Federal Court		Cour fédérale

Date: 20101101

Docket: IMM-4599-09

Citation: 2010 FC 1072

Ottawa, Ontario, November 1, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NAVRAT KUMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application made 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 of an immigration officer of Citizenship and Immigration Canada (the immigration officer) dated July 3, 2009, wherein the immigration officer (the officer) found the applicant to be ineligible to make an application for permanent residence in Canada as a member of the federal skilled worker class.

[2] The applicant seeks an order from this Court quashing the decision of the officer and remitting the matter back to Citizenship and Immigration Canada (CIC) for reconsideration by a different officer.

Background

[3] On February 26, 2008, the Federal Government introduced changes to the Act's skilled worker processing scheme. These amendments permitted the issuance of Ministerial Instructions which may establish an order, by category or otherwise, for the processing of applications or requests and may set the number of applications or requests by category or otherwise, to be processed in any year.

[4] On November 28, 2008, the Government of Canada published in the Canada Gazette instructions issued by the Minister of Citizenship and Immigration under subsection 87.3(3) of the Act (Ministerial Instructions). The Ministerial Instructions outline eligibility criteria that apply with respect to processing of all applications for permanent residence visas made under the federal skilled worker class as defined in the Act, that were received by CIC on or after February 27, 2008. Under the Ministerial Instructions, if an application does not meet the eligibility criteria, it will not be processed and the application fee amount paid will be fully refunded.

[5] For the federal skilled worker class, all applications must be sent to the Centralized Intake Office (CIO) in Sydney, Nova Scotia. The CIO assesses whether the application should be placed

into processing at a visa office. If the application corresponds with the Ministerial Instructions, the applicant will be sent a letter requesting him or her to submit a full application and supporting documents within 120 days to the indicated visa office. If the application does not correspond with the Ministerial Instructions, the CIO will send a letter informing the applicant that the application is not eligible for processing.

[6] The relevant portion of the Ministerial Instructions provides that:

> . . . applications submitted by foreign nationals residing legally in Canada for at least one year as Temporary Foreign Workers or International Students . . .

shall be placed into processing immediately upon receipt (Ministerial Instructions, Canada Gazette, Vol. 142, No. 48, p. 3044).

Facts

[7] The applicant is a citizen of Thailand. She arrived in Canada in September of 2005 on a study permit valid until August 2006. She received a diploma in human resources management from a college in Toronto in July of 2006. She then obtained a work permit valid until May 20, 2007 and began working as a human resources assistant at the Holiday Inn. She was promoted to a management position and obtained an extension of her work permit until July 25, 2007. Prior to this expiry date, Holiday Inn obtained a positive labour market opinion for the applicant's position and obtained for her a work permit valid until September of 2009.

[8] In December of 2008, the applicant resigned from her position at Holiday Inn in favour of a position with another employer. The new employer later withdrew their offer leaving the applicant unemployed.

[9] In May 2009, a lawyer representing the applicant submitted an application for permanent residence to the CIO for assessment against the Ministerial Instructions as a temporary foreign worker. As evidence of legally residing and working in Canada for the required twelve months, the applicant included copies of her current and prior work permits. She did not submit a letter of employment as required by the CIC applicable online checklist because she was not currently employed.

[10] There is some dispute about when the application was received. The applicant claims it was received on May 8th, while the respondent asserts that CIO did not receive the application until May 27th. Meanwhile, on April 30, 2009, the applicant returned to Thailand to await the decision on her application.

[11] On July 3, 2009, the applicant received the decision of the immigration officer at the CIO rejecting the applicant's application, indicating that she did not meet the requirements of the Ministerial Instructions and was not eligible for further processing. The immigration officer was not satisfied that the applicant had been legally residing and working in Canada as a temporary foreign worker for at least one year immediately prior to submitting the application.

Issues

[12] The issues are as follows:

1. What is the standard of review?

2. Did the immigration officer commit a reviewable error of fact or law in concluding that the applicant's application did not meet the requirements of the Ministerial Instructions?

3. Did the immigration officer provide the applicant with a fair process?

Applicant's Written Submissions

[13] The applicant primarily argues that the Ministerial Instructions have been misinterpreted by the CIO. The requirement that an applicant be "… residing legally in Canada for at least one year…", applies to any period of twelve months prior to the submission of the application and does not require the applicant to be presently employed or presently studying at the time the application is submitted. It only requires present legal status in Canada after completing twelve months of employment or studies. The immigration officer's use of the word immediately in the decision letter was an error of law. The applicant's work permits and her signed declaration stating that she had worked at the Holiday Inn for more than twelve months constitutes sufficient evidence to establish in fact that she was (i) a legal resident of Canada when she submitted the skilled worker application and (ii) that she had worked in Canada for at least one year. Accordingly, the immigration officer's decision to refuse her application was unreasonable.

[14] In the alternative, even if the applicant had not submitted sufficient evidence that she had legally resided and worked in Canada for at least one year, the applicant submits that the officer's decision was nonetheless unreasonable because it was based on a lack of evidence of her residency status, evidence that the applicant was specifically instructed not to include by the applicable checklist.

[15] Finally, the applicant submits that she was not given the opportunity to present her case fully and fairly. There was nothing in the applicant's application to suggest that she had not been legally residing in Canada or working in Canada for at least twelve months prior to the submission. Therefore, the immigration officer had a duty to inform her of the officer's concerns and allow her the opportunity to reply. Had the applicant known that evidence beyond what CIC requested in their checklist was required, she would have provided this.

Respondent's Written Submissions

[16] The applicant's application was not recommended for further processing simply because she was not legally residing and working in Canada at the time her application was received. There is no dispute that the applicant was unemployed at the time, so while she was legally residing in Canada, she was not a temporary foreign worker.

[17] The applicant's argument that she was only required to have worked in Canada for twelve months at any time is incorrect. This Court has definitively stated that the Ministerial Instructions

require a year of legal residence in Canada as a temporary foreign worker or an international student immediately prior to application (see *Jin v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1234, 86 Imm. L.R. (3d) 13). Nor does the applicant's suggested interpretation accord with the spirit, true intent and meaning of the Ministerial Instructions. The true intent was to prioritize the processing of those applicants with experience in categories of occupations that are needed in Canada and those who could make an immediate contribution to the Canadian economy and easily integrate into the labour market.

[18] In any event, the applicant's departure from Canada before the application was received by the respondent has rendered her claim academic. The jurisprudence makes it clear that the lock-in date for the processing of an application is the date that the application is received by the respondent. Therefore, she was not a legal resident, even if her reading of the Ministerial Instructions is correct.

Analysis and Decision

[19] **Issue 1**

What is the standard of review?

In accordance with the direction of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the appropriate standard of review for the immigration officer's factual determination is reasonableness. *Dunsmuir* above, also confirms that curial deference is to be extended to an administrative body's interpretations of their enabling

legislation and applicable subordinate enactments and rules with which it will have particular familiarity (at paragraph 54). Thus, the immigration officer's interpretation of the Ministerial Instructions is to be afforded deference.

[20] Of course, where an issue of procedural fairness is brought to the Court's attention, no federal board, commission or tribunal is to be afforded deference. Administrative processes, including the Commission's, must be fair (see *Donoghue v. Canada (Minister of National Defense)*, 2010 FC 404 at paragraph 27 and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at paragraph 65).

[21] **Issue 2**

Did the immigration officer commit a reviewable error of fact or law in concluding that the applicant's application did not meet the requirements of the Ministerial Instructions?

The relevant portion of the Ministerial Instructions reads 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:
> - 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;
>
> …

[22] As noted, the applicant points out that the text does not explicitly require that a year of legal residence in Canada as a temporary foreign worker or an international student be completed

immediately prior to submission of the application. Indeed, submits the applicant, there is no temporal restriction at all.

[23] The applicant suggests that the text be interpreted to allow for any one year of legal work or studies in Canada, as long as the applicant has maintained legal residency, i.e. a valid work permit or study permit, at the time the application is received by the CIO.

[24] While this may be a reasonable compromise, it cannot overturn the CIO's interpretation. The applicant's suggested interpretation is no more in conformity with the actual words of the Ministerial Instructions than the CIO's. Further, the CIO's interpretation is to be afforded deference and will not be found unreasonable merely because an alternative interpretation is suggested.

[25] In addition, the CIO's interpretation has been affirmed as correct by this Court in *Jin* above, at paragraphs 11 and 12:

> 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».
>
> 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".

As a result, I would not interfere with the CIO's interpretation of the Ministerial Instructions.

[26] This disposes of the applicant's first argument. Once the immigration officer's interpretation is accepted, there remains no question as to whether the correct determination was reached.

[27] **Issue 3**

Did the immigration officer provide the applicant with a fair process?

Again, since I have determined that there was nothing unlawful about the immigration officer's interpretation of the Ministerial Instructions, there can be no claim of procedural unfairness.

[28] To repeat, the applicant's argument on this issue is that since there was nothing in her application to suggest that she had not been legally residing in Canada or working in Canada for at least twelve months prior to the submission of her application, the immigration officer had a duty to inform her of the officer's concerns. This argument is of course based on the applicant's interpretation that she need only have worked for at least twelve months at any time in the past in Canada.

[29] I accept the proposition that if an application, on its face meets all of the applicable requirements, an immigration officer would be under a duty to inform the applicant of any other

consideration or concern prior to rejection. Here, the application was clearly missing a required component. The CIC's posted checklist required submission of a letter of employment or other proof of employment status. The applicant submitted neither and simply indicated that she was unemployed.

[30] There was no breach of procedural fairness in this case.

[31] The application for judicial review is therefore dismissed.

[32] After the hearing of this matter, the applicant filed an additional document, namely, the applicant's temporary resident visa (multiple-entry valid from April 21, 2008 to September 18, 2009). I will allow this document to be filed. However, I am of the view that this document does not assist the applicant as at the date of the lock-in, the applicant's job offer had been withdrawn and she was not working in Canada.

[33] The applicant proposed the following serious question of general importance for my consideration for certification:

> Are the words "residing legally" in the criteria under Category Three of the Ministerial Instructions properly defined as physical presence in Canada or do they include legal temporary resident status in Canada as a worker or student and are the words "at least one year as Temporary Foreign Workers or International Students" restricted to the year "immediately prior" [*sic*] the application is received by the Centralized Intake Office in Sydney, Nova Scotia or do they include any year of previous work or study in Canada as long as the Applicant has maintained unbroken valid temporary resident status?

[34] I am not prepared to certify this question as it is not determinative of the issues of this case and as well, it has also been determined previously by this Court.

JUDGMENT

[35] **IT IS ORDERED that** the application for judicial review is dismissed and no question is certified.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

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

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.	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.
87.3(1) This section applies to applications for visas or other documents made under subsection 11(1), other than those made by persons referred to in subsection 99(2), sponsorship applications made by persons referred to in subsection 13(1), applications for permanent resident status under subsection 21(1) or temporary resident status under subsection 22(1) made by foreign nationals in Canada and to requests under subsection 25(1) made by foreign nationals outside Canada.	87.3(1) Le présent article s'applique aux demandes de visa et autres documents visées au paragraphe 11(1), sauf celle faite par la personne visée au paragraphe 99(2), aux demandes de parrainage faites par une personne visée au paragraphe 13(1), aux demandes de statut de résident permanent visées au paragraphe 21(1) ou de résident temporaire visées au paragraphe 22(1) faites par un étranger se trouvant au Canada ainsi qu'aux demandes prévues au paragraphe 25(1) faites par un étranger se trouvant hors du Canada.
(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.

(4) Officers and persons authorized to exercise the powers of the Minister under section 25 shall comply with any instructions before processing an application or request or when processing one. If an application or request is not processed, it may be retained, returned or otherwise disposed of in accordance with the instructions of the Minister.

(4) L’agent — ou la personne habilitée à exercer les pouvoirs du ministre prévus à l’article 25 — est tenu de se conformer aux instructions avant et pendant le traitement de la demande; s’il ne procède pas au traitement de la demande, il peut, conformément aux instructions du ministre, la retenir, la retourner ou en disposer.

(5) The fact that an application or request is retained, returned or otherwise disposed of does not constitute a decision not to

(5) Le fait de retenir ou de retourner une demande ou d’en disposer ne constitue pas un refus de délivrer les visa ou

issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made.

autres documents, d’octroyer le statut ou de lever tout ou partie des critères et obligations applicables.

(6) Instructions shall be published in the Canada Gazette.

(6) Les instructions sont publiées dans la Gazette du Canada.

(7) Nothing in this section in any way limits the power of the Minister to otherwise determine the most efficient manner in which to administer this Act.

(7) Le présent article n’a pas pour effet de porter atteinte au pouvoir du ministre de déterminer de toute autre façon la manière la plus efficace d’assurer l’application de la loi.

FEDERAL COURT

SOLICITORS OF RECORD

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