Federal Court  Cour fédérale

Date: 20130215

Docket: IMM-2872-12

Citation: 2013 FC 162

Ottawa, Ontario, this 15th day of February 2013

Present: The Honourable Mr. Justice Roy

BETWEEN:

JASPREET SINGH MOMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Preliminary issue

[1] The respondent, at the outset of the hearing, and without notice to the applicant, made the argument that this matter is *moot* in view of the fact that the labour market opinion issued in this case has expired.

[2] Applicant's counsel, in very short submissions, referred the Court to the case of *Obeng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 754, where Justice Lagacé ruled that there was no live controversy between the parties as the applicant's invitation to come to Canada had expired. Nevertheless, the Court exercised its discretion and decided on the issues.

[3] It is not contested by the parties that there is discretion in the Court hearing the matter and deciding the issues in spite of the mootness of the case. *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 provides the applicable framework. Justice Sopinka, for the Court, put it plainly at page 353:

> … The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

[4] But first, the respondent must establish that the case is moot, that a tangible and concrete dispute has disappeared. I was not convinced at the hearing that such was the case. Furthermore, counsel for the respondent did not press the issue, suggesting that he was raising it as "an officer of the Court".

[5] My reluctance to readily conclude to mootness found its expression in this short dictum of Warren C.J., of the United States Supreme Court in *Sibron v. New York*, 392 US 40 (1968) at page 55, an appeal of a conviction heard after the sentence had been already completed:

> … most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness".

Given the narrow issue that is before the Court, it is not clear that there is not a concrete dispute as *substratum*.

[6] Be that as it may, assuming that the mootness doctrine could find application in this case, I would exercise discretion and decide the contentious issue between the parties. The matter was fully argued by the parties. The need to promote judicial economy is not really present.

[7] The third factor considered by the Supreme Court in *Borowski*, above, was "the need for the Court to demonstrate a measure of awareness of its proper law-making function" (page 362). The Court goes on to say that "[o]ne element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention" (page 365). In the circumstances of this case, that sensitivity militates in favour of exercising discretion, if there is a need to do so. It would be unfair to an applicant if the mere passage of time following a negative decision in an immigration matter could easily negate access to the courts. If, as alleged by respondent's counsel, the labour market opinion has expired, I suspect that situation can be remedied at the new hearing. In view of the decision I have reached, my Reasons for Judgment may provide some guidance as the matter will have to be re-assessed.

The issue

[8] This is an application for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, (the "Act") of the decision of a Citizenship and Immigration Canada visa officer (the "officer") to refuse the temporary work visa sought by the applicant, Mr. Jaspreet Singh Momi (the "applicant").

Facts

[9] The applicant is a citizen of India who lived, studied and obtained a Bachelor of Science in India. It appears from the record that the applicant worked in India until 2009.

[10] From June 2009 to October 2011, the applicant attended school in Australia where he obtained a "Diploma of Hospitality" and a "Certificate in Commercial Cookery". In view of the unavailability in Australia of a permanent residence program for overseas students, which had been discontinued, the applicant sought a Canadian work permit. Such permit was denied by the officer in a decision dated March 2, 2012 which was communicated to the applicant on March 12.

[11] The reason given for the denial of the work permit reads as follows:

> … Based on documentation/information provided in this application I am not satisfied pa would leave Cda at end of authorized stay. […] At the time of applying for the Australian student visa, this course of study would have allowed him the future to apply for Australian PR under the well documented Australian PR immigration program for overseas students. That option is no longer available to pa as the PR program has been stopped.

[12] The applicant raises two issues:

1. Did the officer err in refusing the applicant's application for a work permit?
2. Did the officer breach procedural fairness in failing to interview the applicant?

The impugned decision

[13] As already stated, the officer concluded that the foreign national, the applicant in this case, would not leave Canada by the end of the period authorized for his stay. The reason given is limited

to "[o]nce in Cda there would be little motivation to leave at the end of authorized stay or if a further CDN PR application was unsuccessful." There does not seem to have any other issue before the officer, including whether there was a labour market opinion that was satisfactory or that the applicant would have employment in this country.

Standard of review

[14] The case law is well established to the effect that, in light of their discretionary nature, the decisions of visa officers regarding temporary work permits are reviewable according to a standard of reasonableness (*Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190; *Baylon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 938; *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 614). It follows that the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and is within the range of acceptable outcomes based on the evidence before it. It is not up to a reviewing Court to substitute its own view of a preferable outcome; the reviewing Court is not sitting *de novo*.

Position of the parties

[15] The applicant submits that the officer's decision was unreasonable because it was based on generalizations. He claims that the officer appears to have satisfied himself that the mere fact that the applicant has remained outside of his own country for a period of time would suggest that he automatically does not want to return there. That is in the view of the applicant an unreasonable inference. Indeed, the applicant abides by the laws of Australia, which should be a strong indication that he will follow Canadian law and leave once the work permit has expired. The applicant also argues that the officer seems to have failed to consider the applicant's strong ties to India and his

lack of existing ties in Canada. Furthermore, the applicant submits that he was denied procedural fairness because the officer did not provide him with an opportunity to address his credibility concerns. He claims that an interview was warranted.

[16] The respondent submits that the applicant did not satisfy his burden of showing that he will leave Canada at the end of an authorized period. The respondent argues that the officer relied on the applicant's specific situation, noting the fact that the applicant had been residing outside of his own country since 2009. Furthermore, the respondent draws a negative inference from the fact that the applicant would have obtained in Canada a position that is permanent, as both the job ads and the offer letter say so. Finally, as for the applicant's compliance with Australian immigration laws, the respondent submits that it is irrelevant because the applicant never had the opportunity to overstay his welcome in Australia.

Analysis

[17] Foreign nationals seeking to enter Canada must establish that they meet the requirements of the Act. Paragraph 20(1)(*b*) of the Act sets out the obligation to be fulfilled for a foreign national who wishes to enter Canada. It reads:

20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	*b*) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

[18] It is section 200 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, (the "Regulations") which would apply in this case. The appropriate paragraphs read as follow:

200. (1) Subject to subsections (2) and (3), an officer shall issue a work permit to a foreign national if, following an examination, it is established that	**200.** (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
[…]	[…]
(*b*) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;	*b*) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;
(*c*) the foreign national	*c*) il se trouve dans l'une des situations suivantes :
[...]	[…]
(iii) has been offered employment and an officer has determined under section 203 that the offer is genuine and that the employment is likely to result in a neutral or positive effect on the labour market in Canada;	(iii) il s'est vu présenter une offre d'emploi et l'agent a, en application de l'article 203, conclu que cette offre est authentique et que l'exécution du travail par l'étranger est susceptible d'avoir des effets économiques positifs ou neutres sur le marché du travail canadien;

[19] I do not believe that it is necessary to determine whether the officer relied on generalizations or not. In my view, the considerations relied upon by the officer are irrelevant or neutral, or even worse, draw an inference that is not reasonable given the state of the record.

[20] The fact that the applicant seeks to obtain the appropriate visa from Canada because his immigration situation in Australia will become precarious would in my view militate in favour of considering the applicant as law abiding. As this Court has held in the past, previous immigration encounters are good indicators of an applicant's likelihood of future compliance (see *Calaunan v*

Canada (Minister of Citizenship and Immigration), 2011 FC 1494 at para 28 and *Murai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 186). That, in turn, suggests compliance with applicable laws. While the applicant's compliance with Australian immigration rules is not evidence directly related to the matter of complying with periods of authorization in Canada, it does indicate in my estimation that the applicant has respected immigration policy in the past, and there is no further evidence to the contrary.

[21] I find it difficult to understand how the fact that the applicant appears to have stayed in Australia since 2009 is sufficient to conclude that if he were awarded a temporary work permit, he would not return to India at its expiration. At best, not wishing to return to India following a stint in Australia by seeking to obtain a temporary work visa in Canada should be considered as neutral as to whether or not the applicant "will leave Canada by the end of the period authorized for their stay". Similarly, having a "permanent job" in Canada does not allow for an inference that the applicant will break the law and remain in this country past the expiry of the work permit. There is no evidence on the record that the applicant would have ties in Canada such that he would be tempted to stay for that reason alone. We should guard against connecting temporary residence and becoming a permanent resident (section 22 of the Act).

[22] Conversely his ties with India remain as his family is there.

[23] In this case, the officer relied on his belief that the applicant will not leave Canada by the end of the period he would be authorized to stay. However, the articulation of the reasons for such a belief is not transparent, justifiable and intelligible. From the record before the Court, they appear to

be speculations, without adequate consideration given to countervailing factors. As such, and without a further articulation, they appear to be arbitrary. They do not meet the basic standard of reasonableness articulated in *Dunsmuir v New Brunswick* , [2008] 1 SCR 190, and they are not saved by the following decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708.

[24] I am struck by the following passage taken from the decision of Justice Mainville, then of this Court, in *Gu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 522:

> [21] Second, the other fact which the officer draws upon to conclude that the applicant will not leave Canada at the end of the study period is her continued presence in Canada since March 2002 with either work or study permits. This is unreasonable. A foreign national who has remained in Canada under validly issued work or study permits should not be penalized for having followed the immigration legislation of this country. The simple fact the applicant has legally remained in Canada cannot reasonably support a conclusion that she would choose to go "underground" or try to stay in Canada without authorization once her study permit expires.

[25] I would apply the same reasoning, *mutatis mutandis*, to the case at bar. It is in my view unreasonable to deny a temporary visa for the sole reason that the applicant has not gone back to India. Indeed the applicant appears to have followed the law in Australia and attempts to follow the law of this country by making a proper application.

[26] As a result, although the decisions of visa officers are entitled to a high degree of deference, this Court's intervention is warranted where a conclusion is not transparent, justifiable or

intelligible. In the case at bar, I find that it is not possible to reconcile the decision made with reasons that would lead in the direction of that conclusion. As such, the decision is not reasonable.

[27] I would allow the application. The matter is remitted for re-determination of the applicant's temporary work visa by a different officer.

[28] The parties did not seek to have a question certified pursuant to section 74 of the Act, and none arose.

JUDGMENT

The application for judicial review is allowed. The decision of a Citizenship and Immigration Canada visa officer dated March 2, 2012 refusing the applicant's application for a temporary work visa is quashed and the matter is remitted for re-determination by a different visa officer.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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