Federal Court		Cour fédérale

Date: 20100120

Docket: IMM-2980-09

Citation: 2010 FC 54

Ottawa, Ontario, January 20, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

RANGA JEEWANTHA WIJESINGHE

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a visa officer in Sri Lanka dated June 16, 2009 denying the applicant's application for a work permit pursuant to subsection 200 (1) of the *Immigration and Refugee Protection Regulations* (IRPR) S.O.R./2002-227 because the applicant did not satisfy the visa officer that he would return to his native Sri Lanka at the conclusion of his stay.

FACTS

Background

[2] The twenty-six (26) year old applicant is a citizen of Sri Lanka. The applicant has been employed as a cook for about two years at the Saketha Medura Baquet Hall at the time of his most recent application. The applicant completed his O and A Levels of secondary school education and a four year diploma in Hotel Management. The applicant states that he is fluent in English.

[3] On May 2, 2008 the applicant made his first application for a work permit. The applicant obtained a positive Labour Market Opinion which confirmed an offer of employment from Doncan Restaurants Inc., also known as Denny's Restaurant, located in Calgary, Alberta. The applicant signed a contract of employment as a cook with Denny's Restaurant for $12 an hour for 40 hours a week. The visa officer, in considering the work permit application, was not satisfied that the applicant was qualified to work in Canada as a cook and denied his application on September 8, 2008.

[4] The applicant disagreed with the first refusal but did not challenge it. The applicant states that the first visa officer based its views on the fact the applicant "was functioning as a *Commis II*" [*Commis* is the French term for a junior cook who works in a specific station and trusted to take care of the station's tools], and not as a "cook" at the time of the application.

[5] The applicant obtained a new labour market opinion on March 11, 2009 which confirmed an offer of employment from the R&A Restaurant, also known as the Copper Kettle, located in Regina, Saskatchewan. The applicant signed a contract of employment as a "Kitchen helper" with the Copper Kettle on November 24, 2008. The Copper Kettle agreed to employ the applicant at a wage of $10.50 an hour for 44 hours a week. The applicant applied for a second work permit on March 29, 2009 which was denied by a second visa officer on June 16, 2009.

Decision under review

[6] The applicant explained he was applying for a "Kitchen helper" position to allow him time on the job to develop into a full time cook. The applicant stated his intention to return to Sri Lanka at the conclusion of his authorized stay. The applicant submitted that he had "numerous options" to apply for permanent residence at the conclusion of his authorized stay.

[7] The visa officer was not satisfied that the applicant was a genuine temporary worker and provided the following reasons:

> PA has been following the path of progressively higher position[s] in the culinary field since 2002. He would now leave all that behind and attend to janitorial duties as well as washing and cutting vegetables. Neither PA nor consultant explain how this would be beneficial to his career in Sri Lanka. Also of concern is that the consultant states PA could pursue PR status in CDA if he chose knowing full well that low skilled workers do not qualify for PR status in CDA. Not satisfied that PA is a genuine temporary worker.

[8] The application for a work permit was therefore denied.

LEGISLATION

[9] Subsection 11(1) of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 requires a foreign national to apply for a visa before entering Canada:

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.

[10] Subsection 22(2) of the IRPA permits a foreign national to apply concurrently for temporary admission and permanent residence:

(2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.	(2) L'intention qu'il a de s'établir au Canada n'empêche pas l'étranger de devenir résident temporaire sur preuve qu'il aura quitté le Canada à la fin de la période de séjour autorisée.

[11] Section 197 of the IRPR allows a foreign national to apply for a work permit at any time before entering Canada:

197. A foreign national may apply for a work permit at any	197. L'étranger peut, en tout temps avant son entrée au

time before entering Canada.	Canada, faire une demande de permis de travail.

[12] Subsection 200(1) of the IRPR sets out the requirements for the granting of a work permit to a foreign national:

200. (1) Subject to subsections (2) and (3), an officer shall issue a work permit to a foreign national if, following an examination, it is established that	200. (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(*a*) the foreign national applied for it in accordance with Division 2;	*a*) l'étranger a demandé un permis de travail conformément à la section 2;
(b) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;	*b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;*
(*c*) the foreign national (i) is described in section 206, 207 or 208, (ii) intends to perform work described in section 204 or 205, or (iii) has been offered employment and an officer has determined under section 203 that the offer is genuine and that the employment is likely to result in a neutral or positive effect on the labour market in Canada; and	*c*) il se trouve dans l'une des situations suivantes : (i) il est visé par les articles 206, 207 ou 208, (ii) il entend exercer un travail visé aux articles 204 ou 205, (iii) il s'est vu présenter une offre d'emploi et l'agent a, en application de l'article 203, conclu que cette offre est authentique et que l'exécution du travail par l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien;
… [Emphasis added]	…

ISSUES

[13] The applicant raises the following issue:

i. Did the visa officer commit a reviewable error by failing to consider all of the evidence provided by the applicant and basing her assessment on an incorrect application of the law?

STANDARD OF REVIEW

[14] *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[15] The applicant raised questions relating to the reasonableness of a visa officer's fact or mixed fact and law findings. It is clear that as a result of *Dunsmuir* and *Khosa* that such questions of are to be reviewed on a standard of reasonableness: see also my decision in *Randhawa v. Canada (MCI)*, 2006 FC 1294, at paragraph 10; *Dhanoa v. Canada (MCI)*, 2009 FC 729, per Justice Harrington at paragraph 11; *Thomas v. Canada (MCI)*, 2009 FC 1038, per Justice Mosely at paragraph 9.

[16] In reviewing the officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are

defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at paragraph 59.

ANALYSIS

Issue: Did the visa officer commit a reviewable error by failing to consider all the evidence provided by the applicant and basing her assessment on an incorrect application of the law?

[17] The applicant submits that the visa officer erred by limiting her assessment to the fact that that the "Kitchen helper" position which the applicant sought in Canada was at lower level then the position the applicant held in Sri Lanka, without considering the reason the applicant applied as a "Kitchen helper", and the applicant's intention to develop into a full time cook in Canada and thereby gain Canadian experience.

[18] The visa officer's decision stated, and I repeat for ease of reference:

> PA has been following the path of a progressively higher position in the culinary field since 2002. He would now leave all that behind and attend to janitorial duties as well as washing and cutting vegetables. Neither PA nor the consultant explain how this would be beneficial to his career in Sri Lanka.

[19] It is clear to the Court that the visa officer has failed to consider the evidence that:

1. the applicant applied as a "kitchen helper" since his first application for a work permit was denied because the visa officer found he was not qualified as a "cook"; and

2. the applicant explained that he was applying as a "kitchen helper" so that he can develop at the restaurant into a full-time "cook", i.e. demonstrate to his employer on the job that he has the qualifications.

This evidence explained why the applicant would accept a lower level position as a “kitchen helper” which the visa officer failed to take into account or address.

[20] The visa officer decision also held:

> Also of concern is that the consultant (the applicant’s immigration consultant) states PA could pursue PR (permanent residence) status in CDA if he chose knowing full well that low skilled workers do not qualify for PR status in Canada.

[21] The Court is of the view that the visa officer failed to consider the applicant’s intention of gaining Canadian experience and becoming a “cook”. With this qualification, with his experience, with his education, and with his alleged fluency in English, the applicant would have the legal right to apply for permanent resident status as a skilled worker after he returns to Sri Lanka at the conclusion of his work visa.

[22] Subsection 22(2) of IRPA provides that a foreign national can have a duel intention to apply for temporary residence as well as eventually permanent residence and that this intention to be a permanent resident cannot form the basis for refusing a visa for temporary residence such as a work permit, as long as the visa officer is satisfied that the applicant will leave Canada at the conclusion of his work permit and not remain in Canada illegally: *Rebmann v. Canada (MCI)*, 2005 FC 310, per Justice Martineau at paragraph 25. Accordingly, it is illegal for the visa officer to draw an adverse inference from the applicant’s future intention to be a permanent resident as a basis for refusing the applicant’s work permit.

[23] The failure of the visa officer to consider the applicant’s relevant evidence renders erroneous the factual and legal inferences which underlie the decision. The officer’s decision is therefore unreasonable and cannot be sustained.

[24] For these reasons, the Court will allow the application for judicial review, set aside the decision of the visa officer, and refer the matter back for redetermination by a different visa officer.

CERTIFIED QUESTION

[25] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is allowed. The decision of the visa officer is set aside and the matter is referred back to a new visa officer for redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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