

Federal Court



Cour fédérale

**Date: 20111107**

**Docket: IMM-1238-11**

**Citation: 2011 FC 1272**

**Ottawa, Ontario, November 7, 2011**

**PRESENT: The Honourable Mr. Justice Rennie**

**BETWEEN:**

**DILIP BHAGWANDAS BHATIA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant seeks judicial review of a decision dated January 6, 2011 by the Federal Skilled Worker Centralized Intake Office (FSWCIO) of the respondent Minister which refused his application for permanent residency in the Federal Skilled Workers (FSW) category. For the reasons that follow, the application is granted.

***Facts***

[2] On May 14, 2010, the applicant submitted an application for permanent residency under the FSW category to the FSWCIO in Sydney, Nova Scotia. The application was date-stamped received on May 14, 2010.

[3] In a July 30, 2010 letter, the FSWCIO informed the applicant that his application did not conform to section 10 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (*IRPR*), was incomplete, was being returned to him and had not been “received” by that office. The letter indicated, in an attached Appendix C, those parts of the application that were considered by the FSWCIO to be incomplete.

[4] Two boxes were checked in Appendix C. The first box indicated that essential fields were not completed, the second that the Visa Office which would process the application was not indicated.

[5] In a subsequent letter dated August 26, 2010, the FSWCIO also informed the applicant that his application did not meet the June 26, 2010 ministerial instructions nor the requirements of section 10 of the *IRPR* because his application was not accompanied by the results of English or French language proficiency test.

[6] I pause at this point in the review of the facts to point out that no explanation was given as to why, if on July 30, 2010, the FSWCIO advised the applicant that his application had been returned and “not received” it wrote to the applicant some three weeks later.

[7] In a January 6, 2011 letter, the FSWCIO informed the applicant that, *inter alia*, his application was ineligible for processing because his intended occupation (NOC Code 0213) no longer corresponded to the list of eligible occupations listed in the June 26, 2010 ministerial instructions.

***Issue***

[8] The single issue in this case is whether the applicant's application was "received" by the FSWCIO before June 26, 2010. It was on this date the list of occupational codes had changed. If the application was received before June 26, 2010, it would have been governed by the ministerial instructions which prevailed at the time, not the June 26, 2010 ministerial instructions. The occupation code which the applicant indicated in his application was on the list of eligible occupations before June 26, 2010, but not after this date.

[9] The interface between the facts surrounding the receipt of the application and the requirements of section 10(1)(c) of the *IRPR* is a mixed question of fact and law, to be assessed against a standard of reasonableness. The decision falls short of the standard.

[10] There is no evidence in the record which supports the conclusion reached that the application was incomplete, nor which justified deeming it not to have been received. All aspects of the form were completed. The fact that the applicant offered either London or Dubai as an acceptable Visa Office, a factor presumably to the respondent's advantage, did not render the

application incomplete and it was unreasonable to consider it to be so. Section 10(1)(c) of the *IRPR* requires that “all information be provided”. All information was provided. None was omitted.

[11] Notwithstanding its letter deeming the application not to be complete the respondent continued to treat the May 14, 2010 application as if it was in fact extant. In the August 26, 2010 correspondence, the respondent wrote to the applicant “referring to your application for permanent residency” and advising him that his application (which presumably had not been received and of which no record kept) was rejected on the basis of the fact that it was not accompanied by the results of English or French language proficiency tests. It notes that the occupational codes had changed as of June 26, 2010, but curiously, it does not reject the application on that basis, but solely on the basis of absence of language proficiency tests.

[12] The August 26, 2010 letter is, of course, inconsistent with the July 30, 2010 letter, but is consistent with the conclusion that the application was still extant and was being considered as such.

[13] On January 9, 2011, the applicant was advised that the review of his application for permanent residence in Canada as a Federal Skilled Worker “has been completed” and that it was rejected on the basis that his declared occupational code no longer corresponded to the eligible occupations.

### *Analysis*

[14] The respondent sought to explain the August 26, 2010 letter by speculating that the letter was prompted by a subsequent or intervening application. Matters such as this cannot be the subject

of speculation. If the respondent Minister thought that a second application was made, he should have cross-examined on the affidavit. He did not. Nor was this second phantom application averred to in the respondent's affidavit. What is proposed as an explanation is not a reasonable or logical inference to be drawn from a series of known facts, but is in the realm of pure speculation, and requires a certain measure of disbelief. The May 14, 2010 application was considered in roughly ten weeks but on the theory advanced by the respondent, the second application was received and considered in less than three weeks, including the time for the transmission of letters from Sydney, Nova Scotia, to Dubai and from Dubai back to Sydney.

[15] The Court must be governed by the record and evidence before it and will not speculate or fill in the blanks to make a case that could otherwise have been made on the record according to the rules of civil procedure and evidence.

### ***Remedy***

[16] In *Al Mashtouli v Canada (Minister of Citizenship and Immigration)* 2006 FC 94, the respondent Minister, in similar but not identical circumstances, advised the Court that if the point of law was determined against him, the application would be processed in accordance with the regulations that prevailed at the time. In consequence, the application was adjourned for one year, after which it could be brought back to the Court if it had not been resolved. No such undertaking was offered in this case. In consequence, *mandamus* will issue.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted.
2. An Order of *mandamus* is granted directing the respondent to consider the applicant's application for permanent residence under the Federal Skilled Worker program as per the ministerial directions in place as of the date the application was received, May 14, 2010.
3. No question for certification arises.

"Donald J. Rennie"

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Judge

## APPENDIX A

***Immigration and Refugee  
Protection  
Regulations (SOR/2002-227)***

***Règlement sur l'immigration  
et la protection des  
réfugiés (DORS/2002-227)***

Form and content of  
application

Forme et contenu de la  
demande

**10.** (1) Subject to paragraphs  
28(b) to (d), an application  
under these Regulations shall

**10.** (1) Sous réserve des  
alinéas 28b) à d), toute  
demande au titre du présent  
règlement :

(a) be made in writing  
using the form provided  
by the Department, if  
any;

a) est faite par écrit sur  
le formulaire fourni par  
le ministère, le cas  
échéant;

(b) be signed by the applicant;

b) est signée par le  
demandeur;

(c) include all information and  
documents required by these  
Regulations, as well as any  
other evidence required by the  
Act;

c) *comporte* les  
renseignements et  
documents exigés par le  
présent règlement et est  
accompagnée des  
autres pièces  
justificatives exigées  
par la Loi;

(d) be accompanied by  
evidence of payment of the  
applicable fee, if any, set out  
in these Regulations; and

d) est accompagnée  
d'un récépissé de  
paiement des droits  
applicables prévus par  
le présent règlement;

(e) if there is an  
accompanying spouse or  
common-law partner,  
identify who is the principal  
applicant and who is the  
accompanying spouse or  
common-law partner.  
Required information

e) *dans* le cas où le  
demandeur est  
accompagné d'un  
époux ou d'un conjoint  
de fait, indique celui  
d'entre eux qui agit à  
titre de demandeur  
principal et celui qui

(2) The application shall,  
unless otherwise provided  
by these Regulations,

(a) contain the name, birth  
date, address, nationality and

immigration status of the applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;

(b) indicate whether they are applying for a visa, permit or authorization;

(c) indicate the class prescribed by these Regulations for which the application is made;

(c.1) if the applicant is represented in connection with the application, include the name, postal address and telephone number, and fax number and electronic mail address, if any, of any person or entity — or a person acting on its behalf — representing the applicant;

(c.2) if the applicant is represented, for consideration in connection with the application, by a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, include the name of the body of which the person is a member and their membership identification number;

(c.3) if the applicant has been advised, for consideration in connection with the application, by a person referred to in any of

agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.

#### Renseignements à fournir

(2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :

a) les nom, date de naissance, adresse, nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;

b) la mention du visa, du permis ou de l'autorisation que sollicite le demandeur;

c) la mention de la catégorie réglementaire au titre de laquelle la demande est faite;

c.1) si le demandeur est représenté relativement à la demande, le nom, l'adresse postale, le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique de toute personne ou entité — ou de toute personne agissant en son nom — qui le représente;



paragraphs 91(2)(a) to (c) of the Act, include the information referred to in paragraphs (c.1) and (c.2) with respect to that person;

(c.4) if the applicant has been advised, for consideration in connection with the application, by an entity — or a person acting on its behalf — referred to in subsection 91(4) of the Act, include the information referred to in paragraph (c.1) with respect to that entity or person; and

(d) include a declaration that the information provided is complete and accurate.

c.2) si le demandeur est représenté, moyennant rétribution, relativement à la demande par une personne visée à l'un des alinéas 91(2)a) à c) de la Loi, le nom de l'organisme dont elle est membre et le numéro de membre de celle-ci;

c.3) si le demandeur a été conseillé, moyennant rétribution, relativement à la demande par une personne visée à l'un des alinéas 91(2)a) à c) de la Loi, les renseignements prévus aux alinéas c.1) et c.2) à l'égard de cette personne;

c.4) si le demandeur a été conseillé, moyennant rétribution, relativement à la demande par une entité visée au paragraphe 91(4) de la Loi — ou une personne agissant en son nom —, les renseignements prévus à l'alinéa c.1) à l'égard de cette entité ou personne.

d) une déclaration attestant que les renseignements fournis sont exacts et complets.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1238-11

**STYLE OF CAUSE:** DILIP BHAGWANDAS BHATIA v. THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto

**DATE OF HEARING:** October 18, 2011

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

**DATED:** November 7, 2011

**APPEARANCES:**

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