighted in *Murai*, above, that he was law-abiding and would comply with Canadian immigration rules, the Court also recalls the existence of another legal presumption which states that foreign nationals wishing to enter Canada are immigrants and it is their duty to rebut that presumption (see *Ngalamulume v Canada (Minister of Citizenship and Immigration)***,** 2009 FC 1268, [2009] FCJ No 1593; *Obeng v Canada (Minister of Citizenship and Immigration)***,** 2008 FC 754, [2008] FCJ No 957 [*Obeng*] ; *Danioko v Canada (Minister of Citizenship and Immigration)*, 2006 FC 479, [2006] FCJ No 578).

[28] Moreover, the Court recalls that the case of *Murai*, above, cited by the applicant does not establish that all applicants should benefit from a presumption that they are "law-abiding and would continue to comply with the rules in the future". Rather, the case of *Murai* teaches that previous immigration encounters are the best indicators of an applicant's likelihood of future compliance. In the case at hand, there is no evidence to suggest that the applicant has previous immigration

encounters, which is reaffirmed by the statements in the applicant's affidavit. In these circumstances, the case of *Murai*, above, is of no assistance to the applicant.

[29] The Court further notes that according to the applicable legislation, the officer must be satisfied that an applicant will not remain illegally in Canada after his authorized period of stay. The Court recalls that it was the duty of the applicant to prove that he would leave Canada by the end of his authorized period of stay and provide relevant documentation to that effect. However, in light of the lack of evidence supporting his strong ties to the Philippines, the existence of his ties to Canada, the apparent economic advantage of relocating to Canada - which is a necessary component of the decision (*Chhetri v Canada (Citizenship and Immigration)*, 2011 FC 872, [2011] FCJ No 1077) – the Court concludes that it was not unreasonable for the Officer to reject his application. For instance, the Court notes that the applicant's parents, his two brothers, his cousin and his two uncles live in Canada. Also, the applicant listed no spouse, children or any other family members living in the Philippines. Also, while the applicant mentions a family farm in his application, no evidence is provided in this regard (Tribunal Record, pp. 4 and 6). In addition, the applicant makes no mention of owning a residence in the Philippines.

[30] Moreover, as Justice Lagacé suggested in the case of *Obeng*, above, officers are entitled to rely on their common sense and rationality in their analysis of an applicant's incentive to leave Canada at the end of his stay. As these are findings of fact, the Court may not reevaluate or reconsider the objective evidence and must defer to the decision of the Officer.

[31] The Visa Officer is presumed to have considered all the evidence when conducting her analysis (*Florea v Canada (Minister of Employment and Immigration)* (FCA), [1993] FCJ No 598, at para 1) and the Court finds that, in the circumstances, the Officer did not make any apparent erroneous or irrelevant findings of fact.

[32] For these reasons, the Court finds that this application for judicial review should be dismissed.

[33] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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