Federal Court Cour fédérale

Date: 20160513

Docket: IMM-4146-15

Citation: 2016 FC 536

Ottawa, Ontario, May 13, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

KAMRAN ASADI

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, of a decision of a Citizenship and Immigration Canada (CIC) visa officer (the Officer) refusing the Applicant's application for permanent residence under the Federal Skilled Worker (FSW) class.

[2] The Applicant is a citizen of Iran. In 2010, he applied for permanent residence under the FSW class. He requested to be considered under the National Occupational Classification (NOC)

unit group 3111: “Specialist physician”. The application was initially refused, in part, on the basis the Applicant only held a Bachelor-level degree. The application was re-opened and updated forms were submitted on April 18, 2015. The Applicant indicated his highest level of education was a “Doctorate – PhD”. He submitted documents from Shiraz University confirming his education credentials. The Applicant also provided CIC with an assessment report issued by the Medical Council of Canada. The assessment report confirmed that the Canadian equivalent of the Applicant’s medical degree is a Doctor of Medicine.

[3] On May 22, 2015, the Applicant was advised that the documents he submitted from Shiraz University were inaccurately translated from Farsi into English. The translated documents state the Applicant completed a “Professional Doctorate Course of Studies (PHD)” and passed exams in “specialized Master courses”. However, a Farsi speaker from the Ankara CIC office noted the words “PHD” and “Master” were absent from the original Farsi documents. The Officer suggested to the Applicant that additional words were added to the translated documents in the hope he would be awarded additional points for education. The Officer accepted the Applicant was a medical doctor, but did not accept the Applicant had a PhD.

[4] The Applicant was provided the opportunity to reply to this letter. He did not.

[5] In a decision letter dated August 10, 2015, the Officer advised the Applicant that his application was refused. The Officer found that the Applicant was two points short of the minimum number of required points (67).

[6] The applicant requested a substituted evaluation pursuant to Subsection 76(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], which

confers discretion on a visa officer to substitute his or her own determination of whether an applicant is likely able to become economically established in Canada. Subsection 76(3) provides:

76 (3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.	76 (3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — n'est pas un indicateur suffisant de l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

[7] The Officer declined the Applicant's request for a substituted evaluation. The Global Case Management System notes disclose the Officer's concerns as follows:

> I note that the applicant submitted an IELTS test results from 2011 during the course of processing for which he received a total of 12 points. The applicant could have increased his point score simply by working to improve his English, retaking the IELTS test and submitting an improved result. An improvement in any of his scores could have pushed the applicant past 67 points. That the applicant elected not to take this apparently uncomplicated way of qualifying for permanent residence raises concerns with me about his level of commitment to actually living and working in Canada.
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> …
>
> If the applicant knowingly permitted the submission of inaccurate translations, this raises concerns about his level of integrity. I am further concerned at the lack of response to my letter dated 22 May 2015. I intentionally allowed additional time for a response to give the applicant a fair opportunity to assemble information. That he did not do so suggests that he may have been aware of the addition of words to the English translation that were not in the original document.

[8] The Officer concluded that the points awarded were a fair reflection of the Applicant's ability to become economically established in Canada, and a substituted evaluation was not warranted.

[9] The determinative issue is whether the Officer reasonably exercised his discretion with respect to a substituted evaluation. A substituted evaluation is a discretionary decision, intended for "clearly exceptional" cases: *Mina v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1182 at para 22; *Requidan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 237 at para 29. A reviewing court will not reweigh the factors relied upon by the visa officer*:* *Budhooram v Canada (Minister of Citizenship and Immigration)*, 2009 FC 18 at para 14.

[10] In reviewing the visa officer's exercise of discretion, the following admonition of the Supreme Court of Canada in *Maple Lodge Farms v Canada*, [1982] 2 SCR 2 at 7-8, is instructive:

> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[11] This principle was cited in the context of discretionary decisions of visa officers in *Jang v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 312 at para 12 and *Rudder v Canada (Minister of Citizenship and Immigration)*, 2009 FC 689 at paras 27-28. It was cited in the particular context of reviewing substituted evaluation decisions in *Synyshyn v Canada*

(Minister of Citizenship and Immigration), 2005 FC 1318 at para 13 and *Koromila v Canada (Minister of Citizenship and Immigration)*, 2009 FC 393 at paras 31-32.

[12] Here, the Officer questioned the Applicant's "integrity". The Officer speculated the Applicant failed to respond to the May 22, 2015 procedural fairness letter because he knew the translated documents were translated inaccurately. In addition, the Applicant's decision not to retake the International English Language Testing System test raised concerns about the Applicant's "level of commitment to actually living and working in Canada."

[13] These considerations, which relate to the Applicant's character and his commitment and motives for applying to immigrate, are beyond the scope of whether or not the Applicant is able to become economically established. Nowhere is "integrity" included among the requirements in section 76 of the Regulations for membership in the federal skilled worker class. Proficiency in the official languages of Canada is a criterion, but the Regulations say nothing about the "level of commitment" of an applicant towards living and working in Canada.

[14] The criteria for consideration are those listed in section 76: education, language proficiency, work experience, age, arranged employment, adaptability, and sufficient funds. Here the Officer relied upon factors that are extraneous to the statutory purpose of the FSW class and the substituted evaluation provision.

[15] Declining a substituted evaluation on the basis of the Applicant's "integrity" and "commitment", where such criteria are absent from the regulatory requirements, was unreasonable. The judicial review is allowed and the matter is referred to another officer for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to another officer for redetermination.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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