

Federal Court



Cour fédérale

Date: 20150204

Docket: IMM-4550-13

Citation: 2015 FC 141

Ottawa, Ontario, February 4, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SEHO SONG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 for judicial review of the decision of a visa officer [Officer], dated May 29, 2013 [Decision], which refused the Applicant's application for permanent residence in Canada as a member of the Canadian Experience class.

II. BACKGROUND

[2] The Applicant submitted his application for permanent residence in September 2012. The Applicant applied under National Occupational Classification [NOC] 0621 (Retail and Wholesale Trade Manager) and NOC 3219 (Pharmacy Technician).

[3] At the time of his application, the Applicant says that he had been working as a Front Store Manager for more than one year at a pharmacy in Toronto. He also says that he worked from October 2009 to December 2010 as a Pharmacy Technician at the same pharmacy.

III. DECISION UNDER REVIEW

[4] The Applicant's application for permanent residence was denied in a letter dated May 29, 2013.

[5] The Officer said that the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] require that an applicant under the Canadian Experience class demonstrate: knowledge of English or French; Canadian skilled work experience; and, Canadian educational credentials (if applying under the Post-Graduation Stream). The Officer found that the Applicant did not meet the skilled work experience requirement. The Officer said that the Applicant's letter of employment detailing his responsibilities as a Front Store Manager did not satisfy him or her that the Applicant had performed the functions listed under NOC 0621. As a result, the Officer concluded that the Applicant had failed to demonstrate that he had "acquired twelve months of full-time skilled work experience in Canada at a National Occupational Classification skill of

type O or level A or B in the last twenty-four months prior to the submission of [his] application and after having obtained [his] Canadian educational credential” (Certified Tribunal Record [CTR] at 34).

[6] The Global Case Management System [GCMS] notes, dated May 29, 2013, provide further explanation of the Officer’s Decision (CTR at 36):

Work: Qualifying period: 2/10/10-2/10/12. According to application, PA worked as a Front Shop Manager (NOC 0621) for Bloor Park Pharmacy from JAN11 to present. Letter confirms employment, salary and lists duties which do not match those under NOC 0621. Specifically, according to the letter, the PA does not: Plan, organize direct control and evaluate the operations of establishments engaged in wholesale and retail sales or of departments in such establishments Does not: Study market research and trends to determine consumer demand, potential sales volumes and effect of competitors’ operations on sales implement price and credit policies Plan budgets and authorize expenditures As the PA’s experience does not include the above, I cannot count this experience. PA also requested assessment for as a Pharmacy Technician (NOC 3219) at the same employer from OCT09 to DEC10. However, work experience is outside of qualifying period with exception of two months. I am not satisfied that the PA has 12 months of full-time skilled work experience. Eligibility failed.

IV. ISSUES

[7] The Applicant raises three issues in this application:

1. Did the Officer err in law in finding that the Applicant did not meet the requirements of NOC 0621?
2. Did the Officer err in calculating the qualifying period for the Applicant’s work experience?
3. Did the Officer breach the duty of procedural fairness in failing to provide the Applicant with an opportunity to respond to his or her concerns?

V. STANDARD OF REVIEW

[8] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[9] The Applicant says that the standard of review for decisions involving the exercise of discretion and questions of mixed fact and law is reasonableness: *Kastrati v Canada (Citizenship and Immigration)*, 2008 FC 1141 at paras 9-10. The standard of review for questions of law and natural justice is correctness: *Restrepo Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at para 44.

[10] The Respondent says that visa officers are experts in assessing permanent residence applications, and this Court has held that visa officers are owed deference due to their expertise: *Onyeka v Canada (Citizenship and Immigration)*, 2009 FC 336 at para 17; *Pacheco Silva v Canada (Citizenship and Immigration)*, 2007 FC 733 at para 6; *Kniazeva v Canada (Minister of*

Citizenship and Immigration), 2006 FC 268; *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 [*Hassani*].

[11] This Court has held that an officer's determination under the Canadian Experience class involves questions of mixed fact and law and is reviewed on a standard of reasonableness: *Anabtawi v Canada (Citizenship and Immigration)*, 2012 FC 856 at para 28. The jurisprudence is clear that questions of procedural fairness are reviewed on a standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Exeter v Canada (Attorney General)*, 2014 FCA 251 at para 31.

[12] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[13] The following provisions of the Regulations were in force at the time the Applicant's application was assessed and are applicable to this proceeding:

Canadian Experience Class**Catégorie de l'expérience canadienne****Class****Catégorie**

87.1 (1) For the purposes of subsection 12(2) of the Act, the Canadian experience class is prescribed as a class of persons who may become permanent residents on the basis of their experience in Canada and who intend to reside in a province other than the Province of Quebec.

87.1 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie de l'expérience canadienne est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur expérience au Canada et qui cherchent à s'établir dans une province autre que le Québec.

Member of the class**Qualité**

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

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

(a) they

a) l'étranger, selon le cas :

(i) have acquired in Canada within the 24 months before the day on which their application for permanent residence is made at least 12 months 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, and have acquired that work experience after having obtained

(i) a accumulé au Canada au moins douze mois d'expérience de travail à temps plein ou l'équivalent s'il travaille à temps partiel dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions au cours des vingt-quatre mois précédant la date de la présentation de sa demande de résidence permanente et, antérieurement à cette expérience de travail, a obtenu au Canada, selon le cas :

(A) a diploma, degree or trade or apprenticeship credential

(A) un diplôme, certificat de compétence ou certificat

issued on the completion of a program of full-time study or training of at least two years' duration at a public, provincially recognized post-secondary educational or training institution in Canada,

d'apprentissage après avoir réussi un programme d'études ou un cours de formation nécessitant au moins deux ans d'études à temps plein et offert par un établissement d'enseignement ou de formation postsecondaire public reconnu par une province,

(B) a diploma or trade or apprenticeship credential issued on the completion of a program of full-time study or training of at least two years' duration at a private, Quebec post-secondary institution that operates under the same rules and regulations as public Quebec post-secondary institutions and that receives at least 50 per cent of its financing for its overall operations from government grants, subsidies or other assistance,

(B) un diplôme, certificat de compétence ou certificat d'apprentissage après avoir réussi un programme d'études ou un cours de formation nécessitant au moins deux ans d'études à temps plein et offert par un établissement d'enseignement postsecondaire privé au Québec qui est régi par les mêmes règles et règlements que les établissements d'enseignement publics et dont les activités sont financées, pour au moins 50 %, par le gouvernement notamment, au moyen de subventions,

(C) a degree from a private, provincially recognized post-secondary educational institution in Canada issued on the completion of a program of full-time study of at least two years' duration, or

(C) un diplôme universitaire après avoir réussi un programme d'études nécessitant au moins deux ans d'études à temps plein et offert par un établissement d'enseignement postsecondaire privé reconnu par une province,

(D) a graduate degree from a provincially recognized post-secondary educational institution in Canada issued on the completion of a program of full-time study of at least one year's duration and within two

(D) un diplôme d'études supérieures après avoir réussi un programme d'études à temps plein d'une durée d'au moins un an, offert par un établissement d'enseignement postsecondaire reconnu par

years after obtaining a degree or diploma from an institution referred to in clause (A) or (C), or

(ii) have acquired in Canada within the 36 months before the day on which their application for permanent residence is made at least 24 months 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; and

[...]

une province, au plus tard deux ans après avoir obtenu un diplôme d'un établissement visé aux divisions (A) ou (C),

(ii) a accumulé au Canada au moins vingt-quatre mois d'expérience de travail à temps plein ou l'équivalent s'il travaille à temps partiel dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions au cours des trente-six mois précédant la date de la présentation de sa demande de résidence permanente;

[...]

VII. ARGUMENT

A. *Applicant*

(1) Reasonableness

[14] The Applicant says that he submitted an employment letter with his application which outlined his performance of the duties required by NOC 0621. The letter outlined the Applicant's duties as Front Store Manager (Applicant's Record at 82-84):

- Determine merchandise (over-the-counter products) and services to be sold
- Take charge of refunds and exchanges
- Manage staff and assign duties (also train new staff)
- Resolve customer complaints

- Organize and locate merchandise to promote sales in two ways
 - Locate and select merchandise for resale
 - Organize special promotions, displays and events (implementing marketing strategies)
- Decide merchandise to carry on the basis of customer's demands, which indicates analyzing and interpreting trends to facilitate future planning of merchandise certain products
- Determine staffing requirements and hire or oversee hiring of staff for the retail section
- Manage the team to increase sales and ensure efficiency
- Work alongside the pharmacist and technicians to balance stock levels and making decisions about stock control
- Touring the sales floor regularly, talking to colleagues and customers, and identifying or resolving urgent issues

[15] The Applicant says that a comparison of the duties outlined in the employment letter with the duties described under NOC 0621 shows that the Officer's finding that he had not performed all of the duties is unreasonable. NOC 0621 provides that Retail Managers perform some or all of the following main duties (CTR at 26-27):

- Plan, direct and evaluate the operations of establishments engaged in wholesale and retail sales or of departments in such establishments
- Manage staff and assign duties
- Study market research and trends to determine consumer demand, potential sales volumes and effect of competitors' operations on sales
- Determine merchandise and services to be sold, and implement price and credit policies
- Locate, select and procure merchandise for resale

- Develop and implement marketing strategies
- Plan budgets and authorize expenditures
- Resolve customer complaints
- Determine staffing requirements and hire or oversee hiring of staff

[16] The Applicant says that the duties provided in the employment letter are specific to employment in pharmacy and encompass the general statements that the Officer made regarding the requirements under NOC 0621. The Applicant says that “either the officer erred in law in misconstruing or ignoring evidence, or the reasons as expressed are inadequate to meet the requirements of fairness” (Applicant’s Record at 129).

[17] The Applicant further submits that the Officer erred in calculating the qualifying period for the Applicant’s experience in relation to NOC 3219. The Applicant says that his application detailed his experience as a Pharmacy Technician from October 2009 to December 2010. The Citizenship and Immigration Canada website provides that an applicant “must have had at least 12 months of full time skilled work experience in Canada in the three year period prior to application” in order to be eligible. The Applicant says that his application was submitted in September 2012 and so should include all full-time employment dating back to September 2009. The Officer erred in not taking his experience as a Pharmacy Technician into consideration.

[18] The Applicant also says that the reasons are deficient because the reason that NOC 3219 was not considered has not been communicated to the Applicant. The provision of insufficient

reasons is a breach of the duty of fairness: *Canada (Citizenship and Immigration) v Jeizan*, 2010 FC 323 at paras 17-22.

(2) Procedural Fairness

[19] The Applicant says that the Officer breached the duty of procedural fairness by failing to provide the Applicant with an opportunity to address the Officer's concerns. The Applicant says that visa officers have a duty to not consider extraneous information and may have a duty to alert applicants about particular concerns: *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at para 22 [*Rukmangathan*].

[20] The Applicant agrees that the duty does not require that an applicant be provided a "running score" of deficiencies: *Rukmangathan*, above. However, the duty exists to allow an applicant an opportunity to reply where the visa officer's concern is with the "credibility, accuracy or genuine nature of the information submitted by the applicant": *Hassani*, above, at para 24. In *Gedeon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1245 at paras 101-102, the Court said that it was a reviewable error when the visa officer failed to provide reasons for rejecting evidence of the applicant's work experience and did not give the applicant an opportunity to address his concerns.

[21] The Applicant says that this is not a case where the Applicant failed to adduce any evidence to support the facts. Rather, the Applicant adduced evidence which the Officer has raised concerns about. The Applicant should have been given an opportunity to respond: *Liao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ no 1926 at paras 15, 17

(TD)(QL); *Kuhathasan v Canada (Citizenship and Immigration)*, 2008 FC 457 at paras 39-41; *Singh Sekhon v Canada (Citizenship and Immigration)*, 2012 FC 700 at paras 12-14.

B. *Respondent*

[22] The Respondent says the Officer reasonably found that the Applicant's evidence was insufficient to establish that he held the required experience under NOC 0621. This assessment of the evidence falls within the Officer's jurisdiction: *Wang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1298 at para 13 [Wang].

[23] The Respondent acknowledges that the current Regulations require qualifying work experience to have been acquired in the three years preceding an application. However, the Regulations that were in force when the Applicant submitted his application provided that the qualifying work experience had to be acquired in the twenty-four months preceding an application. As a result, the Officer correctly identified the qualifying period as October 2010 to October 2012. The Applicant had only two months of experience working as a Pharmacy Technician in this time period.

[24] The Respondent says that the reasons detail the deficiencies in the Applicant's evidence and set out the appropriate time period. The Officer's reasons are supported by the record and the Regulations. There is no merit to the Applicant's claim that the reasons are insufficient: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-17.

[25] The Respondent further submits that this Court has discussed the low level of procedural fairness that is owed to visa applicants: *Malik v Canada (Citizenship and Immigration)*, 2009 FC 1283 at paras 26, 29. An officer is not required to alert an applicant to concerns that arise from legislative requirements or from their own evidence: *Dhillon v Canada (Citizenship and Immigration)*, 2009 FC 614 at para 30; *Liu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1025 at para 16; *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815 at para 7. Whether the Applicant had the requisite experience was directly related to the regulatory requirements. The onus is on the applicant to submit all necessary information and the onus does not shift to the visa officer to seek more information: see *Singh v Canada (Citizenship and Immigration)*, 2010 FC 212 at para 11; *Arango v Canada (Citizenship and Immigration)*, 2010 FC 424 at para 15.

VIII. ANALYSIS

[26] The Applicant now concedes that the Officer did not err in the calculation of the qualifying period for NOC 3219. This leaves the Court to deal with unreasonableness and breach of procedural fairness with regard to the Decision on NOC 0621 – Front Store Manager. There is no need to address the procedural fairness issues raised because I have concluded that the Decision is unreasonable with regards to the Applicant's application under NOC 0621.

[27] I say this because a comparison between the duties that Human Resources and Skills Development Canada sets out for NOC 0621 and the employer's letter submitted with the application, which describes in detail what the Applicant does as a Front Store Manager at Mary Gergis Pharmacy Inc O/A Bloor Park Pharmacy, leaves me in no doubt that the Applicant's

duties satisfy the lead statement for NOC 0621 and nearly all of the main duties listed in NOC 0621. The only one that I cannot say is immediately apparent is any reference to “competitors’ operations” which appears in the third bullet under *Main Duties*:

- Study market research and trends to determine consumer demand, potential sales volumes and effect of competitors’ operations on sales

The employer’s letter covers everything else.

[28] I agree with the Respondent that the Officer has a broad discretion to weigh the evidence submitted in making a decision, and that the Court should be very reluctant to interfere with that discretion: see *Wang*, above, at para 13. However, the present case requires interference because the evidence before me shows that the Decision is simply incomprehensible.

[29] It is clear that the duties listed in the employer’s letter do not use the same words that appear in NOC 0621. But this will inevitably be the case because applications have been refused when an employer simply reiterates the wording of a NOC. So employers are obliged to describe in their own words exactly what applicants do. This requires officers to examine applications carefully and not to reject them because the same words are not used.

[30] In the present case, the Respondent conceded before me that, given the details in the employer’s letter, it would not have been unreasonable for the Officer to have concluded that the Applicant did fulfill the requirements of NOC 0621. The Respondent correctly points out that just because a positive decision would have been reasonable does not mean that a negative decision is unreasonable. In this case, however, there are, in my view, no grounds for the

Officer's finding that the Applicant did not meet the requirements of NOC 0621. In other words, the Decision lacks justification and intelligibility and falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law: see *Dunsmuir*, above, at para 47. This means the Decision must be quashed and returned for reconsideration in accordance with these reasons.

[31] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by another officer in accordance with my reasons; and
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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