Federal Court  Cour fédérale

Date: 20180710

Docket: IMM-636-18

Citation: 2018 FC 718

Edmonton, Alberta, July 10, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ROSEMARY ANENIH

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On or about May 10, 2017, the Applicant, who lives in Nigeria, applied for a permit to work as a child caregiver in Canada. By decision dated January 10, 2018 [Decision], a visa officer [Officer] of the Visa Section of the High Commission of Canada in London, England, denied the Applicant's application for a work permit on the basis that she had not demonstrated that she would be able to adequately perform the work of a caregiver.

[2] The Officer's notes indicate as follows:

> …Applicant works as a child minder in elementary school. I note that the requirements of the position require knowledge of caring for children, ability to care for and feed children, and love of children. Applicant has only secondary education. Applicant previously worked as a hairdresser. I note that applicant does not appear to have experience as an in-home caregiver, only as an assistant at an education centre. There is no evidence that the applicant has taken full responsibility for children in an environment where she is the only adult. Not satisfied that the applicant meets the requirements of the job…

[3] The Applicant brings this application for judicial review [Application] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, challenging both the reasonableness and fairness of the Officer's Decision.

[4] Judgement was issued from the Bench, dismissing the Application because I found that the Decision was both reasonable and fair. Below are the written reasons that I stated would follow.

II. Preliminary Issue

[5] The Respondent argues that certain paragraphs of the Applicant's affidavit and memorandum of fact and law, contain or refer to evidence that was not before the Officer, and should therefore be disregarded by this Court.

[6] I agree with the Respondent that evidence which could have been before the decision-maker, but was not, is inadmissible (*Connolly v Canada (Attorney General)*, 2014 FCA 294 (at para 7); *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 (at paras 13-28)), and I find

that such inadmissible evidence has indeed been included in the Applicant's affidavit, and referenced in her memorandum.

[7] The Respondent further submits that other paragraphs of the Applicant's affidavit and memorandum should be disregarded by this Court because they improperly contain argument. I agree. Although the Respondent relies on no case law on this point, I am satisfied that under Rule 81(1) of the *Federal Courts Rules*, SOR/98-106, an affidavit must be confined to facts within the deponent's personal knowledge. The Court may strike any portion of an affidavit where it contains opinion, argument or legal conclusion (*Sharma v Canadian Pacific Railway*, 2016 FC 135 at para 19).

III. Analysis

i. *Reasonableness of the Decision*

[8] The Applicant submits that the Officer did not consider all the evidence she provided. She excerpts from her prospective employer's online advertisement for the caregiver position, and argues that the duties are very similar to those she performs as a child minder. Specifically, she contends that the Officer's description of her as an "assistant at an education centre" was contradicted by her employment reference letter and the details of her position in her curriculum vitae. She further argues that the Officer's conclusion that she had never taken full, unsupervised responsibility for children is unsupportable on the evidence.

[9] Although the Applicant casts these arguments in terms of the reasonableness of the Decision, she also states that the Officer's failure to consider evidence is an error of law, reviewable on a correctness standard, relying on *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 (at para 7) [*Ozdemir*]. However, the Applicant misreads *Ozdemir*, which had to with a decision-maker's duty to provide reasons and, in any event, significantly predates *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the leading case on adequacy of reasons.

[10] Thus, I agree with the Respondent that the Applicant raises issues which engage the reasonableness standard of review, requiring the Decision to be justified, transparent, and intelligible, and fall within the range of acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Further, as the Respondent notes, visa officers' discretionary decisions are entitled to a high degree of deference (*Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 at para 19).

[11] With these principles in mind, I agree with the Respondent that the Decision is reasonable. I do not agree that the Officer's reference to the Applicant as an "assistant" is fatal to the Decision, since it was also correctly identified that the Applicant works as a child minder at the outset of the Officer's notes. Further, the Applicant submitted limited information to the Officer with respect to her work as a child minder, and no evidence that she ever provided unsupervised care to children. It was therefore reasonable for the Officer to conclude, based on the evidence offered, that the Applicant's experience as a child minder was not equivalent to the duties of a full-time caregiver.

[12] Further, I agree with the Respondent that the Applicant is, in effect, asking this Court to re-weigh the evidence and arrive at a different conclusion, which is not this Court's role (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61).

ii. *Procedural Fairness*

[13] The Applicant next submits that the Officer had a duty, as a matter of procedural fairness, to allow her to respond to his conclusion that she had never taken full responsibility for children in an environment where she was the only adult. The Applicant characterizes this as a "subjective opinion" formed by the Officer, and relies on *Campbell Hara v Canada (Citizenship and Immigration)*, 2009 FC 263 [*Campbell*]:

> [23] While there is no statutory right to an interview, procedural fairness requires that an applicant be given an opportunity to respond to an officer's concerns under certain circumstances (*Li v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1284 at paragraph 35. This duty may arise, for example, if an officer uses extrinsic evidence to form an opinion, or otherwise forms a subjective opinion that an applicant had no way of knowing would be used in an adverse way: *Li* at paragraph 36.

[14] The Applicant also relies on *Sapru v Canada (Citizenship and Immigration)*, 2011 FCA 35 (at para 31) to argue that she was entitled to "a fair opportunity" to respond to the Officer's concerns. She submits that this issue is subject to a correctness review, and I agree that is the appropriate standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 33-56).

[15] However, I note that the degree of procedural fairness owed to the Applicant falls at the low end of the spectrum in this context (*Kindie v Canada (Citizenship and Immigration)*,

2011 FC 850 at para 5). Furthermore, I disagree with the Applicant's characterization of the Officer's concerns as being a "subjective opinion" that she could not have known would be used in an adverse way, of the type referred to in *Campbell*. Here, the Officer's concerns related directly to the evidence that the Applicant provided to the Officer, namely (i) her work history and (ii) the requirements of her prospective job as a caregiver. The Officer did not inject a subjective element into the assessment that went outside of the four corners of the scant evidence submitted, or the statutory scheme by which the Officer was bound.

[16] On the latter point, paragraph 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] states that an Officer shall not issue a work permit where "there are reasonable grounds to believe that the foreign national is unable to perform the work sought". As the Officer's concerns related directly to the requirements of the Regulations, and the statutory scheme at large, there was no need to apprise the Applicant of those concerns (*Ayyalasomayajula v Canada (Citizenship and Immigration)*, 2007 FC 248 at para 18).

IV. Conclusion

[17] The Application is dismissed. No questions for certification were proposed and I agree that none arise on the facts of this case.

JUDGMENT in IMM-636-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and none arise.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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