Date: 20081006

Docket: IMM-2806-07

Citation: 2008 FC 1127

Ottawa, Ontario, October 6, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

RODALYN ABULE VILLAGONZALO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of a visa officer (the officer) at the Canadian Embassy in Makati City, Philippines dated June 21, 2007, wherein the officer found that Rodalyn Abule Villagonzalo (the applicant) did not meet the requirements for a work permit.

[2] The applicant requested that the application for judicial review be granted, that the decision of the officer be set aside and that the matter be remitted for reconsideration before a different officer.

Background

[3] The applicant applied for a work permit on June 28, 2006 under the live-in caregiver program. The Canadian Embassy in Makati City requested that the applicant attend an interview on June 21, 2007. During the interview, the applicant was asked about her previous travels to Canada.

[4] The applicant had previously been issued a Temporary Resident Visa (TRV) so that she could attend her brother's wedding in Canada. Before the issuance of that permit, the applicant had expressed that her intended purpose for travel to Canada was to travel with her parents for a month and to attend her brother's wedding to be held on September 11, 2004. However, the applicant stated at the June 21, 2007 interview, that she in fact did not attend her brother's wedding because her daughter was ill. Instead, the applicant travelled to Canada in November 2004 without her parents. During her stay in Canada, she was offered employment from her sister as a live-in caregiver. While finalizing the details of her work permit application, it appears that the applicant undertook to extend her visitor status while in Canada as it was set to expire on or about May 12, 2005. The applicant's request for an extension was denied on May 22, 2005 and she left Canada on June 1, 2005. It appears that the applicant's first work permit application, made while she was in Canada, was eventually denied.

[5] In a decision dated June 21, 2007, the same day as the interview, the officer decided that the applicant did not meet the requirements for a work permit. This is the judicial review of the officer's decision.

Officer's Decision

[6] The officer's decision was communicated in a standard form letter dated June 21, 2007. The reason given for the denial was that the applicant had failed to satisfy the officer that she would leave Canada by the end of the period authorized for the stay because she had "a past history of not respecting the terms and conditions of [her] previous visa."

[7] The officer's notes concerning the June 21, 2007 interview provide more insight into the reasons provided by the officer in denying the application:

> PA informs me that she went to CDA as a visitor (V040800781) on 13NOV2004. FOSS record shows PA was denied VR on 17MAY2005. PA left CDA for the US on 01JUN2005, at which time after overstaying her initial TRV and being denied VR, the PA was out of status.
>
> PA states she did not go to CDA with her parents as she stated at intv. At Intv PA confirms she stated she would only be in CDA a month.
>
> PA states she stayed at her sister's house (now her employer) during the time she was in CDA for 8 mths.
>
> PA has clearly previously misrepresented at the very least her intentions on her TRV. Furthermore she then overstayed said visa.
>
> PA has a history of not respecting T&Cs of a TRV.

> I have examined the contents of the file and not withstanding the submissions of the PA, based on her past history, of not respecting the T&Cs of her previous TRV, I am not satisfied he [*sic*] is a BF Temp Resident as mentioned in A20(1)(b).

Issues

[8] The applicant submitted the following issue for consideration:

1. Did the officer base the decision on irrelevant considerations or on erroneous findings of fact made in a perverse or capricious manner or without regard to the material presented before the officer?

[9] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the visa officer err in finding that the applicant failed to meet the conditions of her previous Temporary Residence Visa?

3. Did the visa officer fail to properly assess the applicant's eligibility for the live-in caregiver program?

Applicant's Written Submissions

[10] The applicant submitted that the appropriate standard of review is reasonableness *simpliciter* because the issue is a question of mixed fact and law (*Ram* v. *Canada (Minister of Citizenship and*

Immigration), [2003] F.C.J. No. 855; *Jhattu* v. *Canada (Minister of Citizenship and Immigration),* 2005 FC 853).

[11] It was submitted that the officer's decision was unreasonable in light of the reasonable explanation provided by the applicant with regards to her past stays in Canada. The applicant argued that the officer failed to take into account that throughout her previous stay in Canada, the applicant undertook to maintain valid TRV status and promptly left when her request for an extension was refused. It was submitted that the officer acted unfairly in failing to balance the factors described in *Baker* v. *Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, and instead made the applicant's previous TRV determinative of this application. Failure to consider the applicant's entire application for a work permit with regards to the entire factual context is a breach of the visa officer's duty of fairness (*Akhbari* v. *Canada (Minister of Citizenship and Immigration),* [2006] F.C.J. No. 1773).

[12] It was further submitted that the officer erred in failing to follow the departmental guidelines set out in Immigration Manual OP 14. This guideline provides that as live-in caregivers are permitted to apply for permanent residence after two years of employment in Canada, it is hard to apply the normal requirement that the applicant will leave Canada, and instead officers should be satisfied that the applicant will leave Canada if the application for permanent residence is refused. In light of this guideline, it was submitted that the officer erred in failing to recognize that live-in caregivers may have dual intent for immigration to Canada.

Respondent's Written Submissions

[13] The respondent submitted that the officer's decision to refuse the applicant on the basis of the non-compliance with the previous TRV was reasonable. The respondent noted that contrary to what was sworn in her affidavit, the applicant did not ensure that throughout her stay in Canada she had observed and respected Canadian immigration laws, nor did she leave immediately upon having her visa refused. Given that in the past the applicant had not followed her stated intention for coming to Canada, the officer had justification for questioning the applicant's present intentions in seeking a work permit.

[14] Moreover, the respondent submitted that the officer's decision was reasonable given that regardless of whether the live-in caregiver requirements were met, the applicant still had to comply with the requirements for a work permit which included satisfying the officer that she was a *bona fide* temporary resident and would leave Canada at the end of the authorized period.

[15] With regards to the departmental guidelines set out in Immigration Manual OP 14, the respondent submitted that although live-in caregivers may have dual intent for immigrating to Canada, some workers do not in the end apply for permanent residency. Since there is no *prima facie* assumption that they will in fact apply for permanent residency, they are still required to meet the requirement imposed on workers. It was submitted that in rendering a positive decision, an officer should be satisfied that the applicant will not stay in Canada illegally once their authorized stay has expired in accordance with the guidelines. The respondent submitted that the officer

legitimately refused the work permit given the applicant's past history of not respecting the terms and conditions of her TRV and that she had not established from the contents of her application or submissions at the interview, that she would leave at the end of her stay if the application was not allowed.

Applicant's Written Reply

[16] In reply, the applicant reiterated that during her stay in Canada under a TRVshe maintained valid or implied status and provided *bona fide* reasons for wanting to extend her temporary resident visa. The applicant also noted that IRPA prohibits applicants from applying for a Canadian work permit while maintaining valid or implied status in Canada and thus the officer erred in making a negative inference with respect to the applicant's previous work permit application.

Analysis and Decision

[17] **Issue 1**

What is the appropriate standard of review?

The Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, [2008] S.C.J. No. 9 collapsed the standard of reasonableness *simpliciter* and patent unreasonableness for a more straightforward standard of reasonableness. *Dunsmuir* above, also streamlined the steps to take in establishing the appropriate standard of review, which was previously referred to as the "pragmatic and functional" approach. The Supreme Court proposed a two step process at paragraph 62:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[18] The proper standard of review pre-*Dunsmuir* of a visa officer's decision was reasonableness *simpliciter* (*Yin* v. *Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 985 (T.D.); *Jhattu* v. *Canada (Minister of Citizenship and Immigration)* (2005), F.C.J. No. 1058). In my opinion, the question of whether the officer failed to meet the conditions of her previous TRV and failed to properly assess her eligibility for the live-in caregiver program is reviewable on a standard of reasonableness in light of *Dunsmuir* above.

[19] 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* above, at paragraph 47).

[20] **Issue 2**

Did the visa officer err in finding that the applicant failed to meet the conditions of her previous Temporary Resident Visa?

As I read the visa officer's decision, his reason for rejecting the application was that he was not satisfied that the applicant would leave Canada when required to do so.

[21] The applicant explained that she originally received a six month TRV to come to Canada to attend her brother's wedding. Due to her child being sick, she was unable to attend the wedding. She did, however, come to Canada in November 2004 to visit her family. The applicant deposed that she told this to the visa officer at the time of her interview for a work permit.

[22] The applicant applied for an extension of her TRV which was denied on May 17, 2005. The denial was received by the applicant a few days later.

[23] The applicant left Canada for the United States on June 1, 2005.

[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.

[27] As a result, the application for judicial review must be allowed and the matter submitted to a different visa officer for reconsideration.

[28] Because of my finding on this issue, I need not deal with the remaining issue.

[29] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[30] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different visa officer for reconsideration.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

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.

Immigration Manual OP14 : *Processing Applicants for the Live-in Caregiver Program :*

8.4 Statutory requirements for admissibility	**8.4 Exigences réglementaires touchant l'admissibilité**
The applicant must undergo the following admissibility checks after the officer has determined that the applicant meets the LCP eligibility criteria:	Après que l'agent a établi que le requérant répond aux critères d'admissibilité au PAFR, celui-ci doit :
• medical examination; • security check for applicants in certain countries (see IC 1, Security and Criminal Screening of Immigrants); • compliance with normal visitor requirements (For further information, see OP 11, Visitors)	• se soumettre à un examen médical; • faire l'objet d'un contrôle sécuritaire (pour les requérants de certains pays - consulter le guide [IC 1, Triage sécuritaire et vérification judiciaire concernant les immigrants]); • satisfaire aux exigences qui s'appliquent habituellement aux visiteurs (pour tout renseignement, consulter le guide OP 11, Visiteurs).

Note: Live-in caregivers are permitted by Regulation to apply for permanent resident after two years of employment within three years of their arrival in Canada. Thus, it is difficult to apply the normal requirement that temporary residents will leave Canada by the end of the period authorized for their stay. 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.

Note : L'aide familial résidant est autorisé par le Règlement à demander la résidence permanente après avoir occupé un emploi durant deux ans au cours des trois années suivant son arrivée au Canada. Il est donc difficile d'appliquer à son endroit les exigences habituelles voulant qu'un résident temporaire quitte le Canada à la fin de sa période de séjour autorisée. Dans la mesure du possible, compte tenu de la difficulté d'établir ce qu'une personne a l'intention de faire à l'avenir, l'agent doit s'assurer qu'un candidat au Programme des aides familiaux résidants a l'intention de quitter le Canada dans le cas où sa demande de résidence permanente serait refusée. La question ne consiste pas tant à savoir si le requérant demandera la résidence permanente, mais s'il demeurera illégalement au Canada.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2806-07
STYLE OF CAUSE:	RODALYN ABULE VILLAGONZALO - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 8, 2008
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	October 6, 2008

APPEARANCES:

Mariana Brankovic	FOR THE APPLICANT
Ricky Y. M. Tang	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Niren and Associates Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT