Federal Court  Cour fédérale

Date: 20100428

Docket: IMM-3551-09

Citation: 2010 FC 466

Toronto, Ontario, April 28, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

AMARJIT SINGH GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Gill, a citizen and resident of India, applied for permanent residence in Canada in 2005. His application was rejected in June 2009 by the Second Secretary, Immigration, at Canada's High Commission in New Delhi. His application had been assessed as a member of the federal skilled worker class, more particularly as a secondary school teacher. He needed 67 points, but was only awarded 62. Had he had "arranged employment" he would have received 10 additional points. As it was he was awarded none. Had he demonstrated that his spouse's brother was a permanent resident

living in Canada, he would have been assessed five more points. As it was he was assessed none. This is a judicial review of that decision.

[2] The delay between receipt of an application for permanent residence and the processing thereof may, as in this case, be counted in years. Much can happen in the interval.

[3] The High Commission in New Delhi sent Mr. Gill two interlocutory letters. The first in January 2009 asked him to provide the results of medical exams and to advise if there was any change in his mailing address.

[4] At that point in time, the evidence which he had submitted to establish that he had a brother-in-law in Canada was copy of the brother-in-law's permanent resident card, a copy of the brother-in-law's Indian passport renewed in Vancouver with a British Columbia address, and an affidavit from his wife in which she also provided her brother's British Columbia address.

[5] In support of his "arranged employment" he had submitted an offer of employment from the Bambolino Montessori Academy of Toronto, and an arranged employment opinion from Service Canada.

[6] In May 2009 the Second Secretary, Immigration, wrote to him to say that she did not find it credible that he had been selected for the job and gave him an opportunity to address her concerns. He replied with further letters both from himself, and from the school.

[7] However the Second Secretary was still not satisfied and, as mentioned above, awarded him no points for having a brother-in-law who is a permanent resident living in Canada and no points for arranged employment. If he had succeeded on either issue he would have achieved the required minimum of 67 points. She said:

> "I have awarded zero points for Arranged employment as you have failed to satisfy me that you have a genuine offer of employment in Canada. I have awarded you zero points for adaptability as you have not demonstrated that your spouse's brother is a permanent resident (the copy of the card you submitted expired on October 6, 2008) or Canadian citizen or that he resides in Canada."

Issues

[8] With respect to adaptability based on a close relative being a citizen of or permanent resident of Canada, and living here, was the decision procedurally fair as Mr. Gill had been given no opportunity to address the Second Secretary's concerns?

[9] With respect to the arranged employment, did the decision maker mischaracterize the legal duty imposed on her by the Regulations? If not, was the decision reasonable?

Discussion

[10] At the time Mr. Gill's application was assessed, his brother-in-law may or may not have been living in Canada; may or may not have met the residency obligation imposed by section 28 of the *Immigration and Refugee Protection Act*; may or may not have received a renewed permanent residency card; may or may not have become a citizen and there may or may not have been an investigation against him.

[11] In my opinion, it was procedurally unfair for the Visa Officer to render her decision without bringing these concerns to Mr. Gill's attention and giving him the opportunity to dispel them. No deference is owed. This is not a case where there had been a bald statement of a relative living in Canada, without any evidence whatsoever. There was evidence. If the Officer wanted more, she should have asked for more.

[12] Whether or not the Minister is correct that it would have been difficult for the Officer to obtain updated information about the brother-in-law's status through government channels, the Officer could, and should, have voiced her concerns to Mr. Gill. A perfect example is found in *Malik v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283. In that case at the time of processing the applicant received a notice which, among other things, stated:

> Please provide copies of documents which show that your (or your accompanying spouse's) relative is residing in Canada. These can include documents such as income tax information, latest pay slips, credit card statements etc. Affidavits and statutory declarations are **not** satisfactory proof of residence in Canada.

[13] No such letter was sent to Mr. Gill. It was simply wrong to rely upon a delay in processing to pounce on the fact that the permanent resident evidence, which was current when submitted, had by then expired. The duty of fairness was not observed (*Laio v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1926 (T.D.) (Q.L.), *Hussein v. Canada (Minister of Citizenship and Immigration)* (1998), 159 F.T.R. 203, 45 Imm. L.R. (2d) 13, and *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877, 63 Imm. L.R. (3d) 285).

[14] Having reached the conclusion I have on the relative in Canada point, I need not consider the arranged employment offer because it is moot.

[15] However, I venture to say that one aspect of arranged employment as applicable to Mr. Gill, a non-resident, was that an officer approve an offer of employment "based on an opinion provided to the officer by the Department of Human Resources Development…that the offer of employment is genuine" (*Immigration and Refugee Protection Regulations*, s. 82(2)(b)(ii)). The Minister suggests that the opinion by the Department is simply a condition precedent to the Visa Officer's assessment *de novo*. Reliance is placed upon the decision of Madam Justice Snider in *Bellido v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 452, where she stated at paragraph 21:

> HRDC validation is not, as the Applicant submits, sufficient evidence of arranged employment. Such validation does not remove the obligation of the Visa Officer to assess whether the Applicant is able to perform the job described in the validation.

[16] Read in conjunction with s. 82(2) of the *Regulations*, which requires the officer to assess whether a skilled worker is able to perform and is likely to accept and carry out the employment, that case certainly stands for the proposition that the Visa Officer must determine whether the applicant is up to the job. In this case the Officer not only found that Mr. Gill was not up to the job, but when all was said and done also was of the view that the job offer was not genuine. Whether a Visa Officer in India is entitled to override the Department's opinion based on an investigation in Canada that the offer is genuine is best left for another day.

[17] Both counsel agreed that there was no question of general importance to certify and that if I were minded to grant judicial review I should simply refer the matter back to another officer for re-determination, and not in any way give directions limiting the reassessment to the residency of Mr. Gill's brother-in-law.

ORDER

FOR REASONS GIVEN:

a. The application for judicial review is granted;

b. The matter is referred back to another visa officer for redetermination;

c. There is no question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

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