Federal Court  Cour fédérale

Date: 20101207

Docket: IMM-2231-10

Citation: 2010 FC 1230

Ottawa, Ontario, December 7, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

WEN HU ZHOU

Applicant

and

CANADA (MINISTER OF CITIZENSHIP & IMMIGRATION)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Zhou, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, asks the Court to set aside a decision refusing his application for a permanent resident visa as a member of the provincial nominee class.

[2] For the reasons that follow, his application is dismissed.

Background

[3] Mr. Zhou is a Chinese citizen. He applied and was selected by British Columbia as a Provincial Nominee on May 6, 2009. He had arranged employment with Togi Garments Ltd. and submitted his application for permanent residence to the Canadian Embassy in Beijing.

[4] By letter dated November 17, 2009, the visa officer processing the application requested that Mr. Zhou provide additional documentation proving the source of his income and the profitability of the companies where he had been employed. The officer provided a list of documents the applicant was to provide, which included a completed Schedule 4A, a form normally required to be completed by provincial nominees immigrating under the business, entrepreneur, or self-employed categories; however, Mr. Zhou was not immigrating under any of these categories.

[5] Mr. Zhou submitted Schedule 4A but was unable to provide all of the documents requested by the officer. In her decision, the officer wrote that the applicant's failure to adequately account for his net worth made it impossible for her to complete a comprehensive and proper assessment of his admissibility. The basis for the decision reached is summarized in the following passages from the officer's letter, dated February 12, 2010:

> In order for your application to succeed, you must satisfy me that you meet all of the requirements of IRPA and the regulations, including a determination that you are not a member of an inadmissible class of persons described in subsections 34-42. Your failure to adequately account for the origins of your net worth makes it impossible for me to complete a comprehensive and proper assessment of admissibility in your case.
>
> Subsection 16(1) of the *Immigration and Refugee Protection Act* requires that a person who makes an application must answer

> truthfully all questions put to them for the purposes of the examination and must produce all relevant evidence and documents that the officer reasonably requires. You do not meet these requirements because you have not complied with my request for evidence to satisfy me that your personal net worth and income were derived from legal and legitimate sources.
>
> …
>
> Subsection 11(1) of the *Act* provides that a foreign national must, before entering Canada, apply to an officer for a visa or any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.
>
> Based on the information that is available, I am not satisfied that you are not inadmissible and that you meet the requirements of the Act for the reasons explained above. I am therefore refusing your application.

[6] The relevant statutory provisions are reproduced in Annex A.

[7] The applicant challenges this decision on a number of grounds including the reasonableness of the request to submit additional documents, the sufficiency of the reasons provided, the jurisdiction of the officer to refuse his application in light his acceptance as a provincial nominee, and the jurisdiction of the officer to refuse the visa based on ss. 11 and 16 of the Act.

[8] The respondent cited *Chang v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 531 at para 7, and *Anfu v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 395 at paras. 18 and 23, in support of its submission that this Court has "consistently held that a visa officer has both the right and the duty to require an applicant to produce documents which the officer believes are necessary for him or her to consider an application".

[9] I agree with the applicant that care must be taken in relying on these decisions. First, they both involved visa applications under the investor category, unlike the application at hand. Second, and more importantly, both decisions refer and rely upon the 1999 decision of this Court in *Biao v Canada (Minister of Citizenship and Immigration)*, 177 F.T.R. 190 (T.D.), aff'd 2001 FCA 43, which in turn relied on a decision of Justice Rothstein, as he then was, in *Kaur v Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 756 (T.D.). These decisions considered the language of s. 9(3) of the former *Immigration Act*, R.S.C. 1985, c. I-2 which, in relevant part, provided that "every person … shall produce such documentation as may be required by the visa officer for the purpose of establishing that his admission would not be contrary to this Act or the regulations." Section 16(1) of the current Act provides, in relevant part, that an applicant must produce "all relevant evidence and documents that the officer reasonably requires" [emphasis added]. Accordingly, it is no longer the case that an officer has unfettered discretion in demanding documents from an applicant; the request is subject to review if there is an allegation that the decision was based on the failure to provide documents requested where they were not reasonably required.

[10] Notwithstanding the addition of a reasonableness test, I reject the applicant's submission that the officer's request that the applicant submit Schedule 4A and the associated documents was unreasonable. The request for further documentation related to concerns surrounding admissibility and, contrary to the applicant's submission, did not violate s. 15(2) of the Act, which provides that examination of whether a foreign national complies with applicable selection criteria shall be conducted solely on the basis of documents delivered by the province. Although Schedule 4A is

normally used for applicants in the business, entrepreneur, or self-employed class, in this case Schedule 4A was being used as a means to provide information and documents to the officer in order that she could determine whether or not the applicant was inadmissible pursuant to ss. 34 to 42 of the Act, independently of the requirements of the Provincial Nominee Program. The applicant's objection amounts to a focus on form over substance.

[11] The applicant says that the refusal of his application appears to be based on an alleged inadequacy in his explanation as to the origins of funds, but that the origin of funds is neither a selection criteria nor an inadmissibility factor. The applicant says that the negative decision must have been based on inadmissibility considerations but the officer made no specific finding that the applicant was inadmissible; rather the officer stated that an admissibility determination is not possible because of the lack of information.

[12] The applicant says that because the officer did not find him inadmissible, the refusal decision must be set aside because the officer lacked the jurisdiction to refuse the application. He relies of the *obiter* comments of Justice Kelen in *Chen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 41, where he stated, at paragraph 18, that:

> Paragraph 9(1)(a) of the Act provides that the applicant shall be granted permanent resident status because he met the Québec selection criteria as an investor immigration unless found inadmissible. The visa officer did not find the applicant inadmissible; rather, the visa officer said he could not be "satisfied that the applicant is not inadmissible". This is not a finding that the applicant is inadmissible. If the visa officer concluded that Mr. Chen was not truthfully answering questions about his source of funds as required under section 16 of the Act, the visa officer could have found Mr. Chen inadmissible under sections 40 or 41 of the Act. He did not do

> so, and did not have the jurisdiction to deny a permanent resident visa to Mr. Chen under paragraph 9(1)(a) of the Act.

[13] The applicant's reliance on *Chen* and on *Belkacem v Canada (Minister of Citizenship and Immigration)*, 2008 FC 375, as to the jurisdiction of the officer to refuse a visa application absent a finding of inadmissibility is misplaced. Both *Chen* and *Belkacem* involved decisions made by the Province of Quebec under the *Canada–Québec Accord relating to Immigration and Temporary Admission of Aliens*. Section 12(a) of that Accord provides that "Québec has sole responsibility for the selection of immigrants destined to that province and Canada has sole responsibility for the admission of immigrants to that province." Because Québec has sole responsibility for the selection of foreign nationals who intend to reside in that Province, s. 9(1)(a) of the Act applies. It was that provision that was relied on by the Court in both cases as suggesting that the officer had no jurisdiction to deny a visa absent a finding of inadmissibility.

[14] The agreement with British Columbia under which Mr. Zhou was nominated does not give sole responsibility to British Columbia for selection of foreign nationals for immigration. Section 7.1(b) of the *Canada-British Columbia Immigration Agreement* provides that "Canada will have responsibility for … determining selection criteria and selecting foreign nationals, taking into account the role of British Columbia in nominating Provincial Nominees." Because the province does not have sole responsibility to select foreign nationals, s. 9(1) of the Act does not apply. Section 9(1) provides that:

> 9. (1) Where a province has, under a federal-provincial agreement, *sole responsibility for the selection of a foreign national* who intends to reside in that province as a permanent resident, the following provisions apply to that foreign national … [emphasis added]

[15] The last issue raised by the applicant is whether the additional documents the officer sought were "documents that the officer reasonably requires" within the meaning of s. 16(1) of the Act.

[16] To assess whether documents are reasonably required by an officer, one must understand why they are being requested. The applicant asserts that the officer never stated which ground of inadmissibility in ss. 34 to 42 of the Act was of concern and therefore the reasonableness of the request cannot be determined.

[17] What the officer did clearly state to the applicant in the fairness letter was that she was seeking evidence to satisfy her that the applicant's "personal net worth and income were derived from legal and legitimate sources." It is evident that the officer's concerns related to the source of the applicant's funds and that her admissibility concerns related to one or more of criminality, organized criminality, or misrepresentation. On these facts, I do not accept that the officer at this stage of her inquiry was required to specify which particular ground of inadmissibility was of concern. The information sought was clearly relevant to any of the three mentioned grounds and that is sufficient to establish that it was reasonably required.

[18] I agree with the applicant that asking the applicant to provide documents from previous employers showing the employers' profitability may be an unreasonable request given that the applicant was a mere employee and not a shareholder or director of those businesses. However, the applicant provided an explanation in each case where he was unable to provide a document and the officer appears to have considered and accepted those explanations. The officer writes:

> I have taken into account your explanation that some of the documents are no longer available due to the passage of time and to the fact that the companies operating from 1994 to 2000 have closed down, yet the complete absence of any third party, reliable financial evidence of the origins of your income during those years remains a concern. Furthermore, you have not provided satisfactory evidence of the regular accumulation of your personal savings as required.

In any event, the denial of the visa was not based on the refusal or inability to provide this information.

[19] The officer was concerned about the origin of the income from that period because the applicant asserted that in 2000 he established a company with a total personal investment of RMB400,000. This company's assets have increased significantly and his share is now valued at more than RMB2,000,000.

[20] The applicant stated that he earned approximately RMB700,000 between 1994 and 1999 from his employment with Gaoyou Nanjiao Materials Supplying and Marketing Company and RMB650,000 between 1998 and 2000 from his employment with Gaoyou Tianyu Packaging Factory.

[21] The applicant was asked to provide documents showing the accumulation of his personal savings from 1978 to the present. In response he wrote:

> Because I was used to consume in cash on most occasions, I only have a few current accounts. Furthermore, the computer system of local bank in Gaoyou City, P.R. China is keeping updating, so the transaction record of the past cannot be inquired. Therefore, I can only provide the history record of the following three current accounts. [*sic*]

None of the information presented pre-dates 2009.

[22] The applicant submits that the officer acted unreasonably in failing to consider the evidence presented and the explanations offered when the documents requested were not available. In my view, the applicant's disagreement is with the assessment of the weight the officer gave to the information that he did provide. The applicant was effectively asking the officer to accept his word that he had earned and saved the necessary funds from his employment in the years preceding the incorporation of his business in order to invest in his business, without offering any objective support for that assertion. Given the little information the applicant was able to provide to the officer, the decision that the officer reached, that she was unable to satisfy herself that his income and assets were derived from legal and legitimate sources, cannot be said to be unreasonable.

[23] For these reasons the application must be dismissed.

[24] The applicant proposes three questions for certification. The respondent opposes certification of any of them.

[25] The first two questions proposed are:

1. Does a visa officer have jurisdiction to refuse an accepted provincial nominee under paragraph 9(1)(a) of the *Immigration and Refugee Protection Act* in the absence of an admissibility finding?

2. Does paragraph 9(1)(a) create an exception to the power of a visa officer to refuse an accepted provincial nominee under ss. 11(1) and 16(1) of *Immigration and Refugee Protection Act*?

[26] Having found that s. 9(1) of the Act does not apply to the facts of this case because British Columbia does not have sole authority to select immigrants, the questions posed would not be dispositive of an appeal.

[27] The third question proposed is:

3. Is it reasonable for a visa officer to require a skilled worker or non-business category applicant to obtain from his former employer business documents such as financial statements and tax statements to prove the profitability of the employer's company in relation to the applicant's source of funds?

[28] The response to the proposed question would only be dispositive of an appeal in this case if the officer had refused the visa because the applicant had failed to provide the information referenced in the question. In this case, the officer's decision was not based on the failure to provide that information but the lack of other information showing the applicant's accumulation of wealth; the question would thus not be dispositive of an appeal.

[29] As the questions would not be dispositive of an appeal, they are not proper questions to certify: *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

ANNEX A

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Loi sur l'immigration et la protection des réfugiés, C.S. 2001, ch. 27

9. (1) Where a province has, under a federal-provincial agreement, sole responsibility for the selection of a foreign national who intends to reside in that province as a permanent resident, the following provisions apply to that foreign national, unless the agreement provides otherwise:	9. (1) Lorsqu'une province a, sous le régime d'un accord, la responsabilité exclusive de sélection de l'étranger qui cherche à s'y établir comme résident permanent, les règles suivantes s'appliquent à celui-ci sauf stipulation contraire de l'accord :
(a) the foreign national, unless inadmissible under this Act, shall be granted permanent resident status if the foreign national meets the province's selection criteria;	a) le statut de résident permanent est octroyé à l'étranger qui répond aux critères de sélection de la province et n'est pas interdit de territoire;
...	...
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.
...	...
16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	16. (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2231-10
STYLE OF CAUSE:	WEN HU ZHOU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 24, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	December 7, 2010

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