Federal Court Cour fédérale

Date: 20121109

Docket: IMM-8427-11

Citation: 2012 FC 1311

Ottawa, Ontario, November 9, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

SINA YOHANNES RUSSOM
MILEN TEWELDAI
ZOSKALES TECLEMARIAM

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants seek judicial review of the November 16, 2011, decision of a Citizenship and Immigration Canada (CIC) visa officer ("the Officer"), whereby the Officer refused Ms. Russom's application for a work permit under the live-in caregiver category.

[2] For the reasons that follow, the application for judicial review is allowed.

I. Background

[3] The Applicants are two Canadian citizens, Ms. Milen Teweldai and her husband, Mr. Zoskales Teclemariam, who seek to employ the other Applicant, Ms. Sina Yohannes Russom, as a live-in caregiver for their three young children. Ms. Russom is a citizen of Eritrea whose initial work permit application under the live-in caregiver category was refused on February 13, 2011. The Applicants sought judicial review of the refusal decision, and the Court entered a judgment on consent, sending Ms. Russom's application back for reconsideration by a different visa officer.

[4] On reconsideration, Ms. Russom was convoked for an interview on November 14, 2011, with the Officer at the Canadian Embassy in Khartoum, Sudan. At the interview, Ms. Russom was asked to identify some common symptoms of children's allergic reactions to insect bites and what steps she might take if she were confronted with such a reaction. She was further asked by the Officer to identify a proper method for taking an infant's temperature.

[5] Ms. Russom has worked in Eritrea teaching English as a Junior School Teacher for six months, and as Kindergarten Helper (Caregiver) at a school for over one year. She is currently a nanny for a family in Khartoum, Sudan.

II. Decision under Review

[6] The Officer based his decision primarily on the answers given by Ms. Russom to the specific questions mentioned above at the interview. In response to his first set of questions about insect bites and allergic reactions, Ms. Russom identified "fever and continuous crying" as indicators of an allergic reaction, but stated that she had never encountered such an issue in her experience caring for children. In response to the question about taking an infant's temperature, Ms. Russom stated that she would use a thermometer, but added nothing about the method she might use.

[7] The Officer was not satisfied with any of Ms. Russom's answers. He found that the questions he asked with respect to insect bites, allergic reactions, and temperature-taking constitute very basic knowledge that any live-in caregiver in Canada charged with child care should be able to explain simply and without difficulty. Her inability to do so to his satisfaction led the Officer to conclude that Ms. Russom did not have the skills and knowledge to perform the work sought. The Officer gave no explanation as to the source of the scope of knowledge he expected Ms. Russom to possess.

[8] While the Officer appears to accept that Ms. Russom otherwise meets the eligibility requirements set out in section 112 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("the Regulations"), he relied on section 200(3)(a) of the Regulations to refuse the work permit application.

III. Issues

[9] The determinative issues in this case are:

a) Whether the Officer erred by applying paragraph 200(3)(a) of the Regulations to the live-in caregiver application; and

b) If not, whether the Officer's decision was reasonable.

[10] The Applicants also ask for costs on a solicitor-client basis.

IV. Standard of Review

[11] An administrative decision-maker interpreting its own statute or statutes closely connected to its function, and with which it has particular familiarity, is owed significant deference (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 54; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 at para 28; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 30). The Officer's interpretation of the Regulations is thus reviewable on the standard of reasonableness.

[12] The Officer's decision with respect to the application itself involves questions of mixed fact and law and is also reviewable on the reasonableness standard.

[13] Reasonableness is concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

V. Analysis

A. *Applicability of s. 200(3)(a) of the Regulations to Live-in Caregiver Applications*

[14] The Regulations set out the requirements that applicants must meet in order to qualify for the live-in caregiver category:

Work permits — requirements	Permis de travail : exigences
112. A work permit shall not be issued to a foreign national who seeks to enter Canada as a live-in caregiver unless they	**112.** Le permis de travail ne peut être délivré à l'étranger qui cherche à entrer au Canada au titre de la catégorie des aides familiaux que si l'étranger se conforme aux exigences suivantes :
(*a*) applied for a work permit as a live-in caregiver before entering Canada;	*a*) il a fait une demande de permis de travail à titre d'aide familial avant d'entrer au Canada;
(*b*) have successfully completed a course of study that is equivalent to the successful completion of secondary school in Canada;	*b*) il a terminé avec succès des études d'un niveau équivalent à des études secondaires terminées avec succès au Canada;
(*c*) have the following training or experience, in a field or occupation related to the employment for which the work permit is sought, namely,	*c*) il a la formation ou l'expérience ci-après dans un domaine ou une catégorie d'emploi lié au travail pour lequel le permis de travail est demandé :

(i) successful completion of six months of full-time training in a classroom setting, or	(i) une formation à temps plein de six mois en salle de classe, terminée avec succès,
(ii) completion of one year of full-time paid employment, including at least six months of continuous employment with one employer, in such a field or occupation within the three years immediately before the day on which they submit an application for a work permit;	(ii) une année d'emploi rémunéré à temps plein — dont au moins six mois d'emploi continu auprès d'un même employeur — dans ce domaine ou cette catégorie d'emploi au cours des trois années précédant la date de présentation de la demande de permis de travail;
(*d*) have the ability to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting; and	*d*) il peut parler, lire et écouter l'anglais ou le français suffisamment pour communiquer de façon efficace dans une situation non supervisée;
(*e*) have an employment contract with their future employer.	*e*) il a conclu un contrat d'emploi avec son futur employeur.

[15] In addition, the Regulations set out circumstances in which a visa officer may not issue a work permit. Subsection 200(3) of the Regulations states, in relevant part:

Exceptions	Exceptions
(3) An officer shall not issue a work permit to a foreign national if	(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :
(*a*) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	*a*) l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour

	lequel le permis de travail est demandé;
[…]	[…]
(*d*) the foreign national seeks to enter Canada as a live-in caregiver and the foreign national does not meet the requirements of section 112;	*d*) l'étranger cherche à entrer au Canada et à faire partie de la catégorie des aides familiaux, à moins qu'il ne se conforme à l'article 112;
[…]	[…]

[16] The Applicants submit that a visa officer may only refuse a work permit to an applicant in the live-in caregiver program on the basis of paragraph 200(3)(d) of the Regulations, namely only when they have failed to meet the criteria laid out in section 112. The Respondent posits that all of the grounds set out in subsection 200(3) of the Regulations, including paragraph 200(3)(a), are equally applicable to live-in caregiver applications. There are few cases on this particular point, but this Court's interpretation of subsection 200(3) is more consistent with the Respondent's view.

[17] While the Applicants rely on *Vendiola v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 655, [2003] FCJ No 875, I prefer the approach taken more recently by this Court in *Khela v Canada (Minister of Citizenship and Immigration)*, 2010 FC 134, [2010] FCJ No 161 and *Bondoc v Canada (Minister of Citizenship and Immigration)*, 2008 FC 842, [2008] FCJ No 1063. In both of those cases, paragraph 200(3)(a) was held to apply to work permits in the live-in caregiver category (see *Khela*, above, at paras 8, 17; *Bondoc*, above, at paras 21-24). Additionally, a purposive approach to section 112 of the Regulations leads to the same conclusion, namely that the provisions are intended to ensure that "caregivers have the capacity to adequately perform the

tasks expected of them" (*Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 684, [2006] FCJ No 859 at para 11).

[18] Finally, I note that this Court has found that paragraph 200(3)(e), which excludes individuals who have engaged in unauthorized work or study in Canada from receiving a work permit, applies to applicants in the live-in caregiver category (see *Maxim v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1029, [2012] FCJ No 1113 at para 33). If the Applicants' logic is adopted, visa officers would be precluded from refusing a work permit for a would-be live-in caregiver on the basis of previous actions in contravention of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and of the Regulations. This would yield an unacceptable result.

[19] I find that the entirety of subsection 200(3) applies to applications in the live-in caregiver category, and that the Officer made no error in this regard.

B. *Reasonableness of the Officer's Decision*

[20] As the Respondent points out, the Officer has discretion to weigh the answers given by Ms. Russom in her interview. He does not, however, have unlimited authority to probe the requirements of her potential employment without an objective basis and to rely instead solely upon his own questionable standards. While I do not view the questions put to Ms. Russom as the Applicants do, namely as "irrelevant" considerations, the absence of objective standards against which the Officer assessed Ms. Russom's capacity to perform the work of a caregiver led the

Officer to an unreasonable conclusion (see *Randhawa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1294, [2006] FCJ No 1614).

[21] Given that the Officer appears to have accepted that the requirements for a live-in caregiver work permit under section 112 of the Regulations were met, his unreasonable conclusion under paragraph 200(3)(a) of the Regulations is sufficient to allow the application for judicial review.

C. *Costs*

[22] Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 mandates that no costs shall be awarded in proceedings such as these unless the Court finds there are special reasons to order them. Indeed, costs are not ordinarily awarded in immigration proceedings in this Court, and the threshold for establishing the existence of "special reasons" is high (see *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932, [2011] FCJ No 1156 at para 74; *Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 201, [2011] FCJ No 250 at paras 29-30). I do not find that there are special reasons to justify an order of costs in this case.

VI. Conclusion

[23] The application shall be sent back for re-determination by another officer, who will take these reasons into account.

JUDGMENT

THIS COURT'S JUDGMENT is that application for judicial review is allowed and the matter is sent back for re-determination by another officer.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-8427-11**
STYLE OF CAUSE:	**SINA YOHANNES RUSSOM ET AL v MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**OCTOBER 30, 2012**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**NOVEMBER 9, 2012**

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