Federal Court		Cour fédérale

Date: 20100513

Docket: IMM-4358-09

Citation: 2010 FC 522

Toronto, Ontario, May 13, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

KANG EUN GU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This case concerns a judicial review application submitted by Kang Eun Gu (the "Applicant"), a citizen of South Korea born on February 10, 1974, concerning a decision of a Non-Immigrant Officer (the "officer") dated August 18, 2009 and made in Buffalo, New York determining that the Applicant did not meet the requirements of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") since she did not meet the criteria set out in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") pertaining to

a Canadian study permit. The officer found that the Applicant's intentions in Canada did not appear to be of a temporary nature.

[2] This judicial review application shall be granted for the reasons which follow.

Background

[3] The Applicant first arrived in Canada in 1998 under a visitor visa which was subsequently renewed. In 2002 she obtained a Canadian study permit which was extended until August of 2006. In 2006, the Applicant then obtained a Canadian work permit. In 2008 she applied for permanent residence under the Live-in Caregiver Class, but she was refused in April of 2009. She then applied in July of 2009 for another Canadian study permit in order to pursue studies in Early Childhood Education at Centennial College in Toronto.

The impugned decision

[4] The officer refused the study permit on the basis that the Applicant had not shown that she would leave Canada by the end of her authorized stay. The officer's notes in the Computer Assisted Immigration Processing System (the "CAIPS notes") indicate that this decision was based on the absence of proof from the Applicant that she had completed any studies in Canada under previously issued study permits or that she had worked in Canada under the work permits issued to her. The officer also noted that the Applicant's prior permanent residence application had been refused. Given the time the Applicant has been in Canada, the officer was not satisfied that the Applicant's intentions were of a temporary nature. The officer was thus not satisfied that the Applicant would leave Canada by the end of the authorized period.

Position of the Applicant

[5] The Applicant asserts that the officer rendered an unreasonable decision, because while the Applicant has remained in Canada since 2002 under various work or study permits, and has been refused an application for permanent residence, these facts do not support the conclusion that the Applicant would choose to stay in Canada illegally beyond the authorized period. The Applicant adds that a person's previous immigration encounters are the best evidence of whether that person intends to remain in Canada beyond the authorized period. Here the Applicant has always complied with all the requirements of the Canadian immigration laws and regulations, and absent positive evidence to the contrary, it must be presumed that she will continue to do so in the future.

[6] Moreover, the consideration of the permanent residence application by the officer was completely irrelevant, and the officer's admitted consideration of this application as a significant basis to refuse the study permit was improper and constituted an error in law.

[7] Finally, the officer erred in basing the refusal on the absence of evidence of prior studies or work without providing the Applicant with an opportunity to respond to these concerns.

Position of the Respondent

[8] The Respondent argues that the officer was entitled to rely on common sense and rationality in determining whether the Applicant's intentions were to remain temporarily or permanently in

Canada. Here the Applicant's immigration history, including her long presence in Canada coupled with the lack of information on her prior work and studies in Canada, are such as to lead to the conclusion that the officer's findings are reasonable.

[9] Though subsection 22(2) of the Act states that an intention to become a permanent resident does not create a bar to an application for temporary resident status, this does not prohibit the officer from taking into account a failed permanent residence application as a factor in determining the Applicant's intention to leave Canada after the study permit expires.

[10] Contrary to the Applicant's assertions, the officer was not required to make further inquiries with the Applicant concerning her prior studies and work in Canada. There is a presumption that a foreign national seeking to enter Canada is an immigrant, and the burden is on the foreign national to rebut this presumption. Further, this Court has repeatedly held that an officer is under no duty to alert an applicant to concerns arising from his or her own evidence and from the requirements of the applicable legislation.

Pertinent provisions of the Act and the Regulations

[11] The provisions of paragraph 20(1)(b) and section 22 of the Act provide for the following:

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, […] (*b*) to become a temporary resident, that	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver : […] *b*) pour devenir un résident temporaire, qu'il détient les

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.	visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.
22. (1) A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(*b*) and is not inadmissible.	**22.** (1) Devient résident temporaire l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)*b*) et n'est pas interdit de territoire.
(2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.	(2) L'intention qu'il a de s'établir au Canada n'empêche pas l'étranger de devenir résident temporaire sur preuve qu'il aura quitté le Canada à la fin de la période de séjour autorisée.

[12] Paragraphs 179(a) and (b) and 216(1)(a) and (b) of the Regulations provide for the following:

179. An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national	**179.** L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(*a*) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	*a*) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(*b*) will leave Canada by the	*b*) il quittera le Canada à la fin

end of the period authorized for their stay under Division 2;	de la période de séjour autorisée qui lui est applicable au titre de la section 2;
216. (1) Subject to subsections (2) and (3), an officer shall issue a study permit to a foreign national if, following an examination, it is established that the foreign national	**216.** (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis d'études à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(*a*) applied for it in accordance with this Part;	*a*) l'étranger a demandé un permis d'études conformément à la présente partie;
(*b*) 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;

Standard of review

[13] As noted by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*") at paras. 54, 57 and 62, the first step in ascertaining the appropriate standard of review is to 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.

[14] The decision of an officer to withhold the grant of a study permit usually involves questions of fact for which a standard of deference usually applies: *Dunsmuir* at para. 53; *Li v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284, 337 F.T.R. 100, [2008] F.C.J. No. 1625 (QL) at paras. 14 to 16; *Kachmazov v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 53, [2009] F.C.J. No. 88 (QL).

[15] However, here the Applicant also raises a procedural fairness argument related to the alleged obligation of the officer in this case to notify the Applicant of certain concerns prior to rendering a decision. As a general rule, principles of natural justice and procedural fairness issues are to be reviewed on the basis of a correctness standard of review: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 (QL) at para. 53; *Li v. Canada (Minister of Citizenship and Immigration)*, *supra* at para. 17.

Analysis

[16] Paragraph 20(1)(b) of the Act places on the Applicant the burden of establishing that she will leave Canada by the end of the period authorized for her stay should the study permit be granted. However, subsection 22(2) of the Act clearly sets out that an intention by the Applicant to become a permanent resident does not preclude her from becoming a temporary resident if she can establish that she will leave Canada by the end of the period authorized for her stay under the study permit.

[17] It is therefore important not to confuse an intention to become a permanent resident with the requirement of establishing that the Applicant will leave Canada at the end of the study period.

[18] The officer's decision is found in his letter of refusal to the Applicant dated August 18, 2009. The reasons for the refusal are set out in the following paragraph:

> It appears that you have been in Canada since March 2002 with either study or work permits. An application for permanent residence has been refused. Your intentions in Canada do not appear to be of a temporary nature, but rather that of an intending immigrant. As a result, I am not satisfied that you will leave Canada by the end of the period authorized for your stay.

[19] I find that the officer has committed at least two reviewable errors in these reasons.

[20] First, the officer concludes that an intention to become a permanent resident results in the inference that the Applicant will not leave Canada by the end of her authorized study period. Yet subsection 22(2) specifically precludes the officer from drawing such an inference unless it is supported by some other facts giving rise to a concern that the Applicant will not leave Canada at the end of the study period.

[21] Second, the other fact which the officer draws upon to conclude that the Applicant will not leave Canada at the end of the study period is her continued presence in Canada since March 2002 with either work or study permits. This is unreasonable. A foreign national who has remained in Canada under validly issued work or study permits should not be penalized for having followed the immigration legislation of this country. The simple fact the Applicant has legally remained in Canada cannot reasonably support a conclusion that she would choose to go “underground” or try to stay in Canada without authorization once her study permit expires.

[22] In the CAIPS notes, the officer was concerned that the Applicant did not establish she had completed any studies in Canada under previously issued study permits or worked in Canada under

the work permits issued to her. Indeed, if the Applicant was using work or study permits for other purposes, then this could certainly give rise to a valid concern about her commitment to leave Canada by the end of the new study permit she was requesting.

[23] However, these past permits had been issued and renewed by the Canadian immigration authorities, and there is no evidence of non-compliance with the Act and the Regulations on the part of the Applicant. In circumstances where past compliance issues have never been raised, I agree with the Applicant that if the officer had a concern about her compliance with past permits, the officer should have informed her of the concern and provided her with an opportunity to respond. As noted by Justice Beaudry in *Li v. Canada (Minister of Citizenship and Immigration), supra* at para. 35:

> There is no statutory right to an interview (*Ali v. Canada (Minister of Citizenship and Immigration)*, (1998) 151 F.T.R. 1, 79 A.C.W.S. (3d) 140 at paragraph 28). However, procedural fairness requires that an Applicant be given the opportunity to respond to an officer's concerns under certain circumstances. When no extrinsic evidence is relied on, it is unclear when it is necessary to afford an Applicant an interview or a right to respond. Yet, the jurisprudence suggests that there will be a right to respond under certain circumstances.

[24] In *Hara v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 263, 341 F.T.R. 278, [2009] F.C.J. No. 371 at para. 23, Justice Russell added the following:

> 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.

[25] 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.

[26] In light of the above reasons, I need not address the other issues raised by the parties.

[27] Consequently the application for judicial review is granted.

[28] The parties did not seek that I certify a question and no such question is justified here. Consequently, no question shall be certified pursuant to paragraph 74(d) of the Act.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, and the matter is returned to the Respondent who shall assign a different Non-Immigrant Officer for re-determination of the Applicant's study permit application. The Applicant will have 30 days from the date of this judgment to provide the Respondent with any additional information and representations addressing the concerns previously raised regarding her application for a study permit.

"Robert Mainville"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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