Federal Court Cour fédérale

Date: 20121030

Docket: IMM-7115-11

Citation: 2012 FC 1266

Toronto, Ontario, October 30, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

RAVINDRAN THANGAPPAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] By the present Application, the Applicant seeks to challenge both a June 17, 2011 refusal of his request for a work permit extension and the restoration of the temporary resident status, and also a September 13, 2011 rejection of his plea for a reconsideration of the refusal. Although the Applicant's Notice of Application only cites the reconsideration rejection as the decision under review, it is clear that the underlying refusal is the focus of the Application.

[2] Counsel for the Respondent argues that, since the present Application only names the reconsideration rejection as the decision under review, the merits of the refusal of his request for a work permit extension and the restoration of the temporary resident status cannot be engaged. I do not agree with this argument. The substantive paragraph of the reconsideration decision reads as follows:

> Your application was considered on its substantive merits, including an assessment under Section 5.30 of the FW1 manual (entrepreneur/self-employed). <u>As you did not meet the criteria for the C11 LMO exemption under the above noted reference, you were required to provide a valid labour market opinion (LMO). As the last three LMOs were all rejected, your case was refused.</u> You were provided with the decision containing the reasons for the refusal by letter dated June 17th, 2011, thereby fully concluding your application. An application that has been fully concluded cannot be reconsidered.
>
> [Emphasis added.]
>
> (Decision dated September 13, 2011, Applicant's Application Record, p 34)

I find that the officer charged with discharging the Minister's discretion to reconsider the decision made a substantive evaluation of the evidence and the conclusion drawn in the underlying decision, and only after this evaluation, rejected the reconsideration request. The officer, therefore, in effect, determined that the work permit was properly refused. As a result, I find that that the reconsideration evaluation opens the way to a full review of the conduct of the June 17, 2011 refusal.

[3] In my opinion, on the facts of the present case, it is not in the interests of justice to limit the Applicant's access to justice on judicial review of the full merits of his challenge simply because of

the technical naming of only the reconsideration decision in the Application filed. It is of note that Justice Zinn came to a similar conclusion on the circumstances present in *Marr v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 367 (FC) at paragraph 56:

> Despite Justice Mainville's finding in *Medina*, I am of the view that in this case the Court should review the reconsideration request determination given that it is essentially part of the same decision. The respondent acknowledged that the Court has jurisdiction to do so if satisfied that the interests of justice demanded it. The June 29, 2010 letter has the same immigration file number, refers to the same decision, and was issued before Mr. Marr filed his application for judicial review on August 5, 2010. No useful purpose is served in requiring this application to be bifurcated into two separate proceedings. In the circumstances, it would be contrary to the interests of justice and the effective administration of justice to insist that Mr. Marr file a separate application and seek leave to judicially review the decision to refuse reconsideration of a decision already under review.

I. Background

[4] The Applicant, a citizen of India, is a karate grandmaster, and an international grand champion and gold medalist in the sport. On February 16, 2008, the Applicant started working in Canada at a martial arts academy as a program leader and instructor pursuant to a three-year work permit under the Temporary Foreign Worker Program.

[5] In August of 2010 the Applicant submitted an application for permanent resident status in Canada under the Canadian Experience Class. Subsequent to this, and before the expiry of his work permit, the Applicant, together with his business partner, incorporated two Canadian companies. One of the two companies was the martial arts academy that had employed the Applicant.

[6] On February 16, 2011, following the expiry of his work permit, the Applicant applied for another work permit and the restoration of his temporary resident status. The work permit application sets out the Applicant's intention to work as an entrepreneur or self-employed candidate pursuant to subsection 205(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*).

[7] Subsection 205 of the *Regulations* provides as follows:

Canadian interests	Intérêts canadiens
205. A work permit may be issued under section 200 to a foreign national who intends to perform work that	205. Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes :
(a) would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents;	a) il permet de créer ou de conserver des débouchés ou des avantages sociaux, culturels ou économiques pour les citoyens canadiens ou les résidents permanents;
(b) would create or maintain reciprocal employment of Canadian citizens or permanent residents of Canada in other countries;	b) il permet de créer ou de conserver l'emploi réciproque de citoyens canadiens ou de résidents permanents du Canada dans d'autres pays;
(c) is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely,	c) il est désigné par le ministre comme travail pouvant être exercé par des étrangers, sur la base des critères suivants :
(i) the work is related to a research, educational or training program, or	(i) le travail est lié à un programme de recherche, d'enseignement ou de formation,
(ii) limited access to the Canadian labour market is necessary for reasons of public	

policy relating to the competitiveness of Canada's academic institutions or economy; or (d) is of a religious or charitable nature.	(ii) un accès limité au marché du travail au Canada est justifiable pour des raisons d'intérêt public en rapport avec la compétitivité des établissements universitaires ou de l'économie du Canada; d) il est d'ordre religieux ou charitable.

II. The Decision

[8] The Minister rejected the Applicant's request for a work permit and communicated the decision in a letter dated June 17, 2011. The letter is largely in standard form and provides only the following as reasons for rejecting the work permit application:

> After considering all the circumstances of your case, your application for a work permit cannot be approved as requested without a valid Labour Market Opinion and Confirmation from Human Resources and Skills Development Canada. Your prospective employer is responsible for obtaining this confirmation. You have not demonstrated that you meet any validation exemptions.
>
> (Decision dated June 17, 2011, Applicant's Application Record, p 35)

[9] The Applicant submitted a reconsideration request to the Minister on the grounds that the Applicant was exempt from a Labour Market Opinion (LMO) because he was applying as an entrepreneur or self-employed individual pursuant to subsection 205(a) of the *Regulations*. This provision exempts applicants from the LMO requirement where certain criteria are met. As described above, the Minister's reconsideration decision reiterates that the Applicant had not met the criteria for LMO exemptions under the Foreign Worker Immigration Manual (the Manual).

III. Reasons for the Decision

[10] The Applicant argues that the officer assessing the work permit application erred in the interpretation and application of the law pertaining to s. 205 of the *Regulations* because the Applicant's pending permanent residency application is not inconsistent with s. 205 and that the Applicant satisfies the s. 205 criteria.

[11] The Respondent argues that the Applicant had not satisfied the requirements of s. 205 because he did not meet the requirements set out in the Manual. On the Respondent's interpretation, the Manual requires that an applicant be a person who: has applied for permanent resident status and has met the definition of an entrepreneur or self-employed and has been selected as one; and can demonstrate that establishing or operating their business would generate a significant economic, social or cultural benefits or opportunities to Canadian, and there must also be compelling and urgent reasons to issue the work permit prior to the processing of the permanent resident application.

[12] I find that a fundamental problem exists in assessing the arguments presented because neither the decision rendered on June 17, 2011 nor the reconsideration decision of September 13, 2011 provides an analysis of the actual application submitted by the Applicant and the reasons for refusing the Applicant's application. As a result, the officer's Computer Assisted Immigration Processing System (CAIPS) notes are critical to understanding the reasons for the refusal.

[13] The CAIPS notes provide as follows.

> Section 5.30 of the Foreign Worker Manual appears to apply to this case. He is applying as C11 – Self Employed/Entrepreneurs –

> significant benefit to Canada. The first reference is to persons who has a permanent residence application – they must meet the definition of entrepreneur and been selected. The client's application is under the Canadian Experience Class – there is no indication it was examined under Entrepreneur or Self Employed. As of this date, no selection has been made. If the APR were under the entrepreneur class, the client would have to supply compelling and urgent reasons to authorize the entry of the person before processing is complete. The client must demonstrate that their admission to Canada to begin establishing or operating their business would generate significant economic, social or cultural benefits or opportunities for Canadian citizens or permanent residents. The client's lawyer states that there are 102 students. He does not mention any other significant benefits to Canada.
>
> Under temporary resident application in section 5.30 it refers to clients who do not intend to reside permanently in Canada. It goes on to say that there may be times where the business or the intended period of work is genuinely temporary. This client is asking for a document for one year. The lawyer refers to the application for permanent residence under the Canadian Experience Class in the cover letter. The client has not satisfied me that his entry is temporary.
>
> Open source information shows that the client appears to have changed the name of the company and kept on working after his work permit had expired. I am refusing this application – the client was on a labour market opinion to get the 3 year work permit. The client appears to require another labour market opinion in order to obtain an extension – the client has not demonstrated significant economic, social or cultural benefits or opportunities for Canada citizens or permanent residents in this application. Application refused.
>
> [Emphasis added.]
>
> (Certified Tribunal Record, pp 16 – 22)

[14] Counsel for the Applicant argues that the notes are ambiguous and do not convey sufficient information to determine the details of the decision-making process undertaken. I agree with this argument. I find that the CAIPS notes, and in particular the critical portions emphasized above, are

unintelligible; it is impossible to understand how the officer came to the final determination with respect to the requirements of s. 205 of the *Regulations*. Thus, I find that the reasons for refusing the Applicant's underlying application lack justification, transparency and intelligibility. Therefore, I find that the decision under review is unreasonable.

ORDER

THIS COURT ORDERS that as requested by Counsel for the Applicant, the Decision under review is set aside and the matter is referred back for a redetermination of the Applicant's application pursuant to s. 205 of the *Regulations* by a different officer.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7115-11
STYLE OF CAUSE:	RAVINDRAN THANGAPPAN V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 16, 2012
REASONS FOR ORDER AND ORDER BY:	CAMPBELL J.
DATED:	OCTOBER 30, 2012

APPEARANCES:

Chad Rawn	FOR THE APPLICANT
Jocelyn Espejo-Clarke	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chad Rawn Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE RESPONDENT