

Federal Court



Cour fédérale

Date: 20160112

Docket: IMM-2949-15

Citation: 2016 FC 37

Vancouver, British Columbia, January 12, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ARTHUR EISMA, LORENZO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review by the Applicant pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by an immigration officer [Officer] dated June 2, 2015, wherein the Officer held that the Applicant was not a victim of human trafficking; and, furthermore, rejected the Applicant's application for a

Temporary Resident Permit and open Work Permit as the Applicant was, at the time of the decision, admissible to Canada.

[2] The Applicant, Arthur Jr. Eisma Lorenzo (age 38), is a citizen of the Philippines.

[3] The Applicant alleges that he first arrived in Canada on June 23, 2011, as a temporary foreign worker, for a grocery store in Labrador City (Buy N Fly Food Limited). He worked at the store as a grocery/produce clerk until the expiry of his one year contract, on June 22, 2012.

While he worked at the store, the Applicant was offered, in February 2012, a position as a waiter by Miriam and Jeff Staples at one of their restaurants. Due to the Applicant's status in Canada, the Applicant was in need of a work permit in order to be employed by the Staples. In order to obtain the required documents, the Applicant met with the lawyer who represented the Staples. Only after the Applicant agreed to pay for the fees and disbursement of the lawyer was the Labour Market Opinion assessment [LMO] delivered to the Applicant.

[4] On June 23, 2012, the Applicant moved to a house designated by the Staples for the residence of their workers; and, after receiving his work permit as a waiter – valid from June 28, 2012 to June 27, 2013, the Applicant started to work for the Staples on June 28, 2012.

[5] The Applicant alleges that although his LMO, and subsequent work permit, were only for the purpose of his employment in the restaurant, Jungle Jim's, the Applicant was told to work at another restaurant owned by the Staples: Greco Pizza.

[6] While the Applicant was employed by the Staples, he alleges that he was a victim of human trafficking: he lived with approximately twenty-six co-workers, at any one time, in a house with five bedrooms and two bathrooms; he did not have a regular working schedule; overtime was not always paid; threats of deportation were made when employees would complain; there was a lack of privacy as the Staples would show-up unannounced at the residence for employees; and, they would require employees to go to work; and, employees would be required to take on additional responsibilities without additional compensation.

[7] On May 31, 2013, the Applicant's employment with Jungle Jim's was terminated; and, on June 2, 2013, his employment with Jungle Jim's officially ended.

[8] Prior to his termination, the Applicant had made various complaints to different entities about his living and working conditions. In October 2012, the Applicant advised the Newfoundland and Labrador Labour Standards office of the difficult housing and working conditions. In November 2012, the Applicant, after attending a labour standard seminar, complained to an individual about the housing and working conditions; and, subsequently, a meeting was organized by the Staples with staff members. In February 2013, the Applicant called Citizenship and Immigration Canada and filed a written joint complaint with other staff members in March 2013.

[9] Following his termination at Jungle Jim's, the Applicant worked at a Canadian Tire store in Labrador City from July 12, 2013 to July 23, 2013. The Applicant had obtained a nomination under the Newfoundland and Labrador Provincial Nominee program for this employment.

[10] Upon receiving a work permit valid from October 16, 2013 to October 16, 2015, for the occupation of waiter, the Applicant worked approximately five and a half months for a company, named L.H. Service Center Ltd., until his employment was terminated on April 2, 2014.

[11] On April 16, 2014, the Applicant moved to British Columbia. Upon arrival in British Columbia, the Applicant tried, unsuccessfully, to find an employer who would apply for a Labour Market Impact Assessment, in order to hire him. On April 14, 2015, the Applicant filed an application for a Temporary Resident Permit for Victims of Trafficking in Persons [VTIP] (against Jungle Jim's); as well as a Temporary Resident Permit for non-VTIP and an open Work Permit.

[12] In support of his VTIP application, the Applicant submitted five reasons:

1. The Applicant was participating in the investigation and prosecution of his former employer Jeff Staples, for living conditions, unpaid overtime, lack of being given regular hours, etc.;
2. The Applicant is financially supporting his family in the Philippines;
3. The Applicant has wide range experience working in hotel, restaurant management and cruise ship industries. The Applicant contributes to the Canadian economy;
4. The Applicant would have difficulties re-establishing in the Philippines given that he left his home and family to come to Canada. He would have no way of supporting himself financially; and,
5. The Applicant's mental health and well-being warrants that he stays in Canada.

II. Decision under Review

[13] Prior to rendering her decision, the Officer interviewed the Applicant on May 14, 2015, mainly to establish the facts and assess the credibility of the Applicant.

[14] In a decision dated June 2, 2015, the Officer rejected the Applicant's application finding that the Applicant was not a victim of human trafficking and that he was ineligible for a non-VTIP Temporary Resident Permit and an open Work Permit.

[15] With regards to the non-VTIP Temporary Resident Permit request, the Officer rejected the Applicant's Temporary Resident Permit request, pursuant to subsections 24(1) and 24(3) of the IRPA, as the Officer was not satisfied that there were sufficient compelling grounds for the issuance of such permit:

Mr. Lorenzo has also requested consideration for a non-VTIP TRP, under IRPA A24. At this time Mr. Lorenzo is not inadmissible. A TRP under A24 has also been considered and I'm not satisfied there are sufficient compelling reasons for the issuance of a TRP. Mr. Lorenzo has now had close to four years in Canada as a temporary resident and has status up to October 16, 2015. Mr. Lorenzo has no family members in Canada and there are no extenuating circumstances that require him to continue to remain in Canada. Over the past year, he has not been successful in finding employment in Canada. Mr. Lorenzo does have family in his home country, Philippines, where his mother and sister live.

(Officer's Decision, Tribunal Record, p 8)

[16] Finally, regarding the VTIP Temporary Resident Permit, the Officer stated the criteria to be considered, as directing the Ministerial Instructions, during the preliminary assessment to determine whether an individual was a victim of human trafficking:

- The recruitment of the individual was fraudulent or coerced and for the purposes (actual or intended) of exploitation;
- The individual was coerced into employment or other activity;
- The conditions of employment or any other activity were exploitative; or,
- The individual's freedom was restricted.

(Officer's Decision, Tribunal Record, p 5)

[17] The Officer assessed the five reasons submitted by the Applicant and rejected them. As a result, the Officer held that there were insufficient indicators to clearly establish, at the time of the decision being rendered, that the Applicant was a victim of human trafficking.

[18] The first reason (participation by the Applicant in the investigation and prosecution) was rejected as no charges; as yet, had been laid under the IRPA. The second (supports his family in the Philippines), third (contribution to the Canadian economy), and fourth (re-establishment and limited financial opportunities in the Philippines) reasons are economic in nature. The Officer held that the Applicant did not demonstrate how he supported his family in the Philippines; furthermore, the Applicant had saved a substantial amount of money considering that he had worked in low-skill jobs. Moreover, the Applicant was able to support himself financially although he was unemployed for approximately one year and two months when the decision was rendered. The fifth reason (mental health and well-being), the Officer held that two years had elapsed since the alleged mistreatment occurred. Thus, the Applicant could have attended to treatment, should he have elected to require such, and, thus, recover from his alleged mental health problems. The Officer also noted that the Applicant worked for two different employers after his work experience at Jungle Jim's; and, he has participated in a number of volunteering

opportunities since his move to British Columbia. Consequently, his application for Temporary Resident Permit as a VTIP was rejected.

III. Issues

[19] The Applicant acknowledged in his Applicant's reply memorandum that he was not eligible for a non-VTIP Temporary Resident Permit, consequently, the Court considers the following to be the central issue:

Is the Officer's decision to reject the Applicant's application for a Temporary Resident Permit as a VTIP reasonable?

IV. Position of the Parties

[20] The Applicant submits that the Officer's decision was unreasonable as she did not properly conduct an analysis of whether the Applicant is a VTIP; that is, there are insufficient reasons in her decision that would indicate that the Officer did in fact take into consideration factors enumerated in the Ministerial Instructions to determine whether the Applicant is a VTIP. As a result, the decision is unreasonable as the Officer failed to conduct a proper analysis, as required by the IRPA and the Ministerial Instructions. Secondly, the Officer's decision is unreasonable as she erred by omitting to consider all the relevant evidence or she misapprehended the evidence.

[21] Conversely, the Respondent submits that the Officer's decision is reasonable as the Applicant was not eligible for any type of the Temporary Resident Permit sought by the Applicant (pursuant to subsection 24(1) of the IRPA) as the Applicant was not inadmissible. Furthermore, since the Applicant does not have a Temporary Resident Permit, he is not eligible for an open Work Permit. Alternatively, the Respondent submits that there was no compelling reason to issue a Temporary Resident Permit as a VTIP; and, the Officer's assessment as to whether the Applicant was or was not in fact a VTIP was reasonable. Moreover, the issuance of a non-VTIP Temporary Resident Permit would serve no purpose as the Applicant, at the time of the Officer's decision being rendered, already had temporary resident status.

V. Standard of Review

[22] The assessment by an immigration officer of an applicant's eligibility to a Temporary Resident Permit, pursuant to subsection 24(1) of the IRPA, is a highly discretionary decision attracting the standard of review of reasonableness (*Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 667 at para 18; *Evans v Canada (Minister of Citizenship and Immigration)*, 2015 FC 259 at para 26 [*Evans*]).

VI. Analysis

[23] The granting of a Temporary Resident Permit pursuant to subsection 24(1) of the IRPA is highly discretionary and exceptional in nature (*Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2015 FC 762 at para 32) as its purpose is to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA:

[22] The objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of IRPA which surfaces in cases where there may be "compelling reasons" to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA. Basically, the TRPs allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments. (Immigration Manual, c. OP 20, section 2; Exhibit "B" of Affidavit of Alexander Lukie; *Canada (Minister of Manpower and Immigration) v. Hardayal*, [1978] 1 S.C.R. 470 (QL).)

(*Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 22)

[24] The Respondent's main argument is that the Officer could not grant the Applicant the sought Temporary Resident Permit as a VTIP as the Applicant, at the moment of the decision rendered by the Officer, was not inadmissible to Canada. Conversely, the Applicant relies on a note in the Ministerial Instructions for *Temporary Resident Permits (TRPs): Consideration specific to victims of human trafficking*, to state that an Officer may grant a Temporary Resident Permit to a VTIP even if the applicant is not inadmissible:

Note: If the victim of human trafficking has existing immigration status through another program, officers may consider not issuing a TRP until the current status has lapsed. **However, the client must still be interviewed, and details reported to OMC.**

Note : Si la victime de la traite de personnes a déjà un statut au regard de l'immigration grâce à un autre programme, l'agent peut envisager de ne pas lui délivrer de PST jusqu'à ce que son statut actuel soit expiré. **Cependant, une entrevue s'impose tout de même, dont les conclusions seront transmises à la DGGOC.**

(Affidavit of Felicia Cheng, Ministerial Instructions, p 12)

[25] To read the Ministerial Instructions as being legally binding and giving powers to the Officer that the IRPA did not intend, as suggested by the Applicant, would be in patent contradiction with the well-established principle that the Ministerial Instructions are not law (*Agraira v Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, 2013 SCC 36 at para 85; *Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32 [*Kanhasamy*]). Ministerial Instructions are “useful in indicating what constitutes a reasonable interpretation of a given provision of the *Immigration and Refugee Protection Act: Agraira*, at para 85” (*Kanhasamy*, above at para 32).

[26] The note in the Ministerial Instructions must be read as a reasonable interpretation of subsection 24(1) of the IRPA and not as giving an additional mandate to officers in their assessment of an application under that provision. The Court reads the note as stating that an officer does not have to automatically reject a Temporary Resident Permit application to someone who is an alleged victim of human trafficking because the applicant is admissible. Rather, an officer may assess the application, and, if the officer finds that the applicant is in fact a VTIP, the officer may hold the issuance of the Temporary Resident Permit as a VTIP until the applicant becomes inadmissible.

[27] This is exactly what the Officer did. She decided to examine the Applicant’s Temporary Resident Permit as that of a VTIP application even though the Applicant was not at the time inadmissible.

[28] Having established that the Officer could assess the Applicant's VTIP application, the Court must now determine whether the Officer's decision was reasonable. The Applicant submits that the Officer's decision was unreasonable as, according to the Applicant, she did not properly undertake an assessment of whether the Applicant is a VTIP; and, the Officer failed to consider all relevant evidence and misapprehended evidence in denying the application.

[29] The Court disagrees. The Officer's decision is reasonable. In her decision, the Officer enumerated the criteria to be used in the preliminary assessment to guide an officer in deciding whether an applicant is a VTIP. Although, the Officer in her decision did not perform a step-by-step analysis of these factors, preferring to perform a step-by-step analysis of the five reasons submitted by the Applicant for his Temporary Resident Permit as a VTIP, it is clear from her decision that the Officer did in fact take the criteria in consideration and incorporated them in her assessment.

[30] The Applicant is mainly arguing that the Officer did not give sufficient weight to his evidence. Having found, after a careful review of the evidence submitted by the Applicant, that the Officer did in fact take into consideration the whole of the evidence, the Court finds that the Officer's decision is reasonable. It is not the role of this Court to reweigh the evidence before the Officer to substitute its own view for a preferable outcome in a Temporary Resident Permit application (*Evans*, above at para 27).

VII. Conclusion

[31] Consequently, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no serious question of general importance to be certified.

OBITER

In view of all of the above in respect of the overall evidence, it is incumbent to recall that, as per the knowledge of the Court of the entirety of the file, and as per its understanding of its context, no charges, as yet, had been laid under the IRPA as to the human trafficking accusation described therein. That, however, may no longer be the case; and, it may be that the Applicant's presence and testimony as per his specific testimony on file, in regard to his former working conditions, may now be as such. If that is the situation, it is for the Immigration authorities to determine whether the presence of the Applicant is required for any present or pending procedures in regard to human trafficking and work conditions stemming therefrom.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2949-15

STYLE OF CAUSE: ARTHUR EISMA, LORENZO v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JANUARY 11, 2016

JUDGMENT AND REASONS: SHORE J.

DATED: JANUARY 12, 2016

APPEARANCES:

Natalie Drolet FOR THE APPLICANT

Marjan Double FOR THE RESPONDENT

SOLICITORS OF RECORD:

West Coast Domestic Workers' Association FOR THE APPLICANT
Vancouver, British Columbia

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, British Columbia