

Federal Court



Cour fédérale

Date: 20091201

Docket: IMM-1611-09

Docket: IMM-1612-09

Citation: 2009 FC 1229

Ottawa, Ontario, December 1, 2009

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**SELVAN RENGASAMY
KUMARENSAN RENGASAMY**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Selvan Rengasamy and Kumaresan Rengasamy are brothers, each with a wife and children in India. They applied for work permits at the Canadian Embassy in New Delhi, India. A visa officer turned them down, primarily because he was not satisfied that they would return to India when their permits expired.

[2] The applicants argue that the officer treated them unfairly by not giving them a chance to respond to the officer's concerns, and by refusing their applications simply because they would have a financial incentive to stay in Canada beyond the duration of their permits. They ask me to set aside the officer's decision and order another officer to reconsider their applications.

[3] I agree that the officer erred and will grant this application for judicial review. There are two issues:

1. Were the applicants treated unfairly?
2. Was the decision reasonable?

II. Factual Background

[4] The applicants currently work as waiters and cook's assistants at a hotel in India. They provided letters from the director of the hotel indicating that they had experience in their positions. They both received offers to work as kitchen helpers at a Calgary restaurant, and submitted employment contracts indicating that they would be paid \$10.42 an hour and provided accommodation up to \$300 a month. They also supplied certificates showing that they had studied English, and forms indicating that they both had wives and children who would not be accompanying them to Canada.

III. The Decision

[5] In fact, two officers reviewed the applicants' materials.

[6] The first officer was concerned that the applicants' reference letters did not identify the signatory. The second officer noted that the letters did not look professional because they had computer-generated letterhead, contained little information, used poor English, and used different fonts.

[7] The officers also noted the large discrepancy between what the applicants were currently earning in India and their prospective wages in Canada. They concluded that the applicants did not have sufficient incentive to return to India at the end of their terms.

[8] The first officer stated:

Given the difference in salary, it is highly likely that he would prefer to bear the hardships of separation with his family than come back to work hard at the same position for much less salary.

[9] The second officer concurred:

On balance, I am not satisfied that [the applicant] would not bear the hardship of separation from his family in India and remain in Canada by any means in order to take advantage of better socio-economic opportunities in Canada. On balance, I am not satisfied that [the applicant] would be a genuine temporary resident in Canada, nor that he would depart Canada at the end of an authorized stay, even if there were no legal means of remaining.

1. *Were the applicants treated unfairly?*

[10] The applicants submit that the officers had a duty to give them a chance to address the concerns about the authenticity of their reference letters.

[11] Generally speaking, officers have a duty to allow applicants to make submissions in respect of any extrinsic materials on which the officers rely. In addition, in my view, officers have a duty to give applicants a chance to respond to concerns that amount to allegations of misrepresentation or other serious misconduct (see, e.g., *Cornea v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 972; *Ahmed v. Canada (Solicitor General)*, 2005 FC 1111).

[12] Here, the officers found that the applicants' letters should be given little weight. True, there was some concern about the authenticity of the letters, but the main conclusion was that the letters were "low quality" and "not professional". In any case, the officer's characterization of the letters was not the main reason for denying the work permits. In the circumstances, I do not believe the officers had a duty to give the applicants a chance to address the point.

2. *Was the decision reasonable?*

[13] The respondent argues that the officer was entitled to infer from the vast differential between the applicants' wages in India and their prospective earnings in Canada that the applicants would have a powerful incentive to overstay their work permits.

[14] Obviously, persons who apply for temporary work permits in Canada are doing so because they can earn more money here than at home. In that sense, anyone who seeks or is granted a

temporary work permit will have a financial incentive to stay in Canada beyond the specified term. Accordingly, a financial incentive to remain in Canada cannot, on its own, justify refusing an application. Otherwise, no application could succeed. As Justice Sean Harrington pointed out in similar circumstances, an officer's decision will be unreasonable where it "relied on the very factor which would induce someone to come here temporarily in the first place as the main reason for keeping that person out" (*Dhanoa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 729).

[15] The Minister submits that the burden is on the applicants to provide evidence showing that they will return home when their permits expire (*Immigration and Refugee Protection Regulations*, SOR 2002/227, s 179(b)). Here, the applicants submitted evidence of their significant family connections in India where each has a parent, a spouse and young children. They have only one distant cousin in Canada. The Minister argues that the applicants' evidence of family ties in India is thin and, therefore, that the applicants did not discharge their burden of proof. The Minister suggests that the applicants could have supplemented their applications by giving more information about the quality of their family relationships.

[16] However, I note that the officer expressed the burden of proof on the applicants differently from the Minister. The officer stated, in effect, that the applicants had the burden of proving that the personal hardship of being separated from their families indefinitely would outweigh the financial benefits of remaining in Canada. In other words, they had to show that their families meant more to them than \$10.43/hour.

[17] I believe the officers misstated of the onus on the applicants. In turn, this caused them to discount unreasonably the significance of the applicants' family ties in India and, therefore, the evidence supporting their undertakings to return to India when their permits expire. As a result, the officers' decision was unreasonable.

[18] Accordingly, I would allow these applications for judicial review and order another officer to re-assess the applications for work permits. No question of general importance arises.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review is allowed. The matter is referred back to another officer for reconsideration;
2. No questions of general importance are stated.

“James W. O’Reilly”

Judge

Annex "A"

Immigration and Refugee Protection Regulations, SOR 2002/227

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Issuance

Délivrance

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 :

[...]

...

(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;

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1611-09 and IMM-1612-09

STYLE OF CAUSE: SELVAN RENGASAMY v. MCI
KUMARESAN RENGASAMY v. MCI

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: November 18, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: December 1, 2009

APPEARANCES:

G. Michael Sherritt FOR THE APPLICANTS

Rick Garvin FOR THE RESPONDENT

SOLICITORS OF RECORD:

SHERRITT GREENE FOR THE APPLICANTS
Barristers & Solicitors
Calgary, Alberta

JOHN SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada