Federal Court Cour fédérale

Date: 20101217

Docket: IMM-6162-09

Citation: 2010 FC 1306

Halifax, Nova Scotia, December 17, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PARAMJIT SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-6164-09

BETWEEN:

NIRVAIR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-6165-09

BETWEEN:

JAGTARAN SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision by a visa officer (the officer) at the Canadian High Commission in New Delhi, India, dated October 13, 2009, wherein the officer denied the applicants' applications for temporary work permits.

[2] The applicants request:

1. That the decision of the officer be quashed and the claim remitted to the Immigration Section of the High Commission of Canada in New Delhi, India, for reconsideration by a different officer;

2. Such further and other relief as may be advised and this Honourable Court considers appropriate in the circumstances.

Background

[3] Paramjit Singh is a citizen of India, born on August 30, 1989. He trained to become a Ragi (monk/priest) for five years in Moga in the province of Punjab, India, beginning in April 1998. From 2004 to 2007, he worked as a Ragi in Nairobi after which he returned to India.

[4] Nirvair Singh is a citizen of India born on March 25, 1983. He trained to become a Ragi for five years in Moga in the province of Punjab, India, beginning in June 1992.

[5] Jagtaran Singh is a citizen of India born on May 6, 1972. He trained to become a Ragi for five years in Moga in the province of Punjab, India, beginning in June 1987.

[6] The applicants' duties as Ragis consist of, among others, delivering daily prayer services, hymns, songs and sermons. The prayers take place between 3:30 a.m. and 6:45 a.m. in the morning and 4:30 p.m. and 9:30 p.m. in the evening.

[7] In 2008, the Secretary of the Nanaksar Satsang Sabha of Ontario heard the applicants perform as a group at the Nanaksar Gurdwara in Moga, India. The Secretary was impressed with the performance and recommended them to the Executive Committee of the Nanaksar Satsang Sabha of Ontario. Following this, they were then invited to work at the Nanaksar Satsang Sabha Gurdwara (Sikh temple) in Brampton (the Brampton Gurdwara).

[8] The Brampton Gurdwara is part of an international chain of Gurdwaras. The headquarters is in New Delhi where the applicants currently work.

[9] The Brampton Gurdwara obtained a positive labour market opinion (LMO) in June 2009 for four Ragi positions each at a salary of $36,000 per year plus lodging and other expenses. In August 2009, all three applicants applied for temporary work permits to work as Ragis at the Brampton Gurdwara, pursuant to this positive LMO.

[10] On October 13, 2009, the officer conducted three separate interviews of the applicants. Their applications were refused on the basis that the officer was not satisfied as to the *bona fides* of the applications, that they met the requirements of the job or that they would leave Canada at the end of the authorized stay.

Officer's Decision

[11] The officer provided one conclusion in the Computer Assisted Immigration Processing System (CAIPS) notes for all three applicants.

[12] The officer's refusal letter indicates through a checked box that the applicants did not meet the requirements of the job as specified in the job offer. In addition, the officer handwrote that the applicants had insufficient knowledge of the religion and its teachings and had provided inconsistent answers.

[13] In the CAIPS notes, the officer questioned the *bona fides* of the applicants. She was not satisfied that they were genuine religious workers and would leave Canada when requested to do so.

[14] The officer was concerned with inconsistencies in the responses of the applicants regarding their activities the morning of the interview, the size of the Canadian congregation and what their duties would be at the Brampton Gurdwara. Further, the officer noted that the applicants' religion taught them not to accept money for their services, yet they were to be paid a salary beyond their living expenses while in Canada.

[15] As such, the officer refused the applications for temporary work permits.

Issues

[16] The applicants submitted the following issues for consideration:

1. Did the immigration officer err in her assessment of the *bona fides* of the applicants' applications for work permits by failing to consider the applicants' experience letters?

2. Did the immigration officer err by failing to consider the principle of dual intent set out in subsection 22(2) of the *Immigration and Refugee Protection Act*?

3. The weight to be given to the officer's affidavit.

4. Whether the officer erred in making a negative inference with respect to the applicants' salaries in Canada when she assessed the *bona fides* of the applications.

5. Whether the officer's determination that the applicants had made inconsistent statements was unreasonable.

6. Whether costs should be awarded to the applicants.

[17] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer base her decision on an erroneous finding of fact made without considering the material before her?

3. Did the officer breach a duty of fairness to the applicants by not alerting them to her concerns about the veracity of their experience letters?

4. Did the officer ignore the applicants' right to enter Canada with a dual intent?

5. Did the officer make an unreasonable non-credibility finding?

6. Should costs be awarded to the applicants?

Applicants' Written Submissions

[18] The applicants submit that the officer did not consider the letters outlining their experience and training as Ragis. This was unreasonable as the letters were positive indicators of their ability to meet the requirements of the job in Brampton.

[19] In addition, the applicants submit that the officer applied a broad generalization about the credibility of letters from Indian employers and failed to consider the actual letters before her, amounting to a breach of natural justice. If she had concerns about the veracity of the letters, the officer should have requested further documentation. By not doing so, the officer put the applicants

in a position where they could not satisfy her of their experience regardless of whether they provided the documentation requested by CIC.

[20] The applicants also provided detailed descriptions during their interview about their training, experience as Ragis, the daily routine at the Gurdwara, their musical skills and information about their religion. Yet, the officer concluded that all three applicants did not meet the job requirements and had insufficient knowledge of the religions and its teachings. The applicants submit that this demonstrates that the officer did not consider the information the applicants provided during their interview in reaching her decision.

[21] The applicants submit that the officer erred by not giving any weight to the assessment by a previous officer who noted each applicant's experience as a Ragi and stated that the applicants met the Human Resources and Social Development Canada (HRSDC) requirements.

[22] The applicants submit that it was unreasonable for the officer to find their responses inconsistent. Any differences between their answers were small and may be attributed to the different roles they played in the services. Their correct answers were consistent with the job offer and are evidence of their credibility and experience as Ragis and they should not be penalized for not knowing the size of the congregation in Canada. The officer unreasonably concluded that they lacked sufficient knowledge of the job in Canada as she did not consider the information they each provided in the interview.

[23] The applicants submit that they would receive a salary of $36,000 to cover living expenses and although they did not explain that they would donate any excess above living costs to charity, there is nothing to suggest the salary was incentive for the applicants to stay in Canada unlawfully. The negative finding regarding the salary was unsupported and led to the assessment of the *bona fides* of the applicant.

[24] The applicants submit that the officer failed to apply the principle of dual intent of subsection 22(2) of the Act. The applicants were permitted to have the intention of becoming permanent residents as long as they returned to India at the end of the authorized stay. The applicants provided sufficient evidence of ties to India to show that they would not stay in Canada beyond the authorized period. In particular, Paramjit Singh provided evidence of his previous travel to and return from Kenya, not considered by the officer, which is further evidence that he would not overstay the temporary work permit.

[25] While the officer has acknowledged that her handwritten comments about the lack of knowledge of the religion were erroneous, it is improbable that these reasons did not form part of her actual reasons for refusal.

[26] The applicants submit that the officer is improperly using her affidavit to improve upon her reasons and her affidavit should not be given any weight. For example, they submit that the officer did not indicate concerns with credibility in the refusal letter or the interview but now states that her decision focused around the applicants' lack of credibility. In addition, her reasons in the refusal

letter should be taken at face value since they were entered closer in time to the decision than the new affidavit.

[27] The applicants submit that the numerous significant errors and inconsistencies in the officer's CAIPS notes and affidavit have caused significant delay and hardship to the applicants and they should be awarded costs.

Respondent's Written Submissions

[28] The respondent submits that the fact that the officer was not convinced by the letters of experience does not mean she did not consider them. She was only required to acknowledge evidence before her which was relatively significant. Since the officer sees many of these letters which are fictitious, it was reasonable for her to require more than just the letters as evidence of experience. The officer did not refer to these letters because reviewing letters such as these is a routine part of her job.

[29] The respondent submits that an assessment by a previous officer based on the LMO cannot be used as evidence of the applicants' experience because the LMO assumes the truth of all information in the applicants' applications and the officer's assessment merely acknowledges that the training and experience satisfy the HRSDC requirements. The officer deciding the visa application must make her own assessment.

[30] The respondent submits that the inconsistent answers of the Ragis raised serious concerns for the officer as to whether they were a group. The inconsistencies were not small. Getting some answers correct about the prospective employer does not cancel out the applicants' wrong answers, especially when they are substantial in nature.

[31] The respondent acknowledges that the handwritten statement that the applicants lacked religious knowledge was erroneous. However, the respondent submits that this is not fatal to the decision because the decision was wholly based on other concerns: the inconsistent answers, lack of basic knowledge about the employer, the serious breach of faith made by accepting a salary above and beyond the living expenses.

[32] The respondent submits that the non-credibility finding was reasonable. The applicants admitted that the salary went against their ethical obligations and never indicated that they would give the remainder to charity.

[33] The officer's finding that the applicants were using the work program to facilitate access to Canada should be read as using the program to facilitate unlawful entry to Canada which was part of her position to assess and was not ignoring the principle of dual intent.

[34] The respondent submits that the applicants have not raised any reviewable errors as none of the findings were unreasonable and the officer did not infringe on the applicants' right to enter Canada with dual intent.

Analysis and Decision

[35] **Issue 1**

What is the appropriate standard of review?

Refusal of a temporary work permit is an administrative decision made within the officer's legislative authority and is ostensibly a determination of fact (see *Samuel v. Canada (Minister of Citizenship and Immigration),* 2010 FC 223 at paragraph 26). In accordance with the direction of the Supreme Court of Canada, administrative fact-finding is afforded a high degree of deference and reasonableness is the appropriate standard of review for the officer's factual determination (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 46).

[36] However, any issues that go to the fairness of an impugned decision must be decided on a standard of correctness. No deference is afforded a decision-maker in this regard and "it is up to this Court to form its own opinion as to the fairness of the hearing" (see *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 983 at paragraph 16).

[37] **Issue 2**

Did the officer base her decision on an erroneous finding of fact made without considering the material before her?

The officer is expected to acknowledge and analyze the relevant evidence before her (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)* (1998), 157 F.T.R. 35, [1998]

F.C.J. No. 1425 (QL) at paragraph 17). A court may infer that the officer made an erroneous finding of fact if the officer failed to mention evidence before her which was relevant and pointed to a different conclusion than that which she reached (see *Cepeda-Gutierrez* above, at paragraph 15).

[38] The refusal letter stated that the applications were refused because the applicants did not meet the requirements of the job. The applicants each submitted two letters outlining their previous work experience and training as Ragis. Since the officer found that the applicants did not meet the requirements of the job offer, these letters were relevant and pointed to a different conclusion than the one she reached. She was required to acknowledge and analyze them.

[39] The officer stated in her affidavit that reviewing letters such as these is her standard practice and that is why they were not referred to directly. However, even if the officer sees and considers letters of this type in her position, it remains that she had a legal duty to acknowledge these specific pieces of evidence for this application and the failure to do so was unreasonable and constitutes a reviewable error.

[40] **Issue 3**

Did the officer breach a duty of fairness to the applicants by not alerting them to her concerns about the veracity of the experience letters?

An officer is not generally under a duty to inform an applicant about concerns regarding the application which arise directly from the requirements of the legislation or regulations (see *Hassani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 F.C.R. 501 at

paragraphs 23 and 24; *Gulati v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 451 at paragraph 43).

[41] However, an officer is obliged to inform an applicant of any concerns related to the veracity of documents and is required to make further inquires (see *Kojuri v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389 at paragraphs 18 and 19; *Olorunshola v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1056, 66 Imm. L.R. (3d) 192 at paragraphs 29 and 33; *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877, 63 Imm L.R. (3d) 285 at paragraphs 12 and 16).

[42] The officer stated in her affidavit regarding the past experience letters submitted by the applicants, that the office "sees many such letters which turn out to be fictitious." As such, she noted that she requires "more than the letters, for instance, newspaper cut outs, photos of them practicing or letters of reference, to properly corroborate claims of training, knowledge & experience." However, the applicants were not put on notice that the officer was concerned with the veracity of the letters and were not requested to present further documents to corroborate the letters. This was an error in law.

[43] Based on the above two issues, I would conclude that the officer's decision breached the duty of fairness to the applicants and it was also unreasonable in that the officer based her decision on an erroneous finding of fact made without regard to the material before her. Consequently, I would remit the applications to another officer for reconsideration.

[44] Because of my findings on the above issues, I need not deal with Issues 4 and 5.

[45] **Issue 6**

Should costs be awarded to the applicants?

The applicants seek costs of $2,500 each. Under Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, costs are only to be awarded in immigration cases where "special reasons" exist. Special reasons may exist where one party acts in a manner that is unfair, oppressive, improper, in bad faith or where there is conduct that unnecessarily or unreasonably prolongs the proceedings (see *Manivannan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1392, 77 Imm. L.R. (3d) 193 at paragraph 51).

[46] This Court has held that the "threshold for 'special reasons' within the meaning of Rule 22 is high" (see *Yadav v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 140, 8 Admin. L.R. (6th) 86 at paragraph 39). Even where the pace of the application processing is slow, special reasons to award costs will not often exist (see *Uppal v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1133, 141 A.C.W.S. (3d) 831 at paragraph 8).

[47] In this case, the applicants have failed to establish any behaviour which would qualify as special reasons. As such, I am not prepared to make an award of costs.

[48] The application for judicial review is therefore allowed.

[49] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[50] **THIS COURT ORDERS that:**

1. The application for judicial review is allowed, the decision of the officer is set aside and the matter is remitted to a different officer for redetermination.

2. No order for costs shall issue.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

22.(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.	22.(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.
. . .	. . .
72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Federal Courts Immigration and Refugee Protection Rules, SOR/93-22

22.No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	22.Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	IMM-6162-09
STYLE OF CAUSE:	PARAMJIT SINGH - and – THE MINISTER OF CITIZENSHIP AND IMMIGRATION NIRVAIR SINGH - and – THE MINISTER OF CITIZENSHIP AND IMMIGRATION JAGTARAN SINGH - and – THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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