Date: 20091203

Docket: IMM-2658-09

Citation: 2009 FC 1234

Ottawa, Ontario, December 3, 2009

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

XIPING JIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review submitted by Ms. Xiping Jin (the "Applicant"), concerns the interpretation of ministerial instructions issued in 2008 pursuant to section 87.3 of the *Immigration and Refugee Protection Act* (the "Act") introduced into the Act by section 118 of the *Budget Implementation Act, 2008*. These ministerial instructions were published in the *Canada Gazette Part 1* on November 29, 2008 (the "Instructions").

[2] Specifically, the Applicant seeks to have this Court interpret the words "[a]pplications submitted […] by foreign nationals residing legally in Canada for at least one year as […]

International Students" set out in the Instructions as including foreign nationals who, at any time in the past, resided legally in Canada for at least one year as International Students. This interpretation would allow an International Student who resided in Canada for at least one year at any time in the past to benefit from priority processing for Federal Skilled Workers permanent residence applications.

Background

[3] The Applicant was studying at Knox College in Toronto from September 2004 to August 2006. She then took a leave from her studies and resided in China until her return to Canada to study in May of 2008. She has pursued her studies in Canada continuously since May 2008 to the time of the hearing on this judicial review. At all relevant times she has held a valid student visa. Her current student visa expires August 30, 2012.

[4] In September of 2008, the Applicant applied for permanent residence in Canada under the Federal Skilled Worker class deeming herself eligible to this class as an International Student who has resided in Canada for at least one year. She processed this application through the Canadian Consulate General in Buffalo, New York state.

[5] On April 17, 2009 the Immigration Section of the Buffalo Visa Office notified the Applicant that her application for permanent residence under the Federal Skilled Workers class could not be processed.

[6] One of the grounds under which the Applicant initially challenged this decision was that the Instructions had not been published in the *Canada Gazette* at the time her application was submitted. However, at the hearing on this judicial review application held on November 17, 2009, the Applicant informed the Court that she was nevertheless seeking to have her application processed under the Instructions. Consequently, she informed the Court that she was not pursuing any argument related to the fact that these Instructions were published in the *Canada Gazette* after she had made her application.

[7] The Applicant pursued the following arguments:

a. the ministerial instructions should be interpreted to apply to her case since, at the time of her application, she did accumulate one year of legal residence in Canada as an International Student, if her time in Canada prior to her leave of studies is taken into account, and

b. the original decision which had been made in her case dated April 17, 2009 was based on the fact her work experience did not correspond to any of the occupations identified in the Instructions. Since her application was rather based on her status as a resident International Student, the April 17, 2009 decision was wrong in that it did not provide reasons why she had been refused as an International Student. The Applicant argued that it was only in these judicial review proceedings that the Respondent finally provided the reasons for not processing her application as an International Student.

Legislative context

[8] Subsections 87.3 (2) and (3) of the Act provide for the following:

(2) The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.	(2) Le traitement des demandes se fait de la manière qui, selon le ministre, est la plus susceptible d'aider l'atteinte des objectifs fixés pour l'immigration par le gouvernement fédéral.
(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions	(3) Pour l'application du paragraphe (2), le ministre peut donner des instructions sur le traitement des demandes, notamment en précisant l'un ou l'autre des points suivants :
(*a*) establishing categories of applications or requests to which the instructions apply;	*a*) les catégories de demandes à l'égard desquelles s'appliquent les instructions;
(*b*) establishing an order, by category or otherwise, for the processing of applications or requests;	*b*) l'ordre de traitement des demandes, notamment par catégorie;
(*c*) setting the number of applications or requests, by category or otherwise, to be processed in any year; and	*c*) le nombre de demandes à traiter par an, notamment par catégorie;
(*d*) providing for the disposition of applications and requests, including those made subsequent to the first application or request.	*d*) la disposition des demandes dont celles faites de nouveau.

[9] These provisions were introduced in the Act through section 118 of the *Budget Implementation Act, 2008*. Section 120 of the *Budget Implementation Act, 2008* sets out that the

provisions of section 87.3 of the Act apply only to applications and requests made after February 27, 2008.

[10] The concerned Instructions were subsequently issued pursuant to section 87.3 of the Act and published in the *Canada Gazette Part 1* on November 29, 2008. The pertinent extracts of these Instructions are as follows:

Federal Skilled Worker applications submitted on or after February 27, 2008, meeting the following criteria shall be placed into processing immediately upon receipt:	Les demandes présentées par des travailleurs qualifiés (fédéral) à partir du 27 février 2008 et qui répondent aux critères suivants doivent être traitées en priorité dès leur réception :
• Applications submitted with an offer of Arranged Employment and applications submitted by foreign nationals residing legally in Canada for at least one year as Temporary Foreign Workers or International Students;	• Demandes présentées avec une offre d'emploi réservé et demandes présentées par des étrangers vivant légalement au Canada depuis au moins une année à titre de travailleurs étrangers temporaires ou d'étudiants étrangers;
• Applications from skilled workers with evidence of experience (footnote: At least one year of continuous full-time or equivalent paid work experience in the last ten years) under one or more of the following National Occupation Classification (NOC) categories: [list of categories is set out]	• Demandes présentées par des travailleurs qualifiés (fédéral) accompagnées d'une preuve d'expérience (note de bas de page :Au moins une année d'expérience professionnelle continue à temps plein ou l'équivalent rémunéré, au cours des dix dernières années) dans l'une ou plusieurs des catégories suivantes de la Classification nationale des professions (CNP) : [liste de catégories est prévue]
[…]	[…]

Applicants to the Federal Skilled Worker Program whose applications were received on or after February 27, 2008, and which do not meet the assessment criteria described above shall be informed, in as short a time as possible, that their applications will not proceed for processing and shall be returned their processing fees, unless the Minister has otherwise instructed that applications be retained.	Les demandeurs au titre de la catégorie des travailleurs qualifiés (fédéral) qui ont présenté leur demande à partir du 27 février 2008 et qui ne remplissent pas les critères d'évaluation énumérés ci-dessus doivent être avisés, le plus rapidement possible, que leur demande ne sera pas traitée et qu'ils seront remboursés, à moins d'instructions contraires du ministre indiquant de conserver la demande.

Analysis

[11] The terms of the Instructions are clear on the residency requirements. The words "applications submitted by foreign nationals residing legally in Canada for at least one year as Temporary Foreign Workers or International Students" suffer no ambiguity. The choice of verb tense makes it abundantly clear that the Temporary Foreign Worker or the International Student must have been residing legally in Canada for at least one year immediately prior to his or her application. The French wording is also unambiguous and conveys the same meaning: «demandes présentées par des étrangers vivant légalement au Canada depuis au moins une année à titre de travailleurs étrangers temporaires ou d'étudiants étrangers ».

[12] Where the Ministerial instructions wish to convey that a past period of time can be considered, they state so clearly, such as in the footnote concerning applications from skilled workers with evidence of experience which clearly provides for recognition of past experience in

the following terms: “[a]t least one year of continuous full-time or equivalent paid work experience in the last ten years”.

[13] This disposes of the Applicant’s first argument. The Applicant however raises a second and stronger argument.

[14] The April 17, 2009 decision conveyed to the Applicant appears to be a standard form letter that reads in part as follows:

> You have not indicated in your application that you have an Arranged Employment Offer or that you are legally residing in Canada for at least one year as a Temporary Foreign Worker or an International Student. Your application has therefore been assessed on the basis of whether you have work experience in the list of occupations eligible for processing. These occupations are identified by codes and described in the National Occupational Classification (NOC). You may access the list of eligible occupations at [Internet address indicated]. The occupation(s) you indicated that you have work experience in do(es) not correspond to any of the occupations specified in the instructions. As your occupation(s) is not included on the list of eligible occupations, we are unable to process your application at this time.

[15] From reading this response, it is easily understandable why the Applicant was confused. She had applied on the basis of her status as a resident International Student and the response she received back referred for the most part to occupational requirements she never applied under. The unfortunate use of form letters in responding to applications where multiple facts situations are involved can easily lead to ambiguity and misunderstanding. This whole litigation could have been easily avoided had a proper and cogent response been provided to the Applicant setting out in

unambiguous terms the basis for which her application could not be processed as an International Student. This was not done.

[16] The form letter states that the Applicant did not indicate in her application that she was legally residing in Canada for at least one year as an International Student. The true reason for not processing the application is thus stated, but in such a convoluted and ambiguous manner as to render the decision almost impossible to understand without further inquiry. This is not a proper way to proceed and is neither correct nor reasonable.

[17] In judicial review, the Court must concern itself with the existence of justification, transparency and intelligibility within the decision-making process. Here the decision was legally correct, but the communication of the reasons for which it was made was deficient.

[18] Nevertheless, this application for judicial review fails on the question of remedy.

[19] Indeed, the solution to the Applicant's issues is to simply submit another application which, in light of her continued studies in Canada for well over a year since May of 2008, should now be processed pursuant to the Instructions. This Court has discretion to withhold relief when a procedural error is purely technical and occasions no substantial wrong or miscarriage of justice: *Minister of Citizenship and Immigration v. Khosa*, [2009] 1 S.C.R. 339 at para. 43. Returning the matter back to the decision maker on the basis of the original application for permanent residence would not provide the Applicant the results she seeks. It is therefore preferable for the Applicant to

submit another application for permanent residence under the Skilled Workers Class as she has been invited to do by the Respondent's counsel.

[20] However asking the Applicant to reapply does not resolve the unfortunate delay in processing a new application. Indeed, had the Applicant been properly informed of the reason for which her application could not be processed, she could have submitted a new application which answered the Instructions as early as May 2009. The Respondent's counsel has indicated that should the Applicant reapply for permanent residence under the Skilled Workers Class, her new application could be given priority processing (at page 60 of transcript of hearing). In light of this judgment and the reasons contained therein, this Court fully expects the Respondent to live up to this undertaking.

Certified question

[21] The Applicant requested that the following question be certified for appeal to the Federal Court of Appeal as a serious question of general importance:

> How should a visa officer correctly calculate the period of at least one year during which a foreign student has been legally residing in Canada before his or her application for permanent residence in Canada as a skilled worker?

[22] The Applicant explained that the purpose of this question was, *inter alia*, to determine if summer recess from studies or doctoral studies abroad should be included in the calculation.

[23] The Respondent objected to such a question on the basis that it does not rest on the Applicant' case and is therefore inappropriate.

[24] I agree with the Respondent that the question raised is inappropriate and does not merit certification pursuant to paragraph 74(d) of the Act. In *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2009] F.C.J. No. 549 at para. 23, the Federal Court of Appeal noted that this paragraph is not to be invoked lightly. The interpretation of this ministerial instruction on the narrow facts of this case is not of general importance. Moreover there exists an easily available alternative recourse for the Applicant through a new application. Consequently no question shall be certified.

Disposition

[25] The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Robert Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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