

Federal Court



Cour fédérale

Date: 20170213

Docket: IMM-3172-16

Citation: 2017 FC 180

Vancouver, British Columbia, February 13, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TAJINDER PREET KAUR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicant seeks judicial review of a decision of an Immigration Officer of Immigration, Refugees and Citizenship Canada [Officer] refusing her application for a permanent resident visa as a member of the Canadian Experience Class

[CEC] pursuant to subsection 87.1(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

II. Facts

[2] The Applicant, aged 24, is a citizen of India.

[3] In April 2011, the Applicant was issued a study permit and entered Canada to attend Columbia College in Vancouver, where she completed a diploma in psychology in December 2013. She was then issued a Post-Graduation Work Permit for three years.

[4] The Applicant worked at Burger King as a front counter attendant from February 2013 until December 2013, and as a shift supervisor from December 2013 until April 2015. Since June 2015, she has been working for Milestones Grill and Bar as a food service supervisor.

[5] On March 21, 2015, the Applicant applied for permanent resident status as part of the Provincial Nominee Program [PNP] of British Columbia as a food service supervisor with Milestones Grill and Bar.

III. Decision

[6] On July 13, 2016, an Immigration Officer determined that the Applicant did not meet the minimum requirements for a permanent resident visa through the Canadian Experience Class and thus did not qualify as a provincial nominee. The Officer was not satisfied that the Applicant met

the requirements of paragraphs 87.1(2)(b) and (c) of the Regulations as the Applicant did not submit enough evidence to show what duties and actions she had performed during her employment.

[7] On July 14, 2016, the Applicant made a request for reconsideration of the decision and provided additional information on her employment. The Officer decided not to use his discretionary power to reconsider the Applicant's application.

[8] On July 26, 2016, the Applicant filed an application for leave and for judicial review of the Officer's decision.

IV. Issues

[9] This matter raises the following issues:

- 1) Did the Officer base his decision on an erroneous finding of fact made in a perverse or capricious manner without regard to the material before him?
- 2) Did the Officer fail to observe the principle of natural justice?

[10] The applicable standard of review with regard to the Officer's decision is reasonableness whereas the issue of procedural fairness is subject to the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Mehfooz v Canada (Citizenship and Immigration)*, 2016 FC 165 at paras 9-11 [*Mehfooz*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

V. Relevant Provisions

[11] Subsection 87.1(2) of the Regulations specifies the requirements for members of the CEC to become permanent residents of Canada:

87.1 (2) A foreign national is a member of the Canadian experience class if

(a) they have acquired in Canada, within the three years before the date on which their application for permanent residence is made, at least one year of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix, exclusive of restricted occupations; and

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification;

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification,

87.1 (2) Fait partie de la catégorie de l'expérience canadienne l'étranger qui satisfait aux exigences suivantes :

a) l'étranger a accumulé au Canada au moins une année d'expérience de travail à temps plein, ou l'équivalent temps plein pour un travail à temps partiel, dans au moins une des professions, autre qu'une profession d'accès limité, appartenant au genre de compétence 0 Gestion ou aux niveaux de compétence A ou B de la matrice de la Classification nationale des professions au cours des trois ans précédant la date de présentation de sa demande de résidence permanente;

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de la Classification nationale des professions;

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de la Classification nationale des

including all of the essential duties;

(d) they have had their proficiency in the English or French language evaluated by an organization or institution that is designated under subsection 74(3) using a language test that is approved under that subsection, the results of which must indicate that the foreign national has met the applicable threshold that is fixed by the Minister under subsection 74(1) for each of the four language skill areas; and

(e) in the case where they have acquired the work experience referred to in paragraph (a) in more than one occupation, they meet the threshold for proficiency in the English or French language, fixed by the Minister under subsection 74(1), for the occupation in which they have acquired the greater amount of work experience in the three years referred to in paragraph (a).

professions, notamment toutes les fonctions essentielles;

d) il a fait évaluer sa compétence en français ou en anglais par une institution ou une organisation désignée en vertu du paragraphe 74(3) qui utilise un test d'évaluation linguistique approuvé en vertu de ce paragraphe et les résultats de ce test démontrent qu'il a obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence applicable établi par le ministre en vertu du paragraphe 74(1);

e) s'il a acquis l'expérience de travail visée à l'alinéa a) dans le cadre de plus d'une profession, il a obtenu le niveau de compétence en anglais ou en français établi par le ministre en vertu du paragraphe 74(1) à l'égard de la profession pour laquelle il a acquis le plus d'expérience au cours des trois années visées à l'alinéa a).

VI. Submissions of the Parties

A. *Submissions of the Applicant*

[12] The Applicant's main argument is that the Officer erred in law by ignoring the evaluation made by the province of British Columbia and by which she was issued a Provincial Nominee Certificate [PNC]. If the Officer wanted to reassess her ability to become economically established in Canada, he ought to follow subsections 87(1) and (3) of the Regulations.

Furthermore, if the Officer had any issue with the Applicant's PNC, he should have consulted with the provincial authorities that issued the certificate and only then substituted his evaluation of the likelihood of the Applicant to become economically established in Canada (*Wai v Canada (Citizenship and Immigration)*, 2009 FC 780).

[13] The Applicant submits that the Officer erred in law by not following subsections 87(1) to (4) of the Regulations to assess her application under the PNP class for which she met all the requirements. The Officer erred in law by assessing her application under the CEC.

[14] The Officer states his reasons that the Applicant's employment letter from Burger King does not indicate the duties and responsibilities demonstrating her work experience. The Applicant submits that before refusing her application, the Officer should have given her the opportunity to complete her application and re-submit it. By failing to give the Applicant an opportunity to complete her application, the Officer breached procedural fairness (*Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283).

B. *Submissions of the Respondent*

[15] As a preliminary issue, the Respondent submits that exhibit B of the Applicant's affidavit should be struck from the record since this document was not before the Officer when he issued his decision (*Abbott Laboratories Limited v Canada (Attorney General)*, 2008 FCA 354 at paras 35-38; *Puida v Canada (Citizenship and Immigration)*, 2014 FC 781 at para 81).

[16] The Respondent submits that there was no evidence before the Officer that the Applicant performed the actions described as the main duties of a food service supervisor. Nothing in the evidence established that she had the requisite one year of skilled work experience for CEC approval.

[17] The Respondent also submits that the Applicant was assessed under the CEC requirements set out in section 87.1 of the Regulations, which governs the determination, as it is the class under which she applied.

[18] The Respondent does not believe there was a breach of procedural fairness because the Officer was under no duty to give the Applicant an opportunity to complete her application. The Applicant ought to have been aware of the requirements she had to fulfill, but still submitted a deficient application (*Obeta v Canada (Citizenship and Immigration)*, 2012 FC 1542 at pars 15, 25-26; *Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 at para 52).

C. *Reply of the Applicant*

[19] The Applicant submits in reply that she submitted her application for permanent residence under the PNP class, not under the CEC as stated by the Respondent.

[20] She also submits that the Officer failed to properly consider her request to reconsider her application, which is a breach of the principle of natural justice since the doctrine of *functus officio* does not apply in this case.

VII. Analysis

[21] For the following reasons, the application for judicial review is denied.

A. *Preliminary Issue*

[22] Regarding the preliminary issued, exhibit B of the Applicant's affidavit should be struck since it was not before the Officer when he issued his decision. It is trite law that a judicial review hearing is to proceed on the basis of the record that was before the decision-maker when the decision was made (*Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 11).

B. *Assessing the Applicant as part of the CEC*

[23] The Applicant claims that the Officer ought to assess her application on the basis of her PNC and not as part of the CEC. However, it is very clear from the letter she received from CIC on February 5, 2016, that:

When nominated under the Provincial Nominee Program through Express Entry, [she] must also meet the program requirements for at least one of the federal immigration programs (Federal Skilled Worker Program, Federal Skilled Trades Program, and/or Canadian Experience Class).

[24] The Officer did not err by assessing the Applicant as part of the CEC.

C. *Procedural Fairness*

[25] The Officer did not have a duty to inform the Applicant that her application was incomplete, nor to give her the opportunity to file all the required documents which had been missing with the application she had submitted. The onus was on the Applicant to establish that she met the requirements of the law. She had the duty to send a complete application, which she did not (*Mehfooz*, above, at paras 12-13).

VIII. Conclusion

[26] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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