Date: 20090121

Docket: IMM-3155-08

Citation: 2009 FC 53

Vancouver, British Columbia, January 21, 2009

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

OLEG KACHMAZOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant applied for a temporary work permit. A visa officer at the Canadian Embassy in Russia was not satisfied that the applicant would leave Canada at the end of the period authorized for his temporary stay. Consequently, the officer refused the application.

[2] The applicant claims that the visa officer erroneously refused the application because the applicant failed to submit a labour market opinion (LMO). Further, the applicant claims that the visa officer erred in his application of the principle of dual intent.

[3] Notwithstanding the articulate submissions of the applicant's counsel and despite having sympathy for the applicant's situation, I am not persuaded that the visa officer erred as alleged. Therefore, the application for judicial review must be dismissed.

I. Background

[4] The applicant is a citizen and resident of Russia. His wife has lived and worked in Canada since November 2005 under the "Live-In-Caregiver" program. On September 3, 2008, she submitted an application for permanent residence in Canada and included her husband in her application.

[5] The applicant was selected by British Columbia as a provincial nominee on March 17, 2008. This selection enables the applicant to apply for permanent residence in Canada under the Provincial Nominee Program (PNP).

[6] On April 22, 2008, the applicant applied for a temporary work permit. On May 7, 2008, the visa officer refused the work permit application. In the CAIPS notes, the officer expressly notes that the applicant had been refused a visitor visa on two previous occasions on the ground that the officers determining those applications were not satisfied that he would leave Canada upon expiration of the visa. The visa officer states that the applicant's circumstances had not changed.

[7] The CAIPS contain a notation that the applicant had not received a LMO. Additionally, the officer notes that the presence of the applicant's wife in Canada provides strong motivation for the

applicant to remain in Canada. Finally, the officer states that he has considered the principle of dual intent, but is not satisfied that the applicant would leave Canada upon expiration of the temporary work permit.

II. The Standard of Review

[8] The standard of review applicable to the question of whether a visa officer erred in an assessment of an application for a temporary work permit is that of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Li v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284. The Court must not intervene unless the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* at para. 47.

III. The Legislative Provisions

[9] The relevant statutory provisions are attached to these reasons as Schedule "A".

IV. The Labour Market Opinion

[10] The applicant alleges that the visa officer erred in requiring a LMO. The agreement between British Columbia and the federal government exempts the applicant from the requirement to submit a LMO (*Immigration and Refugee Protection Regulations*, section 204) and *FW 1 Foreign Worker Manual*, section 5.27).

[11] I agree with the applicant that the British Columbia PNP is exempt from the requirement to submit a LMO. However, a provincial nominee must nonetheless meet the requirements for a

temporary work permit including the requirement of establishing, to the satisfaction of the visa officer, that the nominee will depart from Canada at the end of the period authorized for the stay should the work permit expire before permanent resident status in Canada is obtained.

[12] In my view, although the visa officer noted the absence of a LMO, the CAIPS and the refusal letter, taken together, indicate that the reason for the refusal was the applicant's failure to satisfy the visa officer that he would leave Canada at the end of the period authorized for his temporary stay. The refusal form letter provides various options for refusal including, among others, the absence of a LMO. In this instance, the reason indicated for the refusal is the noted failure. The absence of a LMO is not indicated as a reason.

[13] Moreover, the visa officer's observation that the applicant's circumstances had not changed leads to an examination of the applicant's circumstances at the time of the previous refusals. That information indicates self-employment, minimal ties to Russia and strong motivation to remain in Canada. While the visa officer might have decided otherwise, I am unable to conclude that the determination he made falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law".

V. Dual Intent

[14] The applicant argues that the visa officer erred in his application of the principle of dual intent. Dual intent, it is said, is enshrined in the *Immigration and Refugee Protection Act* (IRPA) and recognizes that an applicant can apply for temporary admission and can concurrently apply for

permanent residence. Here, the applicant was eligible to apply for permanent resident status on the basis of his provincial nominee status and also as the spouse of a live-in-caregiver. According to the applicant, it was unreasonable for the officer to consider his wife to be a "magnet" since they are both eligible to apply for permanent residence.

[15] It is common ground that a person "may have the dual intent of immigrating and of abiding by the immigration law respecting temporary entry": *Rebmann v. Canada (Solicitor General)*, [2005] 3 F.C.R. 285 (F.C.); *Bondoc v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 1063.

[16] Although a visa officer does not have to be satisfied that an applicant has a temporary purpose in coming to Canada, the officer must be satisfied that an applicant will not remain illegally in Canada if the application for permanent residence is rejected: *Bondoc*. Further, a visa officer may have regard to information in prior applications and interviews and may draw inferences regarding an applicant's intention to return: *Jie v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1733.

[17] Considering the visa officer's express statement that he had considered dual intent as well as the fact that the applicant's eligibility to apply for permanent residence in Canada under two separate programs does not entitle him to a work permit, I am unable to conclude that the visa officer's determination was one that was not reasonably open to him.

[18] The applicant has not demonstrated that the visa officer's assessment was unreasonable and the application must therefore be dismissed. Counsel did not suggest a question for certification and none arises. The style of cause will be amended as requested.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. The style of cause is amended to delete "The Minister of Public Safety and Emergency Preparedness" as a respondent.

"Carolyn Layden-Stevenson"
Judge

SCHEDULE "A"

Immigration and Refugee Protection Act, 2001, c. 27

Subsection 22(2)

22. (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.	**22**. (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.

Immigration and Refugee Protection Regulations, SOR/2002-227

Sections 179, 200 203 204

179. An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national (*a*) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class; (*b*) will leave Canada by the end of the period authorized for their stay under Division 2; (*c*) holds a passport or other document that they may use to enter the country that issued it or another country; (*d*) meets the requirements applicable to that class; (*e*) is not inadmissible; and (*f*) meets the requirements of section 30.	**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*) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants; *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*) 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*) il se conforme aux exigences applicables à cette catégorie; *e*) il n'est pas interdit de territoire; *f*) il satisfait aux exigences prévues à l'article 30.

200. (1) Subject to subsections (2) and (3), an officer shall issue a work permit to a foreign national if, following an examination, it is established that

(*a*) the foreign national applied for it in accordance with Division 2;

(*b*) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

(*c*) the foreign national

(i) is described in section 206, 207 or 208,

(ii) intends to perform work described in section 204 or 205, or

(iii) has been offered employment and an officer has determined under section 203 that the offer is genuine and that the employment is likely to result in a neutral or positive effect on the labour market in Canada; and

(*d*) [Repealed, SOR/2004-167, s. 56]

(*e*) the requirements of section 30 are met.

200. (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) l'étranger a demandé un permis de travail conformément à la section 2;

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;

c) il se trouve dans l'une des situations suivantes :

(i) il est visé par les articles 206, 207 ou 208,

(ii) il entend exercer un travail visé aux articles 204 ou 205,

(iii) il s'est vu présenter une offre d'emploi et l'agent a, en application de l'article 203, conclu que cette offre est authentique et que l'exécution du travail par l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien;

d) [Abrogé, DORS/2004-167, art. 56]

e) il satisfait aux exigences prévues à l'article 30.

203. (1) On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(*c*)(i) and (ii), an officer shall determine, on the basis of an opinion provided by the Department of Human Resources Development, if the job offer is genuine and if the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada.

(2) The Department of Human Resources Development shall provide the opinion referred to in subsection (1) on the request of an officer

203. (1) Sur demande de permis de travail présentée conformément à la section 2 par un étranger, autre que celui visé à l'un des sous-alinéas 200(1)*c*)(i) et (ii), l'agent décide, en se fondant sur l'avis du ministère du Développement des ressources humaines, si l'offre d'emploi est authentique et si l'exécution du travail par l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien.

(2) Le ministère du Développement des ressources humaines fournit l'avis à la demande de tout employeur, groupe

or an employer or group of employers. A request may be made in respect of

(*a*) an offer of employment to a foreign national; and

(*b*) offers of employment made, or anticipated to be made, by an employer or group of employers.

(3) An opinion provided by the Department of Human Resources Development shall be based on the following factors:

(*a*) whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;

(*b*) whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;

(*c*) whether the employment of the foreign national is likely to fill a labour shortage;

(*d*) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;

(*e*) whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and

(*f*) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

(4) In the case of a foreign national who intends to work in the Province of Quebec, the opinion provided by the Department of Human Resources Development shall be made in concert with the competent authority of that Province.

d'employeurs ou agent faite à l'égard :

a) soit de l'offre d'emploi présentée à l'étranger;

b) soit d'offres d'emploi qu'un employeur ou un groupe d'employeurs a présentées ou envisage de présenter.

(3) Le ministère du Développement des ressources humaines fonde son avis sur les facteurs suivants :

a) l'exécution du travail par l'étranger est susceptible d'entraîner la création directe ou le maintien d'emplois pour des citoyens canadiens ou des résidents permanents;

b) l'exécution du travail par l'étranger est susceptible d'entraîner le développement ou le transfert de compétences ou de connaissances au profit des citoyens canadiens ou des résidents permanents;

c) l'exécution du travail par l'étranger est susceptible de résorber une pénurie de main-d'oeuvre;

d) le salaire offert à l'étranger correspond aux taux de salaires courants pour cette profession et les conditions de travail qui lui sont offertes satisfont aux normes canadiennes généralement acceptées;

e) l'employeur a fait ou accepté de faire des efforts raisonnables pour embaucher ou former des citoyens canadiens ou des résidents permanents;

f) le travail de l'étranger est susceptible de nuire au règlement d'un conflit de travail en cours ou à l'emploi de toute personne touchée par ce conflit.

(4) Dans le cas de l'étranger qui cherche à travailler dans la province de Québec, le ministère du Développement des ressources humaines établit son avis de concert avec les autorités compétentes de la province.

204. A work permit may be issued under section 200 to a foreign national who intends to perform work pursuant to

(*a*) an international agreement between Canada and one or more countries, other than an agreement concerning seasonal agricultural workers;

(*b*) an agreement entered into by one or more countries and by or on behalf of one or more provinces; or

(*c*) an agreement entered into by the Minister with a province or group of provinces under subsection 8(1) of the Act.

204. Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé est visé par :

a) un accord international conclu entre le Canada et un ou plusieurs pays, à l'exclusion d'un accord concernant les travailleurs agricoles saisonniers;

b) un accord conclu entre un ou plusieurs pays et une ou plusieurs provinces, ou au nom de celles-ci;

c) un accord conclu entre le ministre et une province ou un groupe de provinces en vertu du paragraphe 8(1) de la Loi.

FEDERAL COURT

SOLICITORS OF RECORD

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