

Date: 20100720

Docket: IMM-5722-09

Citation: 2010 FC 758

Ottawa, Ontario, July 20, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

KAMALDEEP KAUR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Kamaldeep Kaur applies for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 of the decision of a Visa Officer who refused her application for a permanent residence in Canada as a skilled worker.

[2] Ms. Kuar is a citizen of India. She applied to come to Canada as a nursing tutor. Her application was refused by a Visa Officer because the Officer was not satisfied she had at least one year continuous employment experience in her field as required by subsection 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*).

[3] Ms. Kaur submitted additional information and requested the Officer reconsider her application. The Officer declined. Ms. Kaur applies for judicial review of that decision.

[4] For the following reasons, I am refusing her application for judicial review.

Facts

[5] Ms. Kuar is a 28 year old woman with formal training in India as a nurse. She applied to become a permanent resident of Canada as a skilled worker and requested she be assessed in the occupational field of Nursing.

[6] By letter dated January 29, 2009 the Citizenship and Immigration Canada Centralized Intake Unit advised it was recommending her application for further assessment and requested she submit a full application for permanent residency to the Canadian High Commission in New Delhi. This letter gave specific instructions with respect to the content of an application, including:

Your full application must consist of the following:

...

- All supporting documents (see document checklist for the visa office to which you are applying).

The letter stated the Applicant had 120 days to complete and submit the full application. It directed she not submit any documents until she submit the entire package and advised the decision would be made on the basis of the documents provided at that time.

[7] The document checklist requires a notarized letter from an employer which includes:

- the specific period of employment,
- the position held during the period of employment and the time spent in each position,
- the applicant's main responsibilities and duties,
- the total salary plus benefits,
- the signature of the immediate supervisor or the company's personnel officer, and
- a business card of the person signing the letter.

[8] The Applicant provided an employer's letter dated November 27th, 2008 from the Swami Vivekanand School of Nursing and Hospital which certifies her position as nursing tutor from September 2004 "to till date." The employer's letter gives a generalized description of the Applicant's duties. It includes complimentary remarks about the Applicant's disposition and wishes her well in future endeavours. However, it says nothing about her remuneration. The signature is illegible and the letter is not accompanied by a business card of the person signing the letter.

[9] On her application form the Applicant had repeated the description of the duties and requirements of a nursing tutor word for word from the duties expected under the National Occupational Category (NOC) 4131 as a nursing instructor.

[10] After the refusal of her application by the Visa Officer on August 5, 2009, the Applicant provided a further notarized letter from her employer providing the missing salary information with a detailed description of the Applicant's duties and responsibilities.

Decision Under Review

[11] The Visa Officer refused the application on the basis there was insufficient information to establish the Applicant had the acquired the necessary experience as a nurse tutor pursuant to subsection 75(2) of the *Regulations*.

[12] The Officer wrote in her notes:

“PA has provided a copy of her experience certificate for the position of Nursing Tutor which gives a description of her duties at work. The certificate is signed by an unnamed signatory. No other proof of employment is provided”.

and

“Based on the information on file I am not satisfied that the PA has performed a substantial number of the main duties of a Nursing Tutor, including all of the essential ones, for any years full time within the period starting ten years before the date of the application and ending at the date of the selection decision. PA has not provided other supporting proof of her employment such as pay slips, ITR documents, or bank statements showing salary deposits; she has not provided a letter of appointment or letter of confirmation.”

[13] The Officer considered what was available on the file and found:

“PA has provided a description of her duties on her Schedule 3; these are an exact cut and paste of the NOC description for this occupation. I am not prepared to accept PA’s statement of her work experience at face value in the absence of satisfactory supporting documentation from the employer”.

[14] The Visa Officer refused the application for permanent resident status as a skilled worker by a refusal letter dated August 5, 2009.

[15] When the Applicant requested an opportunity to provide further information, the Visa Officer wrote on September 9, 2009 that the application was concluded and there was no reconsideration once a case was refused.

Relevant Legislation

Immigration and Protection Refugee Regulations, (SOR/2002-227)

75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed 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 and who intend to reside in a province other than the Province of Quebec.
Skilled workers

(2) A foreign national is a skilled worker if
(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;

75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.
Qualité

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :
a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties.

Minimal requirements

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

B de la matrice de la Classification nationale des professions — exception faite des professions d'accès limité;

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

Exigences

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

Issues

[16] Two issues arise in this matter:

- a. Did the officer breach her duty of procedural fairness by not providing the Applicant with an opportunity to address the insufficient information?
- b. Is the Applicant entitled to reconsideration?

Standard of Review

[17] The Supreme Court's Decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 determined there are two standards of review at common law in Canada: Reasonableness and correctness. Questions of fact and mixed fact and law should be granted deference and will be review on a standard of reasonableness, whereas questions of law will generally be reviewed on a standard of correctness.

[18] I find both issues in this case concern the duty of procedural fairness. These are questions to which no deference is accorded; the standard of review is therefore correctness.

Argument and Analysis

[19] The Applicant argues the Officer breached her duty of procedural fairness by not providing an opportunity to be "disabused" of doubts with respect to the Applicant's work experience.

[20] Subsection 75(3) of the *Regulations* provides:

If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

(emphasis added)

[21] There are cases where a duty of procedural fairness requires visa officers to bring flaws to an applicant's attention and provide them with an opportunity to address them. This is not one of those cases.

[22] In *Hassani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 Justice Mosley considered the same scenario with respect to a mechanic. He drew a distinction between those requirements found in statutes and regulations and those arising otherwise. In the case of the former, he found visa officers have no duty to provide an applicant an opportunity to address concerns, he wrote at paragraph 26:

The finding of the officer that the applicant had failed to show that he had experience in “operation/admin/accounting/mgmt” and therefore did not meet the qualification of Maintenance/Operations and Account Management, is a finding based directly on the requirements of the legislation and regulations. The duty was on the applicant to demonstrate that he met the criteria of the occupation under which he had requested his assessment. The applicant was not required to be apprised of the officer’s concerns in this regard to the evidence submitted.

(emphasis added)

[23] In *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 786 at para. 8 Justice Snider found there is no duty to advise an applicant of a deficient application and requiring so would in effect be requiring the visa officer to give advance notice to unsuccessful applicants.

[24] The Applicant provided an employer’s letter that did not provide the information explicitly required, namely: the Applicant’s salary and benefits. The Applicant’s information concerning her employment experience is required to satisfy subsection 75(2) of the *Regulations*.

[25] Nor did Applicant provide the information via other means. Had she done so, it might give rise to an opportunity to provide further information as clarification. In this respect, the Visa

Officer considered the Applicant's description of her responsibilities and duties on the application form and noted that the Applicant appeared to have simply copied the listed duties of a Nurse Tutor rather than offer a description of her own specific responsibilities and duties. The Officer also noted the absence of pay slips or salary deposits.

[26] The same principle applies here as in *Hassani* and *Sharma*. There is no duty on a visa officer to solicit an explanation from an applicant for her deficient application.

[27] The Applicant has also argued a breach of procedural fairness when the Visa Officer refused to reconsider the application after the Applicant sent further documentation.

[28] The Respondent responds with the doctrine of *functus officio* and relies on the Supreme Court's decision in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. wherein the Court wrote at para. 20:

...there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to a matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.

[29] This is not a blanket rule, there are circumstances where a decision maker may reopen a decision. The Supreme Court considered these factors in *Chandler* at paras. 19-25 and the same principles have emerged elsewhere. None of them apply to this case.

[30] I find in the instant case there are no reasons to justify re-opening the application in light of improved submissions. The process is clear. An applicant must provide a complete application. The Applicant was given express notice of the requirements. The letter approving consideration of her application for permanent resident status as a skilled worker expressly required a full application with all supporting documents.

[31] The skilled worker visa application process is designed to allow for efficient processing of complete applications by giving express description of the application requirements. By expressly requiring full applications and setting out consequences for not doing so, delay arising from incomplete applications is avoided.

Conclusion

[32] The Applicant had notice of the requirements necessary to complete a full application. She did not submit the complete documentation required when she submitted her application to the Visa Officer.

[33] I find the Visa Officer met her duty of procedural fairness when she properly considered the application before her and refused to accept late submissions.

[34] The result is no doubt a disappointment to the Applicant but it underscores the importance of providing a complete application in such situations.

[35] The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5722-09

STYLE OF CAUSE: KAMALDEEP KAUR and MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 14, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

DATED: JULY 20, 2010

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