Federal Court  Cour fédérale

Date: 20100209

Docket: IMM-3881-09

Citation: 2010 FC 134

Ottawa, Ontario, February 9, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LAKHWINDER KHELA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Based on the *Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 decision, justification for a Visa Officer's decision becomes self evident through evidence that often only a first-instance decision-maker would have heard and/or seen.

Without due regard or deference to the finder of fact, based on documented evidence, a Court would merely arrive at conclusions based on speculation, thereby, potentially setting aside the analysis of a first-instance decision-maker without substantial regard for the evidence.

It is for the evidence to be allowed to speak for itself. It is for the evidence to show rather than for a judgment simply to tell; if the evidence is self-evident, it is important for a first-instance decision-maker to bring forward that evidence and that the evidence, itself, before a first-instance decision-maker, be acknowledged with deference by this Court rather than for this Court to editorialize and comment in abstraction. Basically, it is for a Court to get out of the way of the evidence as heard and/or seen by a first-instance decision-maker, and then if properly identified by a first-instance decision-maker in his decision, allowing the evidence to speak for itself.

II. Introduction

[2] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration Section of the Consulate General of Canada in Chandigarh, India, refusing the Applicant's application for a Work Permit under the Live-In Caregiver Class (LICC).

III. Background

[3] In March of 2006, the Applicant, Mr. Lakhwinder Khela, applied to the Consulate General of Canada for a Work Permit under the Live-In Caregiver Class. On July 14, 2009, Mr. Khela was interviewed by an Officer of the Canadian Consulate to determine his suitability for the LICC. At the conclusion of the interview, the Officer verbally advised Mr. Khela that his application was denied. This decision was followed by written reasons received by Mr. Khela on August 6, 2009.

IV. Decision under Review

[4] The letter advising Mr. Khela of the reasons for the denial states that despite his completion of a training course related to performing the work of a Live-In Caregiver (the Applicant received a diploma from the Nawanshahar, India branch of the Surrey Business and Technology College in 2005), he was unable to demonstrate that he had sufficient knowledge and skills to adequately provide care without supervision (Decision at p. 1).

V. Issues

[5] 1) Did the Officer err by questioning the Applicant's child-care credentials?

2) Was the Visa Officer's decision that there were reasonable grounds to believe the Applicant could not perform the work of a Live-In Caregiver unreasonable?

VI. Relevant Legislative Provisions

[6] "Live-In Caregiver" is defined in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations):

"live-in caregiver" *« aide familial »* "live-in caregiver" means a person who resides in and provides child care, senior home support care or care of the disabled without supervision in the private household in Canada where the person being cared for resides.	« aide familial » *"live-in caregiver"* « aide familial » Personne qui fournit sans supervision des soins à domicile à un enfant, à une personne âgée ou à une personne handicapée, dans une résidence privée située au Canada où résident à la fois la personne bénéficiant des soins et celle qui les prodigue.

[7] A prospective "Live-In Caregiver" must receive a work permit before entering Canada pursuant to section 111 of the Regulations and must meet the requirements contained in section 112 before that permit is issued:

Processing	Traitement
111. A foreign national who seeks to enter Canada as a live-in caregiver must make an application for a work permit in accordance with Part 11 and apply for a temporary resident visa if such a visa is required by Part 9.	**111.** L'étranger qui cherche à entrer au Canada à titre d'aide familial fait une demande de permis de travail conformément à la partie 11, ainsi qu'une demande de visa de résident temporaire si ce visa est requis par la partie 9.
Work permits — requirements	Permis de travail : exigences
112. A work permit shall not be issued to a foreign national who seeks to enter Canada as a live-in caregiver unless they	**112.** Le permis de travail ne peut être délivré à l'étranger qui cherche à entrer au Canada au titre de la catégorie des aides familiaux que si l'étranger se conforme aux exigences suivantes :
(*a*) applied for a work permit as a live-in caregiver before entering Canada;	*a*) il a fait une demande de permis de travail à titre d'aide familial avant d'entrer au Canada;
(*b*) have successfully completed a course of study that is equivalent to the successful completion of secondary school in Canada;	*b*) il a terminé avec succès des études d'un niveau équivalent à des études secondaires terminées avec succès au Canada;
(*c*) have the following training or experience, in a field or occupation related to the employment for	*c*) il a la formation ou l'expérience ci-après dans un domaine ou une catégorie d'emploi lié au

which the work permit is sought, namely,	travail pour lequel le permis de travail est demandé :
(i) successful completion of six months of full-time training in a classroom setting, or	(i) une formation à temps plein de six mois en salle de classe, terminée avec succès,
(ii) completion of one year of full-time paid employment, including at least six months of continuous employment with one employer, in such a field or occupation within the three years immediately before the day on which they submit an application for a work permit;	(ii) une année d'emploi rémunéré à temps plein — dont au moins six mois d'emploi continu auprès d'un même employeur — dans ce domaine ou cette catégorie d'emploi au cours des trois années précédant la date de présentation de la demande de permis de travail;
(*d*) have the ability to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting; and	*d*) il peut parler, lire et écouter l'anglais ou le français suffisamment pour communiquer de façon efficace dans une situation non supervisée;
(*e*) have an employment contract with their future employer.	*e*) il a conclu un contrat d'emploi avec son futur employeur.

[8] A "Live-In Caregiver" applicant must meet the requirements set out above and must not fall within the exclusions under subsection 200(3) of the Regulations:

Exceptions	Exceptions
(3) An officer shall not issue a work permit to a foreign national if	(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :
(*a*) there are reasonable	*a*) l'agent a des motifs

grounds to believe that the foreign national is unable to perform the work sought;

raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé;

(*b*) in the case of a foreign national who intends to work in the Province of Quebec and does not hold a *Certificat d'acceptation du Québec*, a determination under section 203 is required and the laws of that Province require that the foreign national hold a *Certificat d'acceptation du Québec*;

b) l'étranger qui cherche à travailler dans la province de Québec ne détient pas le certificat d'acceptation qu'exige la législation de cette province et est assujetti à la décision prévue à l'article 203;

(*c*) the specific work that the foreign national intends to perform is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute, unless all or almost all of the workers involved in the labour dispute are not Canadian citizens or permanent residents and the hiring of workers to replace the workers involved in the labour dispute is not prohibited by the Canadian law applicable in the province where the workers involved in the labour dispute are employed;

c) le travail spécifique pour lequel l'étranger demande le permis est susceptible de nuire au règlement de tout conflit de travail en cours ou à l'emploi de toute personne touchée par ce conflit, à moins que la totalité ou la quasi-totalité des salariés touchés par le conflit de travail ne soient ni des citoyens canadiens ni des résidents permanents et que l'embauche de salariés pour les remplacer ne soit pas interdite par le droit canadien applicable dans la province où travaillent les salariés visés;

(*d*) the foreign national seeks to enter Canada as a live-in caregiver and the

d) l'étranger cherche à entrer au Canada et à faire partie de la catégorie des

foreign national does not meet the requirements of section 112; or

(*e*) the foreign national has engaged in unauthorized study or work in Canada or has failed to comply with a condition of a previous permit or authorization unless

(i) a period of six months has elapsed since the cessation of the unauthorized work or study or failure to comply with a condition,

(ii) the study or work was unauthorized by reason only that the foreign national did not comply with conditions imposed under paragraph 185(*a*), any of subparagraphs 185(*b*)(i) to (iii) or paragraph 185(*c*);

(iii) section 206 applies to them; or

(iv) the foreign national was subsequently issued a temporary resident permit under subsection 24(1) of the Act.

aides familiaux, à moins qu'il ne se conforme à l'article 112;

e) il a poursuivi des études ou exercé un emploi au Canada sans autorisation ou permis ou a enfreint les conditions de l'autorisation ou du permis qui lui a été délivré, sauf dans les cas suivants :

(i) une période de six mois s'est écoulée depuis les faits reprochés,

(ii) ses études ou son travail n'ont pas été autorisés pour la seule raison que les conditions visées à l'alinéa 185*a*), aux sous-alinéas 185*b*)(i) à (iii) ou à l'alinéa 185*c*) n'ont pas été respectées,

(iii) il est visé par l'article 206,

(iv) il s'est subséquemment vu délivrer un permis de séjour temporaire au titre du paragraphe 24(1) de la Loi.

VII. Relevant Positions of the Parties

Applicant's Position

Issue 1: Did the Officer err by questioning the Applicant's child-care credentials?

[9] Mr. Khela submits that the Computer Assisted Immigration Processing System (CAIPS) notes of the interview show the Officer had doubts about Mr. Khela's training. Specifically, the Officer wrote that Mr. Khela's documentation was "questionable" because it appeared that the program had been completed in Canada. Mr. Khela contends it is unreasonable to refuse a work permit on the grounds that he completed the program through an overseas branch of a Canadian college.

Issue 2: Was the Visa Officer's decision that there were reasonable grounds to believe the Applicant could not perform the work of a Live-In Caregiver unreasonable?

[10] Mr. Khela submits it was unreasonable for the Officer to come to the conclusion that he could not perform the work of a "Live-In Caregiver" in an unsupervised environment based on the answers he gave to certain situational questions asked by the Officer. Specifically, Mr. Khela states that the Officer should have accepted his answers to questions relating to first-aid of an injured child and care of a diapered infant, as they were appropriate in the circumstances.

Respondent's Position

Issue 1: Did the Officer err by questioning the Applicant's child-care credentials?

[11] The Respondent contends it is clear from the letter sent to Mr. Khela that the Officer did not refuse to issue a work permit because of doubts regarding Mr. Khela's credentials. The Respondent

cites the CAIPS notes to show that the Officer had a concern, put this concern to Mr. Khela and refused to issue a work permit because of Mr. Khela's responses to situational questions.

Issue 2: Was the Visa Officer's decision that there were reasonable grounds to believe the Applicant could not perform the work of a Live-In Caregiver unreasonable?

[12] With respect to Mr. Khela's concerns regarding his answers to the Officer's questions, the Respondent cites the cases of *Corpuz v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 857, 124 A.C.W.S. (3d) 779 and *Bondoc v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 842, 170 A.C.W.S. (3d) 173 for the proposition that it is not unreasonable for a Visa Officer to assess whether a "Live-In Caregiver" applicant is capable of performing the required duties. The Respondent specifies that Mr. Khela's responses to the Officer's questions regarding first-aid and child care demonstrated little knowledge in these important areas.

[13] After the interview, Mr. Khela made notes from memory of the questions asked and the answers given; he cites from these notes and states that the questions asked and the answers given, according to his statement of those questions and answers, show that he gave correct answers to the questions regarding first-aid of an injured child.

VIII. Standard of Review

[14] In the case of *Bondoc*, above, the Federal Court held that a Visa Officer's determination of an application for a work permit under the LICC is a question of fact and, therefore, the standard of review is reasonableness.

[15] The standard of reasonableness is concerned with the existence of "justification, transparency and intelligibility within the decision-making process", as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." A court undertaking a review under the standard of reasonableness must be cognizant of the fact that "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result" (*Dunsmuir*, above, at para. 47).

IX. Analysis

Issue 1: Did the Officer err by questioning the Applicant's child-care credentials?

[16] The letter sent to Mr. Khela shows that the Officer's reason for refusing to issue a work permit is that she was not satisfied that he could perform the work sought, in spite of his completion of a training course. The Court notes that the refusal letter also contains an option for the Visa Officer to refuse to issue a work permit because an applicant had not completed six months of full-time training in a classroom setting; because this option is unchecked, it appears that the sole ground for refusal is Mr. Khela's failure to demonstrate sufficient knowledge and skill to perform the work (Decision at p. 1). The Court understands that the CAIPS notes show the Officer had concerns regarding Mr. Khela's credentials, but the decision letter is clear with regard to why the work permit was not issued.

Issue 2: Was the Visa Officer's decision that there were reasonable grounds to believe the Applicant could not perform the work of a Live-In Caregiver unreasonable?

[17] With respect to the reasonableness of the Officer's decision, the Court notes that the exceptions in subsection 200(3) of the Regulations state that an Officer shall not issue a work permit to a foreign national if "there are reasonable grounds to believe that the foreign national is unable to perform the work sought". In the case of *Bondoc*, above, the court held that it is the Visa Officer who must be satisfied that the requirements for the issuance of a work permit are met and that it is therefore reasonable for Visa Officers to conduct an assessment of an applicant's abilities (*Bondoc*, above, at para. 24).

[18] The Court is faced with two accounts of the interview, the contemporaneous CAIPS notes and Mr. Khela's recollections which were written after he left the interview. The Court notes that these two accounts of the interview are inconsistent with one another, especially with regard to the questions relating to Mr. Khela's knowledge of first-aid and child care. The Court concludes that it must rely on the CAIPS notes for two reasons; first, they were made during the interview and second, the Court concludes that it ought not to doubt the veracity of the CAIPS records in the absence of compelling evidence that they are incorrect, which is absent in this case.

X. Conclusion

[19] It is the Court's conclusion that the Officer's decision was reasonable. It is clear, both from the CAIPS notes and Mr. Khela's statement, that the Officer asked relevant questions and was not satisfied with the answers. Although Visa Officers do not have unlimited discretion to refuse to

issue work permits, the Court must be mindful that it is to show deference to the Officer's reasoning and must only intervene if an Officer makes a decision without regard to the material before him or her or comes to a conclusion that is not reasonably supported by the evidence. In this case, the CAIPS notes show that Mr. Khela gave answers that are not demonstrative of a reasonable level of first-aid knowledge: to wit, to pick up an unconscious child found at the bottom of the stairs and to carry the child, place that child on a table and tell him everything is OK, does not constitute an understanding of first-aid. The Officer's decision is reasonable as it clearly demonstrates on the face of the evidence, justification, transparency and intelligibility within the jurisdiction of a first-instance decision-making process.

[20] For all the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Adrian Huzel	FOR THE APPLICANT
Ms. Kimberley Shane	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ADRIAN HUZEL, Barrister and Solicitor Vancouver, B.C.	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT