Federal Court  Cour fédérale

Date: 20100331

Docket: IMM-1525-09

Citation: 2010 FC 352

Ottawa, Ontario, March 31, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

KATHERINE SALAHOVA

Applicant

and

THE MINSITER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Did Ms. Salahova "make" an application for a permanent resident visa as a member of the Skilled Worker Class before February 27, 2008? If she did, she is entitled to an assessment in accordance with Sections 75 and following of the *Immigration and Refugee Protection Regulations*. If not, by virtue of a Ministerial Instruction issued pursuant to Section 87.3 of the *Immigration and Refugee Act*, her application could not be processed because the Minister has decreed we have no

need at this time for immigrants with work experience as a secondary school teacher or as an elementary school teacher of English.

[2] Ms. Salahova mailed her application from her home in Minsk, Belarus, to the Canadian Embassy in Warsaw, Poland, on February 25, 2008. It was received at the Embassy on March 3, 2008. The Immigration and Visa Section of the Embassy informed her months later that, in accordance with the Minister's Instructions, since she did not have an arranged employment offer, was not legally residing in Canada for at least one year as a temporary worker or as an international student, or did not have work experience in any of the occupations listed in the Instruction, her application was not eligible to be processed. This is a judicial review of that decision.

[3] What Ms. Salahova lost is an opportunity. She was aware from the outset that she was short of the required number of points in the selection criteria, but was hopeful that there were circumstances to allow the Visa Officer to carry out a substituted evaluation based on the likelihood of her ability to become economically established in Canada, as contemplated by Regulation 76.

[4] Unfortunately for Ms. Salahova, she is facing a statute with clear and specific retroactive effect.

[5] Section 87.3 of IRPA only became law close to four months after her application was received at the Canadian Embassy. Section 87.3 was part of Bill C-50, *An Act to implement certain*

provisions of the budget tabled in Parliament on February 26, 2008 and to enact provisions to preserve the fiscal plan set out in that budget. It received Royal Assent June 18, 2008.

[6] Section 87.3 allows the Minister to issue instructions aimed at reaching Canada's immigration goals. More particularly Section 87.3(3) provides:

87.3 (3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions	87.3 (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.

[7] Although there is a presumption against a statute having retroactive effect, Section 120 of Bill C-50 specifically provided:

Transitional Provision	Disposition transitoire
120. Section 87.3 of the *Immigration and Refugee Protection Act* applies only to applications and requests made on or after February 27, 2008.	120. L'article 87.3 de la *Loi sur l'immigration et la protection des réfugiés* ne s'applique qu'à l'égard des demandes faites à compter du 27 février 2008.

[8] Ms. Salahova's position is that she "made" the application when she mailed it on February 25. Although the Minister has quibbled on this point, I am satisfied that she sent it by mail that day, and that it was only received on March 3.

[9] The question then is whether the application was "made on or after February 27, 2008" or "faite à compter du 27 février 2008", within the meaning of Bill C-50.

[10] The Minister's Instructions were only published in the Canada Gazette on November 29, 2008.

[11] Unfortunately, the Instructions use many words which may or may not mean the same thing, such as:

a. "The instructions only apply to applications…made on or after February 27, 2008"
b. "All applications made prior to February 27, 2008 shall be processed in the manner existing at the time of application"
c. "Federal Skilled Worker Application submitted on or after February 27, 2008…"

d. "Requests made on the basis of humanitarian and compassionate grounds…" (not applicable in this situation)

e. "Applicants to the Federal Skilled Worker Program whose applications were received on or after February 27, 2008…will not proceed for processing…"

[12] The French version consistently uses the word "présentées" rather than "faites", the term used in the Act.

[13] Certainly the French version is quite straightforward and, in my opinion, means "received" at or "submitted" to the Embassy. However, the Minister's Instructions must conform to Bill C-50, which begs the question whether the application was "made" or "faites" when it was mailed on February 25, 2008 or only when it was received at the Embassy on March 3, 2008.

[14] If we were to draw an analogy to contracts by correspondence, the application should be treated as an offer and would only come into effect when received. However, there is a wealth of jurisprudence which deals with applications made under IRPA or its predecessor acts.

[15] One problem has been whether an application was "locked-in" when received by the immigration authorities or when it was processed. There can be a considerable delay. It is now accepted that reception trumps processing (*Wong v. Canada (Minister of Employment and Immigration* (1986), 64 N.R. 309 (F.C.A.)). Some decisions turn on the specific provisions of the

Regulations, such as deemed receipt, absent actual proof to the contrary, occurring a specific number of days after a notice was mailed.

[16] In *Wong*, above, Mr. Justice Mahoney said:

> The visa could not be issued or refused except by a visa officer who is, by definition, an officer stationed outside Canada. Any processing required to be done by the visa officer would necessarily have to be done outside Canada. It does seems to me, however, that an application for an immigrant visa is made when it duly initiates the process leading to the issue or refusal of the visa and not only when that processing is committed to the particular official authorized to dispose of the application.

[17] "Lock-in" dates are often important because of a backlog in applications.

[18] In *Choi v. Canada (Minister of Employment of Immigration)*, [1992] 1 F.C. 763 (C.A.), Mr. Justice MacGuigan stated at paragraph 10:

> In light of Wong, I must give effect to this new argument presented by the appellant that the "lock-in" date for occupational assessment has always rightly been the date of the receipt, by the Department, of the application. […]

[19] A more recent decision of the Federal Court of Appeal to the same effect is *Hamid v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 217, [2007] 2 F.C.R. 152, 54 Imm. L.R. (3d) 163.

[20] Consequently, I must conclude that Ms. Salahova's application was not "made" within time. I would have been better if the Minister's Instruction was more consistent in its language, but in context "made," "received" and "submitted" can only mean the same thing.

[21] Ms. Salahova argued in the alternative that the result was procedurally unfair. In one sense her situation is unfortunate. Obviously, if she knew on February 25 what the law was going to be, with retroactive effect, she would not have gone through the bother of applying in the first place. However, Parliament was constitutionally empowered to do what it did, as was the Minister under Section 87.3 of IRPA. As reaffirmed by the Court of Appeal in *dela Fuente v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186, [2007] 1 F.C.R. 387, 53 Imm. L.R. (3d) 171 at para. 19:

> […] The doctrine of legitimate expectations is a procedural doctrine which has its source in common law. As such it does not create substantive rights and cannot be used to counter Parliament's clearly expressed intent (*Canada (M.E.I.) v. Lidder*, [1992] F.C.J. No. 212 (F.C.A.) at paras. 3 and 27).

[22] In the circumstances, I am unable to certify any question which would permit an appeal to the Federal Court of Appeal.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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