

Date: 20080408

Docket: IMM-6438-06

Citation: 2008 FC 455

Vancouver, British Columbia, April 8, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

VIREAK PHORN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Vireak Phorn (“the Applicant”) seeks judicial review of the decision of Visa Officer Moira Escott (the “Visa Officer”), denying his application for permanent residence pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”) and the *Immigration and Refugee Protection Regulations*, SOR/2002-2007 (the “Regulations”).

[2] The Applicant is a Buddhist monk and Cambodian citizen. He entered Canada as a visitor in December 2001. He has been working as a monk at the Khmer Buddhist Temple in Vaughan, Ontario, since December 2001.

[3] The Applicant applied for permanent residence on March 5, 2005, as a member of the economic class, as a skilled worker in the occupation of “monk”. By letter dated October 20, 2006, his application was refused on the grounds that he has failed to obtain the required number of points. The Applicant was awarded 59 points and the minimum number of points to qualify for permanent residence is 67 points. The Visa Officer awarded zero points for “arranged employment” out of a maximum of 10 points. She also awarded zero points for “adaptability”, again out of a maximum of 10 points.

[4] In the refusal letter, the Visa Officer referred to subsection 12(2) of the Act that provides that a foreign national may be selected as a member of the economic class on the basis of his or her ability to become economically established. Subsection 75(1) of the Regulations describes the federal skilled worker class in terms of ability to become economically established. The Regulations provide that skilled worker applicants be assessed on the basis of criteria set out in subsection 76(1). Subsection 76(3) of the Regulations allows for the exercise of discretion in evaluating an applicant who has not demonstrated the ability to become economically established in Canada. Although the Visa Officer considered the exercise of discretion pursuant to subsection 76(3), she did not make a positive determination in that regard.

[5] The Applicant raises a number of arguments. He submits that the Visa Officer erred in interpreting subsection 82(2) of the Regulations, by failing to provide adequate reasons for her decision, by failing to provide him with the opportunity to address her concerns about his application, and by importing discriminatory factors into the exercise of her discretion pursuant to subsection 76(3), contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I

of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the "Charter").

[6] The Respondent filed an affidavit from the Visa Officer as part of his Application Record in this proceeding. At paragraphs 6 to 11, the Visa Officer discussed why the factors of arranged employment and adaptability did not apply in the Applicant's case and why she awarded no points in respect of those factors. Paragraph 6 to 11 provide as follows:

6. The factors of arranged employment and adaptability were not applicable in the applicant's case. Pursuant to Regulation 82, points for arranged employment are awarded if the applicant is in a specific situation at the time of the application as well as at visa issuance.
7. I did not award the Applicant points under R82(2)(a) because he did not meet the criteria of this subsection in that he did not hold a work permit.
8. Similarly, I did not award the Applicant points for arranged employment under R82(2)(b) because he did not hold the work permit described therein.
9. I did not award the Applicant points for arranged employment under R82(2)(c) because although he did work in Canada before being issued a permanent resident visa, no opinion on an offer of employment was provided from the Department of Human Resources Development.
10. Finally, I awarded no points under R82(2)(d) because the Applicant did not hold a work permit at the time of assessment.
11. Since the Applicant did not meet any of the requirements under R82, I did not award the applicant points for arranged employment. The Applicant was advised of this in writing in the refusal letter.

[7] Section 82 of the Regulations provides as follows:

82. (1) In this section, "arranged 82. (1) Pour l'application du

employment" means an offer of indeterminate employment in Canada.

Arranged employment (10 points)

(2) Ten points shall be awarded to a skilled worker for arranged employment in Canada in an occupation that is listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix if they are able to perform and are likely to accept and carry out the employment and

- a) the skilled worker is in Canada and holds a work permit and:
- (i) there has been a determination by an officer under section 203 that the performance of the employment by the skilled worker would be likely to result in a neutral or positive effect on the labour market in Canada,
 - (ii) the skilled worker is currently working in that employment,
 - (iii) the work permit is valid at the time an application is made by the skilled worker for a permanent resident visa as well as at the time the permanent resident visa, if any, is issued to the skilled worker, and
 - (iv) the employer has made an offer to employ the skilled worker on an indeterminate basis once the permanent resident visa is issued to the skilled worker;

présent article, constitue un emploi réservé toute offre d'emploi au Canada à durée indéterminée.

Emploi réservé (10 points) :

(2) Dix points sont attribués au travailleur qualifié pour un emploi réservé appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions, s'il est en mesure d'exercer les fonctions de l'emploi et s'il est vraisemblable qu'il acceptera de les exercer, et que l'un des alinéas suivants s'applique :

- a) le travailleur qualifié se trouve au Canada, il est titulaire d'un permis de travail et les conditions suivantes sont réunies :
- (i) l'agent a conclu, au titre de l'article 203, que l'exécution du travail par le travailleur qualifié est susceptible d'entraîner des effets positifs ou neutres sur le marché du travail canadien,
 - (ii) le travailleur qualifié occupe actuellement cet emploi réservé,
 - (iii) le permis de travail est valide au moment de la présentation de la demande de visa de résident permanent et au moment de la délivrance du visa de résident permanent, le cas échéant,
 - (iv) l'employeur a présenté au travailleur qualifié une offre d'emploi d'une durée indéterminée sous réserve de la délivrance du visa de résident

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| <p>b) the skilled worker is in Canada and holds a work permit referred to in paragraph 204(a) or 205(a) or subparagraph 205(c)(ii) and the circumstances referred to in subparagraphs (a)(ii) to (iv) apply;</p> | <p>permanent;</p> <p>b) le travailleur qualifié se trouve au Canada, il est titulaire du permis de travail visé aux alinéas 204a) ou 205a) ou au sous-alinéa 205c)(ii) et les conditions visées aux sous-alinéas a)(ii) à (iv) sont réunies;</p> |
| <p>c) the skilled worker does not intend to work in Canada before being issued a permanent resident visa and does not hold a work permit and:</p> <p>(i) the employer has made an offer to employ the skilled worker on an indeterminate basis once the permanent resident visa is issued to the skilled worker, and</p> <p>(ii) an officer has approved that offer of employment based on an opinion provided to the officer by the Department of Human Resources Development at the request of the employer or an officer that:</p> <p style="padding-left: 40px;">(A) the offer of employment is genuine,</p> <p style="padding-left: 40px;">(B) the employment is not part-time or seasonal employment, and</p> <p style="padding-left: 40px;">(C) the wages offered to the skilled worker are consistent with the prevailing wage rate for the occupation and the working conditions meet generally accepted Canadian standards; or</p> | <p>c) le travailleur qualifié n'a pas l'intention de travailler au Canada avant qu'un visa de résident permanent ne lui soit octroyé, il n'est pas titulaire d'un permis de travail et les conditions suivantes sont réunies :</p> <p>(i) l'employeur a présenté au travailleur qualifié une offre d'emploi d'une durée indéterminée sous réserve de la délivrance du visa de résident permanent,</p> <p>(ii) un agent a approuvé cette offre sur le fondement d'un avis émis par le ministère du Développement des ressources humaines, à la demande de l'employeur, à sa demande ou à celle d'un autre agent, où il est affirmé que :</p> <p style="padding-left: 40px;">(A) l'offre d'emploi est véritable,</p> <p style="padding-left: 40px;">(B) l'emploi n'est pas saisonnier ou à temps partiel,</p> <p style="padding-left: 40px;">(C) la rémunération offerte au travailleur qualifié est conforme au taux de rémunération en vigueur pour la profession et les conditions de l'emploi</p> |
| <p>(d) the skilled worker holds a work permit and</p> | |

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| (i) the circumstances referred to in subparagraphs (a)(i) to (iv) and paragraph (b) do not apply, and
(ii) the circumstances referred to in subparagraphs (c)(i) and (ii) apply. | satisfont aux normes canadiennes généralement acceptées;

d) le travailleur qualifié est titulaire d'un permis de travail et, à la fois :

(i) les conditions visées aux sous-alinéas a)(i) à (iv) et à l'alinéa b) ne sont pas remplies,
(ii) les conditions visées aux sous-alinéas c)(i) et (ii) sont réunies. |
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[8] The Applicant entered Canada as a visitor. When he applied for permanent residence, his visa was subject to the following conditions:

1. Prohibited from engaging in employment in Canada.
2. Prohibited from attending any educational institutions and taking any academic, professional or vocational training courses.
3. Must leave Canada by 24 June 2006.

[9] The visa also was endorsed with the following under the heading "Remarks":

Temporary resident status maintained as per R183(6). Authorized to perform religious duties for the Khmer Buddhist Temple of Ontario.

[10] The Act and the Regulations provide the statutory framework for the granting of permanent residence as a member of the skilled worker class. According to the recent decision in the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the decision of the officer, as an administrative decision-maker, is to be assessed on the standard of either correctness or reasonableness. In this case, the issue of statutory interpretation will be assessed on the standard of

correctness and the issue of the exercise of discretion will be assessed on the standard of reasonableness.

[11] The Applicant argues that the Visa Officer erred in interpreting paragraphs 82(2)(a) and 83(1)(c) and (e) of the Regulations. He argues that the correct reading of these provisions of the Regulations shows that Parliament intended that he be exempt from the requirement to obtain a work permit and a Labour Market Opinion (“LMO”) as conditions of eligibility to become a permanent resident. He submits that he held a valid work permit, authorizing him to perform religious duties and there was no need for him to obtain a LMO.

[12] Section 1 of the Regulations defines “work permit” as follows:

"work permit" means a written authorization to work in Canada issued by an officer to a foreign national.	Document délivré par un agent à un étranger et autorisant celui-ci à travailler au Canada.
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[13] Subsection 8 provides as follows:

(1) A foreign national may not enter Canada to work without first obtaining a work permit. Exception	(1) L'étranger ne peut entrer au Canada pour y travailler que s'il a préalablement obtenu un permis de travail.
(2) Subsection (1) does not apply to a foreign national who is authorized under section 186 to work in Canada without a work permit.	Exception (2) Cette obligation ne s'applique pas à l'étranger qui est autorisé à travailler au Canada sans permis de travail au titre de l'article 186.

[14] Subsection 186(1) of the Regulations provides as follows:

186. A foreign national may work in Canada without a work permit:

(1) as a person who is responsible for assisting a congregation or group in the achievement of its spiritual goals and whose main duties are to preach doctrine, perform functions related to gatherings of the congregation or group or provide spiritual counselling;

186. L'étranger peut travailler au Canada sans permis de travail :

(1) à titre de personne chargée d'aider une communauté ou un groupe à atteindre ses objectifs spirituels et dont les fonctions consistent principalement à prêcher une doctrine, à exercer des fonctions relatives aux rencontres de cette communauté ou de ce groupe ou à donner des conseils d'ordre spirituel;

[15] The Applicant did not have a work permit when he applied for permanent residence, rather he held a visa which both prohibited him from engaging in employment in Canada and authorized him to perform religious duties for the Khmer Buddhist Temple in Vaughan.

[16] The combined effect of sections 2, 8 and subsection 186(1) of the Regulations, relative to the Applicant, is that he is only allowed to perform religious duties for the Khmer Buddhist Temple. Insofar as this is "work", he is allowed to work in Canada. However, the endorsed visa of the Applicant is not a "work permit" within the regulatory scheme established by the Regulations. The Visa Officer correctly interpreted and applied the Regulations. The decision is consistent with that reached by the Court in *Tong v. Canada (Minister of Citizenship and Immigration)* (2007), 309 F.T.R. 209.

[17] I am not persuaded that the Visa Officer erred in the exercise of her discretion pursuant to subsection 76(3). There is no evidence that she relied on extraneous or irrelevant factors, or ignored any evidence that was before her.

[18] It is not necessary to consider the constitutional arguments raised by the Applicant. This matter essentially involves a question of statutory interpretation and can be disposed of on that basis.

[19] In the result, the application for judicial review is dismissed, there is no question for certification arising.

JUDGMENT

This application for judicial review is dismissed. There is no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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