



Kundi v. Canada (Minister of Citizenship and Immigration), 2001 FCT 700 (CanLII)

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Docket: IMM-3541-00

Neutral Citation: 2001 FCT 700

Fredericton, New Brunswick, this 25th day of June, 2001

PRESENT: THE HONOURABLE MR. JUSTICE JOHN A. O'KEEFE

BETWEEN:

BALJEET SINGH KUNDI

Applicant

- and -

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

O'KEEFE J.

[1] This is an application for judicial review of the decision of visa officer M. Keshub, dated June 13, 2000, denying the applicant's application for permanent residence in Canada.

[2] The applicant seeks an order in the nature of *certiorari* quashing the above decision, and an order in the nature of *mandamus* requiring the Canadian High Commission to reconsider the applicant's application in accordance with the law.

[3] The applicant, Baljeet Singh Kundi, was born May 20, 1965 and is a citizen of India. The applicant made an application for permanent residence in Canada under the independent category, indicating Machine Shop Inspector (NOC Code 7231.2) as his intended occupation. Among other things, the applicant included the following in his application:

- Various documents concerning his education.
- A letter dated October 5, 1990 from Sarwan Associates stating that the applicant had worked there as a trainee between June 19, 1988 and July 17, 1990. Following the successful completion of his training, the applicant

was appointed as a "machinist (supervisor)".

- A letter dated November 16, 1997 from Ashish & Bros. stating that the applicant worked there as a machine shop inspector from October 6, 1994 to November 16, 1997.
- A letter dated January 2, 1998 from KALSI Mechanical Works certifying that the applicant has been working there since November 17, 1997 as a machine shop advisor.
- Pictures of the applicant showing him in the workplace at KALSI.

[4] The applicant stated that he attended an interview with his wife and son on May 10, 2000. During the course of the interview, the applicant tendered evidence that his "mother's real brother" was living in Canada. As a result, his application was converted from the independent category to the assisted relative category and he was awarded five bonus points. By letter dated June 13, 2000 which reads in part as follows, the applicant's application for permanent residence in Canada was denied:

Based on the information provided in your application form and at your interview, you were assessed against the requirements for **Machine-Shop Inspector, NOC 7231.2**. The units of assessment you have been awarded for each of the selection criteria are:

| | |
|---------------------|-----------|
| Age | 10 |
| Occupational Factor | 05 |
| ETF/S.V.P. | 15 |
| Experience | 00 |
| Demographic Factor | 08 |
| Education | 13 |
| English | 09 |
| Suitability | <u>04</u> |

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Section 11(1) of the *Immigration Regulations, 1978*, does not permit issuance of an immigrant visa to applicants who have not been awarded any units of assessment for the experience factor unless the applicant has arranged employment certified by a Canada Employment Centre together with a written statement from the proposed employer verifying that he is willing to employ an inexperienced person in the position in which the person is to be employed. Further to the prospective employer's statement, the visa officer must be satisfied that the person can perform the work required despite the lack of experience.

You requested to be assessed as a **Machine-Shop Inspector**. On the basis of information you submitted and your description of your duties at your current employment, I have assessed you as having zero points of experience under this occupation. You do not have any experience matching the occupational descriptions of the above mentioned occupation. You also do not have the educational background to qualify for this occupation in Canada. Under the National Occupational Classification (NOC), you would require completion of a four years Apprenticeship Program or a combination of over four years of work experience in the trade and some college or industry course in Machining. Whereas, you have only completed 12 years of education and one year diploma course in the trade of Machinist from a private institution.

You have not been awarded any units of assessment for the experience factor and you do not have arranged employment certified by a Canada Employment Centre. You therefore come with the inadmissible class of persons described in section 19(2)(d) of the *Immigration Act* and your application has been refused.

On the basis of information you provided at interview, you were assessed against the requirement for **Supervisor, Machine Shop, NOC 7211**. Unfortunately, the occupational demand for this occupation in Canada is zero.

[5] The applicant now seeks judicial review of this decision.

Relevant Statutory Provisions

[6] Paragraph 19(2)(d) of the *Immigration Act*, R.S.C. 1985, c. I-2 states:

19.(2) No immigrant and, except as provided in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:

...

(d) persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders or directions lawfully made or given under this Act or the regulations.

19.(2) Appartiennent à une catégorie non admissible les immigrants et, sous réserve du paragraphe (3), les visiteurs qui_ :

...

d) soit ne se conforment pas aux conditions prévues à la présente loi et à ses règlements ou aux mesures ou instructions qui en procèdent, soit ne peuvent le faire.

[7] The educational requirements for NOC Code 7231.2 require in part the following:

- Some secondary school education is required
- Completion of a four-year apprenticeship program

or

a combination of over four years of work experience in the trade and some college or industry courses in machining is usually required to be eligible for trade certification.

- Trade certificate is available, but not compulsory, in all provinces and territories except Quebec.

Issues

- [8]
1. Did the visa officer err in the assessment of the applicant's experience?
 2. Did the visa officer exceed jurisdiction?
 3. Was there a breach of the duty of fairness?
 4. Did the visa officer err in the assessment of personal suitability?

Analysis and Decision

[9] Issue 1

Did the visa officer err in the assessment of the applicant's experience?

Paragraph 18 of the visa officer's affidavit states:

Since Baljeet Singh Kundi, did not have the formal education and training in the trade of Machinist, I was not satisfied that Baljeet Singh Kundi had the work experience as a, Machine Shop Inspector and was qualified to work in this occupation in Canada. Given his training at a private institution and claimed work experience at three small workshops, I was convinced that he was probably performing the duties of a Supervisor, Machine Shop.

In the CAIPS notes:

PA HAS LISTED HIS CURRENT AND INTENDED OCCUPATION AS "MACHINE SHOP INSPECTOR NOC 7231.2 WHICH IS COVERED UNDER NOC OCCUPATION MACHINIST. EDUCATIONAL REQUIREMENTS FOR MACHINIST ARE: COMPLETION OF A FOUR-YEAR APPRENTICESHIP PROGRAM OR A COMBINATION OF OVER-FOUR YEAR OF WORK EXP IN THE TRADE AND SOME COLEGE [sic] OR INDUSTRY COURSE IN MACHINING.

PA APPEARS TO BE WORKING IN A SMALL WORKSHOP AND MAY HAVE SOME EXPERIENCE AS A MACHINIST. HOWEVER, HE DOES NOT HAVE THE FORMAL EDUCATION AS A MACHINIST. HAS PROVIDED A TRADE CERT ISSUED BY A PRIVATE INSTITUTION WHICH DOES NOT APPEAR TO BE A RECOGNIZED INSTITUTION TO IMPART TRAINING IN THE TRADE OF MACHINIST. I AM NOT SATISFIED THAT PA HAS THE REQUIRED EDUCATIONAL QUALIFICATION/TRAINING AS A MACHINIST. THEREFORE, HE IS NOT QUALIFIED TO WORK AS A MACHINE-SHOP INSPECTOR.

And in the decision letter to the applicant at page 2:

You requested to be assessed as a **Machine-Shop Inspector**. On the basis of information you submitted and your description of your duties at your current employment, I have assessed you as having zero points of experience under this occupation. You do not have any experience matching the occupational descriptions of the above mentioned occupation. You also do not have the educational background to qualify for this occupation in Canada. Under the National Occupational Classification (NOC), you would require completion of a four years Apprenticeship Program or a combination of over four years of work experience in the trade and some college or industry course in Machining. Whereas, you have only completed 12 years of education and one year diploma course in the trade of Machinist from a private institution.

[10] It is conceded by the respondent that the visa officer misconstrued the educational requirements of the applicant's intended profession in that the applicant only required the additional education (completion of a four year apprenticeship program or a combination of over four years of work experience in the trade and some college or industry courses in machining is usually required to be eligible for trade certification) if he was going to be certified. Only Quebec required certification and the applicant was not going to settle in Quebec. The respondent argues that the error in the education requirements had no bearing on awarding zero units of assessment for experience by the visa officer.

[11] I do not agree with this position for two reasons. First, the visa officer, in paragraph 18 of the visa officer's affidavit stated that since the applicant "did not have the formal education and training in the trade of machinist, I was not satisfied that Baljeet Singh Kundi had the work experience as a Machine Shop Inspector and was qualified to work in this occupation in Canada". Secondly, the visa officer, in the CAIPS notes, stated that the applicant may have some experience as a machinist but he did not have the formal education as a machinist. The occupation "machinist" seems to be used interchangeably with the occupation "Machine Shop Inspector" by the visa officer. The refusal letter also seems to use these terms as one for the other.

[12] My review of the evidence indicates that the visa officer seemed to connect the applicant's lack of educational qualification (where the officer erroneously required the applicant to have an education sufficient for trade certification) to the awarding of zero points for experience. In my opinion, the applicant should have been entitled to some units of assessment for experience as the CAIPS notes of the visa officer state that the applicant "may have some experience as a machinist". It is not my role to decide how many units of assessment should be awarded. The visa officer erred in awarding zero units of assessment for experience and the decision must be set aside.

[13] Because of my finding on Issue 1, I need not decide the remaining issues raised by the applicant.

[14] The application for judicial review is granted, the decision of the visa officer is set aside and the matter is referred to a different visa officer for reconsideration.

[15] Neither party wished to certify a serious question of general importance.

ORDER

[16] **IT IS ORDERED** that the application for judicial review is granted, the decision of the visa officer is set aside and the matter is referred to a different visa officer for reconsideration.

"John A. O'Keefe"

J.F.C.C.

Fredericton, New Brunswick

June 25, 2001

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3541-00

STYLE OF CAUSE: BALJEET SINGH KUNDI

- and -

THE MINISTER OF CITIZENSHIP

& IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MONDAY, JUNE 18, 2001

REASONS FOR ORDER AND ORDER OF O'KEEFE J.

DATED: MONDAY, JUNE 25, 2001

APPEARANCES:

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FOR APPLICANT

Mr. J. Eastman

FOR RESPONDENT

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FOR RESPONDENT

FEDERAL COURT OF CANADA

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