Federal Court Cour fédérale

Date: 20170419

Docket: IMM-3573-16

Citation: 2017 FC 377

Ottawa, Ontario, April 19, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

BHUPENDRA KUMAR JAIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Bhupendra Kumar Jain, is a 53 year old citizen of India who, in 2014, applied for a permanent resident visa as a federal skilled worker; his spouse and two children were included in the visa application as accompanying family members. A Program Support Officer [PSO] at Citizenship and Immigration Canada informed the Applicant in a letter dated November 20, 2014, that his application had received a positive determination of "eligibility to

be processed," but that a final decision on his "eligibility to be selected" as a federal skilled worker would be made by a visa office.

[2] In a letter dated June 29, 2016, an Immigration Officer [the Officer] at the High Commission of Canada in London, United Kingdom, refused the Applicant's application for a permanent residence visa because the Officer was not satisfied that the Applicant would be able to become economically established in Canada. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the Officer's decision.

I. Background

[3] Division 1 of Part 6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended [*Regulations*], outlines the process for a foreign national to apply for permanent residence under the federal skilled worker class. An applicant must establish, among other things, that they have experience in a particular occupation outlined in the *National Occupational Classification* [*NOC*]. An applicant must also establish that they will be able to become economically established in Canada; this is assessed by awarding points based on the selection criteria stated in paragraph 76(1) (a) of the *Regulations*. These criteria include an applicant's education, proficiency in English or French, experience, age, arranged employment in Canada, and adaptability. An applicant must obtain a minimum number of 67 points in order to be issued a permanent resident visa. However, under subsection 76(3), an immigration officer may substitute the criteria set out in paragraph 76(1) (a) with their evaluation of the likelihood of a skilled worker's ability 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.

[4] Based on his extensive experience in the banking industry, the Applicant applied to be assessed under *NOC* code 0013: Senior managers - financial, communications and other business services. The Applicant acknowledged in his application materials that he did not have the requisite points based on the selection criteria from paragraph 76(1) (a) of the *Regulations* since he self-assessed his point score at 66, one point short of the minimum amount. The Applicant reached this score by calculating 22 points for his education, 24 points for his proficiency in English, 15 points for his experience, and five points for adaptability; he did not assign himself any points for his age or any arranged employment in Canada.

[5] Since the Applicant's self-assessed score was below the minimum amount of required points, he requested a substituted evaluation under subsection 76(3) of the *Regulations*. The applicable operational manual states that this subsection "may be used if an officer believes the point total is not a sufficient indicator of whether or not the applicant may become economically established in Canada." The Applicant submitted to the Officer that it was highly likely he and his family could successfully establish themselves in Canada because of various factors: his employability based on his senior management experience in the international banking industry; his English skills; his wife's education and work experience; the fact he was only 50 years of age; his previous permanent resident status in Canada; his son's enrollment at the University of British Columbia; and, his financial assets. The Applicant further submitted in his application that his financial resources would assist with his family's ability to economically establish in

Canada because he had nearly CAD $3,000,000 in assets and would transfer at least CAD $1,000,000 when they immigrated.

II. The Officer's Decision

[6] In a letter dated June 29, 2016, the Officer refused the Applicant's request for a permanent resident visa. The Officer noted subsection 12(2) of the *IRPA* and subsection 75(1) of the *Regulations*, pursuant to which a foreign national may be selected as a member of the economic class as a skilled worker on the basis of their ability to become economically established in Canada. The Officer reviewed the selection criteria stated in subsection 76(1) of the *Regulations* and assessed 66 points for the Applicant. The Officer's assessment of each of the selection criteria was identical to the self-assessment submitted by the Applicant. The Officer noted that the Applicant did not obtain the minimum number of points required for a permanent resident visa.

[7] The Officer then proceeded to address the Applicant's request for consideration under subsection 76(3) of the *Regulations*, pursuant to which an officer may substitute their evaluation of the likelihood of a 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. After reviewing the Applicant's submissions in this regard, the Officer expressed concerns over the Applicant's ability to economically establish in Canada:

> The statement provided that you will find work in financial services due to your previous work experience does not satisfy me that you will economically establish despite obtaining insufficient points. Your evidence of funds means that you may not be considered inadmissible for financial reasons, however, this does

> not demonstrate an ability to economically establish. I have reviewed all of the information before me, however the information and the explanations you have given me have not satisfied me that you will be able to become economically established in Canada despite obtaining insufficient points. As a result, I am not substituting my evaluation pursuant to subsection 76(3).

[8] The Officer noted in the Global Case Management System [GCMS] notes that the Applicant had "not provided a specific plan as to what he intends to do to find work and economically establish in Canada" and that he had not provided evidence of "making contact with prospective employers in Canada or …of any potential job offers in Canada." The Officer acknowledged that the Applicant had significant financial assets which would assist with his family's settlement, but found that "this does not equate to economic establishment." The Officer also noted that the Applicant had failed to meet the residency requirements, relinquishing his previous permanent resident status in 2014, and had not provided an explanation as to why he had not met those requirements; it was, the Officer noted in the GCMS notes: "of concern that he failed to economically establish in Canada previously." The Officer concluded his substituted evaluation by stating that the points awarded adequately reflected the Applicant's ability to economically establish in Canada.

III. Issues

[9] The Applicant's submissions raise the following issues:

1. What is the appropriate standard of review?
2. Did the Officer err in stating that significant financial assets do not equate to economic establishment?

3. Was the Officer's decision reasonable?

4. Did the Officer improperly reconsider the decision made by the PSO?

IV. Analysis

A. *Standard of Review*

[10] The standard of review in respect of a visa officer's assessment of a permanent resident application under the federal skilled worker class is reasonableness; the same standard applies to a visa officer's decision to exercise the discretion to conduct a substituted evaluation under subsection 76(3) of the *Regulations* (see: *Rahman v Canada (Citizenship and Immigration)*, 2013 FC 835 at para 16, [2013] FCJ No 884; *Ghajarieh v Canada (Citizenship and Immigration)*, 2013 FC 722 at para 12, 435 FTR 211 [*Ghajarieh*]; *Brown v Canada (Citizenship and Immigration)*, 2013 FC 661 at para 9, [2013] FCJ No 726). As noted in *Ghajarieh*, a visa officer making a determination under subsection 76(3) is "a specialized decision-maker whose factual findings relating to an applicant's eligibility for permanent residence in Canada attract significant deference" (para 12).

[11] Accordingly, the Court should not intervene if the Officer's decision is justifiable, transparent, and intelligible, and it must determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland*

and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339.

B. *Did the Officer err in stating that significant financial assets do not equate to economic establishment?*

[12] The Applicant relies heavily upon *Choi v Canada (Citizenship and Immigration)*, 2008 FC 577 at para 21, 167 ACWS (3d) 979 [*Choi*], where this Court stated that: "any consideration under subsection 76(3) should not be limited to the assessment of points, but rather should be open to all factors identified in subsection 76(1), including the settlement funds possessed by the applicant." According to the Applicant, settlement funds are an important factor to be considered, and the Officer in this case clearly erred in finding that the availability of such funds is not an indicator of "economic establishment."

[13] The Respondent argues that the Officer did not make any errors in his assessment and treatment of the Applicant's settlement funds. The Respondent distinguishes *Choi*, not only because it was decided under a different legislative scheme, but also because the visa officer in *Choi* completely failed to consider the existence of settlement funds. In this case, unlike *Choi*, the Respondent maintains that the Officer did consider the Applicant's settlement funds. The Respondent cites *Xu v Canada (Citizenship and Immigration)*, 2010 FC 418 at para 31, 366 FTR

230 [*Xu*], where Justice Zinn noted that: "Parliament chose not only to make settlement funds or arranged employment a minimum requirement but also removed those considerations from the list of criteria for which an officer may substitute his or her opinion." In addition, the Respondent refers to *Zulhaz Uddin v Canada (Citizenship and Immigration)*, 2012 FC 1005 at para 41, [2012] FCJ No 1095, where Justice O'Keefe stated that: "officers are not required to consider these [settlement funds] in subsection 76(3) analyses." According to the Respondent, the Officer recognized the Applicant's settlement funds but reasonably found that this factor did not equate to becoming economically established in Canada.

[14] Despite the parties' arguments to the contrary, the cases they cite with respect to this issue are not contradictory. In *Xu*, the Court did not state that a visa officer could never consider settlement funds when conducting a substituted evaluation under subsection 76(3); on the contrary, Justice Zinn merely refused to import a requirement that an officer must consider such funds:

> [32] In my opinion, for this Court to import the requirement that these funds must be considered by an officer is to overstep the proper role of the Court. I read section 76(3) of the Regulations as not requiring consideration of the settlement funds available to the applicant; however, that is not to say that an officer cannot consider the applicant's settlement funds.
>
> [33] Justice Kelen in *Choi* did not hold that the officer was required to consider settlement funds; rather he held that "any consideration under subsection 76(3) should not be limited to the assessment of points, but rather should be open to all factors identified in subsection 76(1)." …

[15] The Officer in this case explicitly considered the Applicant's settlement funds, noting in the GCMS notes that the Applicant "does have significant financial assets which would assist

with the family's settlement, however this does not equate to economic establishment." This statement by the Officer was made immediately after the Officer cited the lack of evidence concerning the Applicant's efforts to seek employment in Canada. It does not run afoul of the jurisprudence because the Officer did not state that settlement funds are not "an indicator" of economic establishment; the Officer, instead, found that these funds, without more, do not "equate" to economic establishment.

[16] The Court in *Xu* observed that the existence of settlement funds, alone, is not indicative of the likelihood of economic establishment:

> [31] Parliament chose not only to make settlement funds or arranged employment a minimum requirement but also removed those considerations from the list of criteria for which an officer may substitute his or her opinion. It might reasonably be suggested that it did so because it was of the view that settlement funds, beyond a minimum level, are not indicative of the likelihood of economic establishment. Section 76(1) (b) of the Regulations points to Parliament being concerned with how skilled workers will meet their immediate economic needs upon arriving in Canada... Presumably, these buffer resources are not included in the point calculation because eventually they will run out without employment, and they say nothing of whether a foreign national will find employment..... In contrast, an arranged offer of employment is strong evidence that a foreign national is sufficiently skilled to compete in the Canadian job market for their specific skill, which is why points are awarded for pre-arranged employment.

[17] In this case, it was reasonable for the Officer to state and find that settlement funds do not equate to economic establishment for the purpose of obtaining a permanent resident visa in the federal skilled worker class. If this were not so, individuals with significant amounts of money and assets would qualify under this class even if they failed to be assessed any points under the selection criteria in paragraph 76(1) (a). While settlement funds may be a relevant consideration

when a visa officer makes a substituted evaluation under subsection 76(3), they do not, in and of themselves, equate to economic establishment or the likelihood of a skilled worker to become economically established in Canada. An officer may consider the existence of settlement funds as a factor, along with all other relevant factors, to determine whether the skilled worker may become economically established in Canada.

C. *Was the Officer's decision reasonable?*

[18] According to the Applicant, the Officer's decision is unreasonable in light of the Applicant's substantial settlement funds, experience, ties to Canada, age, and the stated need for workers in *NOC* code 0013. The Applicant notes that he fell just one point short of the required 67 points to be eligible for a permanent resident visa, and that his circumstances should have led the Officer to make a different determination for several reasons. First, his settlement funds were approximately 40 times more than what was required for a family of four. Second, he has experience in an occupation with a demand in the labour market according to the updated Ministerial Instructions. Lastly, he received no points for his age, although he was only 50 years old at the time of application.

[19] The Respondent argues that the Officer's decision under subsection 76(3) of the *Regulations* was consistent with the jurisprudence and reasonable. Subsection 76(3) only applies to exceptional circumstances where the points awarded are not a sufficient indicator of whether a skilled worker will become established in Canada. According to the Respondent, a visa officer is owed considerable deference in making such a determination and the "fact that the applicant or even this court would have weighed the factors differently is not a sufficient ground for judicial

review" (*Esguerra v Canada (Citizenship and Immigration)*, 2008 FC 413 at para 16, 166 ACWS (3d) 358). The Respondent says in view of *Roohi v Canada (Citizenship and Immigration)*, 2008 FC 1408 at para 32, [2008] FCJ No 1834, that a substituted evaluation "may result in a negative substituted evaluation as well as in a positive substitute evaluation." In the Respondent's view, the Applicant failed to establish that his circumstances warranted the Officer to exercise his exceptional discretion under subsection 76(3).

[20] The Applicant does not claim that the Officer's decision lacks transparency, intelligibility, or justifiability in the decision-making process. The Applicant does contend though, that the Officer's decision is an unreasonable or unacceptable outcome. In my view, the Applicant's arguments amount to little more than disagreement with the conclusion the Officer reached. It is neither the Applicant's nor this Court's role to re-evaluate the likelihood of the ability of the Applicant to become economically established in Canada under subsection 76(3) of the *Regulations*.

[21] The Officer's determination in this case was reasonable. Under subsection 76(3) of the *Regulations*, a visa officer is tasked with determining "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." In conducting the substituted evaluation, the Officer reviewed the points assessed for each of the selection criteria, the Applicant's settlement funds, and the Applicant's attempts to find employment in Canada, and determined that the points awarded were indeed a sufficient indicator of whether the Applicant may become economically established in Canada. Although

the Applicant had significant settlement funds, he provided no evidence as to his efforts to seek employment in Canada. The Officer weighed these considerations in reaching the final decision. The Applicant's significant settlement funds did not necessitate a positive determination. The Officer was entitled to review all factors to determine whether the points awarded properly reflected the Applicant's ability to economically establish in Canada. The Officer's decision should not be disturbed because it falls within the range of acceptable and possible outcomes defensible in respect of the facts and the law.

D. *Did the Officer improperly reconsider the decision made by the PSO?*

[22] The Applicant claims that the Officer improperly reconsidered the PSO's determination under subsection 76(3) of the *Regulations*, pointing to the PSO's letter dated November 20, 2014, which stated that the Applicant's application had received a positive determination of "eligibility to be processed" but that a final decision on his "eligibility to be selected" as a federal skilled worker would be made by a visa office. The Applicant suggests that the PSO made a positive determination under subsection 76(3), thereby restricting the Officer's analysis to only whether the Applicant was inadmissible on grounds of misrepresentation, health, security, or criminality.

[23] The Respondent says the Applicant's argument is without merit because it fails to appreciate the distinct roles of a program support officer and a visa officer. In accordance with the Ministerial Instructions, a program support officer only determines whether an applicant meets the requirements as to be eligible for processing. Once this is determined, the program support officer refers the file to the visa office for a final selection decision. In the present case,

the GCMS notes reveal that this occurred. The PSO noted that the Applicant was eligible to be processed and indicated the file would be sent to the "visa office for further assessment/decision" and "…for possible substituted evaluation."

[24] On this issue, I agree with the Respondent. The Applicant's argument is without merit. The PSO did not make any determination as to whether the Applicant should receive a permanent resident visa under the federal skilled worker class. The PSO's letter clearly stated that the Applicant's application was eligible to be processed, and explicitly stated the final decision regarding "eligibility to be selected as a federal skilled worker" would be made by a visa office. The PSO did not purport to make any decision regarding the merits of the Applicant's application for permanent residence, let alone conduct any substituted evaluation under subsection 76(3) of the *Regulations*. This is confirmed by the notes in the GCMS dated November 12, 2014, which indicated: "Applicant does not appear to have required 67 points on the selection grid. To officer for review"; and then eight days later on November 20, 2014, stating that the file was "forwarded to visa office for possible substituted evaluation." Thus, the PSO never made any determination as to the merits of the Applicant's application for a permanent resident visa; all the PSO did was conduct an initial review of the application to ascertain its "eligibility to be processed" since the final decision as to the Applicant's "eligibility to be selected as a federal skilled worker" rested with a visa office.

V. Conclusion

[25] For the reasons stated above, this application for judicial review is dismissed. The Officer's decision in this case is justifiable, transparent, and intelligible, and is an acceptable outcome defensible in respect of the facts and law.

[26] Neither party proposed a question for certification, so no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3573-16
STYLE OF CAUSE:	BHUPENDRA KUMAR JAIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 2, 2017
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	APRIL 19, 2017

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Catherine Vasilaros	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT