Federal Court  Cour fédérale

Date: 20160310

Docket: IMM-3841-15

Citation: 2016 FC 304

Ottawa, Ontario, March 10, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

AMIR HOMAYOUN PARSSIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the decision of a Case Officer [the Officer] with Citizenship and Immigration Canada [CIC] rejecting the applicant's application for a permanent resident visa as a member of the Canadian Experience Class [CEC] on the basis that the applicant did not the meet the skilled work experience requirements within the meaning of

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

[2] I am of the view that the Officer's decision falls within the range of possible acceptable outcomes based on the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]) and that the Officer did not breach the duty of procedural fairness. As a result the application is dismissed.

I. Background

[3] The applicant is a citizen of the United States of America who applied for permanent residence in Canada as a member of the CEC in July of 2014. An applicant within the CEC must demonstrate that they meet a number of requirements under section 87.1 of the IRPR including skilled work experience in Canada.

[4] In the application, the applicant noted his work experience as an information system consultant under National Occupation Classification [NOC] code 2171 from May 4, 2011 to December 31, 2011 for Canadian Tire and from October 15, 2013 to October 31, 2014 for TD Canada Trust Bank. In the application the applicant indicates "Yes" in response to the question "Were you self-employed during any of the above listed periods" of employment and wrote "I have been working for the Canadian Tire and TD Bank through recruiting agencies as these corporations do not hire temporary workers directly themselves."

II. Decision under Review

[5] On August 7, 2015 the Officer wrote to the applicant rejecting his application on the grounds that the applicant's work experience in Canada was in a self-employed capacity.

[6] The Officer notes that the applicant's employment with Canadian Tire and TD Bank during the qualifying period was in the capacity of an independent contractor and subcontractor, and that contractors and consultants are considered self-employed in a contract for service business relationship and not in an employer/employee relationship. The Officer further notes that the IRPR state that any period of self-employment shall not be included in calculating the period of work experience. On this basis the Officer concludes that the applicant's work experience is not eligible for consideration.

[7] In reaching this conclusion the Officer notes that the applicant signed a contractor services agreement with NTT Data to provide consulting services to TD Bank as an independent contractor and also signed a service agreement with GSI Group to provide subcontractor services to Canadian Tire. The Global Case Management System [GCMS] notes, which form part of the Certified Tribunal Record, also indicate that the applicant's employment letters do not describe the applicant's duties and functions and that the applicant's 2013 T4 slip appears to indicate that the company employing the applicant is owned by the applicant.

III. Relevant Legislation

[8] Section 87.1 of the IRPR states as follows:

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 ability to become economically established in Canada, their experience in Canada, and their intention 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 capacité à réussir leur établissement économique au Canada et de leur expérience au Canada et qui cherchent à s'établir dans une province autre que le Québec.
(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 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	*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) during that period of employment they performed	*b)* pendant cette période d'emploi, il a accompli

the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification;

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) 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, including all of the essential duties;

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 professions, notamment toutes les fonctions essentielles;

(d) they have had their proficiency in the English or French language evaluated by an organization or institution designated under subsection 74(3) and have met the applicable threshold fixed by the Minister under subsection 74(1) for each of the four language skill areas; and

d) il a fait évaluer sa compétence en français ou en anglais par une institution ou organisation désignée en vertu du paragraphe 74(3) et obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence applicable établi par le ministre en vertu du paragraphe 74(1);

(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).

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).

(3) For the purposes of subsection (2),

(3) Pour l'application du paragraphe (2) :

(a) any period of employment during which the foreign national was engaged in full-time study shall not be included in calculating a period of work experience;	*a)* les périodes d'emploi effectué durant des études à temps plein ne peuvent être comptabilisées pour le calcul de l'expérience de travail;
(b) any period of self-employment or unauthorized work shall not be included in calculating a period of work experience [emphasis added]; and	*b)* les périodes de travail non autorisées ou celles accumulées à titre de travailleur autonome ne peuvent être comptabilisées pour le calcul de l'expérience de travail;
(c) the foreign national must have had temporary resident status during their period of work experience and any period of full-time study or training.	*c)* l'étranger doit détenir le statut de résident temporaire durant les périodes de travail et durant toutes périodes d'études ou de formation à temps plein

IV. Applicant's Position

[9] The applicant submits that the Officer's determination that his work experience constituted self-employment under paragraph 87.1(3)(b) of the IRPR was unreasonable.

[10] The applicant argues that in determining whether or not the applicant was self-employed the Officer was obligated to assess the applicant's work experience against factors identified in CIC's Canadian Experience Class selection criteria – Qualifying work experience [Guidelines] but failed to do so. The Officer instead relied only on the fact that the applicant had a contract with an agency rather than direct employment with the company. As a result the applicant

submits that analysis was deficient and inadequate, although the applicant acknowledges that the Officer did not misapply the IRPR *per se* but rather failed to perform the analysis described in CIC's own Guidelines.

[11] The applicant argues that he had a legitimate expectation that the Officer would apply the Guidelines and the failure to do so renders the decision unreasonable on the basis that it does not satisfy the requirements for justification, transparency and intelligibility.

[12] The applicant further submits that the Officer erred in refusing the application without first notifying the applicant that the Officer had concerns with the applicant's evidence as it related to the applicant's work experience. The applicant submits that in not accepting the applicant's work experience the Officer must have had concerns that the evidence was untrue or that there was a reason to doubt its veracity or credibility. This, in the applicant's submission, triggered a duty to provide the applicant with an opportunity to address the Officer's concerns.

[13] The applicant further submits that the Officer's errors were egregious and that the reasons are highly deficient indicating that the Officer treated the matter in a cavalier manner. As such the applicant submits special reasons exist justifying an award of costs. The applicant quantified costs at five thousand dollars in oral submissions.

V. Respondent's Position

[14] The respondent argues that the Officer reasonably determined that the applicant's period of employment submitted for consideration constituted self-employment under paragraph

87.1(3)(b) of the IRPR, thus disqualifying him for permanent residency under the CEC. The respondent submits that the Officer had no obligation or need to consider the Guidelines as the applicant clearly indicated on his immigration application forms that he was self-employed and his supporting documentation referred to him as a self-employed subcontractor. As there was no ambiguity relating to the applicant's employment status the respondent submits there was no need for the Officer to mention all the factors identified in the Guidelines to determine if the applicant was an employee or self-employed.

[15] The respondent further submits that there was no breach of procedural fairness as the Officer did not have any concerns with the credibility of the applicant's evidence, but rather simply noted that the evidence submitted disqualified the claimed work experience from being considered as part of a CEC application for permanent residency. The respondent submits that there is no requirement to confront the applicant with requirements that clearly stem from the IRPR.

VI. Issues

[16] The applicant raises the following issues:

1) Is the Officer's decision that the applicant did not have qualifying work experience unreasonable?
2) Is the decision unfair since the applicant was not advised of the concerns regarding his work experience or provided with an opportunity to respond?
3) Should costs be awarded to the applicant?

VII. Standard of Review

[17] There is no dispute as between the parties that the Officer's substantive decision determining that the applicant did not possess the requisite skilled work experience under the CEC is a question of mixed fact and law attracting the reasonableness standard of review (*Dunsmuir* at para 51; *Song v Canada (Minister of Citizenship and Immigration)*, 2015 FC 141 at para 11). Similarly it is well established that questions of procedural fairness attract the correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 43; *Kuhathasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 457 at para 18, 72 Imm LR (3d) 57).

[18] In oral submissions the applicant advanced the view that a correctness standard applied to questions of statutory interpretation whereas the respondent submitted that the reasonableness standard was generally applicable where a decision-maker was interpreting his/her home statute. While I agree with the respondent's position in this instance, (*Dunsmuir* at para 54) it is of little relevance in the context of this application, as the applicant concedes in his written submissions that there was no misapplication or misinterpretation of the IRPR.

VIII. Analysis

A. *Is the Decision Reasonable*

[19] On the face of the application the applicant declared he was self-employed during the entire period of work experience submitted for consideration and provided an explanation as to

why; "I have been working for the Canadian Tire and TD Bank through recruiting agencies as these corporations do not hire temporary workers directly themselves." Furthermore, for each period of work experience, the applicant identified himself as an "Info system consultant". The contract that covered the Canadian Tire employment period identified the applicant as a "self-employed" individual. The contract that covered the TD Canada Trust Bank period of employment identified the applicant as an "independent contractor". In addition the applicant's 2013 T4 identifies the applicant's employer as "AMIR PARSSIAN CONSULTING SERVICES" and identifies an address that is the same address as provided for the applicant, Amir Parssian. These aspects of the application are all reflected in the GCMS notes completed after an initial review of the application.

[20] It is within this context that the applicant argues the inadequacy of the Officer's reasons on the basis that they do not include an analysis of all the factors identified in the Guidelines. However the Guidelines identify factors an Officer "should" consider, not factors an Officer "must" consider. The Guidelines do not require that all of the factors be assessed, they do not specify the degree of weight that should be placed on any of the factors, nor do they require that an Officer consider any of the factors where the Officer has no doubt as to whether an applicant under the CEC is an employee or self-employed individual. In addition the Guidelines state that "Generally speaking, consultants/contractors are considered to be self-employed individuals in a 'contract for services' business relationship. For example, independent contractors in the financial, real estate and business services industries." Finally, the Guidelines state that Officers should consider "any other relevant factors, such as written contracts"; and the Officer did so in this case.

[21] In assessing reasonableness, the Court is not limited to a consideration of the reasons themselves but rather must consider the reasonableness of the decision as a whole within the context of the record as noted by Justice Stratas on behalf of a unanimous Federal Court of Appeal in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 59, 255 ACWS (3d) 955:

> **59** [I]n assessing reasonableness, reviewing courts are not limited to asking whether the *reasons* are acceptable and defensible. Rather, reviewing courts are to assess whether the *outcome* reached is acceptable and defensible: *Dunsmuir*, above at paragraph 48. In other words, they must assess "whether the decision, viewed as a whole in the context of the record, is reasonable"; *Construction Labour Relations*, above at paragraph 3; *Newfoundland Nurses*, above at paragraph 15. There are limits to this though. The Court cannot cooper up an outcome that the Commission itself would not have reached: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 54-55; *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114, 372 D.L.R. (4th) 567 at paragraphs 27-38.

[22] In this case I am satisfied, having considered the record as a whole including the GCMS notes that it was reasonable for the Officer to conclude, that the applicant was a self-employed individual during his period of qualifying work experience. Unlike *Sydoruk v Canada (Minister of Citizenship and Immigration)*, 2015 FC 945 at paras 17-19, this is not a case where the Officer failed to apply mandatory criteria set out in the IRPR. The applicant conceded in oral argument that the Guidelines do not have the force of law. I cannot agree with the applicant's view that the Officer had a duty to mention in the reasons all of the factors set out in the Guidelines where the evidence, as presented by the applicant, including his own statement on the application, the written contracts, and the 2013 T4, allowed the Officer to reasonably conclude the applicant was

self-employed for the purpose of paragraph 87.1(3)(b) of the IRPR during the periods of employment submitted for consideration.

B. *Did the Officer's failure to notify the applicant of his concerns render the Decision unfair?*

[23] In support of his position that the Officer acted unfairly, the applicant cites Justice Richard Mosley's decision in *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24, 302 FTR 39, where he states:

> 24 [I]t is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern.

[24] In this case the Officer did not question the applicant's credibility, the accuracy or genuineness of the information submitted. Rather the Officer's concern arose from the requirement under paragraph 87.1(3)(b) of the IRPR that a period of employment submitted for eligibility in the CEC not be one of self-employment. The Officer took the applicant at his word when he indicated on the application that he was a self-employed individual during the periods of his employment submitted for consideration. The Officer considered the applicant's documents submitted for the purpose of the application and found they supported this conclusion. At no point did the Officer question the genuineness of the documents submitted or

make a negative credibility finding. The applicant's preference that the Officer interpret the documentation differently does not amount to a breach of the duty of procedural fairness.

C. *No Special Reasons for Costs*

[25] In light of my conclusion that the application be denied, no special reasons exist justifying an award of costs against the respondent pursuant to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

IX. Conclusion

[26] I am satisfied that there is no basis for the Court to interfere with the Officer's decision in this case.

[27] The parties have not identified a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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