

Federal Court



Cour fédérale

Date: 20191210

Docket: IMM-930-19

Citation: 2019 FC 1578

Ottawa, Ontario, December 10, 2019

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

**KASHIF SARFRAZ
NAIMA KASHIF
MUHAMMAD AHMAD
MUHAMMAD HAAD**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Principal Applicant [sometimes PA], Kashif Sarfraz, is a citizen of Pakistan. After securing a job offer as a retail sales/trade supervisor with Husky Travel Centre, a Saskatchewan-based employer that operates service stations, Mr. Sarfraz applied for and received a provincial

nomination for permanent residence through the Saskatchewan Immigration Nominee Program [SINP] International Skilled Worker - Employment Offer stream. A “retail trade supervisor” is evaluated as a National Occupation Level [NOC] B position by Employment and Social Development Canada [ESDC].

[2] Mr. Sarfraz applied to Immigration, Refugees and Citizenship Canada [IRCC] for permanent residence on the basis of his provincial nomination. He included his wife and two minor children as dependants. His application was forwarded to the High Commission of Canada in London, United Kingdom for processing.

[3] On December 19, 2016, the High Commission sent Mr. Sarfraz a procedural fairness letter [Fairness Letter]. In the Fairness Letter, the visa officer initially assessing the file noted Mr. Sarfraz had an outstanding job offer but expressed concern Mr. Sarfraz did not possess the language skills necessary for the position, based on ESDC’s summary of the retail trade supervisor position on the Government of Canada’s Job Bank. After converting Mr. Sarfraz’s International English Language Testing System [IELTS] test scores into the Canadian Language Benchmark [CLB] framework, the Officer found Mr. Sarfraz held moderate skills in speaking [CLB 5] and writing [CLB 6], but only basic skills in reading [CLB 4] and listening [CLB 4]. The Officer concluded a retail trade supervisor would need “moderate to high” English language proficiency, based on ESDC’s assessment.

[4] In his reply to the Fairness Letter, Mr. Sarfraz disputed the relevance, method and result of the Officer’s assessment as to whether his language skills were sufficient to work as a retail

sales/trade supervisor. He submitted improved language scores to show his speaking, writing, reading, and listening skills had improved further since his initial application, and provided a task-based analysis that compared the tasks he would be expected to perform as a retail sales/trade supervisor against his demonstrated CLB competencies. He also pointed to the Federal Skilled Trade Program [FSTP], where CLB 4 is considered sufficient to complete tasks ESDC describes as a complexity level 4, to suggest requiring a higher level of language past the minimum was arbitrary. A few months after this initial reply, Mr. Sarfraz again provided updated IELTS scores, demonstrating he fell within the moderate range of the CLB framework [CLB 6 equivalents] in all areas.

[5] On March 21, 2018, a second visa officer [Officer] reviewed the file, including Mr. Sarfraz's additional evidence and submissions. On December 14, 2018, this Officer denied Mr. Sarfraz's application for permanent residence as a member of the SINP pursuant to section 87(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], for failing to meet the requirements of section 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This Officer also believed that Mr. Sarfraz could not become economically established because of his English language skills.

[6] For the reasons that follow, this application for judicial review of the Officer's December 14, 2018 decision is granted and remitted to a different officer for redetermination.

II. Impugned Decision

[7] The Officer's detailed reasons for denying Mr. Sarfraz's permanent residence application are contained in the Global Case Management System [GCMS] notes. The Officer took note of Mr. Sarfraz's updated documents, including updated IELTS results which show continual improvement, Mr. Sarfraz's counsel's submissions, Mr. Sarfraz's own letter, Mian Sajid's [Mr. Sarfraz's prospective employer] support letter, bank statements, Naima Kashif's [Mr. Sarfraz's wife] commercial make-up training certificate and beauty salon employment reference, an estimated evaluation of her jewelry, and various resources from the IRCC and Job Bank websites. The Officer also noted Mr. Sarfraz's objection to the terminology used in the Fairness Letter [basic/moderate/high], and explained this referred to IRCC's "generally-understood meaning" for the range. The Officer agreed nonetheless to use the terminology employed by the CLB [basic/intermediate/advanced] in the GCMS notes to avoid confusion. The Officer clarified the Fairness Letter itself acknowledged that ESDC essential skills profiles complexity levels do not correlate precisely with IELTS scores, and that "there has been an assessment considering the capabilities suggested by language test results compared to the information from the Canadian government's leading source for jobs and labour market employment."

[8] Acknowledging Mr. Sarfraz's submission that he has the ability to perform the duties of a retail sales/trade supervisor and that the FSTP requires lower language skills as a minimum threshold than what he possesses, the Officer concluded the FSTP is not an appropriate comparator given Mr. Sarfraz's intended occupation is not a skilled trade. Further, the Officer

found “the minimum language requirements ...represent a standard for eligibility”, but that the standard is not indicative that an applicant will become economically established, or how they will do so.

[9] The Officer noted Mr. Sarfraz’s submission that his task-based assessment, completed prior to his most recently improved IELTS scores, demonstrates he would be able to fulfill his job functions. The Officer found this analysis did not consider CLB 6 competencies, however, and proceeded to set out what CLB 6 competencies meant. Having done so, the Officer then concluded it was not unreasonable to expect someone in “an occupation in Canada, requiring contact with the public as well as supervision of employees, to necessitate having an advanced level of English language proficiency.”

[10] The Officer summarized Mr. Sarfraz’s letter, in which Mr. Sarfraz assured he had confirmed his English skills were good enough for the position given his prior experience. He also outlined the steps he has taken to ensure his economic establishment, including continuing to take English classes and make improvements, making connections in the community, having \$38,000.00 in post-arrival settlement funds, and noted his wife would be able to get employment in Canada. The Officer concluded, however:

““[s]ettlement” & “economic establishment” are not interchangeable terms; an immigrant, such as in the family class, & with the sort of support indicated to potentially be available to the PA, may settle successfully in Canada without becoming economically established. As clearly stated in the P/F, the PN class is an economic class. Settlement assistance which may be offered or available to PA does not indicate that PA has the ability to become economically established.”

[11] The Officer noted Mr. Sarfraz's wife's potential contributions, but found the ability to become economically established applies only to the PA and her contributions were therefore unhelpful to assessing whether he, as the PA, could become economically established. The Officer further noted Mr. Sarfraz's prospective employer's outstanding job offer, including Mr. Saijid's representation that he "has hired other store supervisors with equivalent and lower CLB scores, and they have had no problem with their work." The Officer further found, however, that "[w]hile a job offer may be a factor to consider in the assessment of an applicant's ability to become economically established, a job offer in itself does not necessarily demonstrate that an applicant has the ability to become economically established." The Officer discounted Mr. Saijid's letter on the basis that the risk to an employer if a potential employee doesn't work out is low, whereas the costs are high if the applicant cannot demonstrate he has the ability to become economically established within a reasonable period of time. The Officer also noted Mr. Saijid did not offer any evidence of why he believed Mr. Sarfraz's language abilities are "good enough", or that he had hired employees with lower CLB scores in the past and they had "no problem with the work."

III. Issues

- A. *Did the Officer breach procedural fairness by creating a legitimate expectation that Mr. Sarfraz's application would be accepted if he obtained moderate CLB scores and then not honouring it?*
- B. *Was the Officer's conclusion that Mr. Sarfraz could not become economically established in Canada reasonable?*

IV. Standard of Review

[12] Whether the Officer complied with the duty of procedural fairness with respect to legitimate expectations and notice of procedural changes is reviewable on a standard best reflected in correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 43-44; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras 54-55. Parties are entitled to both a fair and a neutral process, and it is for the Court to decide if this occurred: *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100. As both procedural concepts arise from the common law and not the Officer's home statute, the Court is equally capable of assessing what is fair in the circumstances, and thus no deference is owed to procedural errors.

[13] Meanwhile, whether an applicant is likely to become economically established is a fact-driven exercise and requires deference to the Officer's expertise. The Officer's substituted decision, therefore, is reviewed on the reasonableness standard: *Debnath v Canada (Citizenship and Immigration)*, 2010 FC 904 [*Debnath*] at para 8; *Wai v Canada*, 2009 FC 780 [*Wai*] at para 18; *Ijaz v Canada (Citizenship and Immigration)*, 2014 FC 920 [*Ijaz*] at para 18.

V. Relevant Provisions

[14] Officers may refuse a permanent residence application if the conditions of the IRPA or the IRPR are not met: IRPA s 11(1).

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| 11 (1) A foreign national must, | 11 (1) L'étranger doit, |
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| before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. | préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi. |
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[15] The assessment of Mr. Sarfraz's application for permanent residence, and the Officer's ability to make a substituted decision, are governed by IRPR s 87 [emphasis added].

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| 87 (1) For the purposes of subsection 12(2) of the Act, the provincial nominee class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada. | 87 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des candidats des provinces est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada. |
| (2) A foreign national is a member of the provincial nominee class if | (2) Fait partie de la catégorie des candidats des provinces l'étranger qui satisfait aux critères suivants : |
| (a) subject to subsection (5), they are named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister; and | a) sous réserve du paragraphe (5), il est visé par un certificat de désignation délivré par le gouvernement provincial concerné conformément à l'accord concernant les candidats des provinces que la province en cause a conclu avec le ministre; |
| (b) they intend to reside in the province that has nominated them. | b) il cherche à s'établir dans la province qui a délivré le certificat de désignation. |
| (3) <u>If the fact that the foreign national is named in a certificate referred to in paragraph (2)(a) is not a</u> | (3) Si le fait que l'étranger est visé par le certificat de désignation mentionné à l'alinéa (2)a n'est pas un |

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| <p><u>sufficient indicator of whether they may become economically established in Canada</u> and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.</p> | <p>indicateur suffisant de l'aptitude à réussir son établissement économique au Canada, l'agent peut, après consultation auprès du gouvernement qui a délivré le certificat, substituer son appréciation aux critères prévus au paragraphe (2).</p> |
| <p>(4) An evaluation made under subsection (3) requires the concurrence of a second officer.</p> | <p>(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.</p> |

VI. Analysis

- A. *Did the Officer breach procedural fairness by creating a legitimate expectation that Mr. Sarfraz's application would be accepted if he obtained moderate CLB scores and then not honouring it?*

[16] The Supreme Court of Canada described the scope of the doctrine of legitimate expectations in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 95, citing DJM Brown and JM Evans, *Judicial Review of Administrative Action in Canada* [loose-leaf], at §7:1710:

The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the

reasonable expectation must be clear, unambiguous and unqualified.

[Emphasis added in original.]

[17] The Supreme Court later explains the phrase “clear, unambiguous and unqualified” refers to conduct which, if made in the context of the private law of contract, would be certain enough to be enforceable: *Agraira, above* at para 96, citing *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 69. While such promises cannot guarantee substantive rights, they can increase the procedural requirements owed: *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26.

[18] I find the Officer did not create a legitimate expectation that Mr. Sarfraz’s application would be accepted if he met a moderate threshold language score [*i.e.* CLB 5]. Instead, I find the Officer referred to the range of complexity involved for his chosen occupation, and in doing so, provided guidance on the relative range in which Mr. Sarfraz’s CLB scores must fall for the Officer even to consider approving the application. The Fairness Letter stated clearly, “it nevertheless appears reasonable to expect that to perform the tasks typical of work as a retail trade supervisor in Canada would require moderate to high English language proficiency.” Providing guidance in this way does not create the presumption that surpassing the lowest threshold in that range will guarantee acceptance; it merely offers a chance of success if this threshold is met or exceeded. This is noted specifically in the Officer’s December 14, 2018 decision which states: “The minimum language requirements for application in any immigration class represent a standard for **eligibility** to be considered in the class” [bold emphasis added].

B. *Was the Officer's conclusion that Mr. Sarfraz could not become economically established in Canada reasonable?*

[19] Although it is not law and therefore not binding on this Court, I believe the applicable Regulatory Impact Analysis Statement [RIAS] provides helpful guidance when assessing the reasonableness of the Officer's decision: *Canada Gazette Part II, Vol 136 Extra No 9, Registration SOR/2002-227, June 11, 2002, pages 234-236; Tharmarasa v Canada (Citizenship and Immigration)*, 2018 FC 1174 at para 18, citing *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 533 at para 157, but see also para 156.

[20] Mr. Sarfraz points to the following excerpts from the RIAS:

“The intent of these Regulations is to enable provinces to support the immigration of persons who have expressed an interest in settling in their province and who the province believes will be able to contribute to the economic development and prosperity of that province and Canada”: RIAS at page 235;

“The provincial economy will benefit when a province is able to bring about the immigration of a candidate who might not meet federal immigration criteria but who has attributes of particular value to the nominating province and its specific economic development objectives. An additional benefit is the ability of the provinces to support a better dispersion of immigrants, and related benefits, into numerous communities across the country”: RIAS at page 235.

[21] I find the following excerpts applicable as well:

“The alternative of provinces being expected to exercise full selection powers was rejected because of the significant resource impacts this model would place on provinces”: RIAS at page 235;

“The provinces will be responsible for issuing the nomination certificate. The foreign national named in the certificate has to meet all the statutory admissibility requirements, satisfy the officer that they will be able to become economically established in

Canada and that they intend to reside in the province that has nominated them”: RIAS at page 236.

[22] In essence, the PNP provides provinces and territories increased flexibility to attract individuals who may not be eligible for federal immigration programs. The RIAS does not indicate, however, that an officer’s assessment of economic establishment must be conducted in the same manner as the province’s or territory’s approach. Rather, it leaves open that officers at the federal level are entitled to their own interpretations on a file, and may consider additional or altogether different factors when determining whether to substitute an evaluation pursuant to IRPR 87(3), as was done here: *Debnath*, above at para 15. While a provincial or territorial nomination decision is owed deference on the government’s assessment of applicable criteria, it is not binding on federal officers: *Chaudhry v Canada (Citizenship and Immigration)*, 2015 FC 1072 [*Chaudhry*] at para 28; *Sran v Canada (Citizenship and Immigration)*, 2012 FC 791 [*Sran*] at para 13. Officers must conduct their own analysis objectively, however, to achieve a consistent process [*i.e.* fair], taking into account their decision should not displace the underlying intent of the applicable program: *Roohi v Canada (Citizenship and Immigration)*, 2008 FC 1408 at para 31. Accordingly, any direct challenge to a provincial or territorial conclusion in the nomination process must be justified, transparent and intelligible: *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47.

[23] As it is not defined statutorily, this Court’s jurisprudence provides guidance on the interpretation of “economic establishment.” The Court has found, for example, it is reasonable for an Officer to begin their inquiry by referring to ESDC’s Job Bank to assess whether the applicant had the skills necessary for the position under which they qualified: *Chaudhry*, above

at paras 32-34, 36. As noted in the Fairness Letter, “[t]he complexity levels of the tasks performed by the majority of workers as retail trade supervisors can range from complexity level 1 to 4.” Further, the term “ability to economically establish” signifies that the Officer is required to consider both present and future circumstances: *Debnath*, above at paras 14-16. The present analysis requires the Officer to look at factors such as whether an applicant has the means to self-support at the present time, either through funds and/or (the short-term prospect of) employment, while the future analysis requires the Officer also to assess the applicant’s skill set and consider whether, if present circumstances (such as finances or employment offers) change, the applicant would be able to adapt. This latter analysis is not considered in the SINP’s selection rubric.

[24] Nonetheless, this Court has found an officer should consider other factors as well, such as the contributions of a spouse, age, education, qualifications, past employment, and the applicant’s own demonstrated motivation and initiative: *Zahid v Canada (Citizenship and Immigration)*, 2015 FC 1263 [*Zahid*] at para 12; *Wai*, above at para 44. However, “[t]hat one factor is singled out for particular emphasis does not mean that all other material factors were not considered in the weighing process”: *Ijaz*, above at para 59; *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, above at para 16.

[25] I find that’s not what the Officer did in the case before this Court. Pointing to the ESDC’s Job Bank profile for retail trade supervisors [NOC 6211], the Officer concluded “[w]hile PA’s demonstrated level of English language proficiency may appear sufficient to perform some of the tasks of a retail trade supervisor, it appears less clear that he could perform the full range of tasks it would appear reasonable to expect in the context of occupations in Canada. ...it does not

appear unreasonable to expect an occupation in Canada, requiring contact with the public as well as supervision of employees, to necessitate having an advanced level of English language proficiency.” I note the full range of tasks in the ESDC’s Job Bank profile for retail trade supervisors includes, for example, reading purchase and lease agreements as well as negotiating settlement terms with vendors and the cost of leasehold improvements with landlords.

[26] In my view, the Officer erred in relying primarily on the Job Bank in evaluating whether Mr. Sarfraz could become economically established in Canada, to the exclusion of the factors that persuaded the Saskatchewan government that the family could be settled, including a confirmed job offer, and without explaining clearly why Mr. Sarfraz’s prospective employer’s evidence [given he knows the position to be filled], the Government of Saskatchewan’s evaluation [given it knows the local economy best], and the evidence that Mr. Sarfraz’s spouse also potentially could contribute to the family’s wellbeing, were insufficient for Mr. Sarfraz to demonstrate economic establishment: *Sran*, above at para 24. In particular, the Officer did not evaluate the tasks which Mr. Sarfraz would be required to perform as a retail sales supervisor for a service station, but rather assumed that he would need to be able to do all the tasks listed in the Job Bank at the outset, without considering training time or that these tasks may not all be required for that particular position. This is consistent with the Officer’s position that a retail trade supervisor would require an advanced level of English language proficiency but also assumes, unreasonably in my view having regard to the plain meaning of IRPR s 87(1), immediate economic establishment to the full extent of the range of tasks outlined in the ESDC’s Job Bank profile for retail trade supervisors [NOC 6211] without any reference to the confirmed job offer.

[27] Further, the Fairness Letter indicates that a copy was sent to the nominating province and it had 90 days to raise concerns or **seek clarification from the visa officer** regarding the assessment of Mr. Sarfraz's application, **after which the final decision will be made**. The very first sentence of Saskatchewan's response states [bold emphasis added]:

“In reply to your email of December 19, 2016 regarding Kashif Sarfraz's application for permanent residence, Saskatchewan would like to share the following information **and have a subsequent discussion about the case.**”

[28] The record is unclear whether the Officer responded to Saskatchewan's request for a subsequent discussion. The response goes on to state [bold emphasis added]:

“The applicant was nominated under the International Skilled Worker – with Employment Offer category. The category was inceptioned in 2014 and it was developed from (to replace) the old Skilled Worker/Professional category. In the new category, the SINP uses a different point grid with mandatory English language requirement and **Saskatchewan consulted CIC for and prior to the program change.**”

[29] Pointing to the new category's requirements reflecting economic establishment factors and agreeing the language ability is vitally important, Saskatchewan notes “[t]he employer has confirmed Mr. Sarfraz would be able to perform the general duties of a supervisor and has the essential language ability to improve at work.” On that basis, the “SINP continue[d] to support Mr. Sarfraz's nomination.” Though the GCMS notes indicate the Officer considered all of the nominating province's submissions thoroughly, there is no indication that the “subsequent discussion” requested by Saskatchewan about the case took place and therefore, the final decision was issued notwithstanding that the nominating province sought clarification within one

day of the Fairness Letter. This was unreasonable, given the purpose of PNPs is to engage provinces in selecting, attracting, and retaining workers to suit their particular needs.

[30] I also find the Officer erred by failing to consider whether or how Mr. Sarfraz's spouse could contribute to the family's overall establishment. The Officer concluded the following:

“The potential contribution of the PA's spouse is also noted, but the ability to become economically established applies only to the PA, not to his dependants, and the potential capacities of a dependant spouse do not demonstrate that a PA has the ability to become economically established.”

[31] This was an unreasonable approach. There is nothing in the IRPR nor the RIAS restricting the Officer's assessment to considering only Mr. Sarfraz's current abilities as the Principal Applicant. Further, both Mosley J. and Harrington J. have emphasized the family's overall capacity should inform an Officer's decision on the ability of the applicant to become economically established: *Sran*, above at para 24; *Zahid*, above at paras 13, 17. This reflects that in modern times, all members of the family often contribute to the economic sustainability of a household. Given this analysis, alongside insufficient evidence demonstrating consultation with Saskatchewan occurred, it is not for this Court to speculate whether they would have made a difference. I find therefore the matter should be remitted for redetermination.

VII. Conclusion

[32] This application for judicial review is allowed and the matter is remitted for redetermination by a different officer. The Officer overly relied on the Job Bank to the exclusion of evidence particular to the actual position for which Mr. Sarfraz had a confirmed job offer in

order to determine arbitrarily a necessary language score. Further, it is unclear from the record whether the Officer responded to Saskatchewan's request for a subsequent discussion before issuing the final decision. Finally, the Officer unduly restricted the economic establishment analysis to Mr. Sarfraz's own abilities, rather than considering whether Mr. Sarfraz's spouse also could assist in alleviating any concerns, despite the IRPR not restricting this question to the PA.

[33] Neither party proposed a serious question of general importance for certification.

JUDGMENT in IMM-930-19

THIS COURT'S JUDGMENT is that the judicial review application is granted and the matter is to be remitted to a different visa officer for redetermination. There is no serious question of general importance for certification.

“Janet M. Fuhrer”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-930-19

STYLE OF CAUSE: KASHIF SARFRAZ, NAIMA KASHIF, MUHAMMAD AHMAD, MUHAMMAD HAAD v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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