Federal Court  Cour fédérale

Date: 20160212

Docket: IMM-8314-14

Citation: 2016 FC 197

Toronto, Ontario, February 12, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

FARAZ AHMED AND CHEECH GLASS LTD.

Applicants

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

JUDGMENT AND REASONS

I. Overview

[1] When and under what conditions can a Canadian employer engage a temporary foreign worker for a vacant position? When a Canadian labor market shortage exists in respect of the position and its inherent qualifications; and, then, only, according to the latest posted determined government hourly wage (reference is also made to paragraphs 39 and 40 of *Toto Babic and*

Brada Construction Ltd. v Canada (Minister of Employment and Social Development), 2016 FC 174).

II. Background

[2] This is an application for judicial review by the Applicants pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision dated December 1, 2014, wherein a Program Officer [Officer] from Employment and Social Development Canada refused to issue a positive Labour Market Impact Assessment [LMIA] as sought by the Applicants.

[3] The Applicant, Faraz Ahmed, is a manager at the Applicant, Cheech Glass Ltd. The Applicants sought to hire a temporary foreign worker [TFW] through the Temporary Foreign Worker Program [TFWP].

[4] The Applicants submitted a first application for a Labour Market Opinion [LMO] to the Department of Employment and Social Development Canada [ESDC] on June 19, 2014. The Applicants were advised on July 11, 2014, that their first application was refused as an incorrect application form was used; not all fields in the form were filled out; and, the required documents were not included in the application. The Applicants submitted a second application, a LMIA as opposed to a LMO, on July 30, 2014. On August 2014, the Applicants received an email from an officer from ESDC informing them that their second application was rejected because it was incomplete as the "Business Information" section of the LMIA form was not filled out; and, that certain requested documents were not missing from their application: Schedule C – Employer

Transition Plan and Proof of Recruitment. Subsequently, on September 10, 2014, the Applicants received another email, from a Business Expertise Advisor, wherein there was a confirmation that the decision of the responsible officer was indeed confirmed; and, their second application was rejected because the Provincial/Territorial workplace safety and insurance clearance letter/certificate was missing from their second application.

[5] A subsequent LMIA application [Application] was submitted on October 3, 2014 and on October 28, 2014, the Applicants' representative sent a letter to the Service Canada LMO Processing Centre informing them that the Applicants were publishing another Job Bank Advertisement (7647402) from October 27, 2014 to February 21, 2015, with a wage of $27.97/hour, as the previous advertisement (7427451) was set to expire on October 29, 2014. After conducting two phone interviews with the Applicant, Faraz Ahmed, the Application was rejected on December 1, 2014; mainly because the Application did not demonstrate that the Applicants had made sufficient efforts to hire Canadians in the stated occupation; and, the employment of the foreign national in the described occupation was not likely to result in the filling of a labour shortage. Moreover, the Officer found that the Applicant had not conducted sufficient recruitment efforts to hire Canadian citizens and permanent residents before offering a job to a temporary foreign worker. Finally, the Officer found that there is no demonstrable shortage of workers in this occupation for the region indicated in the Application.

III. Position of the Parties

[6] The Applicants argue that the Application should have been dealt with and processed in accordance with the law and regulations at the time they were submitted, not decided (*Kanes v*

Canada (Minister of Citizenship and Immigration), [1993] FCJ No 1472). Additionally, the Application should have been processed in accordance with the "legitimate expectation" of the Applicants (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Canada (Minister of Citizenship and Immigration) v Bendahmane*, 8 Imm LR (2d) 20 (FCA)); and, that the conduct of the Respondent gives rise to promissory estoppel (*Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, [2001] 2 SCR 281, 2001 SCC 41). Namely, it was unfair for the Respondent to change the guidelines and instructions on a continuing basis; to refuse the Application due to the prevailing wage for the occupation in the Toronto region, which was increased after the Application was submitted; to reject the Application based on unclear and seemingly minor issues; and, to refuse the Application because the advertisement was no longer available at the time of the assessment of the Application by the Officer. Moreover, the decision-maker relied on extrinsic evidence to reject the Application without providing an opportunity for the Applicants to refute the evidence in possession of the decision-maker (*Olorunshola v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1056; *Begum v Canada (Minister of Citizenship and Immigration)*, 2004 FC 165). As a result, the Applicants submit the Officer committed an error of law and the judicial review should be granted because of the alleged breach of procedural fairness.

[7] Conversely, the Respondent submits that given that the Applicants only, of late, raised the issues of procedural fairness, the Respondent limited his submissions to those particular issues. Firstly, the Respondent submits that there was no procedural unfairness in applying published guidelines to assess the Application. Remembering that the TFWP is a program of last resort where no qualified Canadian or permanent resident is available to work, the requirement

for an employer to advertise for the position throughout the period in which the Application is being assessed is justified by the fact that if advertising efforts are insufficient, there is a risk that qualified Canadians may not apply for the available occupation. The procedural fairness owed the Applicants by the Officer was that the Officer would assess the Application in accordance with the requirements of the guidelines. Since the Officer, in assessing the Application, applied the guidelines, he met his duty of procedural fairness. Secondly, the Respondent submits that there is no merit to the argument that the Applicants' advertisement was assessed according to a newly published median wage. On October 3, 2014, the Working in Canada website, which is the website on which the Officer relied on, in respect of the prevailing wage, indicated that the prevailing wage for marketing consultants for the Toronto region was $31.25/hour. Consequently, as the Applicants' published advertisement of October 27, 2014, indicated a rate of $27.97, the Officer met his duty of procedural fairness by relying on the October 3, 2015 rate as this rate pre-dates the date on which the advertising was published. The Applicants had the obligation to verify prior to making their advertisement that the prevailing wage had not changed. Furthermore, the Respondent submits that there were other grounds on which the Officer relied by which to reject the Application: the Applicants did not demonstrate having made sufficient efforts to hire Canadians; the Applicants did not demonstrate the degree to which the extensive qualifications sought were in fact necessary for the position; the inconsistencies regarding the required qualifications as published in the advertising and those stated by the Applicant, Faraz Ahmed, during the interview with the Officer; and, there is no labour shortage of marketing consultants in the Toronto region. As a result, it was correct in respect of procedural fairness for the Officer to decide as he did; and, there was no breach of procedural fairness by the Officer.

IV. Standard of Review

[8] Whether the Officer breached a duty of procedural fairness is an issue of law reviewable on a standard of correctness (*Frankie's Burgers Lougheed Inc. v Canada (Minister of Employment and Social Development)*, 2015 FC 27 at para 23 [*Frankie's Burgers*]; *Dunsmuir v Nouveau-Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at paras 79 and 87; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

V. Analysis

[9] The Court notes, as submitted by the Respondent, that the Applicants only raised issues regarding an alleged breach to procedural fairness by the Officer; they did not argue that the Officer's decision was unreasonable. Therefore, the central issues to be determined by the Court are:

1) Did the Officer rely on policy requirements which were not in place at the time of the submission of the Application?
2) Did the Officer fail to provide an opportunity to reply to extrinsic documentary evidence?

[10] In assessing a LMIA (previously a LMO), the degree of procedural fairness owed to the Applicant is relatively low, as stated by Chief Justice Paul S. Crampton in *Frankie's Burgers* at para 73:

> In the context of applications by employers for LMOs, a consideration of the relevant factors that should be assessed in determining those requirements suggests that those requirements

> are relatively low. This is because, (i) the structure of the LMO assessment process is far from judicial in nature, (ii) unsuccessful applicants can simply submit another application (*Maysch v Canada (Citizenship and Immigration)*, 2010 FC 1253, at para 30; *Li v Canada (Citizenship and Immigration)*, 2012 FC 484, at para 31 [*Li*]), and (iii) refusals of LMO requests do not have a substantial adverse impact on employers, in the sense of carrying "grave," "permanent," or "profound" consequences (*Baker*, above, at paras 23-25).

[11] The order, dated August 21, 2015, by Justice Richard G. Mosley, granted leave to the Applicants for the decision dated December 1, 2014, by a Program Officer within the confines of the TFWP at ESDC.

[12] In its decision dated December 1, 2014, the Officer employed the "standard language" used by the ESDC to reject the Applicants' LMIA application. Firstly, the Officer found that the Applicants did not demonstrate sufficient efforts to hire Canadians for the occupation (section 203(3)(e) of the IRPR). Secondly, the Officer found that the Applicants did not demonstrate that the employment of the foreign national in the described occupation is likely to result in the filling of a labour shortage (section 203(3)(c) of the IRPR). Although the Applicants stated that the "reasons [in the Officer's decision] are a bit confusing" they did not plead that the Officer's reasons are insufficient. As a result, the Court will not examine this issue. Nonetheless, the Court notes that the "adequacy" of reasons is not a stand-alone basis by which to quash a decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at para 14).

A. *Reliance on policy requirements post-application*

(1) Changes to the guidelines and the LMIA Form

[13] The Applicants argue that the Officer breached his duty of procedural fairness by continually changing the guidelines and forms. As a result, of this alleged breach of procedural fairness, the Applicants submit that the decision must be sent back and considered anew according to the guidelines as they were at the time of the "initial application" made on June 19, 2014.

[14] As mentioned previously, only the December 1, 2014 decision, from an Application submitted on October 3, 2014, is under review. If the Court was to find that a breach of procedural fairness did, in fact, occur, than, the Application would have to be considered anew according to the guidelines as they were on October 3, 2014.

[15] Nonetheless, the Court is not satisfied that the Applicants did demonstrate in their submissions how the alleged changes to the guidelines and to the form, did impact the assessment of the Officer in respect of their Application. It is impossible for the Court to find that there was a breach of procedural fairness if the Applicants do not, at the very least, indicate how these changes had tangible consequences for their Application bearing in mind the contents of the Applicants' Application itself and the circumstances set-out thereon.

(2) Changes to the prevailing rate

[16] Firstly, on October 3, 2014, the prevailing rate for the NOC 4163, Business Development Officers and Marketing Researchers and Consultants [marketing consultant], as published on the Job Bank website, changed from $27.97/hour to $31.25/hour. The Applicants submitted their Application on the same date with an offered rate of $27.95\hour. The Applicants' argument that

the Officer relied on extrinsic evidence to establish the prevailing rate must be rejected. The Certified Tribunal Record, at page 147, clearly indicates that the decision-maker will rely on the Job Bank website to determine the prevailing wage. The Job Bank website is publicly available and if the Applicants wanted to contest the prevailing rate, they had the opportunity to do so in their LMIA application.

[17] Secondly, the Applicants submit that the Officer breached his duty of procedural fairness as he relied on the prevailing rate published on October 3, 2014, for a marketing consultant to find that the Applicants did not demonstrate sufficient efforts to hire Canadians in the occupation. The Respondent did state that the Officer did assess the Application based on the prevailing rate published on October 3, 2014 ($31.25), as the rate was changed after the Application was submitted but before the advertisement was renewed:

> While the prevailing wage increased after the applicant had applied for an LMIA, it increased three weeks before the applicant re-advertised the position as it was required to do in support of a positive LMIA. [My emphasis.]
>
> (Respondent's Further Memorandum of Argument, p 14 at para 36)

[18] Thirdly, the Applicants submit that the Officer breached his duty of procedural fairness by relying on the October 3, 2014 rate to find that the Applicants did not meet the advertising requirements. The Respondent relied on the affidavit of Agnuszk Tomada [Affidavit Tomada] to submit that the advertisement published on the Job Bank website by the Applicants on October 27, 2014, should have indicated a wage of $31.25; and, the failure to do so demonstrates that the Applicants did not make sufficient efforts to hire Canadians. In her affidavit, Ms. Tomada stated:

> Similarly, if an employer fails in its advertisement to offer at least the median wage for the occupation in the region in which the employer wishes to hire a TFW, the requirement of making reasonable efforts to hire a Canadian will generally not be satisfied, regardless whether the advertising requirements were otherwise followed. [My emphasis.]

[19] In *Frankie's Burgers*, Chief Justice Crampton states that the guidelines are clear in respect of the importance for a LMIA applicant to fulfill the requirements for advertising before and after a LMIA (previously a LMO) is submitted:

> The Guidelines make it very clear that employers are expected to at least meet the minimum recruitment efforts required for lower skilled occupations before they apply for an LMO. This is an entirely reasonable position, as ESDC officers need to be able to assess requests for LMOs at a point in time. There is nothing unreasonable about taking the position that such time is when the application is submitted. The fact that ongoing recruitment efforts are also required simply ensures that employers will continue to endeavour to find Canadian citizens or permanent residents to fill the vacant positions until a positive LMO is issued. [My emphasis.]
>
> (*Frankie's Burgers*, above at para 45)

[20] Since the Applicants had the obligation to demonstrate, until a positive LMIA is issued, that they made sufficient efforts to find Canadian citizens or permanent residents to fill a vacant position, it would be contrary to the object of the IRPR with regard to the TFWP to find that a LMIA applicant would not have to assure that the rate advertised in their advertising is at least the same as the prevailing rate for the occupation in the specified region.

[21] Although the timeline in respect of the prevailing wage was problematic due to a change on the day of the Application, the number of factors which are vague and incoherent and which

have led the decision-maker to a finding of lack of credibility, substantively, outweigh the issue of procedural fairness, thus, recognizing that even if the matter was sent back, the ultimate decision would, as per the other factors specified above, remain the same as the one before the Court (*Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202; *Frankie's Burgers*, above at para 81; *Gal v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1771 at para 8).

VI. Conclusion

[22] For all the above reasons, 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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