

Federal Court



Cour fédérale

Date: 20121128

Docket: IMM-5539-11

Citation: 2012 FC 1382

Ottawa, Ontario, November 28, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

JJO JACOB

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction and Background

[1] The applicant is a citizen of India. He challenges the August 8, 2011 decision of Immigration Officer Harmon (Officer) who refused his application for permanent residence in Canada on Humanitarian and Compassionate (H&C) grounds.

[2] In order to appreciate the basis of the applicant's application for permanent residence the following background facts are important.

[3] Mr. Jacob arrived in Canada on September 20, 2005 on a student visa for studies at a Business College in Toronto which stopped operating three months after his arrival.

[4] Looking into other options he found employment as a caregiver to an elderly, bed-ridden man whose wife had advertised for the job after obtaining a positive Labour Market Opinion (LMO). The applicant had two years experience as a live-in caregiver in India. He applied for a work permit on the basis of the positive LMO; it was issued on November 16, 2006 valid for one year. That work permit contained a remark which read: "This work permit is not/not issued under the LCP Program."

[5] The live-in caregiver class is a class prescribed by the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (*IRPR*). It is a class of foreign nationals who may become permanent residents on the basis of the requirements set out in the enabling statute; the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). Section 113 of the *IRPR* provides a foreign national becomes a member of the live-in caregiver class if they have entered Canada as a live-in caregiver and worked in that capacity for at least two of the four years immediately following their entry. To become a member of the class the work permit must be issued to that person before entering Canada. Processing of applicants for the Live-in Caregiver Program (LCP) is governed by the requirements of OP-14 which establishes eligibility requirements in terms of education, training or work experience, language ability and a job offer approved by Service Canada, i.e. a positive LMO.

[6] The applicant's work permit was renewed on March 3, 2008 valid for two years until February 23, 2010. That work permit also contained the same remark as the previous wording - "This work permit is not/not issued under the LCP Program."

[7] On April 7, 2009, the applicant made an In-Canada application for permanent resident status under the LCP Program after he had worked in Canada under valid work permits for 3 years. He was assisted in filing this application by a consultant who advised him he was eligible for LCP permanent residency.

[8] On July 30, 2009, Citizenship and Immigration Canada (CIC) advised the applicant he met the requirements to apply for permanent resident status as a member of the Live-in Caretaker Class. He was told a final decision would not be made until all remaining requirements had been met and, in particular, medical examinations and security checks. He was also told he could now apply for an open work permit which entitled him to work in any occupation and location of his choice and that he could also apply for a study permit.

[9] The same official (TJ-E) who wrote the good news letter on July 30, 2009 wrote the applicant a second letter on October 20, 2009 advising that "in the course of reviewing your file, it appears that your application for permanent residence may have to be refused as you do not appear to meet immigration requirements". That official informed the applicant that in order to become a permanent resident under the LCP he had to meet the requirements in the *IRPR* pertaining to that class and, in particular, must have been assessed under the LCP from abroad to apply under that

program. That official noted the applicant's permits were not issued under the LCP and therefore was never in the LCP. The official asked for submissions.

[10] The applicant responded by sending a letter explaining how he became a live-in caregiver in Canada, his continued employment as a caregiver to Mr. and Mrs. Thomas, his oversight about the work permit not being under the LCP and the positive letter he had received on July 30, 2009 from CIC.

[11] He concluded his letter by stating he made an error, asked for forgiveness and requested the continuation of the processing of the application. That application was refused on February 8, 2010 by TJ-E.

[12] He challenged the refusal in Federal Court on October 28, 2010 Justice Campbell, noting the applicant's request for special consideration, was of the view the applicant's letter of November 6, 2009, "constitutes a request for the opportunity to make full representations on H&C grounds and that this request was not considered prior to the permanent residence decision being made". His order reads:

THIS COURT ORDERS that:

Accordingly, I set aside the Decision under review and refer the matter back for reconsideration on the direction that, prior to the permanent residence decision being made on the Applicant's Application for permanent residence, a full opportunity to make a humanitarian and compassionate application be provided to the Applicant and that the application be considered prior to a final decision on the permanent resident application.

[Emphasis added]

II. The Application for Reconsideration

[13] The applicant made his H&C application on January 2, 2011. In support of the reconsideration ordered by Justice Campbell, the applicant's former counsel, on January 2, 2011, under a covering letter which stated "in accordance with the Federal Court decision, applicant Mr. Jacob sends this application for exemption on H&C grounds". He cited the following enclosed documents:

- (a) Completed Application forms IMM 5001 and IMM 5283, one of which is the supplementary information on H&C considerations. In those submissions, the applicant highlighted the fact that since November 2006 he had worked as a live-in caregiver for Mr. Thomas who is bed-ridden and his wife who is disabled. He states he was attached to "this family as my own" and it would not be fair to leave them as they need help. The applicant also made observations on his being a professional caregiver and what he had in India in terms of job prospects, working conditions, pay and experience.

- (b) In support of his H&C application the applicant wrote the following in answer to the question: "Explain the humanitarian and compassionate reasons that prevent you from leaving Canada":

I applied for Permanent resident status under Live in caregiver, the application was refused on the ground that I did not enter Canada as a live in caregiver. Pursuant to the Federal Court decision I make this request that I may be kindly exempt from this requirement. I want to stay in Canada and work as a live in Caregiver for the family (my ex employer) one of the family member is bed ridden and the other is also disabled, a letter form her is attached, including a letter from their family doctor. I do not have any job

prospect in India, and my family do not have any resources to fund any business for me.

[Emphasis added]

- (c) In answer to the question: “If you are requesting an exemption clearly indicate the specific exemption you are requesting”, the applicant wrote:

I applied for Permanent resident in the Live in caregiver class (LCP Program). However, my application was (initially approved) refused because I did not enter Canada as a Live in caregiver. The refusal letter indicates that I am not a member of the class as described in paragraph 112 of the regulations and as required by Paragraph 115 of the Regulations (Immigration and refugee Protection Regulations). I am requesting an exception from the condition which requires me to enter into Canada as a Live in Caregiver to apply for permanent resident under Live in Caregiver class.

[Emphasis added]

[14] He enclosed the following material:

- (a) A November 24, 2010 letter from Mrs. Alamma Thomas stated that the applicant is the primary caregiver of her husband who is paralyzed and bed-ridden; she also discussed her needs being 75 years of age and disabled after a car accident. She noted that because of his stroke her husband cannot speak clearly and mainly speaks in his Native Indian language which allows the applicant to communicate with him and understand his needs.
- (b) A letter dated December 8, 2010 from the Thomas’ family doctor discussing their medical conditions in terms of their specialized needs and language requirements

and the importance the applicant remain as their primary caregiver in order that they may continue to receive the quality of care they require for day-to-day living.

- (c) A letter from the St. Thomas Orthodox Syrian Church pointing to his involvement in that Community.

- (d) A letter from the Royal Bank.

III. The Impugned Decision

[15] On August 8, 2011 Officer Harmon refused the applicant's application. In his reasons under the heading "Factors presented for consideration" he wrote: "Exemption under the LCP, establishment in Canada and the hardship he would face should he return to the India."

[16] Under the heading "Degree of establishment demonstrated" the Officer noted the details of his employment in Canada, he noted the family doctor's letter and the letter from the Church.

[17] The Officer prefaced his analysis with the following statement:

The applicant is seeking an exception from the in-Canada selection criteria based on humanitarian and compassionate or public policy considerations to facilitate processing of the application for permanent residence from within Canada. The applicant bears the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside Canada in the normal manner would be i) unusual and undeserved and ii) disproportionate.

[Emphasis added]

[18] The Officer then wrote:

The Applicant humanitarian and compassionate grounds are based on establishment in Canada and the hardship he would face should he return to India. The applicant has requested an exemption from the requirements to be a member of the LCP class.

...

The applicant indicates on the IMM5283 dated 23 January 2010 (sic) he is requesting an exemption from the condition which requires him to enter into Canada as a live in Caregiver and to apply for permanent resident under live in caregiver class. The applicant further indicates he would like to remain in Canada and work as a live-in caregiver for his ex-employer and this commitment be considered.

[Emphasis added]

[19] The Officer noted the applicant's submission he is currently unemployed and since February 2010 he has been residing with his ex-employer who supports him as evidenced by a letter of support.

[20] The Officer next noted the applicant's submission to the question requiring an explanation of the H&C reasons that prevented him from leaving Canada and commented as follows:

I accept that the applicant helps the Thomas family as a Caregiver. However, the applicant has not provided any evidence to demonstrate that Alamma Thomas and her husband Koshy Thomas would be unable to obtain alternative care or would be without physical care if the applicant is no longer in Canada. It is noted that no evidence was provided to show the level of interdependency or to show that long-term emotional or physical harm would be suffered should the applicant return to India. Though I recognize that the applicant has developed a level of closeness to the Thomas family, there appears to be little evidence to demonstrate that these relationships could not be maintained. I note that relationships are not bound by geographic borders and methods exist by which they may continue to communicate.

I acknowledge that in the past the applicant played a role as an employee and Caregiver for the elderly couple, however I am not satisfied that the couple would be completely without care or support to meet their basic needs. I find that there is insufficient evidence before me to indicate that the applicant has established that severing these ties would have such a significant negative impact that it would constitute as unusual and undeserved or disproportionate hardship which justifies an exemption under humanitarian and compassionate considerations.

[Emphasis added]

[21] The Officer then turned to his analysis on the applicant's degree of establishment in Canada and the hardship of his leaving since his arrival in Canada in September 2005 as a student. He noted the applicant had been gainfully employed from November 2006 to February 10, 2010 as a caregiver whom the applicant had submitted he earned the faith of his employer who offered him free accommodation, he had never received social assistance and he has a sufficient bank balance. He mentioned the reference letter from the Church. On the issue of his return to India he reviewed the applicant's submissions. He wrote:

I accept that the applicant has a certain level of integration and establishment after residing in Canada for approximately 6 years. I note that the applicant was also able to achieve a level of establishment in India. He received 15 years of formal education, graduated with a Bachelor of Science degree and was gainfully employed as a Live-in Caregiver at Kripa Bhavan (Gill Gal Old age Home) in India, prior to coming to Canada. Considering his educational background and experience, there is little evidence before me to indicate that the applicant would be unable to re-establish himself or that he would be unable to support himself. While I acknowledge that the applicant resided in Canada since September 2005 and that rebuilding his life in India will not be without adjustment, the applicant lived in India until 22 years of age when he came to Canada as an adult and thus he is familiar with the language, customs and culture of that country. I acknowledge that the applicant has family members in India who may be able to assist in his readjustment. I am not satisfied that sufficient evidence was

provided to show that the applicant would be unable to re-establish himself or that he would be completely without support in India.

[Emphasis added]

[22] The Officer concluded:

I have considered all information regarding this application as a whole. Having reviewed and considered the grounds the applicant has forwarded as grounds for exemption, I do not find they constitute as unusual and undeserved or disproportionate hardships. Therefore, I am not satisfied that sufficient humanitarian and compassionate grounds exist to approve this exemption request.

IV. The Applicant's Affidavit

[23] In support of his judicial review application the applicant deposed in an affidavit upon which he was not cross-examined:

1. The background facts which are referred to in the introduction to these reasons and in particular;
 - i. the fact he came to Canada on a student visa in September 2005, began his studies but after three months the college stopped operating and he could no longer attend the course;
 - ii. he answered the newspaper advertisement posted by Mrs. Thomas seeking a caregiver to her husband;
 - iii. when he submitted his application for a work permit with a positive LMO he had no understanding of the requirements of the LCP or that he had to apply from outside Canada;
 - iv. he did not understand the meaning of the remark in the issued work permits that they are not issued under the LCP;

- v. operating on that misunderstanding he applied for permanent residency under that program as he had worked in Canada under a valid work permit for 3 years and was badly advised by a consultant he was eligible for LCP permanent residency;
- vi. noted the error made by CIC when he was first advised he was eligible; and
- vii. he was never called for an interview.

V. The Statutory Scheme

[24] “Live-in-caregiver” is defined in section 2 of the *IRPR* as follows:

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| <p>“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.</p> | <p>« 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.</p> |
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[25] Applications for membership in the live-in-caregiver class is a two step process. To qualify an applicant must first obtain the necessary employment authorization and a favourable LMO.

[26] Section 113(1) of the *IRPR* contains additional statutory provisions on membership in the live-in-caregiver program.

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| <p>113. (1) A foreign national becomes a member of the live-in caregiver class if</p> <p>(a) they have submitted an application to remain in Canada as a permanent resident;</p> | <p>113. (1) L'étranger fait partie de la catégorie des aides familiaux si les exigences suivantes sont satisfaites :</p> <p>a) il a fait une demande de séjour au Canada à titre de résident permanent;</p> |
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- (b) they are a temporary resident;
- (c) they hold a work permit as a live-in caregiver;
- (d) they entered Canada as a live-in caregiver and for at least two of the four years immediately following their entry or, alternatively, for at least 3,900 hours during a period of not less than 22 months in those four years,
- (i) resided in a private household in Canada, and
- (ii) provided child care, senior home support care or care of a disabled person in that household without supervision;
- (e) they are not, and none of their family members are, the subject of an enforceable removal order or an admissibility hearing under the Act or an appeal or application for judicial review arising from such a hearing;
- (f) they did not enter Canada as a live-in caregiver as a result of a misrepresentation concerning their education, training or experience; and
- (g) where they intend to reside in the Province of Quebec, the competent authority of that Province is of the opinion that they meet the selection criteria of the Province.
- b) il est résident temporaire;
- c) il est titulaire d'un permis de travail à titre d'aide familial;
- d) il est entré au Canada à titre d'aide familial et, au cours des quatre ans suivant son entrée, il a, durant au moins deux ans, ou encore, durant au moins 3 900 heures réparties sur une période de vingt-deux mois ou plus :
- (i) d'une part, habité dans une résidence privée au Canada,
- (ii) d'autre part, fourni sans supervision, dans cette résidence, des soins à domicile à un enfant ou à une personne âgée ou handicapée;
- e) ni lui ni les membres de sa famille ne font l'objet d'une mesure de renvoi exécutoire ou d'une enquête aux termes de la Loi, ni d'un appel ou d'une demande de contrôle judiciaire à la suite d'une telle enquête;
- f) son entrée au Canada en qualité d'aide familial ne résulte pas de fausses déclarations portant sur ses études, sa formation ou son expérience;
- g) dans le cas où l'étranger cherche à s'établir dans la province de Québec, les autorités compétentes de cette province sont d'avis qu'il répond aux critères de sélection de celle-ci.

VI. The Position of the Parties

(a) On behalf of Mr. Jacob

[27] Counsel for Mr. Jacob (who was not the same counsel who filed Mr. Jacob's application for exemption on H&C grounds) argues:

1. The exemption application was framed under section 25 of the *IRPA* for an exemption from one of the requirements of the LCP namely that the applicant must originally have entered Canada under the program, namely, an exemption from the requirement of paragraph 113(d) of the *IRPR*. He asked to stay in Canada in order to continue caring for his employers, one who is bed-ridden and the other disabled.
2. The Federal Court had ordered a re-determination of the applicant's application for permanent residence in Canada under the LCP, i.e. that program's permanent residency benefit was reopened and the exemption sought was an exemption to be a member of the Live-in Caregiver Class to qualify for that benefit.
3. He raised three issues:
 - i. Whether the Officer rendered an unreasonable decision in rejecting the request for exemption from the condition in section 113 of the *IRPR* that in order to become a member of the live-in caregiver class he had to enter Canada as a live-in caregiver;
 - ii. Did the Officer err in law in ignoring the evidence; and
 - iii. Were the Officer's reasons inadequate.

(b) On behalf of the Respondent

[28] Counsel for the respondent states Mr. Jacob sought to have his application for permanent residence assessed in the live-in-caregiver class and requested he be exempted from the requirement that he enter as a live-in-caregiver, and in particular from paragraph 113(d).

[29] The respondent submits the Officer's refusal was reasonable. He submits that the exemption must be warranted due to hardship to Mr. Jacob and not considerations relating to others. The respondent also argues Mr. Jacob did not apply and was not granted a work permit in the live-in-caregiver class, and, as such was not assessed outside of Canada. The respondent suggests that if Mr. Jacob is permitted to apply for permanent residence he may not have sufficient work experience.

VII. Analysis and Conclusions

(a) The Standard of Review

[30] I agree with the respondent the standard of review in this case is reasonableness in that the Officer's decision is based on questions of mixed law and fact. The result is this Court will not intervene unless the decision does not fall within the range of possible acceptable outcomes which are defensible in respect the facts and law.

(b) Conclusions

[31] For the reasons that follow I am of the view the Officer's decision is indeed unreasonable.

[32] First, according to the Supreme Court of Canada's decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 in matters of statutory interpretation words of an Act (or Regulation) must be interpreted harmoniously with their scheme and object. The Officer did not engage in this exercise. He did not consider that the purpose of the Regulatory scheme underlying the live-in-caregiver Program was to encourage people to come into Canada to fill in a void which exists in our labour market and in consideration for their commitment to work in the domestic field participants are virtually guaranteed permanent residence. The Officer's failure let him to ignore a relevant consideration.

[33] Second, I cannot agree with the respondent's position that section 25 of the *IRPA* is limited to consideration of hardship to the individual applicant (or his children). The words of section 25 are not limited as such. What the applicant was seeking was an exemption from the requirement he had to have entered Canada as a live-in-caregiver. He entered Canada legally under a student visa but owing to circumstances beyond his control the institution which he attended closed its doors. He then applied for authorization as a live-in-caregiver and was so authorized. He fulfilled his obligations under the *IRPR* and was advised he met the requirements for permanent residence. In short, the Officer erred in processing Mr. Jacob's application as if it was a simple exemption request from having to apply for permanent residency to Canada from abroad. He was applying for permanent residency in Canada because that is what he was entitled to as a live-in-caregiver which he was but for having entered in Canada legally but as a student.

[34] Third, it is clear the Officer ignored the evidence of Mr. Jacob's interdependency with the Thomas family, notably ignored Mrs. Thomas' letter as well as the doctor's letter.

[35] For these reasons, this judicial review application is granted.

JUDGMENT

THIS COURT’S JUDGMENT is that this judicial review application is granted. The Officer’s H&C decision is set aside and the matter is remitted for reconsideration by a different officer. No certified question was proposed.

“François Lemieux”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5539-11

STYLE OF CAUSE: **JUJO JACOB v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION and MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS**

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: April 18, 2012

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

DATED: November 28, 2012

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