Federal Court  Cour fédérale

Date: 20100128

Docket: IMM-918-09

Citation: 2010 FC 99

Toronto, Ontario, January 28, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

RAJESH KISSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the decision made on January 9, 2009 at the High Commission of Canada in Port-of-Spain, Trinidad and Tobago, by visa officer A. Corbett, rejecting the applicant's application for a permanent resident visa in Canada made pursuant to the Federal Skilled Worker category. These are my reasons for determining that the application must be granted and the matter reconsidered by a different visa officer.

Background

[2] Mr. Rajesh Kisson, the applicant, is a citizen of Trinidad and Tobago. He and his wife, Ms. Cheryl Persaud, first came to Canada in May 1996 with visas obtained under their birth names. They were issued exclusion orders and left in November 1996. The couple subsequently changed their names by deed poll and entered Canada in 1998 on Temporary Resident Visas obtained without disclosing the prior visa history.

[3] From June 2000 until August 2006, without an employment authorization, the applicant held a position as a glass carver with St. Regis Crystal Inc., obtained through the employment agency A&A Logistics. The applicant's primary duties were to use hand tools and glass working machines to produce glass figurines. He was successful in that work and registered a Canadian Intellectual Property certificate for a Frosted Glass Tree that he created. In 2005, his employer, St. Regis Crystal Inc., obtained an Arranged Employment Opinion (AEO) from Human Resources and Skills Development Canada (HRSDC) in connection with a permanent and indefinite offer of employment to Mr. Kisson in the position of a glass carver.

[4] An application for an exemption from the visa requirements on humanitarian and compassionate grounds was denied in November 2005. The couple left Canada in August 2006. An application for permanent residence in the Federal Skilled Worker category was denied in November 2006 for insufficient points. The applicant was assessed a total of 58 points, including 12

for language proficiency, nine short of the total required. He was credited with no points for education as he went no further than primary school.

[5] In April 2007 with the assistance of counsel, the applicant reapplied under the Federal Skilled Worker category and requested a substituted evaluation and an exemption from the requirements of the IRPA pursuant to humanitarian and compassionate considerations.

[6] In October 2007, after an interview at the High Commission in Trinidad and Tobago, the visa officer determined that applicant would need to complete an International English Language Testing System (IELTS) test. The IELTS test was written by the applicant in December 2008. He believes that due to the poor quality of the tape recording, echoing in the exam room and nervousness associated with exam writing, the results do not accurately reflect his level of proficiency in English. He was awarded only 6 points for language proficiency.

[7] In January 2009, The High Commission in Trinidad and Tobago refused the applicant's second application for permanent resident status.

Decision Under Review

[8] The visa officer's letter, dated January 9, 2009, constitutes his reasons for decision:

> Immigration Section
> P.O. Box 565,
> Port-of-Spain,

Trinidad and Tobago

9 January 2009

Rajesh Kissoon
c/o Law Firm of Green & Spiegel
390 Bay Street, Suite 2800
Toronto, Ontario
M5H 2Y2
Canada

File No. : B048814732

Dear Mr Kissoon,

I have now completed the assessment of your application for a permanent resident visa as a skilled worker. I have determined that you do not meet the requirements for immigration to Canada.

Subsection 12(2) of the *Immigration and Refugee Protection Act* states that a foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada. Subsection 75(1) of the regulations prescribes the federal skilled worker class as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada.

Pursuant to the *Immigration and Refugee Protection Regulations*, 2002, skilled worker applicants are assessed on the basis of the requirements set out in subsection 75(2) and the criteria set out in subsection 76(1). The assessment of these requirements determines whether a skilled worker will be able to become economically established in Canada. The criteria are age, education, knowledge of Canada's official languages, experience, arranged employment and adaptability.

Your application was assessed based on the occupation(s) in which you requested assessment (Glass Carver, NOC 5244). The table below sets out the points assessed for each of the selection criteria:

	POINTS ASSESSED	MAXIMUM POSSIBLE
AGE	10	10
EDUCATION	0	25

OFFICIAL LANGUAGE PROFICIENCY		6	24
EXPERIENCE		21	21
ARRANGED EMPLOYMENT		10	10
ADAPTABILITY	10		10
TOTAL	**57**		**100**

You have obtained insufficient points to qualify for immigration to Canada, the minimum requirement being 67 points. As you have not completed secondary education you have been awarded zero points for education. Following review of your IELTS test results and given that you state no proficiency in French, you have been awarded 6 points for language. You have not obtained sufficient points to satisfy me that you will be able to become economically established in Canada.

Subsection 11(1) of the Act states that 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 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. Subsection 2(1) specifies that unless otherwise indicated, references in the Act to "this Act include regulations made under it.

Following an examination of your application, I am not satisfied that you meet the requirements of the Act and the regulations for the reasons explained above. I am therefore refusing your application.

You have submitted that humanitarian and compassionate grounds should be considered in view of your inability to meet the language requirement for skilled workers. The Immigration Program Manager has completed the assessment of your request for humanitarian and compassionate consideration pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act* and is of the opinion that humanitarian and compassionate considerations do not justify granting you permanent residence or an exemption from any applicable criteria or obligation of the Act. The Immigration Program Manager has formed this opinion following a review of the documentation and written explanation submitted by you or on your behalf as well as the interview notes, and does not consider that these elements constitute ground for H&C considerations.

> As a result, I am refusing your request for consideration under this provision of the Act.
>
> Thank you for the interest you have shown in Canada.
>
> Yours sincerely,
>
> A. Corbett
> First Secretary (Immigration)

Issues

[9] The sole issue is whether the visa officer's decision refusing the applicant's application for a permanent resident visa made pursuant to the Federal Skilled Worker category was reasonable.

Analysis

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court of Canada abandoned the patent unreasonableness standard leaving only two standards of review, correctness and reasonableness. The Supreme Court also held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review.

[11] Accordingly, the standard of review for the decision of a visa officer who has made a discretionary decision on a permanent residence visa application is the deferential standard of reasonableness as discussed in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC

798, [2008] F.C.J. No. 995. I adopt for the purposes of the case at bar, the following comments of Justice Beaudry, at paragraphs 10-11 of that decision:

> 10 The jurisprudence of this Court has recognized that the decision of an immigration officer in the assessment of an application for permanent residence under the federal skilled worked class involves an exercise of discretion and should therefore be afforded considerable deference. In *Choksi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 555, at paragraph 14, [2007] F.C.J. No. 770, Justice Mactavish determined that "to the extent that such an assessment is carried out in good faith, in accordance with the principles of natural justice, and without relying on irrelevant or extraneous considerations, the decision is reviewable on the standard of patent unreasonableness." (See also *Singh v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 58, [2008] F.C.J. No. 65).
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> 11 Following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, the review of an Officer's assessment of an application for permanent residence should continue to be subject to deference by the Court, and is reviewable on the standard of reasonableness (*Dunsmuir*, at paragraphs 55, 57, 62, and 64).

[12] No deference is due if the Court determines that an administrative decision-maker has failed to adhere to the principles of procedural fairness: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28, at paragraph 100. Such matters continue to fall within the supervising function of the Court on judicial review: *Dunsmuir*, *supra*, at paragraphs 129 and 151.

The Substituted Evaluation Assessment

[13] In *Fernandes v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 243, [2008] F.C.J. No. 302, at paragraph 7, Deputy Judge Strayer, as he then was, comments on the purpose of a

substituted evaluation assessment as prescribed in subsection 76(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

> 7 It is clear that the purpose of subsection 76(3) is to allow an exception to be made to the point system where the Applicant's chances of becoming successfully established in Canada is greater than is reflected in the points assessment: see e.g. *Yeung v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1174 at para. 15. To obtain such advantage the Applicant must request the exercise of the discretion and must give some good reasons for it: see *Lam v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1239 at para. 5. However, such reasons need not be elaborate and may consist of a more full description of the Applicant's background, education, and work experience and knowledge of an official language of Canada: see *Nayyar v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 342 at para. 12. [My Emphasis]

[14] I am of the view that the applicant's submissions provided good reasons for the exercise of the discretion under subsection 76(3) of the Regulations. The evidence in this case, does not satisfy me that the visa officer and immigration program manager gave sufficient consideration to the applicant's (1) extensive work experience in Canada, (2) significant involvement in community organizations in Canada. (3) arranged employment, (4) knowledge of Canadian culture and customs, (5) that the applicant had lived in Canada for eight years without relying on government assistance and (6) the fact that the Vice-President of St. Regis Crystal Inc., had declared that English language proficiency was not a significant consideration.

[15] I agree with the applicant that in considering the substituted evaluation, the visa officer did not demonstrate that he looked beyond the selection criteria listed at subsection 76(1) of the Regulations (i.e. education, language, experience, age, arranged employment, adaptability). I am

unable to find in the evidence any indication that the visa officer's substituted evaluation broadly assessed the likelihood of the ability of the applicant to become economically established in Canada according to his set of circumstances. "The clear intent of subsection 76(3) is to allow the visa officer to substitute their evaluation taking into account a number of factors, and not just the factors listed in paragraph 76(1)(a) as contended by the respondent:" *Choi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 577, [2008] F.C.J. No. 734, at para. 20.

[16] Realizing that such a discretionary decision by the visa officer under subsection 76(3) of the Regulations is reserved for "exceptional cases" and is entitled to deference, as argued by the respondent relying on *Requidan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 237, [2009] F.C.J. No. 280, at para. 29, I am not convinced that the decision in this case was made entirely in good faith and with regard to the relevant matters, as submitted by the applicant when he requested a substituted evaluation in April 2007. The record suggests that the visa officer may have been influenced by the applicant's prior immigration history.

The Consideration of Humanitarian and Compassionate Grounds

[17] In considering whether there were humanitarian and compassionate grounds for an exception, the officer's analysis focussed exclusively on the fact that the applicant had indicated that one reason for consideration was the presence in Canada of his mother-in-law. It was noted that this had not been disclosed until her status in Canada was regularized through re-marriage in 2007. In

any event, her presence in Canada was only one factor that the officer was to consider for an assessment under section 25 of the IRPA.

[18] I am not satisfied that the officer considered the totality of the circumstances in this case. I agree with the applicant that the existing employment offer and the applicant's previous establishment in Canada are indicative of the possibility that the applicant will once again be able to establish himself successfully in Canada. I find it unreasonable that these key factors do not appear to have been considered by the officer when he assessed the humanitarian and compassionate considerations under section 25 of the IRPA.

[19] I don't accept the respondent's submission that in this case, the applicant is attempting to use humanitarian and compassionate considerations as "a back door when the front door has, after all legal remedies have been exhausted, been denied in accordance with Canadian law:" *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, [2009] F.C.J. No. 582, at para. 17.

[20] I note that in the same paragraph Justice Shore stated that "… The purpose of humanitarian and compassionate discretion is to allow flexibility to approve deserving cases not anticipated in the legislation." The applicant was entitled to have a proper assessment of whether his application was deserving of such flexibility through consideration of the relevant factors. The record does not support the conclusion that this was done.

Conclusion

[21] In my view, the reasoning process in this case was flawed and the resulting decision falls outside the range of possible, acceptable outcomes: *Dunsmuir*, *supra*, at para. 47.

[22] The process adopted by the officers and its outcome did not resonate with the principles of justification, transparency and intelligibility. Consequently, it is open to this Court to intervene: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, para. 59.

[23] No serious questions of general application were proposed for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is allowed, the decision of the visa officer dated January 9, 2009 rejecting the applicant's application for permanent resident visa is set aside, and the application for a permanent resident visa made pursuant to the Federal Skilled Worker category is referred to another visa officer for re-determination. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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