Foreign worker sent home after using old work permit

Worker's failure to demonstrate intention to return home results in exclusion order

BACKGROUND

FOREIGN workers who want to come to Canada to fill a need in the labour market must have a work permit relating to the specific jobs in which they intend to work. Work permits apply to specific jobs, so it doesn't mean a foreign worker who's been accepted can simply move to other work if things don't work out. In particular, a foreign worker who leaves employment in Canada and goes back to his home country can't return to Canada expecting to work in a different job on the same work permit, even if it's still valid. In such circumstances, there may be a question of whether the foreign worker intends to return home once the work permit expires — especially if the worker makes comments raising such suspicions.

MUST AN APPLICANT for a work permit demonstrate that he has the intention and ability to return to his country of residency after the expiry of his work permit? Recently, in *Barua v. Canada (Minister of Public Safety and Emergency Preparedness)* the Federal Court of Canada had to decide that the answer to that question is yes.

Rajib Barua, a citizen of Bangladesh, first came to Canada in 2004 as a student and recently held a work permit. However, he left his job at a Petro Canada gas station in British Columbia and returned to Bangladesh to get married. He then returned to Canada and used his still valid work permit to re-enter, even though he was no longer employed. He subsequently obtained an offer of employment at another Petro Canada station in the Yukon and attended at the port of entry to apply for a new work permit. He was interviewed by two Canada Border Services Agency (CBSA) officers who recommended that he be excluded from Canada based on concerns that he would not leave Canada upon the expiry of his work permit.

The first officer who interviewed Barua set out his account in a declaration filed as part of the court record. According to that officer, Barua admitted using his work permit to enter Canada, knowing there was no job to support it. Further, Barua stated that he intended to reside permanently in Canada and he would not return to Bangladesh even if a return ticket were purchased for him, as it would be harder for him to find employment there and he had limited resources. The second interviewing officer confirmed the same information and an exclusion order was issued pursuant to the Immigration and Refugee Protection Act (IRPA). Section 20(1)(a) of the IRPA requires that a foreign national who seeks to enter or remain in Canada with the intention of becoming a permanent resident must be in possession of a visa to that effect. Clearly that was not the case with Barua

Further, s. 41(a) of the IRPA makes a foreign national "inadmissible for committing any act or omission which contravenes directly or indirectly a provision of this act." The examining officer arrested Barua on the basis that he was unlikely to appear voluntarily for removal.

Barua argued that the primary issue was whether the officers properly considered the effect of s. 22(2) of the IRPA, which allows people who intend to permanently immigrate to Canada to nevertheless become temporary residents, so long as they also intend to abide by the law respecting temporary entry. According to Barua, the exclusion order should not have been issued because there was no evidence either examining officer considered the question of dual intent.

Worker had years of compliance

Further, Barua argued that, although he intended to permanently reside in Canada, that was possible in the future once he had complied with all the requirements of the IRPA. He contended that he was attending at the port of entry precisely to obtain a valid work permit and he had obeyed all the rules for nine years before the exclusion order. He argued that it was unreasonable for the examining officers not to consider his favourable history of compliance, which far outweighed any of the comments he made after he was refused entry to Canada.

Barua relied on *Sibomana v. Canada (Citizenship and Immigration)*, where the court allowed an application for judicial review on similar facts. Barua noted that his history of compliance was longer than that of the applicants in *Sibomana*. Also, as in *Sibomana*, he said that the officer should have relied upon s. 22 of the IRPA and should have considered his dual intent rather than issue an exclusion order under s. 20(1)(a) of that legislation.

The Minister of Public Safety and Emergency Preparedness noted that only the exclusion order had been challenged for judicial review and the decision to deny the work permit was not at issue. The minister also noted that Barua was given an opportunity to withdraw his application to enter Canada but he instead said to the officers at the interview that he intended to remain in Canada permanently. Further, the matter had to be analyzed in context: Barua had re-entered Canada with his previous work permit knowing that the job associated with it was no longer available, and he told the examining officers that he was travelling alone but then identified a friend travelling with him. These facts raised concerns about Barua's honesty. Therefore, the decision to issue an exclusion order was reasonable and well within the range of acceptable and possible outcomes. It was open to the officers to rely on the applicant's statements that he would not leave Canada. Last, the minister said that the officers' notes were made contemporaneously with the event, while the applicant's affidavits presented in court were only sworn after he was refused entry, and that was a relevant fact for the court to consider, as was the case in the 2014 decision in *Muthui v. Canada (Citizenship and Immigration)*.

The court noted that established jurisprudence is that the decision of an officer should not be interfered with if it is intelligible, transparent, justifiable, and falls within the range of possible, acceptable outcomes that are defensible in respect to the facts and the law. The court can neither reweigh the evidence that was before the officers, nor substitute its own view of a preferable outcome.

The court took issue with Barua's affidavits, which provided further evidence that was not before the officers at the time the decision was made concerning his exclusion order. The court relied on the extensive jurisprudence — including the 2012 case of *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)* — holding that the gener-

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al rule is that the evidence record for the purposes of a judicial review application is restricted to that which was before the decision maker. Although there are some exceptions to this rule, none applied to the present case. Accordingly, any additional evidence filed with the court subsequent to the date of the decision to issue the exclusion order was not to be considered. The only exception made by the court was to allow some of Barua's evidence that was directed as to what he said at the interview because it was purportedly before the decision maker. However, where the evidence of the applicant conflicted with the notes of the two officers, the court preferred the notes because they were recorded contemporaneously.

Worker expressed intention to stay after expiry of work permit

The court also disagreed with Barua's argument that his factual circumstances were identical to those in *Sibomana*. In that case, the applicants had sought entry on a temporary work permit. However, unlike Barua, they had stated that although they considered the possibility of obtaining permanent resident status, they intended to leave the country when their temporary status expired. It was in view of that express intention to leave the country that the court determined in *Sibomana* that the decision to issue an exclusion order could not be justified or maintained under s. 20(1)(a) of the IRPA, as that paragraph applies only to entry to become a permanent resident. Accordingly, that exclusion order did not fall within the range of possible, acceptable outcomes defensible in respect of the facts and law.

However, in Barua's case, the record before the court clearly showed that he had no intention to leave the country upon expiry of his temporary work permit. The officers' notes reflected that conversation with him. Therefore, it could hardly be said that Barua had the same intention as the applicants in *Sibomana*. If anything, the officers' notes showed that Barua's intentions were to enter and remain in Canada permanently, and therefore issuance of the exclusion order was appropriate and reasonable.

The fact that Barua had re-entered Canada with his previous work permit, knowing it was no longer supported by a job, and the fact that he said he was travelling alone when the opposite was true, in all likelihood heightened the officers' concerns about his intentions. The officers' notes stated that the applicant had been dishonest during examination, withheld information, and the had been allowed the opportunity to withdraw his application for entry.

The court held that the reasons to issue the exclusion order were reasonable in the circumstances and they were intelligible, transparent, justifiable, and within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

Had the applicant not attempted to secure a new work permit, his situation would have been very different and the range of his options much broader. Instead, his insistence to pursue things on his own resulted in his exclusion from Canada. Applicants for work permits should be aware that misstating their intentions can result in serious consequences.

For more information see:

- *Barua v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 CarswellNat 252 (F.C.).
- *Sibomana v. Canada (Citizenship and Immigration)*, 2012 CarswellNat 3170 (F.C.).
- *Muthui v. Canada (Citizenship and Immigration)*, 2014 CarswellNat 200 (F.C.).
- *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 CarswellNat 126 (F.C.A.).

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