Federal Court Cour fédérale

Date: 20160204

Docket: IMM-2193-15

Citation: 2016 FC 131

Toronto, Ontario, February 4, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NAVDEEP KAUR DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. NATURE OF THE MATTER

[1] This is a judicial review of a decision [Decision] of a Citizenship and Immigration Canada [CIC] immigration officer [Officer] dated April 22, 2015. The Officer refused the Applicant's application for a permanent resident visa as a member of the federal skilled worker [FSW] class, finding that, contrary to subsection 75(1) of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 [the Regulations], she lacked the intention to reside outside of Quebec.

[2] The Applicant, however, maintains that she intended at all times to permanently reside in Brampton, Ontario, and is only in Quebec on a study permit to complete her PhD at McGill University. Her application for judicial review will be granted for the reasons below.

II. BACKGROUND

[3] The Applicant is a 30-year-old citizen of India. She entered Canada on December 17, 2013 on a study permit. She lives with her husband in Montreal, Quebec, where she is in the second year of her PhD in Electric Engineering. The Applicant obtained her Masters of Technology in Power Electronics and Electrical Machine Drives from the Indian Institute of Technology in Delhi, India. She also holds an undergraduate degree in Electrical Engineering. Prior to her doctoral studies at McGill, the Applicant worked as an Assistant Professor and software engineer in India.

[4] The Applicant's older sister is a Canadian citizen and lives in Brampton, Ontario. Her parents are Canadian permanent residents and reside with that sister, as does the Applicant's brother, although his status is unknown. In terms of immediate family, only the Applicant's married sister lives in India.

[5] In August 2014, the Applicant submitted an application for permanent residence as a member of the FSW class, wherein she noted her intention to live in Brampton. By letter dated

December 1, 2014, the Applicant received a positive eligibility determination of her application on the basis of her work experience. The Applicant was further advised that her application was in process and that a final eligibility decision would be made by a visa officer.

[6] In a fairness letter dated February 3, 2015, CIC advised the Applicant of the concern that she did not intend to reside in a province other than Quebec, because a PhD generally takes 4-5 years to complete and thus she would have to reside in Quebec were a visa to be issued in the next few months. This would be contrary to subsection 75(1) of the Regulations, which states:

> 75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec. (Emphasis added)

[7] On February 17, 2015, the Applicant responded, attaching her statutory declaration, as well as one declaration from her sister and her parents, to the reply letter. The Applicant's sworn statements included the following information: (i) she is attending McGill, a top research university, in part because of the English instruction and in part due to a financial award; (ii) she plans to finish her PhD within three years, after which she will move to Brampton, her intended destination; and (iii) her job prospects in Quebec are limited because of her lack of French language skills.

[8] On April 22, 2015, the Officer refused the application. The Global Case Management System notes indicate that the Officer reviewed the further documentation submitted by the Applicant in response to the February 3, 2015 fairness letter. The crux of the Decision reads:

> The information you provide does not satisfy me that you have taken the necessary steps to reside in a province other than the province of Quebec. You have completed approximately 1 year of studies at the PhD level which can take up to 6 years to complete. Your letter dated February 17, 2015, states you plan to obtain a tuition supplement for 3 years, complete your PhD program and move to Brampton permanently. While you have relatives in Brampton, you continue to have a valid study permit and CAQ to study in Quebec. Furthermore, you have requested an extension of this study permit to continue your studies. You have been working, studying and living in Quebec with your husband since 2014-01. I am therefore not satisfied that you have the intention to reside in a province other than the Province of Quebec. (Certified Tribunal Record [CTR], p 4)

[9] The Officer noted that both subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] and subsection 75(3) of the Regulations require a foreign national to satisfy the legislative requirements in order to obtain a permanent resident visa as a skilled worker, which the Applicant failed to do.

[10] In seeking judicial review of this Decision, the Applicant advances a number of arguments which can be summarized as (a) the Officer erred in interpreting the Regulations and (b) the Officer unreasonably assessed the evidence related to her intentions on residence. The Respondent counters that the Officer applied the facts correctly to the law and reasonably assessed the evidence.

III. STANDARD OF REVIEW

[11] The first issue in this case concerns the Officer's interpretation of subsection 75(1) of the Regulations. The standard of review applicable to a visa officer's interpretation of his or her home statute remains an unsettled area of law.

[12] The Court has available to it two approaches. The first approach, articulated by Justice Gleason in *Qin v Canada (Citizenship and Immigration)*, 2013 FC 147 at paras 9-16 [*Qin*], aff'd 2013 FCA 263 [*Qin FCA*], holds that correctness applies. The second approach, articulated by Justice Strickland in *Ijaz v Canada (Minister of Citizenship and Immigration)*, 2015 FC 67 at paras 20-32 [*Ijaz*], takes its lead from *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] and several cases that followed.

[13] In *Qin*, Justice Gleason found that she was bound by Federal Court of Appeal authorities (*Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 339 [*Khan*] and *Patel v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 187 [*Patel*]) which determined that the correctness standard applies to a visa officer's interpretation of the Regulations. Justice Gleason acknowledged that recent jurisprudence from the Supreme Court suggests that deference should be afforded to administrative decision-makers' interpretation of their home statute. Nonetheless, she found that *Khan* and *Patel* were directly on point and thus binding.

[14] *Qin* was upheld on appeal, including on the standard of review question, albeit for different reasons (*Qin FCA* at para 33). *Qin* was also followed in *Dashtban v Canada (Minister of Citizenship and Immigration)*, 2015 FC 160 [*Dashtban*], which considered *Ijaz* but declined to follow it. In *Dashtban* at para 26, Justice Boswell, relying on *Qin* and *Patel*, as well as *Canada (Citizenship and Immigration) v Shahid*, 2011 FCA 40 at para 25, noted the following:

> …to some extent, *Ijaz* is distinguishable from this case, since the question of law was harder to separate from the factual assessment and new versions of the *Regulations* were in issue, so *Patel* was less directly on point (*Ijaz* at para 26). To the extent that *Ijaz* could be interpreted more broadly, however, I decline to follow the reasonableness standard of review as adopted by that case.

[15] In *Ijaz*, Justice Strickland found that the post-*Dunsmuir* jurisprudence had displaced earlier case authorities such as *Khan* and *Patel*, relying instead on *Dunsmuir* and the more recent Supreme Court decisions in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*], *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, and *McLean v British Columbia (Securities Commission*), 2013 SCC 67. These Supreme Court authorities provide that an administrative decision-maker's interpretation of the home statute is normally subject to deference. *Ijaz* dealt with the interpretation of credential equivalency, in the same class (FSW) being considered in this judicial review.

[16] The *Ijaz* approach has found some support. In *Canada (Minister of Citizenship and Immigration) v Cisnado*, 2015 FC 483 [*Cisnado*], for example, Justice Locke cited *Ijaz*, concluding that reasonableness will usually be the applicable standard of review when a tribunal is interpreting its own statute (*Alberta Teachers,* at para 45; see also *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87, at para 64). However, *Cisnado* involved an appeal to the Immigration Appeal Division of a sponsorship decision that a visa officer had refused, placing it in a different context than the one at hand.

[17] Acknowledging the muddy state of the standard of review for these kinds of cases, and the fact that either standard is open to me, I will proceed on the basis that visa officers should be reviewed on a correctness standard for pure legal interpretation of their home statutes when an important question of law, like the meaning of intention, is at stake. I therefore endorse the standard of review analysis for a visa officer's interpretation of their statute provided by Justice

Boswell in paragraphs 22-31 of *Dashtban*. Questions of fact or of mixed fact and law in a visa officer's decision, however, attract a reasonableness standard.

IV. ANALYSIS

A. *Interpretation of Subsection 75(1) of the Regulations*

[18] The first question is whether the Officer correctly interpreted subsection 75(1), which stipulates that FSWs are foreign nationals who may become permanent residents on the basis of (i) their ability to become economically established in Canada, and (ii) their intention to reside in a province other than the Province of Quebec.

[19] The Officer's interpretation of subsection 75(1) required the Applicant to show that she has "taken the necessary steps to reside in a province other than the province of Quebec". In the opinion of the Officer, the Applicant's plans to finish her PhD in Montreal negated her intention to reside outside of Quebec, in violation of subsection 75(1).

[20] The geographic requirement in subsection 75(1) contemplates where a foreign national intends to reside, not where she or he resides presently. Certainly, current residence may serve as evidence of a foreign national's intentions, but it cannot be viewed as determinative.
Furthermore, there is no guidance provided in the Act or the Regulations, nor any policy manuals or bulletins, defining "intend to reside" or setting out what evidence applicants are expected to provide to prove intention. Indeed, until CIC actually takes issue with an applicant's intentions, a simple confirmation in the immigration application package is sufficient to evidence an intention

to settle in a province other than Quebec, as is evident from the contents of the required FSW immigration forms (see below at para 30).

[21] In this case, CIC challenged the intention of the Applicant in its February 3, 2015 fairness letter: "I note that you have just started your PhD at Concordia University, which generally takes 4 to 5 years to complete. I am therefore, not convinced you will reside in a province other than Quebec were a visa granted to you in the next few months" (Application Record, pp 150-51).

[22] First, it should be noted that the Applicant was not studying at Concordia University. Numerous documents included with her FSW application package clearly indicated that she studies only at McGill University, including a copy of her study permit, McGill University's Offer of Admission and proof of registration, and her Certificat d'acceptation du Québec.

[23] Second, the officer who drafted the fairness letter was not convinced that the Applicant would reside outside Quebec if the visa was granted "in the next few months". There is, however, no requirement for immediate residence in Canada (in a province other than Quebec) under the Act. As long as the Applicant lands in Canada before expiry of the immigrant visa, the Applicant can, after becoming a permanent resident, reside anywhere for the first three years – whether in Quebec, or indeed, outside Canada, and still meet residency requirements. The Act simply requires that the new permanent resident, per section 28, be resident for a total of 730 days (two years) within the first five year timeframe (and each five year timeframe thereafter on a rolling basis until gaining citizenship status). In other words, the Applicant, were she to be granted permanent residency status, could live outside of Canada for the first three years after

landing and still remain compliant with the residency requirement of the Act – which also provides exemptions for certain people who fail to meet the "two in five year" rule.

[24] Of course, it is not the fairness letter that is under review in this application, but that letter nonetheless forms part of the evidentiary record that led to the subsequent refusal, as it requested documentation to allay the concern of an intention not to reside in a province other than Quebec.

[25] In response to the fairness letter, the Applicant provided a significant package of evidence, including sworn statements, detailed in paragraph 7 above. The main thrust of these statements asserted that her intention remained to live in Ontario for four reasons:

a) As she was in the second year of her PhD in electrical engineering, she would complete this degree within three years, which coincided with her MEDA award, which provided three years of financial support;
b) She would, after this three year period, move to Brampton, her intended permanent destination in Canada, to be with her immediate family, including her mother, father, brother, sister, and brother-in-law;
c) Her job prospects in her intended profession of professor would be limited in Quebec without any French language knowledge; and
d) Her husband, a software engineer, would also have far better job prospects in Ontario.

[26] Sworn statements from the Applicant's parents and sister confirmed their status in Canada, residence in Brampton, Ontario, and the close-knit nature of the family. They all stated that the Applicant and her husband would settle in Brampton, and the family would provide initial settlement support for them.

[27] In light of all this, I find that the Officer erred in the April 22, 2015 refusal letter. The Officer found that the Applicant has not taken the "necessary steps" to reside in a province other than Quebec. However, there is no requirement for any necessary steps to be taken to prove intention.

[28] The Applicant, as a basis of comparison, provided an example of Ontario's provincial nominee program (PNP) application forms. Ontario happens to be one province that provides examples of the types of evidence that can satisfy a criterion common to all PNPs: the intention to live and work in the given province of destination. Applicants to the federal program at issue, the FSW, by contrast, are only required to fill out the General IMM0008 form, which simply asks, at Question 6, "Where do you intend to live in Canada? (a) Province/Territory; (b) City/Town". Neither that form nor any of the related legislation or policy guidelines require any supporting documentation to demonstrate intent.

[29] If there was a requirement to demonstrate compliance with subsection 75(1) of the Regulations by producing more than a simple statement of intent to permanently reside outside of Quebec as provided in Question 6 of the Generic IMM0008 form, that requirement would need to be stated somewhere explicitly, in order to provide notice to the applicant. Here, the Officer erred in imposing such a requirement.

B. *Assessment of the Evidence*

[30] The Officer's second error concerned the assessment of the evidence. The Applicant provided ample and eminently credible evidence of an intention to reside permanently in

Ontario, given her close-knit family structure, language capabilities, and her and her spouse's job prospects. She also provided, by contrast, an explanation of her intent to reside in Quebec on only a temporary basis.

[31] The assessment of intention, since it is a highly subjective notion, may take into account all indicia, including past conduct, present circumstances, and future plans, as best as can be ascertained from the available evidence and context. In this case, the Applicant clearly expressed her intention to permanently reside in Brampton, Ontario, as well as her intention to finish her PhD in Quebec, which required continued temporary residence in Quebec. These intentions are not contradictory; rather, they are complementary to one another. As summarized above, she also provided statutory declarations from herself, her parents, and her sister setting out the reasons why she intended to move to Ontario, all in cogent terms, which further buttressed her stated intention to live outside of Quebec.

[32] Obviously, evidence from the Applicant and her family members supporting a subjective intent may be viewed with some degree of caution as they could naturally be slanted to the Applicant's desired outcome of securing Canadian permanent residence status. However, there were ample objective indicia to support the Applicant's sworn statements of intent, including the residence of her close family members in Brampton, Ontario, their Canadian status, and the careers and languages of both the Applicant and her spouse. The fact that she did not speak French and the fact that there are few English-only University departments in Quebec made Ontario an objectively more attractive location with respect to job opportunities.

[33] Finally, with respect to the Officer's findings regarding Quebec, the fact that the Applicant is studying in one province does not denote an intention to settle there permanently. Students will naturally travel to the best program available to them, or to where financial assistance is being offered. Both of these considerations apply to the Applicant. Furthermore, her temporary residence is contingent on her studies, and that status, by its very nature, is of limited, non-permanent duration. A study permit is not a direct pathway to permanent residence. While it may yield certain benefits to those who wish to ultimately transition from temporary to permanent status, there is a clear division in both the application process and the eligibility criteria for the two types of status.

[34] There is simply nothing in the record which would suggest the Applicant intends to reside in Quebec beyond the terms of her studies at McGill University, which she maintains will conclude within the eligibility period such that she will still be able to maintain her permanent residency under the Act. To have concluded otherwise amounts to an unreasonable assessment of the facts.

V. CONCLUSION

[35] The Officer used an improper test in his consideration of intent. The Applicant also provided a detailed and credible explanation of why she wanted to live in Ontario, buttressed by complementary and compelling evidence. Based on an incorrect interpretation of the terms "intend to reside" in subsection 75(1) of the Regulations as well as an unreasonable consideration of the evidence, I will allow the application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed. The matter is remitted back to the CIC for redetermination by a different officer.
2. There are no questions for certification.
3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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