IMM-1047-96

BETWEEN:

SALIM D. LAKHANI

Applicant

-and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent

REASONS FOR ORDER

HEALD D. J.

This is an application for Judicial Review of a decision by a visa officer, Mary Keefe, dated February 9, 1996. In that decision the visa officer dismissed the Applicant's application for permanent residence in Canada.

THE FACTS

The Applicant, through his immigration counsellor, submitted documents in support of his application for an immigrant visa as an assisted relative. The application was submitted on January 29, 1993. It was initially "paper screened" with the Applicant receiving 53 units of assessment.

At the request of the Applicant's consultant a review was conducted, the case was re-opened and the Applicant was awarded an additional ten units of assessment to reflect that he was being sponsored by a relative in Canada. The

Applicant was interviewed in person by visa officer Keefe on March 23, 1994. At that interview, she advised the Applicant that even though he had received only 63 units of assessment and 70 units were required to pass selection, she would "consider recommending positive discretion" once she was satisfied that the Applicant and his defendants had met all of the statutory requirements for admission to Canada. She also attested in Paragraph 20 of her affidavit as follows: "At the interview, I observed that the Applicant answered "no" to question number 27B on the application for permanent residence form (ie. IMM 8) which requires an applicant to disclose whether he had ever been convicted of or was currently charged with any crime or offence in any country. In order to confirm that the Applicant understood this question fully and answered it correctly, I asked the further question using the following words, "Have you ever been placed on a period of probation for any criminal or civil offense?" The Applicant responded, "No" . "

Following that interview, the Applicant's immigration counsellor forwarded the Applicant's F.B.I. Identification Record to visa officer Keefe. That record disclosed that the Applicant had a criminal conviction in the U.S.A. for Driving Under the Influence of Drugs/Alcohol, dating from 1987. The Applicant had been fined $300.00 and sentenced to 12 months probation. The counsellor pointed out that she did not have any prior knowledge of the conviction. She also stated that when the Applicant was confronted, he had been very apologetic. He stated that he had never considered his conviction to be a criminal offence since the matter had been settled by the payment of a fine. The counsellor made the further submission that, since the conviction had taken place a number of years ago and since there had been no intention to deceive, the visa officer might well conclude that the Applicant had been rehabilitated. However neither the Applicant nor his immigration counsellor made any further submissions on the issue of rehabilitation.

The visa officer concluded that the conviction for Driving Under the Influence was the equivalent to the offence of Operating While Impaired as set out in section 253 of the Criminal *Code.* Since the Criminal *Code* offence was punishable on indictment by a term of imprisonment not exceeding five years, the visa officer concluded that the conviction for Driving Under the Influence rendered the Applicant inadmissible to Canada pursuant to paragraph 19(2)(a.1) of the Immigration Act.'

Since the Applicant had failed to disclose this material information, the visa officer declined to exercise her positive discretion to recommend that the application be accepted, regardless of the criminal conviction.

By letter dated February 9, 1996, visa officer Keefe informed the Applicant that his application had been refused on two grounds: (a) the Applicant received insufficient units of assessment to qualify for immigration to Canada; and (b) the Applicant was inadmissible because of his conviction for Driving While Under the Influence.

ISSUES

The applicant raises three issues:

(a) Whether the visa officer failed to take into account relevant considerations;

(b) Whether the visa officer improperly delegated her authority to the Computer Assisted Immigration Processing System ("the CAIPS "); (c) Whether the visa officer breached the duty of fairness by failing to deal expeditiously with the Applicant's file.

t This subsection renders inadmissable persons who have been convicted outside Canada of an offence that "if committed in Canada" would constitute an offence punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years.

ANALYSIS

**Notwithstanding the three issues set out supra, I have concluded that the question of criminal inadmissibility is, on these facts, dispositive of this application. Accordingly, I will initially consider this question.**

**On this issue, it was the submission of the Applicant that the visa officer erred in failing to provide him a reasonable opportunity to become involved in the process of criminal rehabilitation. In counsel's submission the Immigration Manual requires the visa officer to assist in the rehabilitation process by completing form IMM 1444 which is entitled "Submission for Approval of Rehabilitation" and also requires the visa officer to make a positive or negative recommendation for submission to a Senior Immigration Officer. In counsel's view, there is no evidence on the record to show that the visa officer considered the Applicant's request to become engaged in the rehabilitation process. While conceding that no evidence of rehabilitation was adduced,** he **submits nevertheless, that the visa officer's failure to initiate the rehabilitation process constitutes reviewable error.**

**I am unable to agree with this submission. The section of the Immigration Manual relied on provides:**

> 1.44 REQUESTS FOR SPECIAL AUTHORITY FROM THE GOVERNOR IN COUNCIL
>
> 1) Authorization Under A19(1)(c)
>
> a) An immigrant who has been convicted of an offence described in A19(1)(a), is eligible for Governor in Council approval of rehabilitation if five years have elapsed since termination of the sentence imposed for the offence and he satisfies the Governor in Council that he/she is rehabilitated. In such cases, the officer will:
>
> ii) complete IMM 1444 "Submission for Approval of Rehabilitation", making a positive or negative recommendation for submission to a senior immigration officer. Complete details for completion and transmission of IMM 1444 can be found at IS 9.[1] (emphasis mine)

2 Applicant's Book of Authorities, Tab 2.

**A perusal of the section of the Manual quoted supra makes it perfectly clear that a condition precedent to a favourable recommendation from a visa officer is the decision of the Governor-in-Council that the Applicant "is rehabilitated".**

**I do not accept the Applicant's submission that, in some way, the visa officer is obliged to inform the Applicant of the existence of this process and, indeed, obliged to initiate the process on behalf of the Applicant.**

**The Applicant has a further problem in that this argument is contrary to the decision of the Federal Court of Appeal in *M.E.I. v.* Gill (1991) 137 N.R. 374 (F.C.A.).**

**In Gill the Court clearly stated that, in these circumstances, the onus is on the Applicant to provide evidence of criminal rehabilitation. The Court stated at page 376:**

> This Court has held that it is not a pre-condition to the operation of paragraph 19(1)(c) that the Governor in Council shall have considered the question of rehabilitation and be not satisfied that the applicant has brought himself within that exception, *[Mohammad v. Canada (Minister of Employment & Immigration et al.)* (1988), 91 N.R. 121; 55 D.L.R. (4th) 321 at 328, D.L.R.]. In *Mohammad,* the Court added, that paragraph 19(1)(c) only requires the visa officer to be satisfied that no decision of satisfaction by the Governor in Council has been made.
>
> Subsection 8(1) of the *Immigration Act* imposes upon a person seeking to come into Canada the burden of proving that such a person has a right to come into Canada or that such admission would not be contrary to the *Immigration Act* or *Regulations.* On this basis, I agree with counsel for the appellant Minister that an applicant for landing like the principal applicant herein is inadmissible under paragraph 19(1)(c) of the Act unless he has satisfied the onus of providing evidence to the visa officer that the Governor in Council is satisfied that the principal applicant has rehabilitated himself. Since, on this record, this onus has not been satisfied, the exception to the class set out in paragraph 19(1)(c) has not been established. Accordingly, the principal applicant remains a member of the inadmissible class described in paragraph 19(1)(c) and the visa officer was correct in so concluding.

**This record also establishes that the Applicant was given an ample opportunity to provide evidence of rehabilitation to the visa officer. It is also interesting to note that the Applicant's Immigration Consultant acknowledged by letter dated May 13, 1994 to the Canadian Consulate General in Buffalo that:**

**"Possibly Rehabilitation may be in order."[3] Notwithstanding this circumstance, no evidence of rehabilitation was given to the visa officer. On this basis and because of his failure to disclose his conviction on his written application form, the visa officer was not satisfied that the Applicant was, in fact, rehabilitated. In my view, this conclusion was reasonably open to her on the material before her and her decision on the issue of criminal admissibility was correct.**

**In view of this conclusion, it becomes unnecessary for me to discuss issues (a) and (b) referred to** *supra.* **However, I think that issue (c) calls for comment.**

**In that issue, the Applicant submits that he was denied procedural fairness because the visa officer did not render her decision for a period of approximately two years. During that period the Applicant's immigration counsellor wrote to the visa officer on seven different occasions.** In **those letters, the counsellor requested information concerning the status of the Applicant's application. The visa officer's only reply was the refusal letter of February 9, 1996.**

**In support of this submission, the Applicant relies on this Court's decision in** *Singh v. Canada (Minister of Citizenship and Immigration)* (1995) 106 F.T.R. 66.In **that case Simpson J. granted the application for Judicial Review of the visa officer's decision. At page 70, she stated:**

> In my view, fairness requires that an applicant receive a timely Decision. What that means will vary with the circumstances of each case. I have no doubt, however, that a 2-1/2 year delay between an interview and notification to the applicant of the Decision is unacceptable where there are no special circumstances which account for the delay.

**In my view the case at bar is distinguishable from the** *Singh* **case because of the existence of special circumstances.** I **refer to paragraph 24 of the affidavit of visa officer Keefe wherein she stated:**

3 Letter attached as Exhibit I to the affidavit of Ali Amlani, sworn March 21", 1996.,

> Although five years had elapsed since the expiration of the sentence in this case, rendering the applicant eligible for the process of criminal rehabilitation I was not satisfied that the applicant, in fact, was rehabilitated as he failed to disclose his conviction on his written application form and failed to admit to it when queried directly at the interview. Furthermore, the applicant did not submit any materials to indicate he was rehabilitated. [4]

I conclude that the circumstances set out in paragraph 24 of the Keefe affidavit *supra* are the kind of special circumstances envisaged by Simpson J. in the *Singh* case *supra.*

There is no evidence on this record to show that this Applicant was denied procedural fairness. Likewise the Applicant has not adduced evidence of prejudice due to the two year delay nor has he provided any evidence of rehabilitation activities on his part during that period. For these reasons, I conclude that procedural unfairness has not been established in the circumstances at bar.

In any event, even if I had concluded that a breach of natural justice had occurred, I have the view that, because of the unusual circumstances in this case, merely sending the matter back for reconsideration could not result in a different decision being reached. In *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 S.C.R. 202 at 208, Iacobucci J., writing for the Court, concluded that all breaches of natural justice will not necessarily render a tribunal's decision void. He relied on the following passage from Professor Wade's textbook on *Administrative Law* (6th ed., 1988) where it was stated:

> A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.

a Respondent's Application Record, p. 5 & 6.

**In my view, in the circumstances of this case, the demerits of the Applicant's case, as set out in the Keefe affidavit render this a "hopeless case". Accordingly, I am prepared to disregard the breach of natural justice identified herein.**

**CERTIFICATION**

**Counsel for the Applicant submitted two questions for certification:**

**Must an immigration officer confronted with an applicant under paragraph 19(1)(c) of the** *Immigration Act* **give the applicant an opportunity to seek the exercise of the Governor-in-Council's prerogative before refusing the applicant?**

2. **Can an immigration officer lawfully delegate a factor in Schedule I of the** *Immigration Regulations* **(1978) to CAIPS?**

**Question Number 1**

In **my view, this question should not be certified since it has already been dealt with in the Gill case discussed** *supra.*

**Question Number 2**

**I have also concluded that this question should not be certified since it is not a question of general importance.** I **agree with counsel for the Respondent that what is involved here is simply an administrative procedure whereby the visa officer employs a processing system to assist her in making her assessment of the Applicant.**

CONCLUSION

For all of the above reasons the within application for Judicial Review is dismissed.

Darrel V. Heald D.J.
Judge

Ottawa, Ontario
October 7, 1996

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

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REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE HEALD, DEPUTY

JUDGE DATED: October 7, 1996

APPEARANCES

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|---|---|
| Mr. Max Chaudhary | FOR THE APPLICANT |
| | FOR THE RESPONDENT |
| Mr. Godwin Friday | |

SOLICITORS ON THE RECORD:

| | |
|---|---|
| Chaudhary Law Office<br>York, Ontario | FOR THE APPLICANT North |
| Mr. George Thomson<br>Attorney General of Canada | FOR THE RESPONDENT Deputy |