

Date: 20091014

Docket: IMM-1676-09

Citation: 2009 FC 1038

Calgary, Alberta, October 14, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JITHIN STEPHEN THOMAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to Section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the March 2, 2009 decision of a visa officer at the High Commission of Canada in New Delhi, India, who determined that the applicant had not satisfied the requirements for obtaining a temporary work permit. These are my reasons for determining that the application must be granted and the matter reconsidered by a different visa officer.

Background

[2] Jithin Stephen Thomas, the applicant, is a 20 year old citizen of India presently employed as an Auto Shop Helper in Palai, India.

[3] Service Canada's Foreign Worker Recruitment Unit in Vancouver, B.C., issued a positive Labour Market Opinion (LMO) confirming an offer of employment made to the applicant to work as a Motor Vehicle Repair Helper in Surrey, B.C. In February 2009, the applicant submitted his application for a Temporary Work Permit to enable him to accept the job offer.

Decision Under Review

[4] In March 2009, the visa officer denied the application on the grounds that the applicant had not shown that he was well established in India and that he had not shown that he would return to India at the end of his authorized period of stay given that there were better work conditions and high economic incentives to remain in Canada.

[5] The applicant was not afforded the opportunity to respond to the visa officer's concerns before the refusal letter was communicated to him.

[6] With regards to the applicant's documents of jointly-held land in India, the visa officer found that the applicant did not indicate in his application if the land generated any income. The

officer noted that overstaying in Canada would have no impact on the property's value. Also, the officer determined that the applicant's mother and brother would take care of the property in the applicant's absence, given that they are also owners.

[7] On the balance, the visa officer was not satisfied that the applicant would be a genuine temporary resident in Canada, nor that he would depart from Canada at the end of an authorized stay. The officer was not satisfied that the applicant met the requirements of paragraph 200(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR).

Issues

[8] The sole issue is whether the visa officer made a reviewable error on any of the statutory grounds listed in subsection 18.1(4) of the *Federal Courts Act*.

Analysis

[9] Several decisions of this Court have held that *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, has not changed the law in respect of factual findings subject to the limitation in paragraph 18.1(4)(d) of the *Federal Courts Act*: *De Medeiros v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 386, [2008] F.C.J. No. 509; *Obeid v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 503, [2008] F.C.J. No. 633; *Naumets v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 522, [2008] F.C.J. No. 655. It has also been held that a tribunal's

decision concerning questions of fact is reviewable upon the standard of reasonableness: *Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427, [2008] F.C.J. No. 515.

[10] The visa officer's factually intensive analysis and application of discretion are central to the officer's role as a trier of fact. As such, these findings are to be given significant deference by the reviewing Court. The visa officer's factual findings should stand unless the reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, supra, at para. 47.

[11] In a case such as this, there might be more than one reasonable outcome. However, as long as the process adopted by the visa officer and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, para. 59.

[12] I agree with the respondent that the burden to provide sufficient information for a visa officer to make a determination that the requirements of the program have been met, rests on the applicant. Fairness did not require that the officer provide the applicant with an interview to address questions that might arise from the material submitted. The officer was entitled to proceed to a determination upon considering the application as it was presented.

[13] However, to arrive at a determination of insufficient establishment in India that would fall within the range of acceptable and defensible outcomes, it was necessary for the visa officer to consider and analyse the relevant evidence on that question: *Minhas v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 696, [2009] F.C.J. No. 867. In this case, that evidence was that the applicant was the joint owner, with his mother and brother, of three properties professionally estimated to be of a considerable value. At least one of the properties was occupied by a tenant. There is no indication in the notes to file that the officer determined the Canadian Dollar equivalent of the applicant's real property assets and the effect that this might have on the applicant's standard of living in his home country. The lack of information provided regarding the income from the properties was a factor to be considered but not conclusive.

[14] In this case, the visa officer's failure to consider the applicant's property holdings and valuations leads to the inference that the visa officer made an erroneous finding of fact without regard to the evidence. As stated in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998], 157 F.T.R. 35, [1998] F.C.J. No. 1425 at paragraph 17, "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'".

[15] It is also difficult to understand why the officer concluded that the applicant would require moderate English language skills to perform the job duties when it was not identified as a requirement in the Employment Contract. Moreover, the record indicates that he had taken two

secondary school courses in English. The decision does not explain why the officer thought that this was insufficient.

[16] The visa officer's failure to consider the applicant's property holdings in India and the excessive weight attributed to language are erroneous findings of fact without regard to the evidence. The reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes: *Dunsmuir*, supra, at para. 47.

[17] The process adopted by the visa officer and its outcome did not resonate with the principles of justification, transparency and intelligibility. Consequently, it is open to this Court to intervene: *Khosa*, supra, at para. 59.

[18] No serious questions of general application were proposed for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is allowed, the decision of the visa officer dated March 2, 2009 refusing the applicant's work permit is set aside, and the application for a work permit is referred to another visa officer for re-determination. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1676-09

STYLE OF CAUSE: JITHIN STEPHEN THOMAS v. MCI

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: October 13, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: October 14, 2009

APPEARANCES:

Michael Sherritt	FOR THE APPLICANT
Camille Audain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sherritt Greene Calgary, Alberta	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT