Federal Court  Cour fédérale

Date: 20121029

Docket: IMM-1881-12

Citation: 2012 FC 1239

Ottawa, Ontario, this 29th day of October 2012

Present: The Honourable Mr. Justice Pinard

BETWEEN:

XIE, Zhenchuan

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") of a decision by a visa officer (the "officer") at the Embassy of Canada in Beijing, China. In the decision, the officer refused the applicant's application for a work permit in Canada.

[2] The applicant is a 26-year-old citizen of China.

[3] From September 2003 to July 2006 the applicant studied culinary art at the high school level. From July 2007 to present he has worked as a "Third Wok Chef" in Cantonese cuisine in Guangzhou, China.

[4] The applicant's father, mother and only sibling, a sister, all live in Guangzhou.

[5] On October 24, 2011 the applicant submitted a work permit application at the Embassy of Canada in Beijing. The applicant stated he had a job offer from a Canadian Chinese restaurant located in Enderby, British Columbia.

[6] The applicant submitted a declaration along with his application in which he explained why he would not remain in Canada after his authorized stay. He also stated he is the heir to a four-storey building owned by his father presently worth approximately 3 million RMB. The applicant submitted a declaration from his father to this effect.

* * * * * * * *

[7] The officer communicated her decision in a standard form letter dated January 5, 2012. The officer stated she was not satisfied that the applicant would leave Canada at the end of his authorized stay because of the applicant's travel history, current employment situation, personal assets and financial status.

[8] The officer stated four reasons for her decision in the Global Case Management System ("GCMS") notes. First, the officer found that because the applicant has a medium occupational level in his field and a high school level of education, it would likely be easy to re-staff the applicant's current position in China. Second, the officer found that the documents submitted by the applicant showed "modest savings" and two "modest-size properties" under his father's name and did not demonstrate the applicant was sufficiently established in China. Third, the officer was not satisfied that the applicant had a strong incentive to depart Canada at the end of his authorized stay because the officer researched job postings for cooks in Guangdong, the Chinese province in which the applicant resides, and found that the applicant's prospective employment in Canada offered a higher income than what was being offered to cooks in Guangdong. Finally, the officer found that the applicant's lack of any travel outside of China, along with his strong family ties to Canada and modest income did not add weight to his establishment in China.

[9] The officer noted that she did not consider interviewing the applicant because there were no concerns beyond the evidence submitted that should be put to the applicant.

[10] The issues raised by the present application for judicial review are the following:

1. Did the officer err in finding that the applicant's current position in China would be easy to re-staff?

2. Did the officer err in her analysis of the applicant's financial establishment and the incentive to work in Canada?

3. Did the officer err in her analysis of the applicant's travel history?

4. Did the officer breach the duty of procedural fairness?

5. Did the officer give proper weight to the applicant's declaration?

[11] The decision to issue or refuse a temporary resident visa involves a determination of mixed fact and law and it is to be reviewed on the reasonableness standard. Such decisions are generally afforded deference by this Court (*Obeng v. The Minister of Citizenship and Immigration*, 2008 FC 754, 330 F.T.R. 196 at para 21; *Ngalamulume v. The Minister of Citizenship and Immigration*, 2009 FC 1268, 362 F.T.R. 42 at paras 15-16; *Huang v. The Minister of Citizenship and Immigration*, 2012 FC 145 at para 4 [*Huang*]).

[12] However, the issue of whether the officer had the obligation to interview the applicant is an issue of procedural fairness that should be assessed on the correctness standard (*Bravo v. The Minister of Citizenship and Immigration*, 2010 CF 411 at para 9; *Huang* at para 4).

* * * * * * * *

1. Did the officer err in finding that the applicant's current position in China would be easy to re-staff?

[13] In my opinion, the officer analyzed the facility with which the applicant's position will be replaced in China for the purpose of determining whether the applicant had demonstrated he was well established in China. The officer subsequently considered various factors, including the applicant's demonstrated establishment in China, to analyze the fundamental issue of whether the applicant would stay in Canada illegally after his authorized stay. Therefore, the officer did not have to explain how the Chinese employer's ability to re-staff the position related to whether the applicant would leave Canada at the end of his authorized stay.

[14] I agree with the respondent that *Huang* is similar to the present case. The officer in *Huang* also considered whether the applicant could be easily replaced in his job as a cook in China. This consideration was one of many factors that supported the officer's finding that the applicant had not demonstrated he was well established in China. This Court did not find the officer's analysis on this point to be unreasonable. Similarly, I am of the view that the officer in the present case did not err in finding that the applicant's position in China would be easy to re-staff.

2. Did the officer err in her analysis of the applicant's financial establishment and the incentive to work in Canada?

[15] Although a financial incentive, on its own, cannot justify the refusal of a work permit, it may be considered along with other evidence regarding the applicant's establishment in China (see *Huang* at para 9).

[16] I agree with the respondent that the officer did not err in her analysis of the applicant's economic situation. The officer did not base her analysis solely on the financial incentive for the applicant to work in Canada. She also considered the evidence of the applicant's financial establishment in China and evidence concerning his career ties to China in determining whether he was established in China. Therefore, in my opinion, the officer did not commit a reviewable error in this regard.

3. Did the officer err in her analysis of the applicant's travel history?

[17] The officer in the present case considered whether the applicant's international travel history could support a finding of establishment in China. The officer did not draw an adverse inference from the travel history and thus committed no reviewable error (see *Huang* at para 11).

4. Did the officer breach the duty of procedural fairness?

[18] First, this Court's decision in *Sekhon v. The Minister of Citizenship and Immigration*, 2008 FC 561, the sole authority cited by the applicant on this issue, does not convince me that it was incumbent on the officer to give the applicant an opportunity to contest the officer's findings that the applicant's savings were modest and that the applicant's father's properties were of modest-size. In contrast to *Sekhon*, the officer in the present case did not doubt that the applicant was genuinely interested in working as a cook in Canada.

[19] Second, the authority cited by the applicant does not convince me that the officer's finding of a financial incentive to remain in Canada illegally was a generalization to which the applicant was entitled to respond. *Bonilla v. The Minister of Citizenship and Immigration*, 2007 FC 20, relied upon by the applicant, is distinct in my view because the generalization made in that case was a broad stereotype, while the officer's opinion in the present case, that there is a financial incentive for the applicant to remain in Canada, is based on evidence of the salary differential.

[20] Regarding the third procedural fairness issue raised by the applicant, the case law teaches that generally, where an officer has extrinsic information of which the applicant is unaware, the applicant should be given the opportunity to disabuse the officer of any concerns arising from that

evidence (*Huang* at para 7; *Gu v. The Minister of Citizenship and Immigration*, 2010 FC 522 at paras 23 to 25). In *Huang*, this Court found that the applicant was not entitled to an interview because the officer relied only on materials submitted by, or known to, the applicant.

[21] In the present case, the officer relied on job postings for cooks in the applicant's province and compared this information with the salary offered by the applicant's prospective employer in Canada. I believe the applicant would have likely been aware of the range of salaries for cooks in his province. Therefore, no reviewable error was made by the officer by failing to give the applicant the opportunity to respond to this evidence.

[22] Regarding the fourth procedural fairness issue raised by the applicant, the authority relied upon by the applicant does not convince me that, because the officer did not believe the applicant would leave Canada at the end of his authorized stay, the applicant was entitled to an interview. The authority cited by the applicant does not demonstrate that these circumstances give rise to an entitlement to an interview.

5. Did the officer give proper weight to the applicant's declaration?

[23] Finally, the applicant argues that the officer ignored the declaration he filed with his work permit application.

[24] The applicant relies on Justice Martineau's decisions in *Cao v. Minister of Citizenship and Immigration*, 2010 FC 941 [*Cao*] and *Huang*, above. He argues that the officer in the present case

had a duty to view the statements in the declaration the applicant filed in support of his work permit application in light of the totality of the evidence and the applicant's personal circumstances.

[25] The applicant submits in his oral pleadings that such declarations are a means for the applicant to convey considerations to the officer which can not be communicated in the work permit application form. Relying on *Cao* and *Huang*, the applicant submits that this Court has found such declarations are not "banal."

[26] The respondent admits in oral pleadings that the officer's decision does not refer to statements the applicant made in his declaration. However, the respondent argues that based on this Court's guidance in *Cao* and *Huang*, the officer did not have a duty to do so. The respondent submits that the officer's statement in her affidavit that she considered all of the evidence put forth by the applicant is consistent with the burden imposed on officers in the case law.

[27] I agree with the applicant that the officer's decision in this case does not comply with Justice Martineau's guidance in *Cao* and *Huang*.

[28] The applicant in *Cao* was also a Chinese citizen who was offered employment as a cook in a Chinese restaurant in Canada. Like the declaration before the officer in the present case, the applicant in *Cao* had submitted a declaration along with his work permit application that directly addressed the question of illegally overstaying a temporary work permit. As part of his decision to allow the application for judicial review in *Cao*, Justice Martineau stated the following regarding how an officer must weigh such a declaration:

> [13] The decision to submit the applicant's declaration is not a banal gesture. The declaration is a clear statement that the applicant understands the consequences of overstaying his welcome in Canada, and for this reason, it will not happen. It cannot be presumed to be true, as the policy considerations of such a blanket approach would be disastrous: every applicant would simply submit a similar declaration in order to "prove" that he would not overstay his temporary permit. However, the statements made in this declaration must be weighed by the officer in light of the totality of the evidence and the personal circumstances of the applicant.
>
> [Emphasis added.]

[29] In *Huang*, Justice Martineau repeated this guidance and concluded that the officer in that case had committed no reviewable error in the manner the officer dealt with the declaration:

> [13] The Court has recognized that declarations of this sort, though not banal, cannot be presumed to be true and must be viewed in light of the totality of the evidence and the personal circumstances of the applicant; viewing them otherwise would amount to a policy where a declaration would be all that was required to prove that an applicant would not overstay his permit (*Cao*, above, at para 13). In the CAIPS notes, the Visa Officer acknowledged the applicant's statements, and determined that "these declarations however are not disinterested and could not be forced upon him". This is not an unreasonable inference in the Court's opinion.
>
> [Emphasis added.]

[30] More generally, a court will be reluctant to defer to an administrative decision-maker's decision where the reasons consider in detail the evidence supporting the decision but do not refer to important evidence pointing to a different conclusion:

> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question

> to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
>
> [Emphasis added.]
>
> (stated by Justice Evans in *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 1425 at paragraph 17 [*Cepeda-Gutierrez*], and reiterated by the Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 60)

[31] In his declaration, the applicant stated that he would obey Canadian law and regulations and leave the country before his work permit expires. He stated that his prospective employer in Canada will pay for his return ticket to China only if the applicant leaves Canada before the expiry of his work permit. He declared that he understood that overstaying his work permit could result in limiting his opportunities to travel internationally in the future, as well as limiting the opportunities of his family members, and as a result he would never stay in Canada illegally. The applicant stated he was very close with his mother, father and sister in China, as well as his girlfriend, and he did not want to be separated from his family or his girlfriend on a long term basis.

[32] In contrast to *Huang*, the officer's GCMS notes in the case at bar made no acknowledgement of the statements in the applicant's declaration. For instance, the officer did not acknowledge the applicant's close personal ties in China and the other reasons for why the applicant would return to China before his work permit expires.

[33] I note that the officer stated in her affidavit that she considered all the evidence put forth by the applicant and that she stated in her cover letter for the decision that she had carefully reviewed all the documentation in the application. The officer did not make any such statement in the GCMS notes. I am of the opinion that a blanket statement of having considered all the evidence does not suffice to meet the burden on the officer as established in *Huang* and *Cao* in dealing with a declaration in a work permit application. In her decision the officer did not directly weigh the statements in the declarations against the other evidence, for example by acknowledging the statements in a manner like the officer did in *Huang*, at para 13.

[34] Moreover, the officer in the present case considered in detail the evidence supporting her decision, namely the employer's ability to re-staff the applicant's position in China, the applicant's financial establishment in China and the applicant's incentive to work in Canada. Yet the officer failed to refer specifically to the applicant's declaration, which was important and direct evidence pointing to the conclusion that the applicant would leave Canada at the end of his authorized stay. In these circumstances, based on this Court's guidance in *Cepeda-Gutierrez* at paragraph 17, it is more easily open to this Court to infer that the officer committed a reviewable error by failing to directly refer to the statements in the declaration.

[35] Therefore, in my view the officer committed a reviewable error by failing to weigh the applicant's declarations in light of the totality of the evidence and the personal circumstances of the applicant.

* * * * * * * *

[36] For the above-mentioned reasons, this application for judicial review is allowed and the matter is referred back to a different visa officer for reconsideration.

[37] I agree with counsel for the parties that this is not a matter for certification.

.

JUDGMENT

The applicant's application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is allowed. The decision by a visa officer at the Embassy of Canada in Beijing, China, is set aside and the matter is sent back for redetermination by a different visa officer.

"Yvon Pinard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1881-12
STYLE OF CAUSE:	XIE, Zhenchuan v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 2, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	October 29, 2012

APPEARANCES:

Me Jean-François Bertrand	FOR THE APPLICANT
Me Émilie Tremblay	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bertrand, Deslauriers Avocats Inc. Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT