Federal Court  Cour fédérale

Date: 20110428

Docket: IMM-5952-10

Citation: 2011 FC 500

Ottawa, Ontario, April 28, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ZEFERINO JOSEPH PENA TORRES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Pena Torres has been an on-again, off-again, somewhat indifferent, student in Vancouver going back to 2002. He was able to study here in virtue of a series of study permit authorizations, and always applied for renewals from outside Canada. Last year, his applications were refused twice over. This is the judicial review of the second refusal.

[2] In her refusal letter, the officer stated: “You have not satisfied me that you are an intending temporary resident to Canada as defined by Canada’s *Immigration and Refugee Protection Act*.”

[3] The tribunal record includes Computer Assisted Immigration Processing System (CAIPS) Notes. It is well-established that these Notes form part of the reasons for decision.

[4] The visa officer considered that different members of Mr. Pena Torres’ family have visited or reside in Canada, and in a draft of the refusal letter she said: “Based on your academic performance you are not a *bona fide* student.”

[5] The visa officer also signed an affidavit in which she said she based her decision on the information on file, which included Mr. Pena Torres’ past academic history and his family members’ history in Canada.

[6] I find the decision to be both capricious and procedurally unfair.

[7] While not an academic star, Mr. Pena Torres’ marks improved as time went by. His study permit applications had been accepted while his marks were poor. It appears illogical to characterize his academic performance as “poor” in the circumstances.

[8] As to his family members, his younger brother is here, and has been here, on a study permit and his mother has accompanied him on a visitor’s visa as she acts as his guardian. There is no indication whatsoever that either has run afoul of the immigration authorities.

[9] The record indicates that Mr. Pena Torres' sister, and her husband, have applied for refugee status. That is the "irregularity" listed. There is no indication in the file as to the basis of the refugee claim.

[10] In his application, Mr. Pena Torres indicated that his sister was in Canada, and studying. There is no evidence whatsoever to indicate that he was personally aware that his sister had filed a refugee claim, which may or may not be *bona fide*.

[11] Although the cases I am about to mention can be distinguished, in the ensemble the underlying principles expressed therein lead to the conclusion that judicial review should be granted.

[12] In *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, [1998] FCJ No 565 (QL) (FCA), it was held that if a federal tribunal is to rely on extrinsic evidence an opportunity must be given to the applicant to respond thereto. The sister's immigration record appears to be extrinsic.

[13] In *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572, the Court of Appeal was dealing with 30-day detention reviews. Mr. Justice Rothstein, as he then was, held that at subsequent reviews the Immigration Division must give clear and compelling reasons for departing from previous decisions.

[14] In *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2007 FC 6, [2007] FCJ No 9 (QL), Mr. Justice Phelan was reviewing a decision of the Immigration and Refugee Board which held that they were reasonable grounds to believe that a particular group to which Mr. Siddiqui belonged was engaged in acts of terrorism. This was a factual finding contrary to decisions of earlier board members based on the same evidentiary record. It was held that the decision breached the principles of fairness in that the decision did not address the contrary earlier findings. This undermines the integrity of board decisions and gives an aura of arbitrariness. I would say capriciousness.

[15] What is different here is that Mr. Pena Torres had interrupted his studies to assist his grandfather who was ill. The plan is that he will be taking over the management of his grandfather's hotel. The other differences are that his last marks were better than the ones submitted with earlier study applications, which had been approved, and his sister's immigration history, which I consider to be extrinsic evidence.

[16] The judicial review of the second decision will be granted. The matter will be referred back to another visa officer for re-determination in light of these reasons.

[17] At the close of hearing, I stated I intended to grant the application. I gave the Minister a delay in which to pose a serious question of general importance which could support an appeal. He replied that there was no such question as the decision is fact specific. I agree.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is granted.

2. The matter is referred back to another visa officer for re-determination.

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

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5952-10
STYLE OF CAUSE:	PENA TORRES v CANADA (MCI)
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 12, 2011
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
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