Federal Court  Cour fédérale

Date: 20160714

Docket: IMM-4109-15

Citation: 2016 FC 810

Ottawa, Ontario, July 14, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

TOUNWENDYAM KEVYN LANDRY OUEDRAOGO

Applicant

And

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Mr. Tounwendyan Kevyn Landry Ouedraogo [the Applicant] has brought an application for judicial review challenging the August 21, 2015 exclusion order (s. 228(1)(c)(iv) of the *Immigration and Refugee Protection Regulations*, SOR/2002-207 [the Regulations], as defined under s. 225(1) of the Regulations) made by Officer Linda Wunderlich [Officer Wunderlich], Hearings Advisor at the Pacific Region Enforcement Centre of the Canada Border Services Agency [the CBSA].

[2] The Applicant is a 20 year old citizen of Burkina Faso. He entered Canada on January 12, 2014, and was initially issued a study permit that was valid until December 31, 2014. A second study permit was issued to the Applicant on November 19, 2014, extending his authorization to remain in Canada until July 31, 2015, to attend High School. He let that study permit lapse and did not apply for restoration in order to attend Langara College starting September 8, 2015.

[3] On the evening of August 19, 2015, the Applicant was pulled over by a Royal Canadian Mounted Police [RCMP] officer during the course of a traffic stop in Vancouver. The Applicant presented an expired international driver's license and was unable to answer the officer's questions regarding the Applicant's immigration status in Canada. The RCMP officer contacted the CBSA and it was discovered that the Applicant had overstayed his study permit. The Applicant was taken into custody and placed in detention at the North Vancouver RCMP detachment, pursuant to s. 55 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[4] On the morning of August 20, 2015, CBSA Inland Enforcement Officer Shauna Good [Officer Good] attended the RCMP detachment and interviewed the Applicant and confirmed that the Applicant had not brought an application for restoration of his status. Having determined that the Applicant was inadmissible to Canada, in accordance with s. 29(2) and s. 41(a) of the Act, Officer Good prepared an inadmissibility report, pursuant to s. 44(1) of the Act.

[5] The Applicant was then transferred to the custody of the CBSA and the matter was referred to Officer Wunderlich. On August 21, 2015, Officer Wunderlich conducted a Minister's

Proceeding, pursuant to s. 44(2); present at the hearing were the Applicant, counsel for the Applicant and the Honorary Consul for Burkina Faso consulate, Mr. Louis Salley. Following the hearing, and pursuant to s. 228 of the Regulations, Officer Wunderlich issued an exclusion order in the Applicant's name. The Applicant was then released from custody on conditions.

[6] On September 8, 2015, the Applicant filed an application for leave and judicial review with respect to the exclusion order issued against him.

[7] On September 16, 2015, CBSA notified the Applicant by way of letter that he was required to present a confirmed ticket for a flight to Burkina Faso departing from Canada no later than October 2, 2015. On September 18, 2015, counsel for the Applicant submitted an application to Citizenship and Immigration Canada to restore his temporary resident status and study permit. On the same day, counsel for the Applicant submitted a request to the CBSA asking for a deferral of his removal.

[8] In a response dated September 23, 2015, the CBSA indicated that all borders to Burkina Faso were closed and the Applicant's removal would be postponed until further notice. On September 30, 2015, the CBSA notified the Applicant by way of letter that he was required to present a confirmed ticket for a flight to Burkina Faso departing Canada no later than October 21, 2015.

[9] On October 2, 2015, counsel for the Applicant again submitted a request to the CBSA asking for a deferral of his removal. On October 13, 2015, the CBSA refused the Applicant's

request for a deferral of his removal. On October 26, 2015, the Applicant filed notice of a motion with the Federal Court to stay his removal from Canada pending the outcome of the underlying judicial review. The motion was dismissed on October 27, 2015. The Applicant left Canada on October 28, 2015.

[10] The decision under review is the exclusion order made on August 21, 2015.

I. Issues

[11] The issues presented by the Applicant are:

A. Did Officer Wunderlich fetter her discretion when determining whether to issue an exclusion order to the Applicant?

B. Was Officer Wunderlich required to take into consideration the fact that the Applicant was within the 90-day restoration period though he had not applied for restoration at the time before issuing an exclusion order?

II. Standard of Review

[12] With respect to the standard of review on an issue involving the fettering of a decision-maker's discretion, Justice Stratas noted in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 20-25 [*Stemijon*] that the decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], did not address where such a question falls within the standard of review analysis. However, in the view of Justice Stratas, at paragraph 24, irrespective of the standard of review, the result will be the same if a decision resulted from a fettered

discretion, it is per se unreasonable (*Babic v Canada (Minister of Employment and Social Development)*, 2016 FC 174 at para 19).

[13] The second issue involves a consideration of Officer Wunderlich's interpretation of the s. 44(2) of the Act, her home statute. It is well established that a decision-maker's interpretation of their home statute is matter that is presumed to be within their realm of expertise and deference should be given by the court (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* [2011] 3 S.C.R. 654 *[Alberta Teachers' Association*], I do not think that the Applicant's reliance on *Sui v Canada (MPSEP*), [2006] FCJ 1659 [*Sui*], in this regard is sustainable as it was issued prior to significant changes in this area ushered in by the Supreme Court of Canada's decisions in *Dunsmuir* and *Alberta Teachers' Association*, above. This issue is properly defined as a mixed question of law and fact, reviewable on the reasonableness standard.

III. Preliminary matter

[14] The Applicant did not file an affidavit verifying the facts he was relying on. But his counsel Catherine A. Sas filed three of her own affidavits and co-counsel Cindy Jeklin also filed her own affidavit. All of the affidavits filed by the solicitors contain contentious issues and recite conversations that occurred, possible opinions as well as some argument.

[15] *Federal Courts Rule* 82 reflects many of the Provincial bar's Rules of professional code of conduct. The Federal Court does not look favorably on the practise of counsel filing affidavits when there is a contentious matter contained in the affidavit. When the affidavits deal with

substantive issues the lines between being an advocate and being a witness are blurred. This is especially so when either Catherine Sas or co-counsel Cindy Jeklin could have been cross-examined on their affidavits and solicitor client privilege issues could have arisen. Catherine Sas's partner, Victor Ing, from the firm Sas & Ing, argued the matter before me.

[16] There was no motion for leave of the court to file solicitors' affidavits. There is no explanation of why the Applicant did not file an affidavit necessitating the solicitors having to file the only affidavits before the Court. Neither was there an issue of procedural unfairness before the court.

[17] No reasoning was provided of why the Respondent did not object to the solicitors' affidavits being filed, the lack of an Applicant's affidavit or a claim that any prejudice was suffered by the Respondent.

[18] I am not condoning any of the practises that occurred in this situation but given that the matter has proceeded to this point with no objections, this disregard for the Federal Courts rules will not be fatal to the Applicant given the importance of the matter to him.

IV. Analysis

A. *Did the Officer Fetter Her Discretion?*

[19] The Applicant submits that Officer Wunderlich fettered her discretion by taking the view that she was bound by a national policy directive to issue an exclusion order and by Officer

Wunderlich's failure to consider the request for an extension of time to file a restoration application.

[20] The Applicant citing the decision of the Supreme Court of in *Canada Maple Lodge Farms v Canada*,[1982] 2 SCR 2 at p. 7, argues that while government policy may serve as a guideline in decision-making, it cannot bind the decision-maker so as to exclude other relevant considerations. The Applicant submits that doing so is an error because it effectively raises the policy directive to the same status as legislation. This principle has been endorsed in the immigration law context, where the Federal Court has consistently ruled that policy documents may serve as guidelines but are not binding on officers (*Bavili v Canada (minister of citizenship and Immigration*, 2009 FC 945 at para 31).

[21] In order to determine whether the Officer Wunderlich fettered her discretion, I think that it is first necessary to determine whether she had a residual discretion in deciding whether or not to issue an exclusion order under s. 44(2) of the Act. In my view, the answer is "yes." Pursuant to s. 44(2) of the Act and 228(1)(c)(iv) of the Regulations, the Minister, or his delegate, may issue an exclusion order to any foreign national who is inadmissible on grounds of failing to leave Canada by the end of the period authorized for their stay, as required by s. 29(2) of the Act.

[22] The issue of whether the word "may" confers a residual discretion on the part of the Minister or his delegate was considered by the Federal Court of Appeal in *Cha v Canada (Minister of Citizenship and Immigration*), 2006 FCA 126 [*Cha*] at paras 18-22, 33 & 38, and in *Aksenova v Canada (MPSEP)*, [2006] FC 557 at para 14.

[23] *Cha*, above, held at paragraph 22 that: "there may be room for discretion in some cases, and none in others. This is why it was wise to use the term "may" & "depending on the grounds alleged, on whether the person concerned is a permanent resident or a foreign national and on whether the report is referred or not to the Immigration Division". In the case of *Cha*, because he was a foreign national who was inadmissible due to criminality, the officer had no discretion to exercise or not exercise the power under s. 44(2).

[24] Unlike *Cha*, the Applicant though a foreign national was not inadmissible due to criminality. The decision on these facts does attract a very limited exercise of discretion. The exercise of discretion is limited to examine whether on an overstay the applicant has applied for restoration or could have been implied to have applied within the 90 day period before he came to the attention of Immigration officials.

[25] Having found that the officer had a very narrow and limited discretion to exercise when she decided whether or not to issue an exclusion order, I must now look at whether she fettered that narrow discretion.

[26] The Applicant characterises an email dated June 27, 2013 from Colby Brose, Acting Regional Program Manager, Investigations Unit, Pacific Enforcement Centre, CBSA, that was originally written on December 6, 2007, and now forwarded to a number of people including Officer Wunderlich, with the subject line "Clarification on overstays and restoration" (pg. 52 of the CTR) as a National Policy guideline. I would not characterise it as such but it is a policy that

the officer followed. The argument presented is that Officer Wunderlich fettered her discretion by following this National Policy guideline.

[27] The affidavit of Catherine Sas recounts a telephone conversation she had with Officer Wunderlich where the officer said she had no alternative but to issue an exclusion order. Cindy Jeklin in her affidavit described a conversation where after Officer Wunderlich advised of her decision to issue the exclusion order she asked Officer Wunderlich had any discretion not to issue. Cindy Jeklin said Officer Wunderlich said she had absolutely no discretion in the circumstances (para 6-8 of affidavit of Cindy Jeklin). Those statements by the Applicant's counsel are contradicted by the material found in the CTR and are given limited weight.

[28] The Certified Tribunal Record (CTR) includes:

- the lengthy detailed notes from the interview by Officer Good on August 20, 2015;
- the Minister's determination checklist for a review of s. 44 reports that includes handwritten notes, the report and the s.44(1) highlights that are concurred with by supervisor Jennifer Macleod on August 21, 2015, who refers the matter to the Minister's delegate.
- Officer Wunderlich's solemn declaration dated August 21, 2015, which narrates the interview conducted with the Applicant.

[29] The sworn declaration by Officer Wunderlich records that the Applicant asked for the interview to be postponed until Catherine Sas could attend. Catherine Sas informed Officer Wunderlich in a conversation that she was not able to attend. The Applicant's interview

proceeded later that day when co-counsel Cindy Jeklin and Consulate Mr. Salley could attend. There is no mention in the declaration or anywhere else in the CTR of counsel asking for time to complete a restoration application.

[30] The Minister's Delegate found the s 44(1) report valid and issued an exclusion order under s. 44(2), but not until she interviewed the Applicant with his counsel and the Burkina Faso Consulate present.

[31] For what occurred at the August 21, 2015 hearing, I will rely on the sworn declaration of Officer Wunderlich that was done the day of the hearing and was included in the CTR. The detailed declaration that contains the questions and answers show me that Officer Wunderlich considered a number of factors:

- Officer Wunderlich asked a number of questions regarding the study permit including past history of renewals;
- Officer Wunderlich canvased extensively whether a restoration application had been made;
- Officer Wunderich then inquired as to why the restoration application had not been brought and the circumstances around there not being a restoration application;
- Officer Wunderich asked for the Applicant's explanation of exactly why he had not brought the extension for the study permit and yet his sister who he lived with did extend her study permit;
- Officer Wunderich recorded how the Applicant planned to attend Langara college starting in the fall without a study permit which was required prior to the start of school;

- In addition the Officer Wunderlich had the interview notes of Officer Good and the materials that the s. 44 report was based on that were reviewed.

[32] The CTR material shows that Officer Wunderlich asked questions and noted factors before making her decision.

[33] In conclusion, I find Officer Wunderlich did not fetter her discretion and exercised the limited discretion given to her by the legislation and considering the guideline/policy which reflects the competing objectives with in the Act and Regulations.

B. *Was Officer Wunderlich required to take into consideration the fact that the Applicant was within his 90-day restoration period before issuing an exclusion order?*

[34] Relying on the decision in *Yu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1213 [*Yu*], the Applicant argues that persons who have lost their temporary resident status, but who have applied to restore their status, cannot be said to be in breach of the provisions of the Act. In *Yu*, above, the applicant had applied to restore his temporary resident status only one day after it expired and several months prior to the issuance of the exclusion order. The exclusion order was set aside in light of the fact that the applicant had made a timely application to restore his status prior to the issuance of the exclusion order (*Yu*, at para 7).

[35] The Applicant expands this argument and submits that a person who has lost his or her status has a right to restore that status under s. 182 of the Regulations for the entire 90 days no matter what the intervening factors. Specifically, the Applicant states that the restoration

provisions state that a visa officer must restore status if that person continues to meet the original requirements of his stay and is not inadmissible (*Sui*, above, at para 34; s. 182 of the Regulations).

[36] In *Sui*, the applicant was issued an exclusion order after he had made an application for restoration and it was determined that the Minister's delegate had erred by failing to consider the fact the applicant had made the application well before the inadmissibility report and subsequent exclusion order were issued (*Sui*, at paras 35 and 59).

[37] The Applicant submits that the decision in *Sui* is analogous to the case at hand and further submits that a strict reading of the legislative provisions would mean that a Minister's delegate would be entitled to refuse every restoration application made on the basis of the restoration applicant's current lack of status. In view of the decision in *Sui*, and a recent decision of *Toure v Canada (MPSEP)*, 2014 FC 1086 [*Toure 2014*], the Applicant argues that this Court has consistently held that failure to leave Canada at the expiry of a permit cannot alone form the basis of an exclusion order because it would render the right to seek restoration meaningless.

[38] The decision of *Toure 2014*, above, cited by the Applicant was set aside by Justice Shore after it was discovered that the applicant had misled the Court on a determinative and central aspect of his application for judicial review (*Toure v Canada (MPSEP)*, 2015 FC 237 [*Toure 2015*]).

[39] While the Applicant acknowledges that the jurisprudence he relies upon concerns applicants who had already made applications for restoration prior to being issued an exclusion order, he argues that there is no principled reason to distinguish the cases where a foreign national had not yet filed an application for restoration compared to the situation where a restoration application had already been made before an exclusion order.

[40] What is highly relevant in this case and distinguishable from the jurisprudence on which the Applicant seeks to rely on is that the applicants in those cases had already made applications for restoration prior to being issued an exclusion order. The Applicant in this case had not made the restoration application when the s. 44 (1) inadmissibility report and the exclusion order were made.

[41] The interpretation that the Applicant favours would have the effect of automatically extending the time for which a temporary resident is authorized to remain in Canada by 90 days which is not how the legislation is written.

[42] I do not think that it can be said that Officer Good, when exercising her discretion, could not write an s. 44(1) report when the Applicant was still within the 90 day restorative process when the application for restoration had not yet been made. Or that Officer Wunderlich in turn could not issue an exclusion order based on the inadmissibility report. As discussed in the first issue, Officer Wunderlich is to determine whether the Applicant had applied for restoration within the 90 days as part of her exercising her discretion and she did that.

[43] So to answer the question posed in issue B, I find that Officer Wunderlich did take into consideration the fact that the Applicant was within the 90-day restoration period though the Applicant had not applied for restoration at the time before she issued an exclusion order.

[44] Whether the Applicant is within the 90 day restoration period will always be considered because the officer has no discretion if the Applicant is not within the 90 day restoration period.

[45] Furthermore, in my view, the discretion of a Minister's delegate to issue an exclusion order and the ability of a foreign national to apply for restoration of their temporary resident status are not mutually exclusive. They operate on parallel tracks; that is to say, both can occur at the same time. In situations like this, where no application has been made, there is nothing in the Act or Regulations which prohibits the CBSA from making an inadmissibility report or issuing an exclusion order.

[46] In fact, even where an application to restore is made, it appears as though the existence of the application should be taken into consideration by the Minister's delegate when they are exercising their discretion, but there is nothing prohibiting the delegate from still making an inadmissibility finding where the foreign national is found to otherwise be non-compliant with the requirements set out in s. 185 of the Regulations. Therefore, even where an application has been made, the simple existence of the application appears to have little effect, aside from the fact that it expands the scope of the delegate's discretion.

[47] An application for restoration is not a shield against deportation and against compliance enforcement and deportation. This is evidenced by the Applicant not being successful in the motion for a stay application and being removed from Canada even though he had an outstanding restoration application at the time of the stay application.

[48] I find that the decision was reasonable.

[49] I will dismiss this judicial review for the above reasons.

V. Certified question

[50] The test for whether I should certify a question was set out by the Federal Court of Appeal in *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9.

[51] The Applicant presented the following certified question:

> "Is the fact that a foreign national is still within the 90-day period to apply for restoration pursuant to section 182 of the Regulations a relevant consideration when the minister's delegate considers whether or not to make an exclusion order based on a failure to comply with section 29(2) of IRPA?"

[52] The Respondent opposes the certification as it does not raise an issue between the parties so is not dispositive of the matter. The Respondent argues that "when determining whether or not it issue an exclusion order per s. 44(2) the act the 90 day restoration period set out in s. 182 of the IRPA Regs is a factor…….albeit not necessarily a determinative factor to be considered by the decision -maker."

[53] I will not certify a question as I found on these facts the certified question would not be dispositive of the appeal.

[54] The Judicial Review is dismissed and no question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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