Federal Court Cour fédérale

Date: 20140424

Docket: IMM-3769-13

Citation: 2014 FC 383

Perth, Ontario, April 24, 2014

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ZI YANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Yang, a Chinese national, was lawfully in Canada in virtue of both a work permit and a study permit. As the work permit was expiring, she applied in writing for an extension. Her uncontradicted evidence is that she was told by somebody at Citizenship and Immigration Canada that it took some time for decisions to be rendered on written applications. It was suggested that she could leave Canada and apply for a work permit extension at the port of entry.

[2] This is exactly what she did. She left Canada at Douglas, B.C., and presented herself to U.S. immigration at Blaine, Washington. She then turned around, or to use the term stated in the U.S. paperwork, "flagpoled", and presented herself to the Canadian authorities. The officers who examined her formed the view that she had worked in Canada illegally after her original work permit had expired. A report was prepared for the Minister's consideration. The Minister's Delegate issued a removal order. Ms. Yang was only allowed back in Canada in order to purchase an airline ticket to China. When she reported back for removal, she was handcuffed, chained and held in custody until she was put on the plane. This is the judicial review of the Minister's Delegate's decision.

I. Issues

[3] This case raises two issues:

a. Was the Minister's Delegate, an officer of the Canadian Border Service Agency (CBSA), authorized in law to issue the removal order; and

b. Was the decision reasonable?

II. Facts

[4] Ms. Yang had been in Canada on and off since January 2007. She returned in August 2012 and was lawfully admitted into Canada with authority to work, and to study. She worked with Canada Rockies International Investment Group Ltd., located in Dease Lake, B.C., a family business whose principal owners were her uncle and cousin.

[5] Prior to the expiry of her work permit, she applied to Vegreville for an extension. She was able to continue her employment pursuant to implied status provisions while her application was being processed. The application was refused as the company had not obtained a Labour Market Opinion (LMO) to support the application. The refusal was communicated to Ms. Yang on or about 6 December 2012.

[6] Thereafter, the company obtained a favourable LMO from Service Canada. Ms. Yang applied to Vegreville for a work permit and restoration of status, supported by the LMO. In the meantime, according to her, she had stopped working, in the sense that she was not being paid.

[7] It was on 21 May 2013 that Ms. Yang left Canada in body, if not in spirit, and presented herself to the U.S. authorities. They gave her a form called "Notice of Refusal of Admission/Parole into the United States". This form was addressed to the Department of Manpower and Immigration, Douglas, B.C. Within a column which bears the title "Reasons for Excludability or Parole", the word "Flagpole" was typed in. There were two other boxes in the form. One is to indicate whether the alien was refused admission into the United States. The other was whether the alien was refused admission and parole in the United States. Both boxes remained blank.

[8] "Flagpole" obviously means something to both the U.S. and Canadian authorities, although whatever understanding there is, was not set out in the record. Counsel for Ms. Yang says it is well-known that individuals in Canada seeking extension of work or study permits simply walk across the border and come back in.

[9] Ms. Yang's examination at the Canadian port of entry at Douglas in Surrey, B.C. was long and arduous. She was interviewed by at least three Border Service Officers. They examined the content of her cell phone and after making various telephone calls concluded that she had been working in Canada illegally after her work permit had expired.

[10] One of the officers prepared a report pursuant to s. 44(1) of the *Immigration and Refugee Protection Act* [IRPA]. That section provides that 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 and transmit it to the Minister.

[11] The officer cited s. 41(a) and s. 20(1)(b) of IRPA, as well as s. 8 of the *Immigration and Refugee Protection Regulations*. Section 41(a) provides that a foreign national is inadmissible through "an act or omission which contravenes, directly or indirectly, a provision of this Act…" Section 20(1)(b) provides that in order to become a temporary resident (which was Ms. Yang's situation), a foreign national must, among other things, "hold the visa or other document required under the regulations….". Section 8 of the *Regulations* provides that "a foreign national may not enter Canada to work without first obtaining a work permit".

[12] The facts written up in the report indicated that Ms. Yang, who is neither a Canadian citizen nor permanent resident:

> Sought entry at port of Douglas in Surrey, B.C., on May 21st 2013 to work;
>
> Subject has engaged in unauthorized work in Canada and a period of six months has not elapsed since the termination of the unauthorized work pursuant to R200(3e).

[13] This report was immediately presented to the Minister's Delegate at the port of entry. She issued an exclusion order in which she stated that she was satisfied that Ms. Yang was a person described in s. 41(a) and s. 20(1)(b) of IRPA and Regulation 8.

[14] Her Chinese passport was seized and she was ordered to report back to CBSA for her removal, which she did, ticket in hand. However, she was considered a flight risk and detained until she was put on a plane.

III. Analysis

[15] If Ms. Yang had not left Canada, she would have maintained her status as a foreign student. She may not have been issued a new work permit in accordance with Regulation 200(3)(e)(i) on the grounds that she had engaged in unauthorized work in Canada and a period of six months had not yet elapsed since the cessation of that work. The question is whether there is a different sanction because she stepped over the border. Regulation 228(1)(c)(iii) permits a Minister's Delegate at the border to issue an exclusion order if a foreign national is inadmissible under s. 41 of IRPA for failing to establish that "they hold the visa or other document as required under s. 20 of the Act…"

[16] It is necessary to carry out a separate analysis of the three provisions cited: s. 41(a) and s. 20(1)(b) of IRPA, and Regulation 8.

[17] Ms. Yang's action which was said to have contravened the Act was to work after the expiration of her work permit. Ms. Yang had explained that after the rejection of her extension,

she continued to assist the company as a volunteer in order to gain experience. "Work" is defined in s. 2 of the *Regulations* as an activity for remuneration "or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market". On the basis that she was not paid, it was necessary to do an analysis to ascertain whether Ms. Yang's activity was in direct competition with Canadians. The Minister's Delegate was aware that Ms. Yang held a LMO under the Temporary Foreign Worker Program. The job description was as bookkeeper. The language requirements, both oral and written, were English and Mandarin, as the owner of the company did not speak English. The employee needed to be in continuous contact with suppliers in China.

[18] As no such analysis was done, the decision that she had violated s. 41 of the Act is unreasonable.

[19] As for s. 20 of IRPA, it was necessary that Ms. Yang held the required visa or other document. She held a study permit. Counsel for the Minister makes much of the fact that the permit did not allow her to leave Canada and return. However, that was not the reason she was written up. Furthermore, a great deal of evidence would have to be led with respect to the practice of "flagpoling" before it could be said that Ms. Yang was in violation of s. 20.

[20] Regulation 8 provides that "A foreign national may not enter Canada to work without first obtaining a work permit." The officers completely mischaracterized the situation. She was at the border in order to apply for a work permit, not to enter Canada to work without a work permit.

[21] For these reasons the exclusion order is set aside. In these circumstances, it is not necessary to determine whether the Minister's Delegate at the border had authorization, or whether the s. 44(1) report had to be referred to the Immigration Division of the Refugee and Immigration Board of Canada.

IV. Remedy

[22] As more than six months have elapsed as per Regulation 200(3)(e), the appropriate remedy is to simply quash the decision.

V. Certified Question

[23] At the close of hearing, I invited both parties to submit a serious question of general importance which would support an appeal to the Federal Court of Appeal. Both have taken the position that the case does not raise such a question. However, Ms. Yang's counsel did go on to propose a question as to the authority of the CBSA officers at the port of entry. I find this case to be very fact specific and so I am not prepared to certify a question.

ORDER

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review of the exclusion order issued on 21 May 2013 is granted.

2. The exclusion order is quashed.

3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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