Date: 20090403

Docket: IMM-3752-08

Citation: 2009 FC 349

Ottawa, Ontario, April 3, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CHAO SONG

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an Officer of Citizenship and Immigration Canada (Officer), dated August 14, 2008 (Decision) refusing the Applicant's application for a work permit.

BACKGROUND

[2] The Applicant is a citizen of China and arrived in Canada at Vancouver International Airport on March 13, 2002 on a valid study permit to study at Seneca College in Toronto. The study

permit expired April 30, 2005. On September 13, 2003, the Applicant was issued a further study permit which was valid until October 31, 2005 to study in the field of Network Administration at an unnamed Technical School. The Applicant could not study from August 2003 until September 2006 because of his parent's financial situation.

[3] On June 2, 2005, the Applicant applied for and was issued a visitor record, which was valid until June 1, 2006, to facilitate his sponsorship by his Canadian wife, Jennifer Corrine Smallpiece. They were married on April 29, 2004. No sponsorship application has been submitted to date.

[4] The Applicant applied for a restoration of his study permit in October 2006. This application was refused because it was determined that the Applicant had breached the terms of his admission to Canada. The Officer was not convinced that the Applicant intended to leave Canada. The Applicant applied for judicial review of that decision and was refused by this Court on September 4, 2007 due to his failure to file an application record.

[5] On May 31, 2007 the Applicant was reported pursuant to section 44(1) of the Act on grounds that there were reasons to believe that he was a foreign national who was inadmissible to Canada. The Applicant claims to have no knowledge of a section 44(1) report involving him since he was in-status with a study permit at the time of his work permit application on July 28, 2008.

[6] Notwithstanding the apparent section 44(1) report, on November 1, 2007, the Applicant was issued a study permit valid until July 30, 2008. The Applicant completed a two year diploma in

business at Lambton College and his eligibility to graduate was submitted on June 30, 2008. The Applicant consulted his immigration consultant, Mr. Peter Lam, who submitted an application for a work permit on July 28, 2008.

DECISION UNDER REVIEW

[7] The Officer refused the Applicant's request for a work permit because he decided the Applicant did not meet the requirements of the Act and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations).

[8] The Officer noted in his Field Operating Support System (FOSS) remarks that the Applicant was not eligible for a work permit as he was the subject of a report that had been written pursuant to section 44(1) of the Act. Section 44(1) reads as follows:

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

[9] No further reasons were given.

ISSUE

[10] The Applicant submits the following issue on this application:

1) The Officer erred in law on the face of the record in refusing the work permit as the Applicant has no knowledge of a section 44(1) report and was in possession of a valid study permit at the time of the application for a work permit and met all other requirements for the issuance of a work permit.

STATUTORY PROVISIONS

[11] The following provision of the Act is applicable in this proceeding:

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	**44.** (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

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

199. A foreign national may apply for a work permit after entering Canada if they	**199.** L'étranger peut faire une demande de permis de travail après son entrée au Canada dans les cas suivants :
(*a*) hold a work permit;	*a*) il détient un permis de travail;
(*b*) are working in Canada	*b*) il travaille au Canada au

under the authority of section 186 and are not a business visitor within the meaning of section 187;

titre de l’article 186 et n’est pas un visiteur commercial au sens de l’article 187;

(*c*) hold a study permit;

c) il détient un permis d’études;

(*d*) hold a temporary resident permit issued under subsection 24(1) of the Act that is valid for at least six months;

d) il détient, aux termes du paragraphe 24(1) de la Loi, un permis de séjour temporaire qui est valide pour au moins six mois;

(*e*) are a family member of a person described in any of paragraphs (*a*) to (*d*);

e) il est membre de la famille d’une personne visée à l’un des alinéas *a*) à *d*);

(*f*) are in a situation described in section 206 or 207;

f) il se trouve dans la situation visée aux articles 206 ou 207;

(*g*) applied for a work permit before entering Canada and the application was approved in writing but they have not been issued the permit;

g) sa demande de permis de travail présentée avant son entrée au Canada a été approuvée par écrit, mais le permis ne lui a pas encore été délivré;

(*h*) are applying as a trader or investor, intra-company transferee or professional, as described in Section B, C or D of Annex 1603 of the Agreement, within the meaning of subsection 2(1) of the *North American Free Trade Agreement Implementation Act*, and their country of citizenship — being a country party to that Agreement — grants to Canadian citizens who submit a similar application within that country treatment

h) il demande à travailler à titre de négociant ou d’investisseur, de personne mutée à l’intérieur d’une société ou de professionnel, selon la description qui en est donnée respectivement aux sections B, C et D de l’annexe 1603 de l’Accord, au sens du paragraphe 2(1) de la *Loi de mise en oeuvre de l’Accord de libre-échange nord-américain*, et son pays de citoyenneté — partie à l’Accord — accorde aux citoyens canadiens qui présentent dans ce pays une

equivalent to that accorded by Canada to citizens of that country who submit an application within Canada, including treatment in respect of an authorization for multiple entries based on a single application; or

demande du même genre un traitement équivalent à celui qu'accorde le Canada aux citoyens de ce pays qui présentent, au Canada, une telle demande, notamment le traitement d'une autorisation d'entrées multiples fondée sur une seule demande;

(*i*) hold a written statement from the Department of Foreign Affairs and International Trade stating that it has no objection to the foreign national working at a foreign mission in Canada.

i) il détient une déclaration écrite du ministère des Affaires étrangères et du Commerce international qui confirme que celui-ci n'a aucune objection à ce qu'il travaille à une mission étrangère au Canada.

200. (1) Subject to subsections (2) and (3), an officer shall issue a work permit to a foreign national if, following an examination, it is established that

200. (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

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

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

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

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;

(*c*) the foreign national

c) il se trouve dans l'une des situations suivantes :

(i) is described in section 206, 207 or 208,

(i) il est visé par les articles 206, 207 ou 208,

(ii) intends to perform work described in section 204 or 205, or

(ii) il entend exercer un travail visé aux articles 204 ou 205,

(iii) has been offered employment and an officer has determined under section 203 that the offer is genuine and that the employment is likely to result in a neutral or positive effect on the labour market in Canada; and

(iii) il s'est vu présenter une offre d'emploi et l'agent a, en application de l'article 203, conclu que cette offre est authentique et que l'exécution du travail par l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien;

(*d*) [Repealed, SOR/2004-167, s. 56]

d) [Abrogé, DORS/2004-167, art. 56]

(*e*) the requirements of section 30 are met.

e) il satisfait aux exigences prévues à l'article 30.

(2) Paragraph (1)(*b*) does not apply to a foreign national who satisfies the criteria set out in section 206 or paragraph 207(*c*) or (*d*).

(2) L'alinéa (1)*b*) ne s'applique pas à l'étranger qui satisfait aux exigences prévues à l'article 206 ou aux alinéas 207*c*) ou *d*).

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

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

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

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;

(*b*) in the case of a foreign national who intends to work in the Province of Quebec and does not hold a *Certificat d'acceptation du Québec*, a determination under section 203 is required and the laws of that Province require that the foreign national hold a *Certificat d'acceptation du Québec*;

b) l'étranger qui cherche à travailler dans la province de Québec ne détient pas le certificat d'acceptation qu'exige la législation de cette province et est assujetti à la décision prévue à l'article 203;

(*c*) the specific work that the foreign national intends to perform is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute, unless all or almost all of the workers involved in the labour dispute are not Canadian citizens or permanent residents and the hiring of workers to replace the workers involved in the labour dispute is not prohibited by the Canadian law applicable in the province where the workers involved in the labour dispute are employed;

c) le travail spécifique pour lequel l'étranger demande le permis est susceptible de nuire au règlement de tout conflit de travail en cours ou à l'emploi de toute personne touchée par ce conflit, à moins que la totalité ou la quasi-totalité des salariés touchés par le conflit de travail ne soient ni des citoyens canadiens ni des résidents permanents et que l'embauche de salariés pour les remplacer ne soit pas interdite par le droit canadien applicable dans la province où travaillent les salariés visés;

(*d*) the foreign national seeks to enter Canada as a live-in caregiver and the foreign national does not meet the requirements of section 112; or

d) l'étranger cherche à entrer au Canada et à faire partie de la catégorie des aides familiaux, à moins qu'il ne se conforme à l'article 112;

(*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

(ii) ses études ou son travail n'ont pas été autorisés pour la seule raison que les conditions visées à l'alinéa 185*a*), aux

imposed under paragraph 185(*a*), any of subparagraphs 185(*b*)(i) to (iii) or paragraph 185(*c*);	sous-alinéas 185*b*)(i) à (iii) ou à l'alinéa 185*c*) 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.

STANDARD OF REVIEW

[13] The standard of review for decisions of a visa officer has, prior to *Dunsmuir*, been held to be reasonableness *simpliciter*: *Castro v. Canada (Minister of Citizenship and Immigration)* 2005 FC 659 at paragraph 6 and *Ram v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 855. However, when a visa officer refuses a work permit solely on statutory interpretation, the standard of review is correctness: *Singh v. Canada (Minister of Citizenship and Immigration)* 2006 FC 684 at paragraph 8 and *Hamid v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1632 at paragraph 4.

[14] The Applicant submits that the Applicant was denied procedural fairness as he had no knowledge of a section 44(1) report that had been written concerning him and which was the sole reason for the refusal of his work permit. The standard of review for procedural fairness questions is correctness: *Hassani v. Canada (Minister of Citizenship and Immigration)*, [2007] 3 F.C.R. 501 at paragraph 13.

[15] 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.

[16] 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.

[17] 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, with the exception of the procedural fairness and statutory interpretation issues, 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."

ARGUMENT

The Applicant

[18] The Applicant submits that the Officer erred in law and that the Applicant was not the subject of a section 44(1) report when he submitted his work permit application. The reasons for refusal of the work permit do not contain a copy of the section 44(1) report. The Applicant also points out that he was denied procedural fairness because there is no evidence that he was advised of the section 44(1) report.

[19] The Applicant submits that he meets all of the requirements of a work permit in accordance with section 179 of the Regulations and that the Officer erred in fact and in law in finding that he was the subject of a section 44(1) report when he was never advised of it.

[20] The Applicant relies upon *Sui v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] 3 F.C.R. 218 (F.C.) (*Sui*) which states at paragraph 60:

> I have also come to the conclusion that it was an error of law to consider that Tao Sui was not entitled to make such an application for restoration simply because after the filing of his application in accordance with the Regulations, a subsection 44(1) report had been issued on the sole basis of subsection 29(2) of the IRPA.

[21] The following question was certified by the Court in *Sui*:

> Does a foreign national who has applied for restoration within the delay set out in section 182 of the Regulations, automatically lose the benefit of his or her application when an enforcement officer considers issuing a report under subsection 44(1) on the basis of a failure to comply with subsection 29(2) of the IRPA?

[22] The Applicant submits that he had a valid status until July 30, 2008 and when he submitted his work application on July 28, 2008, he met all of the requirements for the issuance of a post-graduation work permit. The work permit should have been issued as it was not discretionary.

[23] The Applicant also takes issue with exhibit A attached to the affidavit of Geeta Ragoonath, Legal Assistant, sworn December 1, 2008 which are the FOSS notes on the Applicant. The Applicant states that the exhibit contains no evidence as to when the notes were made and that they could have been made after the refusal of the work permit on July 28, 2008.

[24] The Applicant has no knowledge of a section 44(1) report, which was allegedly written on May 31, 2007. He notes that the Respondent says that the section 44(1) report existed on May 31, 2007, but the issuance of the study permit granted on November 1, 2007 was pursuant to regulation 215(d) on the grounds that the removal order was unenforceable. The Applicant notes that the Respondent has failed to explain why the removal order is now enforceable when it became unenforceable.

[25] The Applicant also submits that the Respondent has failed to identify the provisions of the Act and the Regulations which would bar the issuance of a work permit on the mere existence of a section 44(1) report. The Applicant notes that Regulation 200 does not cite a section 44(1) report as a ground for the refusal of a work permit. The Respondent has failed to explain why a study permit could be issued but a work permit could not when a section 44(1) report exists.

The Respondent

[26] The Respondent submits that the Officer acted within the scope of his authority and the Decision was based on a proper understanding and interpretation of the applicable provisions of the Act and the Regulations.

[27] The Respondent states that the Applicant was not entitled to a work permit and that it was irrelevant that another immigration officer exercised his discretion and issued the Applicant a study permit in November 2007 to enable him to complete his studies. That permit did not cancel the section 44(1) report or make the Applicant admissible to Canada or qualify him for a work permit. The Respondent states that the officer who issued the permit took the view that it did not confer any status on the Applicant.

Procedural Fairness

[28] The Respondent states that the evidence refutes the Applicant's contention that the section 44(1) report was probably written after he applied for the work permit. The evidence shows that the section 44(1) report was written in May 2007 and not anytime in 2008.

[29] The Respondent also notes that even when the Applicant's study permit was restored, the officer made note of the section 44(1) report and stated that the study permit did not confer the

status on the Applicant. Therefore, the Applicant has failed to demonstrate that he was denied procedural fairness in the making of the Decision to refuse his application for a work permit.

ANALYSIS

[30] At the hearing of this matter on March 5, 2009 in Toronto, the Respondent conceded that, as the record stands, it is not possible for the Court to ascertain whether a section 44 report exists, what the basis for the report is, or which provisions of the Act or the Regulations the Officer relied upon to refuse a work permit on the basis of a section 44 report. The Respondent further conceded that these deficiencies require that the matter be returned for reconsideration.

[31] Both counsel agreed that, on the particular facts of this case, and given the Respondent's concession, the Court does not need to certify a question. I agree.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is granted and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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