Federal Court  Cour fédérale

Date: 20180305

Docket: IMM-1047-17

Citation: 2018 FC 234

Ottawa, Ontario, March 5, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

GRACE UDODONG, LAURA MMEDARA JOHN UDODONG, DAVID EDIMA UDODONG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] The Applicants, a mother [Grace] and her minor children [Laura and David], are citizens of Nigeria. They are challenging the decision of an immigration officer [Officer], dated February 17, 2017, refusing their request for the restoration of their Temporary Resident Status

[TRS] as visitors. The Officer found that the Applicants were ineligible to have their TRS restored because the reason for their further stay as visitors included the intent to study.

[2] Grace entered Canada in July 2013 on a student visa. Upon graduation she obtained a post-graduate work permit which was valid until October 19, 2016. In March 2014, Laura and David joined her. Laura arrived on a study permit while David came with a visitor's visa before being issued a study permit. Their TRS expired at the same time as their mother's.

[3] Before the expiry of her post-graduate work permit, Grace applied to extend it but her request was denied as she had failed to obtain a Labour Market Impact Assessment. On or about November 3, 2016, she submitted her request for the restoration of her TRS as a visitor; she did the same on behalf of Laura and David. As indicated at the outset of these Reasons, those requests were denied on the basis that the Applicants intended to study during their time as visitors. As a matter of fact, Grace had secured admission to a college for a one-year course starting in January 2017.

[4] The Applicants claim that the Officer exercised her discretion in a manner contrary to the provisions of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [Act] and *Immigration and Refugee Protection Regulations* (SOR/2002-227) [Regulations] relating to restoration applications. In particular, they contend that immigration officers have no discretion in a restoration application under this statutory framework when the application is made within the prescribed time and the specified statutory and regulatory conditions are met, which, they submit, is the case here. They further argue that expressing an intention to study does not

preclude them from having their TRS as visitors restored because a person's initial temporary purpose does not need to remain constant and unchanged.

II. Issue and Standard of Review

[5] The sole issue to be decided in this case is whether the Officer committed a reviewable error in dismissing the Applicants' restoration application. There is no dispute between the parties that a decision on whether to restore TRS is reviewable on a standard of reasonableness. This includes the conclusions reached by the Officer in interpreting and applying the relevant statutory and regulatory provisions (*Sharma v Canada (Citizenship and Immigration)*, 2014 FC 786 at para 10 [*Sharma*]).

[6] As is well established, the analysis on a standard of reasonableness 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 v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

III. Analysis

[7] According to subsection 11(1) of the Act, a foreign national cannot enter or remain in Canada unless authorized to do so, be it, for instance, as a permanent resident or as a temporary resident. When one seeks to enter or remain in Canada as a temporary resident, they must

establish, pursuant to subsection 20(1)(b) of the Act, that 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." According to subsection 22(1) of the Act, the status of temporary resident is conferred on a foreign national when a visa officer is satisfied that the foreign national has applied for that status, meets the obligations set out in subsection 20(1)(b) and is neither inadmissible nor the subject of a ministerial declaration made under section 22.1 of the Act that he may not become a temporary resident on grounds of public policy considerations.

[8] Once granted, section 29 of the Act confers on the holder of the status of temporary resident the right to enter and remain in Canada on a temporary basis "as a visitor or as a holder of a temporary resident permit," subject to the temporary resident's obligations to "comply with any conditions imposed under the regulations and with any requirements under [the] Act, […] leave Canada by the end of the period authorized for their stay and […] re-enter Canada only if their authorization provides for re-entry."

[9] Section 30 of the Act prohibits foreign nationals from working or studying in Canada "unless authorized to do so under this Act."

[10] The Regulations define the different classes of temporary residents and the rules applicable to each of them. There are three classes of temporary residents: visitors, workers and students. All three are subject to the general rules set out in Part 9 of the Regulations (sections 179 to 190). In addition to the general rules, each is subject to a specific set of rules: Part 10 for

visitors (sections 191 to 193), Part 11 for workers (sections 194 to 209.997) and Part 12 for students (sections 210 to 222).

[11] Section 179 of the Regulations lists the requirements that need to be satisfied in order for a temporary resident visa to be issued either in the visitor, worker or student class. It reads as follows:

Temporary Resident Visa	**Visa de résident temporaire**
Issuance	**Délivrance**
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 end of the period authorized for their stay under Division 2;	b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;
(c) holds a passport or other document that they may use to enter the country that issued it or another country;	c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;
(d) meets the requirements applicable to that class;	d) il se conforme aux exigences applicables à cette catégorie;
(e) is not inadmissible;	e) il n'est pas interdit de territoire;

(f) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and	f) s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);
(g) is not the subject of a declaration made under subsection 22.1(1) of the Act.	g) il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

[12] Section 183 sets out the conditions imposed on foreign nationals that are granted temporary resident status. These conditions include the obligation to leave Canada at the end of the authorized period for their stay as well as the obligation not to work or study unless authorized by Part 9 or Parts 11, in the case of the workers class, and 12, in the case of the students class.

[13] Some conditions may be imposed, varied or cancelled by a visa officer pursuant to section 185 of the Regulations. These are:

a. The period authorized for the stay;

b. The work that may be permitted;

c. The studies that may be permitted;

d. The areas in which the temporary resident is permitted or prohibited to travel; and

e. The times and places at which the temporary resident must report.

[14] Section 181 of the Regulations allows for an extension of the authorization to remain in Canada as a temporary resident if an application to that effect is made by the end of the period authorized for the stay and the temporary resident establishes that they have complied with all conditions imposed on their entry into Canada and continue to meet the requirements of section 179.

[15] When TRS has been lost, it can be restored at certain conditions, which are set out in section 182 of the Regulations. That provision reads as follows:

Restoration of Temporary Resident Status	**Rétablissement du statut de résident temporaire**
Restoration	**Rétablissement**
182 (1) On application made by a visitor, worker or student within 90 days after losing temporary resident status as a result of failing to comply with a condition imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c), an officer shall restore that status if, following an examination, it is established that the visitor, worker or student meets the initial requirements for their stay, has not failed to comply with any other conditions imposed and is not the subject of a declaration made under subsection 22.1(1) of the Act.	182 (1) Sur demande faite par le visiteur, le travailleur ou l'étudiant dans les quatre-vingt-dix jours suivant la perte de son statut de résident temporaire parce qu'il ne s'est pas conformé à l'une des conditions prévues à l'alinéa 185a), aux sous-alinéas 185b)(i) à (iii) ou à l'alinéa 185c), l'agent rétablit ce statut si, à l'issue d'un contrôle, il est établi que l'intéressé satisfait aux exigences initiales de sa période de séjour, qu'il s'est conformé à toute autre condition imposée à cette occasion et qu'il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

[16] Therefore, in order to apply for restoration, a visitor, worker or student must not have lost their TRS for longer than 90 days as a result of one of the events listed in section 182. Failure to leave Canada after the period authorized for their stay is one of those events.

[17] As indicated previously, the Applicants claim that they meet the conditions set out in section 182: their application was made well within 90 days after losing their TRS; they have not failed to comply with any other conditions imposed; they are not subject to a ministerial declaration under section 22.1 of the Act; and they meet the "initial requirements for their stay," that is those set out in section 179 of the Regulations. They say that if these conditions, other than the one that led to the loss of the TRS, are met, a visa officer has no discretion; he must restore the TRS.

[18] Again the sole reason for not restoring the Applicants' TRS is that they expressed an intention to study while restoration was sought for the visitors' class. Is that justification reasonable? In other words, does it fall within a range of possible, acceptable outcomes defensible in fact and in law? I believe it does.

[19] The Applicants submit that the fact they expressed an intention to study is immaterial to the section 182 analysis. Their argument rests on two cases - *Patel v Canada (Minister of Citizenship and Immigration)*, 2006 FC 224 [*Patel*] and *Radics v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1590 [*Radics*] - where this Court, they say, held that the initial temporary purpose need not remain unchanged.

[20] In *Patel*, the applicant applied to have her TRS in the visitor class restored while awaiting the results of her permanent resident application. Her initial temporary purpose as a visitor was to attend her first granddaughter's wedding. The applicant then sought – and was granted – three extensions of her TRS as a visitor while her application for permanent residence, sponsored by her children here in Canada, was being processed. The applicant made a fourth extension request but that request was denied on the basis that she was not a *bona fide* temporary resident. She then applied for restoration of her TRS as a visitor on the same basis as her extension requests; that application was denied.

[21] It is in that context that the Court held that a foreign national's initial temporary purpose need not remain constant and unchanged in order for TRS to be restored. However, the Applicants' situation can clearly be distinguished from that in *Patel* as they were not waiting, as visitors, on a pending permanent resident application. Also, their "new purpose" for extending their temporary stay in Canada – studying – is akin not to the temporary residents' visitor class, in which they sought to be restored, but to the student class, which is governed by a number of different and separate rules. In other words, I do not believe that the restoration scheme, as set out in the Act and Regulations, allows for restoration in a given temporary resident class for a purpose related to another class of temporary residents.

[22] In *Radics*, the applicant arrived as a visitor and was permitted to remain in Canada for six months. He did not apply to extend his temporary resident visa in time and thus asked for restoration while waiting for an employment validation from Human Resources and Skills Development Canada. The visa officer denied restoration as he was not satisfied that the

applicant would leave Canada "at the end of any status granted." The Court set aside that decision on the basis that the officer had given no reasons for it and that it was rendered while "important material evidence" was missing due to a government error.

[23] The Court noted that the applicant was "entitled to explore Canada as a possible place to move and work" but pointed out that he would "need[s] to apply for a work permit before entering Canada." I do not see much support in *Radics* for the proposition that expressing an intention to study does not preclude the Applicants from being restored as visitors. Here, again, the main purpose of the Applicants' application for restoration was not to explore Canada as a possible place to move and study while visiting, but to actually study in Canada. This, in my view, requires a study permit, not the restoration of one's TRS as a visitor.

[24] But most importantly perhaps, the case law on restoration strongly suggests that when an applicant is seeking to be reinstated in a different temporary resident class than the one in which he previously held a temporary status, "meets the initial requirements of their stay" of section 182 can reasonably be interpreted as referring to the initial requirements applicable to the class into which the applicant wishes to be reinstated rather than to the class of the TRS previously held.

[25] In *Abubacker v Canada (Citizenship and Immigration)*, 2016 FC 1112, the parties agreed and the Court accepted that "meets the initial requirements of their stay" means meeting the initial requirements of the TRS that the party wishes to have restored, regardless of which status

was previously held. In that case, the applicant's student status had expired but the applicant applied to be restored with a post-graduation work permit.

> [10] The parties agreed and I accept that the Restoration PDI provides that the phrase "meets the initial requirements for their stay" in subsection 182(1) of the IRPR can be interpreted so that a student in the applicant's situation whose study permit has expired and who needs a PGWP is required to show that he or she meets the requirements for a PGWP and not those for a study permit. As well, the Restoration PDI indicates that in the applicant's situation, paragraph 179(d) of the IRPR means that the applicant must show that he meets the requirements for a PGWP.

[26] In *Sharma*, the Court concluded that given that the applicant applied for restoration as a worker, a valid Labour Market Opinion and Confirmation was required, without one, he could not be restored as a worker, only as a visitor, which is not what he applied for (*Sharma* at para 50).

> [46] I believe the Applicant could have asked for and achieved restoration of his status as a visitor under s. 186(l). However, and for whatever reasons, on the advice of his counsel at the time, he clearly wanted restoration of his status as a worker. The fact that he may have subsequently realized that this was a mistake, does not render the Decision unreasonable.

[27] In *Stanislavsky v Canada (Minister of Citizenship and Immigration)*, 2003 FC 835 [*Stanislavsky*], the applicants originally came to Canada with a TRS as visitors to care for the male applicant's mother, who died not long thereafter. They applied for and received one extension of their TRS. When it expired, they applied to have their status restored, pending their application for permanent residence. It is clear from this decision that it is the temporary purpose at the moment of restoration that matters and not the original temporary purpose that must be assessed by the officer.

[28] Though *Stanislavsky* does not relate to the restoration to a different class of temporary residents, the decision supports the view that the question of whether the applicants in that case met the initial requirements of their stay is assessed at the time of the application for restoration; the visa officer did not examine whether the applicants met the requirements of the initial status applied for.

> [14] A person seeking a temporary resident permit must have the intention of staying in Canada for a temporary purpose and an officer must be satisfied that such person will leave Canada upon the expiry of status: see sections 20(1)(b) and 29(1) and (2) of the Act and De La Cruz, supra. In this case, the Officer did not refuse the Applicants' application for restoration of temporary status on the basis that they would not be in Canada for a temporary purpose. On the contrary, the Officer denied the application because the Applicants' stay in Canada would be for a "long" temporary purpose, that is, while awaiting a decision on their application for permanent residence. The extended delay in this regard was attributed to the long processing time in Vegreville, Alberta relative to inland sponsorship applications.
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> [15] In my opinion, the fact that the Applicants had submitted an inland sponsorship application was relevant to their intention to remain in Canada for a temporary purpose, that is for the duration of the processing of their landing applications. Granted, this was a new and different temporary purpose from their original temporary purpose when they entered Canada as visitors in July 2000. **However, the current statutory and regulatory scheme does not say that a person's initial temporary purpose must remain constant and unchanged. The only requirement is the existence of a "temporary purpose"** and in the present case, I find that the Officer did not address his mind to this question in relation to the prevailing personal circumstances of the Applicants. That is a reversible error.
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> […]
>
> [17] A review of the record in this case suggests that the Officer improperly limited his consideration of the Applicants' application for reinstatement of status to the length of time required for the Respondent's employees to deal with processing of the inland sponsorship application without addressing the existence or otherwise of a current "temporary purpose" for the Applicants' stay in Canada. Accordingly, this application for judicial review is

> allowed and the matter remitted to a different officer for redetermination. There is no question for certification arising.
>
> (My emphasis)

[29] Here, given that the Applicants applied to restore their temporary permits in the visitor class, they were obliged to meet the initial requirements of their stay as visitors, not the initial requirements of their previous TRS in the student or worker class. Since their stated intention was to study, I am satisfied that it was not unreasonable for the Officer to conclude that they did not meet the initial requirements of their stay as temporary visitors. In other words, the Officer's interpretation of the regulatory scheme regarding restoration and its application to the facts of this case fall, in my view, within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[30] As result, the Applicants' judicial review application will be dismissed.

[31] Neither party proposed the certification of a question for appeal.

JUDGMENT in IMM-1047-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. No question is certified;

3. The style of cause is amended to reflect the correct spelling of the Applicants' last name as UDODONG.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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