Federal Court  Cour fédérale

Date: 20101026

Docket: IMM-713-10

Citation: 2010 FC 1049

Ottawa, Ontario, October 26, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SURAJDEEP SINGH DHILLON

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(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision of a Visa Officer of the High Commission of Canada, denying the applicant's application for a permanent resident visa as a skilled worker.

[2] For the reasons that follow, this application is dismissed

Background

[3] Mr. Singh Dhillon is a 26 year-old citizen of India. On May 7, 2009, he submitted an application for permanent residence in Canada as a skilled worker. His application was reviewed by the visa office in Sydney, Nova Scotia, and it was recommended for further assessment.

[4] The Sydney visa office sent the applicant an email on June 19, 2009, requesting that he submit a full application for permanent residence within 120 days. The email provided that the application would be assessed by the New Delhi visa office, and that the New Delhi visa office would make a final determination of the applicant's eligibility for processing on the basis of the documentation the applicant was required to provide. The required documentation was listed in the email, and included visa office-specific forms and supporting documents, for which a link was provided. The application forms required that proof of relationship to relatives in Canada and proof of relatives' residency be provided. The form provided that:

> Documents submitted as proof of residency in Canada must be less than six (6) months old. Examples of documents:
>
> - income tax assessment (Canada Revenue Agency) for the relative,
> - telephone bills,
> - credit card invoices,
> - employment documents, and/or
> - bank statements.

[5] The above-listed information was sought in order to assess whether an applicant would be awarded any points on account of family relationships in Canada. Subsection 83(5)(a) of the

Immigration and Refugee Protection Regulations, SOR/2002-227, provides that a skilled worker shall be awarded 5 points if the skilled worker or accompanying spouse has a relative "who is a Canadian citizen or permanent resident living in Canada." As was noted by counsel for the respondent, the requirement is not that the relative be resident in Canada, as that term may have any number of meanings, but that the relative is "living" in Canada at the requisite point in time.

[6] The applicant submitted his application for permanent residence to the New Delhi visa office on October 15, 2009.

[7] The applicant has an uncle who allegedly was living in Canada at the date of application. With the application the applicant included copies of his uncle's Permanent Resident Card (indicating he became a Permanent Resident on June 21, 2009), Social Insurance Card, and Alberta Driver's Licence (issued June 22, 2009) which listed his address as being in Lacombe, Alberta. In his affidavit filed in these proceedings, the applicant explains that "Due to an oversight when reviewing the checklist provided from the website, I subsequently failed to provide all the requested documents."

[8] The Visa Officer reviewed the application on December 2, 2009, and undertook an analysis based on the points system prescribed by the Regulations. The applicant received 65 points, two points shy of the 67 points required to be eligible for permanent residence. The applicant received 0 points for "Adaptability." One of the factors considered was "Family Relationship [in Canada]," for which the Visa Officer gave no points because, in her opinion, the applicant had failed to provide

proof that his uncle was living in Canada. The CAIPS notes, which serve as the reasons for the decision, provide as follows:

> Family relationship: 0 points – Application rec'd 15 OCT 2009. Applicant indicates he has an uncle (mother's brother) in Cda – who is CC however no proof of residence. Letter from CPC Sydney to Applicant provides the website to find out required mission specific docs – proof of residency is required – applicant has only provided proof that he has an uncle and that he is a CC but nothing to support any residence in Canada as per kit checklist (tax assessment, phone bills, credit card invoices, employment docs, bank statements) – As I am not satisfied that the applicant [*sic*] is currently residing in Canada, '0' points allotted for family relationship.

[9] Although the CAIPS notes indicate that the uncle is a CC, meaning Canadian Citizen, he was actually a Permanent Resident, as evidenced by the Permanent Resident card submitted by the applicant. The applicant submits that this error is proof that the Visa Officer failed to consider the evidence submitted, or to properly consider it.

Issues

[10] The applicant raises the following issues:

1. Whether the Visa Officer breached the duty of fairness by failing to consider the evidence, forwarded by the applicant, which clearly provided proof of his uncle's Canadian residency?

2. Whether the Visa Officer breached the duty of fairness by failing to provide the applicant with the opportunity to disabuse her of any concerns she had regarding his uncle's residence?

3. Whether the Visa Officer committed an error of law in her analysis and allocation of points for adaptability?

Analysis

[11] In addition to the three issues identified by the applicant in his memorandum, there is a question of the standard of review to be applied to those three issues. The applicant submits that as stated in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, the standard of review for questions of procedural fairness is correctness. He asserts that issues 1 and 2 above are questions of procedural fairness and are thus to be reviewed on the correctness standard. The respondent submits that the appropriate standard of review is reasonableness given that the tribunal is an expert panel and that this Court in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 798, decided that the decisions considering skilled worker applications are reviewable on a reasonableness standard.

[12] While the respondent is right that the Court decided in *Wang* that decisions on skilled worker applications are reviewable on a reasonableness standard, Justice Beaudry, at para. 13 of his decision in *Wang* clearly stated that "It is trite law that a breach of procedural fairness is reviewable on the standard of correctness."

[13] However, I do not agree with the applicant that issue 1 is a question of procedural fairness. It is clear from the decision, the Visa Officer's affidavit, and her cross-examination that the Visa

Officer did consider the evidence submitted that the applicant says proves his uncle's residency. What the applicant is asking the Court to do is to quash the findings the Visa Officer made based on her assessment of that evidence. This is not a question of procedural fairness; it is a question of whether that conclusion was reasonable, and accordingly it is to be assessed on the deferential reasonableness standard.

[14] I find that issue 2 is a proper question of procedural fairness and is to be reviewed on the correctness standard. The parties are in agreement that issue 3 is to be reviewed on the standard of reasonableness.

Consideration of the Identity Documents

[15] The applicant says that the identification documents provided to the Visa Officer are adequate to prove that the applicant's uncle resides in Canada, and that any finding otherwise must be an error of fact committed by ignoring the relevant documentary evidence. The applicant relies on *Grewal v. Canada (Minister of Employment and Immigration)* (1993), 62 F.T.R. 308 (T.D.), for the proposition that where an immigration officer's finding of fact is manifestly in error, *certiorari* should be issued to set aside the decision. The applicant states: "It is a fact that the Applicant has an uncle who resides in Canada and the Applicant has submitted proof to the Visa Officer to evidence the uncle's residence."

[16] The applicant also relies on *Choi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 577, *Wang v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1107, and *Lak v.*

Canada (Minister of Citizenship and Immigration), 2007 FC 350, which each found that Visa Officers erred by not considering certain evidence presented by the applicants (a letter from a potential employer affirming suitability for a job in *Choi*, alternative evidence of educational credentials in *Wang*, and evidence that a medical degree is considered a professional degree in Iran in *Lak*). The applicant states:

> The Visa Officer does not mention even once in her decision, why she feels that a government issued Alberta Driver's Licence, would not be as valid as those documents listed on the Kit Checklist, such as a telephone bill, to proof [*sic*] residency.

[17] The applicant says that the Visa Officer failed to turn her mind to the documentary evidence and failed to provide any reason for why she rejected the applicant's uncle's Driver's Licence, thereby violating the duty of procedural fairness.

[18] The respondent agrees with the applicant that the checklist is not an exhaustive list of acceptable documents, but argues that an applicant omits the requested documents "at his peril." The respondent says that an applicant runs the risk that the proffered documents will not be sufficient to show residency, as happened here. Contrary to the applicant's submissions the respondent says that the Visa Officer did in fact consider the documents submitted but determined that they were not sufficient to prove residency.

[19] The respondent relies on the case of *Malik v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283, where the Court found that the level of procedural fairness for this

type of application is low and that a decision that insufficient evidence has been provided was neither a fettering of discretion nor a breach of procedural fairness. At para. 37 of *Malik*, Justice Mainville, as he then was, stated that:

> Indeed the Applicant could easily have accessed the required documentation to establish that his brother was living in Canada and in fact did access additional information shortly after the decision was communicated to him. In such circumstances, the Applicant cannot now raise a fettering of discretion argument.

The respondent submits that the Visa Officer found that the evidence provided did not establish that the uncle was resident in Canada, and that this finding was not unreasonable.

[20] The applicant's submissions rest on two assumptions that I find to be unsupported by the record. When these assumptions are removed, it becomes clear that the Visa Officer's decision was reasonable. First, the applicant starts from the position that the documents submitted do in fact prove his uncle's residency. At the hearing, applicant's counsel submitted that any reasonable person reviewing those documents would have concluded that the uncle was living in Canada. Second, the applicant assumes that in coming to her conclusion, the Visa Officer ignored at least one of the documents that had been submitted.

[21] The applicant states that he submitted proof of his uncle's residency to the Visa Officer and specifically points to the Driver's Licence. While the Visa Officer could perhaps have elaborated more on the reasons she did not accept the Driver's Licence as proof that the uncle was living in Canada, a failure to do so does not place the decision outside the "range of acceptable outcomes that are defensible in respect of the facts and the law" as stated in *Dunsmuir v. New Brunswick*, 2008

SCC 9. Furthermore, this situation is not analogous to the facts in *Choi*, *Wang*, or *Lak*, where the alternative pieces of evidence were the only evidence available; here, the appropriate documents were apparently available. Indeed, as noted above, the applicant himself admits in his affidavit that the failure to include them was his own oversight. Although counsel submitted that the uncle only recently arrived in Canada and would not have the sort of documents listed in the Kit information, there is no evidence to support that and the applicant's own sworn statement strongly suggests otherwise.

[22] The applicant is correct that the Visa Officer did not explicitly refer to the Driver's Licence in her decision. However, her statement that the applicant failed to provide evidence to prove his uncle's residence in Canada clearly indicates that she did not consider the Licence as sufficient evidence. Indeed, the affidavit of the Visa Officer which she provided in this application and on which she was cross-examined supports this logical inference. She attests that:

> I was unable to make a determination as to whether the relative was currently residing in Canada or not as the applicant did not submit any of the suggested documents that would prove residency as per [the New Delhi Visa Office requirements]. I considered the documents which were submitted, including the driver's licence and PR Card, but found that they did not satisfactorily demonstrate <u>current</u> residency. [emphasis added]

[23] It is also noteworthy that the Visa Officer did not find as a fact that the uncle was not residing in Canada; rather, she found that the applicant had failed to satisfy her that the uncle was living in Canada at the date of her decision. In short, the burden of proving the residency of a relative rests with the applicant. It is not the Visa Officer's obligation to either prove or disprove

residence – her obligation was only to determine whether the weight of the evidence submitted established residency, and in this case she found that it did not.

Duty of Fairness to Seek Further Clarification from Applicant

[24] The applicant submits that the duty of fairness owed to the applicant included the duty of the Visa Officer to inform the applicant of any concerns she had following her examination of the application, a duty to provide him with a reasonable opportunity to disabuse her of those concerns, and a duty to investigate the matter more thoroughly.

[25] The applicant cites *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877, where the applicant had explained to the Visa Officer that transcripts were not usually issued in Iran and instead provided a diploma. The Court found that in those circumstances the Officer had a duty to investigate the issue more thoroughly before rejecting the application because of the failure to provide transcripts.

[26] The applicant submits that he "had no way of knowing" that the Visa Officer would expect him to adhere strictly to the Kit Checklist, as the email he received did not warn him of the need for strict compliance. The applicant also notes that the email did not warn him that the Visa Officer would not ask for further submissions if he failed to provide documentation. The applicant says the "ambiguous" email instructions should increase the duty to give the applicant an opportunity to make further submissions.

[27] I agree with the respondent that the applicant had no reason to believe he would be able to file any additional material or be contacted for clarification. The email sent to the applicant requesting that he file an application clearly provided:

> The Visa Office will make a final determination of your eligibility for processing on the basis of the information and documentation you provide. [emphasis added]

Furthermore, as noted above, the applicant himself admitted that the failure to include the requested documents was an "oversight" on his part.

[28] The situation here is not analogous to *Salman*, where the applicant provided alternative evidence with an explanation of why the requested evidence, a transcript, could not be provided. Here there is no evidence that better evidence, of the sort requested in the instructions, was not available.

[29] The applicant says that the email did not warn him that strict compliance with the forms was required, but he provides no explanation for why he would think that anything less than strict compliance would be required, especially given that the email sent him says "Your full application *must* consist of the following …" [emphasis added]. Again, the applicant's own admission in his affidavit that he overlooked the requested documents when completing his package suggests that the instructions were understood by him and were not "ambiguous," as he now suggests in his written submissions.

Analysis of Points Awarded

[30] The applicant says that it appears that the Visa Officer's finding that he had failed to prove his uncle's residency rests solely on the fact that the applicant did not provide the documentation listed on the Kit Checklist as examples of the sort of documentation that is to be submitted. He notes that the Driver's Licence was in fact less than six months old at the time of the application, a requirement of the listed documentation, and therefore it should have been accepted.

[31] The applicant also notes that nowhere in the Act, the Regulations, or the Federal Skilled Workers' Manual is it stated that Visa Officers are only to consider the documents listed on the Kit Checklist. Accordingly, he submits that where an applicant has provided documentation to prove that he or she has a relative residing in Canada, the applicant must be given five points unless the document's authenticity is challenged, since the Kit Checklist is only a guide. The applicant argues that since Parliament has left it up to Visa Officers to decide how they will assess whether an applicant has a relative living in Canada, the applicant here should not be put to strict compliance with the Kit Checklist. The applicant says that by failing to consider the other evidence, the Visa Officer fettered her discretion and committed an error of law. In the applicant's Reply, he notes that under Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, only residents of Alberta may obtain an Alberta Driver's Licence.

[32] The respondent submits that the Officer did not fetter her discretion because the CAIPS notes clearly show that she considered the applicant's documents, but found that they did not show that the relative was actually living in Canada. The respondent says that this was a reasonable determination, and relies on *Malik*.

[33] I agree with the respondent on this issue. Again, the applicant assumes that the documentation he provided proves that his uncle is living in Canada. Contrary to this assumption, the Visa Officer did not accept that the Driver's Licence proved that fact. Accordingly, the applicant's argument that any document proving residency must result in points being awarded cannot be accepted on these facts as the Visa Officer never accepted the Drivers' Licence as proof of residence in Canada. The applicant is quite right that the Visa Officer has the discretion to decide how to assess whether an applicant has a relative living in Canada – here the Officer exercised that discretion in a reasonable way and found that the applicant had not established that his uncle was currently resident in Canada. There was no fettering of discretion as the Visa Officer did not reject the application on the basis that the applicant had failed to provide the examples of documents listed in the Kit; rather she examined those documents that were provided, weighed them, and concluded that they did not establish on the balance of probabilities that the uncle was currently living in Canada.

[34] The fact that the Visa Officer did not accept the Driver's Licence as evidence, even though it was issued within six months from the date of the application, does not render her decision unreasonable. It is clear that the issue here was the type of evidence provided, not the date it was provided. A Driver's Licence proves nothing about residence other than that the holder stated that this was their residence at the time they received their licence.

[35] Further, the applicant's submissions regarding Alberta's *Operator Licensing and Vehicle Control Regulation* are not convincing. There is no obligation on a Visa Officer to seek out provincial legislation to determine the requirements for the issuance of a certain document. Nowhere in his application to the High Commission did the applicant include any information about the Alberta's *Operator Licensing and Vehicle Control Regulation.* If he had informed the Visa Officer that his uncle was a recent arrival in Canada, did not have any of the documents listed in the Kit checklist, and provided information that Drivers' Licences in Alberta are issued only to residents of that Province, then I may have been persuaded, on the basis of *Salman*, that the Officer's assessment of the evidence without further inquiry was unreasonable.

[36] The Visa Officer's decision was reasonable and the applicant has not shown that the process used to reach it was procedurally unfair. Accordingly, this application is dismissed.

[37] Neither party proposed a question for certification; there is none.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-713-10
STYLE OF CAUSE:	SURAJDEEP SINGH DHILLON v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	October 21, 2010
REASONS FOR JUDGMENT AND JUDGMENT BY:	ZINN J.
DATED:	October 26, 2010

APPEARANCES:

Peter W. Wong, Q.C.	FOR THE APPLICANT
Rick W. Garvin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CARON & PARTNERS, LLP Barristers & Solicitors Calgary, Alberta	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT