Date: 20100223

Docket: IMM-2760-09

Citation: 2010 FC 210

Ottawa, Ontario, February 23, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ZAVIN BOUGHUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the negative decision of a visa officer (Officer), dated May 10, 2009 (Decision), which refused the Applicant's application for a temporary resident visa to Canada.

BACKGROUND

[2] The Applicant originally came to Canada on his mother's application as a dependent and became a permanent resident in June, 1992. Despite his permanent resident status, the Applicant continued his employment overseas.

[3] In September, 1996, an inquiry was held to determine if the Applicant was still a permanent resident because of the amount of time he had spent outside of Canada. The inquiry found that he was still a permanent resident because he maintained his intention to reside in Canada, as demonstrated by his applying for a returning Resident Permit.

[4] However, the Applicant was found inadmissible to Canada upon his attempted return in July, 1999. At this time, an officer wrote a report against the Applicant indicating that he had not met the terms of his residency obligations. The Applicant returned to Syria prior to an inquiry being held with regard to his status in Canada.

[5] The Applicant's mother became sick in 2004. The Applicant sought a Temporary Resident Visa (TRV) to visit her in Canada.

[6] Between May, 2004 and April, 2009 the Applicant applied for a TRV on five occasions. Each application was refused. While making these applications, the Applicant was unaware that he retained permanent resident status and, as a result, was ineligible for a TRV.

[7] In February, 2009, the Applicant was made aware of the questionable status of his permanent residency. The Applicant then signed a voluntary relinquishment of permanent resident status.

[8] The Applicant was advised that he could reapply for a visitor's visa after signing a waiver of appeal with regard to his relinquishment of permanent resident status.

DECISION UNDER REVIEW

[9] The Applicant's application was refused because the Officer was not satisfied that the Applicant would leave Canada at the end of his stay. The grounds for this finding included :

a) His travel history;

b) His immigration status;

c) His family ties in Canada compared to those of his country of residence; and

d) The purpose of his visit.

[10] The Officer's CAIPS notes (Notes) revealed that the purpose of the Applicant's trip was to "go to Cda for a three week visit to see his brother and I presume his mother who also resides in Cda." The Officer noted that neither the Applicant nor his sponsors had a lack of funds. However, the Notes indicated that the Applicant's previous travel had been limited and he had no ties in his home country.

[11] In support of his application, the Applicant provided proof of his finances, letters of support with regard to his mother's illness, and a letter of leave from his employer.

[12] Nonetheless, the Officer determined that there was "limited reason" for the Applicant to return to Syria since he is single, unmarried and has no children. The Notes state that "the issue here is one of bona fides and the intent of the applnt to return to his home country or country of citizenship."

[13] The Officer felt "there was little reason for this former Immigrant (who lost his status) to return to either Syria or Kuwait." As a result, the Officer concluded that the Applicant had not demonstrated he would leave Canada at the end of his stay and refused the Applicant's application.

ISSUES

[14] The Applicant submits the following issues on this application:

1. Did the Officer err by failing to consider all of the evidence provided by the Applicant?
2. Did the Officer err in refusing to interview the Applicant with respect to his application for a TRV?
3. Did the Officer err by failing to consider the goal of family reunification?
4. Did the Officer fetter his discretion with respect to evidence of the Applicant's intention to return to Syria?

STATUTORY PROVISIONS

[15] The following provision of the Act is applicable in these proceedings:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
If sponsor does not meet requirements	Cas de la demande parrainée
(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.	(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage.

[16] The following provision of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) is also applicable in these proceedings:

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	*a*) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs,

or student class;	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; and	*e*) il n'est pas interdit de territoire;
(*f*) meets the requirements of section 30.	*f*) il satisfait aux exigences prévues à l'article 30.

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] The issue of whether the Officer erred by failing to consider all of the Applicant's evidence is a fact-based question. As such, it attracts a standard of reasonableness upon review. See *Dunsmuir*, above, at paragraph 51.

[19] Similarly, reasonableness is the appropriate standard when determining whether the Officer erred in failing to consider the issue of family unification, since this is an issue of fact, discretion and/or policy, as per *Dunsmuir*, above, at paragraph 51.

[20] When reviewing a decision on the standard of reasonableness, the analysis 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* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[21] Whether or not the Officer was required to interview the Applicant is an issue of procedural fairness. Issues of procedural fairness are reviewable on a standard of correctness. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, and *Dunsmuir*, above, at paragraph 60.

[22] Similarly, the determination of whether the Officer fettered his discretion is also an issue of procedural fairness which must be examined in light of the circumstances of the case. If a breach of natural justice or procedural fairness is found, no deference is due to the Officer. See *Kathiravelu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1287, 302 F.T.R. 107 at paragraph 12.

ARGUMENTS

The Applicant

Failure to Consider all Evidence

[23] The Applicant submits that the Decision was made without the consideration of his circumstances. While the Applicant's immigration history was available to the Officer, so too should have been the correspondence between the Applicant and the First Secretary with regard to the standing of the Applicant's status.

[24] Furthermore, the Officer's reasons fail to consider the Applicant's "Voluntary Relinquishment Form," which was included in the package. Citizenship and Immigration Canada's Overseas Processing Manual OP11 (Manual) instructs visa officers to consider all the evidence provided by an applicant in his or her application. Also, section 9 advises officers to determine whether an applicant intends to remain in Canada illegally, claim refugee status, or otherwise disobey his or her admission to Canada.

[25] The Applicant only learned that he retained resident status in early 2009. He subsequently relinquished this status. The Applicant's relinquishment of permanent residence status and his waiver of rights to appeal his loss of status are relevant to a determination of his application. The Applicant's relinquishment of residence status was stated in his application.

[26] The Officer, however, failed to consider this important factor and found that the Applicant had "lost" his permanent resident status. The Applicant contends that the Officer's failure to consider this pertinent factual information, and the Officer's mischaracterization of the facts, make it clear that he failed to consider the totality of the evidence in this case. The Applicant submits that the Officer's obligation to consider his relinquishment is even higher where this issue is directly relevant to the Officer's concerns about the Applicant's ties to his home country.

[27] Moreover, the fact that the Applicant relinquished his residence is enough to rebut the legal presumption that the Applicant is an intending immigrant.

[28] The Officer further erred in failing to consider the Applicant's travel history. This consideration is important when determining whether the Applicant would remain in Canada illegally. Although the record demonstrates that the Applicant has traveled frequently to Kuwait, the Officer failed to consider this in drawing his conclusions on the facts. A similar instance occurred in *Khatoon v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 276, 71 Imm. L.R. (3d) 102 in which Justice Tremblay-Lamer determined that, contrary to what the officer had held, "a trip from Pakistan to Saudi Arabia is international travel."

[29] Moreover, the Officer improperly limited his assessment to the Applicant's immigration history and the constitution of his family. This too is a reviewable error. See, for example, *Stanislavsky v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 835, 237 F.T.R. 27 at paragraph 17.

Interview

[30] While there is no statutory right to an interview with regard to an application for temporary residence status, the Applicant contends that there are some instances in which procedural fairness requires that an applicant be given the opportunity to respond to an officer's concerns. See, for example, the factors considered in *Ali v. Canada (Minister of Citizenship and Immigration)*, 151 F.T.R. 1, [1998] F.C.J. No. 468 at paragraph 28. Furthermore, there have been instances in which this Court has recognized a visa officer's obligation to provide an applicant with a chance to respond to a serious concern. See, for example, *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 471, 63 Imm. L.R. (3d) 157 at paragraph 53.

[31] The Officer erred in failing to interview the Applicant for numerous reasons: (1) the First Secretary had told him that an interview would be held; (2) the complicated nature of his status; and (3) the Applicant had been called to the embassy for what "appeared to be" an interview.

[32] Evidence provided by the Applicant has demonstrated his intention to return by continuing his work overseas after having received resident status in Canada. Moreover, the Applicant did not

pursue a remedy when he learned his residence status was in jeopardy; instead, he returned overseas and continued working for almost 10 years. When the Applicant learned that he still had permanent resident status, he took the necessary action to relinquish his status.

[33] Had the Officer properly understood the basis for the Applicant's application, and if he still questioned the Applicant's intentions, the Applicant should have been permitted to respond to the Officer's concerns. The First Secretary informed the Applicant's counsel that the Applicant could expect to be interviewed or, at the very least, be seen in person, to waive his appeal rights. However, this opportunity was never provided. As a result, the Applicant was unable to respond to the Officer's factual concerns or clarify the factual error upon which the Officer's Decision was based.

Family Reunification

[34] The Applicant's submission letter made it clear that he wanted to enter Canada to visit his mother. Indeed, there was no need for the Officer to "presume" that this is a reason for his visit. Rather, this was the stated purpose and primary reason for the Applicant's attempt to visit, which was supported by a letter from the Applicant's brother with details of his mother's medical condition.

[35] The only mention made of the Applicant's mother in the Decision is what the Applicant characterizes as the Officer's "dismissive remark" made about his mother. Furthermore, the Decision does not consider the Applicant's desire to visit his mother while she is still alive.

[36] Furthermore, the Officer clearly failed to consider section 3 of the Act which is concerned with family reunification. In the case of *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 427, 44 Imm. L.R. (3d) 272, the Court determined that an officer erred in failing to consider paragraph 3(1)(d) of the Act. The Court found that "the applicant stated that his application was clearly to facilitate his reunion in Canada with his spouse and family. In my view, this purpose is compatible with paragraph 3(1)(d) of the Act, and the officer should have considered this factor." Furthermore, the case of *Gupta v. Canada (Minister of Citizenship and Immigration)*, 186 F.T.R. 232, 6 Imm. L.R. (3d) 127 has determined that the Act's goal of family reunification is broad enough to encompass the reuniting in Canada of Canadian citizens and their close relatives from abroad.

[37] The Applicant's motive for a TRV was clear: family reunification. The Applicant wishes to see his elderly mother who is unwell and cannot travel to visit him. The Applicant and his family have been separated for a long time. The Officer erred in failing to consider the impact of this separation and the Applicant's true intentions for visiting Canada.

Fettered Discretion

[38] The Officer placed an excessive amount of focus on the Applicant's ties to his home country to the exclusion of the other evidence and information before the Officer. This uneven assessment is tantamount to a fettering of the Officer's discretion. The case of *Kenig v. Canada (Minister of*

Citizenship and Immigration), 158 F.T.R. 249, [1998] F.C.J. No. 1748 at paragraph 13 held as follows:

> The focus of the Visa Officer on the applicant's ties to Kazakhstan and his failure to effectively take into account even all of the evidence in that regard, essentially to the exclusion of consideration of the other evidence that was before him, amounted to a fettering of discretion that constituted a reviewable error.

[39] Similarly, in the case at hand, the Decision failed to consider all of the Applicant's evidence that demonstrates a genuine intent with regard to remaining in Canada and an urgent need to visit his family. Rather, the Officer put undue emphasis on one factor, to the exclusion of all other compelling evidence, which resulted in a fettering of discretion.

The Respondent

Presumption

[40] A legal presumption exists that a foreign national seeking to enter Canada is presumed to be seeking to immigrate. It is the Applicant's burden to rebut this presumption. Accordingly, anyone who applies for a TRV to enter the country must prove that he or she is not an immigrant and will leave Canada at the end of the authorized stay. See *Danioko v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 479, 292 F.T.R. 1; *Li v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 791, 208 F.T.R. 294.

Evidence

[41] Officers are presumed to consider all of the evidence before them. Furthermore, they are not required to explain why they did not accept each piece of evidence. See *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 and *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, 282 N.R. 394 at paragraph 9.

[42] When considering a TRV, it is important to balance the requirement of fairness with the requirements of the administrative immigration process. The Respondent contends that this process contains "a significantly lower fairness threshold," which includes "a minimal requirement (if any) for reasons." As the Court stated in *Li*, above, at paragraph 50:

> In balancing the factors in Baker, the procedural requirements mandated by the duty of fairness should be relaxed for the processing of applications for student authorizations by visa officers overseas. Therefore, there are no grounds to argue unfairness in this process because a visa officer did not communicate all of her concerns to the applicant, or that she did not accord the applicant an opportunity to respond to those concerns.

[43] In this case, the Officer was aware that the Applicant had previously been a permanent resident of Canada but no longer retained this status. Although the Applicant has argued that the Officer erred by focussing on his "loss" of status rather than his relinquishment of status, the Respondent suggests that this is simply a question of semantics. Moreover, the Applicant is only now focussing on his relinquishment of status and the ramifications thereof and did not make such submissions during his hearing. The fact that the Officer did not interpret the Applicant's loss of status in the way most favourable to the Applicant does not mean the Officer erred.

[44] The Applicant's file shows that the Applicant attempted to retain his status when revocation was threatened in 1996.

[45] The Officer's reasons state that the Applicant has a limited travel history. Thus, the Applicant's argument that his travel history was ignored is not tenable; nor is the Applicant's argument that his travel history is extensive. A review of the Record and the application for the TRV demonstrates the opposite: that the Applicant has made numerous trips to Kuwait. The Notes acknowledge the Applicant's trips to Kuwait.

[46] The Applicant has failed to prove that the Officer ignored any evidence. Rather, the Applicant has suggested that the Officer did not interpret the evidence in a manner more favourable to him.

[47] The Applicant was unable to prove that he would leave Canada at the end of his authorized stay as required by the Act. As such, the Officer's conclusion was reasonable.

Interview

[48] The Applicant has conceded that there is no requirement in the context of a TRV for an official to conduct an interview.

[49] While the Applicant has suggested that there was a refusal to interview him, at no time did the Applicant request an interview. It is impossible for the Officer to have refused an interview that was never requested.

[50] The Respondent submits that the case of *Ogunfowora* is distinguishable from the case at hand. In *Ogunfowora*, above, at paragraph 56, the Court found that "the applicants had no way of knowing that the officer would rely on several factors." In the case at hand, however, the Applicant had been refused a TRV several times before for essentially the same reasons. As a result, the Applicant cannot be said to have been unaware of the previous concerns of past decision-makers. Because of his extensive experience in applying for TRVs, the Applicant should have been aware of the onus on him to convince the Officer of his intention not to remain in Canada. The Respondent contends that "there can be no error in failing to interview someone who was refused a TRV for a fifth time."

Family Reunification

[51] The Respondent submits that the Officer was clearly aware of the Applicant's desire to see his family. However, regardless of the Applicant's motivation, the Officer is obliged to comply with the legal presumption contained in the Act. See *Danioko* at paragraph 15 and *Li* at paragraph 37.

[52] Although family reunification is a goal of the Act, compliance with the Act and the Regulations is a legislative requirement. The Applicant's motivation for visiting Canada is a factor

for consideration, but does not relieve the Applicant of his burden to prove to the Officer his intention to leave Canada at the expiration of his visa. In the case at hand, unlike *Zhang*, there was reason for the Officer to believe that the Applicant would not leave Canada at the end of his authorized stay.

Discretion Not Fettered

[53] The Officer is not required to issue a visa unless the Officer is satisfied the Applicant fulfils the legislative requirements. In this case, the Officer was clearly not satisfied that the legislative conditions were fulfilled.

[54] The Manual instructs Officers not to issue a visa unless they are satisfied that an applicant will leave the country upon its expiration. The Officer believed that the most important factor in this case was the Applicant's ties to Canada as opposed to those in Syria. This led the Officer to believe that the Applicant may not leave to country upon the expiration of a visa.

[55] The Decision made by the Officer is highly discretionary, and it is not the role of the Court to reweigh the evidence.

ANALYSIS

Failure to Consider Totality of Evidence

[56] In his reasons the Officer indicates what he finds determinative. This does not mean that other evidence was ignored. The Officer is not obliged to mention every piece of evidence and, on these facts, the Officer clearly indicates an awareness of the Applicant's previous immigration history and family situation. I do not see the reference to "loss" of status as opposed to "relinquishment" of status as evidence of a material factual error. The Officer is merely saying that the Applicant once had status but now does not. Nor is there evidence that the Officer ignored the Applicant's trips to Kuwait.

[57] In the end, the Applicant has not shown that the Officer ignored evidence. The Applicant is simply disagreeing with what the Officer found determinative and saying that he should have given other factors more weight. The Court cannot intervene with the Decision on this basis. See *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, 212 D.L.R. (4th) 139 at paragraph 11.

Refusing to Interview

[58] Procedural fairness did not require an interview in this case. The Applicant is, in effect, saying that the Officer should have discussed his conclusions with him and given him a chance to bolster his case to make it more persuasive.

[59] The Officer did not have concerns about the case before him. There was evidence that went both ways and which had to be weighed. There is nothing to suggest that material evidence was overlooked.

[60] The Applicant did not request an interview and he has a previous history of dealings on TRV applications. He knew what was required to convince the Officer. The fact that the Officer did not decide the application the way the Applicant would have liked does not mean that material evidence was overlooked or that there was a breach of procedural fairness. The Applicant was given every opportunity in his application to provide persuasive evidence that he would leave Canada at the end of his stay, and the Applicant provided the evidence he wanted to adduce on this point. The fact that the Officer did not agree with the Applicant's position does not mean that there were concerns that required an interview.

[61] The Applicant says that an interview would have given him a chance to clarify the relinquishment issue and to sign the waiver showing he had no intention to stay in Canada. I do not think that either of these factors would have materially assisted the Applicant. The wording of the Decision makes clear what the deciding factors were, and I do not believe that the Officer, by using the word "lost," failed to consider the Applicant's immigration history or failed to understand it in any material way. The Applicant is trying to place undue emphasis on one word that, in the context of the Decision as a whole, is not determinative in the way he alleges.

Failure to Consider the Goal of Family Reunification

[62] The task before the Officer was to decide whether the Applicant would leave Canada at the end of his temporary stay. The Officer clearly states and considers the family re-unification reasons put forward by the Applicant in his visa application. There is nothing to suggest that the Officer failed to consider family re-unification objectives in making the Decision. Once again, the Applicant simply disagrees with the Decision.

Fettering of Discretion

[63] This is simply a disagreement by the Applicant concerning the amount of weight that the Officer placed upon certain factors. It is the Officer's job to weigh competing factors and reach conclusions based upon what he or she finds to be most determinative of the issue in hand. This process does not involve a fettering of discretion.

[64] There is nothing to suggest that any factor was left out of account in this process. The Applicant simply disagrees with the Officer's conclusions.

Conclusions

[65] The Applicant is obviously very disappointed by this Decision and I can well understand why. It is clear to me that a decision in his favour would have been reasonable, but that does not make the Officer's Decision unreasonable. See *Dunsmuir* at paragraph 47.

[66] I suspect that if I had been making this decision myself, I would have granted the TRV but Parliament has given that power to visa officers, not to the judiciary. I cannot interfere unless the Decision falls outside of the acceptable reasonable range enunciated in *Dunsmuir*. I do not think it does and I do not think there is evidence of any breach of procedural fairness.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is denied.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2760-09
STYLE OF CAUSE:	ZAVIN BOUGHUS
	- and -
	MINISTER OF CITIZENSHIP AND IMMIGRATION
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DATED:	FEBRUARY 23, 2010

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