Date: 20080325

Docket: IMM-3533-07

Citation: 2008 FC 375

Ottawa, Ontario, the 25th day of March 2008

Present: the Honourable Mr. Justice de Montigny

BETWEEN:

ZINEB BELKACEM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review from a decision by visa officer Karine Roy-Tremblay of the Canadian Embassy at Rabat in Morocco, denying the applicant's application for permanent residence in the class "skilled workers – Quebec". The applicant alleged there had been a breach of procedural fairness and the visa officer had drawn a mistaken conclusion of fact from the evidence in the record. For the reasons that follow, I accept the applicant's arguments.

I. Facts

[2] The applicant made a Quebec selection certificate application in October 2002 that was finally granted in 2005. The applicant then filed a federal visa application with the Canadian visa service in Rabat in April 2005. Under the terms of the Canada-Quebec Agreement, it was for the federal government to determine whether the candidate pre-selected by Quebec was admissible.

[3] In her form the applicant stated she had worked between 1996 and December 2006. She accordingly supplied the following documents in support of her statement: a certificate of salary issued by the Director of the Caisse nationale de sécurité sociale (CNSS) in Rabat for the period from January 1993 to August 1999 with regard to her employment with CIEME Maroc, an employment certification letter from the DMW company from 2001 to date and three pay slips dated 2006.

[4] The visa officer tried to check the applicant's employment with DMW and to do this consulted the CNSS Internet site, which indicated no statements subsequent to 1999. The visa officer accordingly tried to contact the DMW manager who filled out the employment certification. However, it appeared that the telephone number shown on the certification was not the company's number. The officer subsequently tried to obtain the necessary information through the Rabat telephone centre, which finally confirmed that the DMW company did not exist.

[5] In order to clarify this situation the applicant was called to an interview on April 2, 2007. The applicant again alleged that DMW existed and that she had worked for this business. The visa officer then gave the applicant 30 days to provide any further documents that would confirm her statements.

[6] In accordance with this request, Ms. Belkacem sent the visa officer the following documents: a copy of the business register for the DMW company, a certificate from the Ministère des Finances et des Investissements Extérieurs, a certification from CNSS regarding the company's payroll, a certification from CNSS concerning another DMW employee, copies of results of online consultations of CNSS for two other employees and two credit notices for a bank account held by the applicant.

II. Impugned decision

[7] As she considered that this further information did not confirm the applicant's employment and DMW's new address, the visa officer concluded that it was impossible to establish the applicant's employment for the period from 2001 to 2006. Accordingly, she rejected the permanent residence application on June 25, 2007 by the following letter:

> [TRANSLATION]
>
> …
>
> I have now completed the review of your application and have come to the conclusion that you do not meet the criteria for admission to Canada as a Quebec skilled worker.

> In subsection 16(1) of the 2001 *Immigration and Refugee Protection Act*, it states that “A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires”. At an interview with immigration on 02-04-2007, you were asked to provide the following information in order to assess whether you were admissible to Canada:
>
> - proof of your employment with the DMW company.
>
> You stated that you worked with that company from January 2001 to December 2006 but you did not provide any evidence to show your employment with the company. All that you provided was the company’s business register, two transfers that you received from the company, a certification of affiliation of the company with CNSS and CNSS stubs for other employees. You indicated that you had not been reported to CNSS when your pay slips showed CNSS deductions.
>
> Subsection 11(1) of the Act provides that: “A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act”.
>
> After reviewing the information in my possession, I am not satisfied that you meet the eligibility criteria and requirements laid down by the Act. I am accordingly denying your application.
>
> …

[8] The applicant is now seeking judicial review by this Court of this decision by the visa officer.

III. Issues

[9] Two issues emerge from the parties' written and oral submissions:

(a) Did the visa officer err in dismissing the applicant's permanent residence application? In particular, could the officer conclude it was impossible to check the applicant's admissibility pursuant to sections 34 to 38 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), solely based on the doubts she had regarding the employment relationship with the DMW company?

(b) Were the requirements of procedural fairness observed? Was the applicant sufficiently informed of the fact that she had to submit evidence not only of the existence of the DMW company but also of her employment relationship with that company at the relevant dates?

IV. Applicable legislation

[10] The applicable provisions of the IRPA read as follows:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

inadmissible and meets the requirements of this Act.

Obligation — answer truthfully

16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

Obligation du demandeur

16. (1) L’auteur d’une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

Obligation — relevant evidence

(2) In the case of a foreign national,

(a) the relevant evidence referred to in subsection (1) includes photographic and fingerprint evidence; and

(b) the foreign national must submit to a medical examination on request.

Éléments de preuve

(2) S’agissant de l’étranger, les éléments de preuve pertinents visent notamment la photographie et la dactyloscopie et il est tenu de se soumettre, sur demande, à une visite médicale.

Evidence relating to identity

(3) An officer may require or obtain from a permanent resident or a foreign national who is arrested, detained or subject to a removal order, any evidence — photographic, fingerprint or otherwise — that may be used to establish their identity or compliance with this Act.

Établissement de l’identité

(3) L’agent peut exiger ou obtenir du résident permanent ou de l’étranger qui fait l’objet d’une arrestation, d’une mise en détention, d’un contrôle ou d’une mesure de renvoi tous éléments, dont la photographie et la dactyloscopie, en vue d’établir son identité et vérifier s’il se conforme à la présente loi.

V. Analysis

[11] The parties disagreed as to the applicable standard of review. While the applicant maintained that the issue was a mixed question of fact and law which required application of the standard of reasonableness *simpliciter*, the respondent maintained that the visa officer's decision should be reviewed only if it was patently unreasonable.

[12] What the visa officer had to determine in this case was whether the applicant was admissible based on the record and the evidence that was before her. It seems to the Court that this was a purely factual question in the determination of which the Court should not intervene unless it can be shown that it was based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before her: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(*d*).

[13] It is true that in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the high court rejected the distinction between the reasonableness standard and that of patent unreasonableness on the ground that the difference between the two concepts was difficult to apply and essentially illusory. In so doing, the Court was careful to note that the reasonableness standard reflected deference to Parliament, and it required "respect for the legislative choices to leave some matters in the hands of administration decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (at para. 49). Consequently, courts should avoid

intervening when the impugned decision is one of the "possible, acceptable outcomes which are defensible in respect of the facts and law" (at para. 47).

[14] Of course, the situation is different regarding procedural fairness. In this area, there can be no question of applying a pragmatic and functional analysis: the visa officer was not entitled to make a mistake and had to comply with the requirements of the rules of natural justice and fairness.

[15] On the first issue, the applicant did not dispute that it was the federal government's function to determine the admissibility of an applicant in medical, security and criminal terms once the latter had been selected by Quebec pursuant to the Agreement made between that province and the Canadian authorities. It is also true to say that the officer did not conclude that the applicant was inadmissible, but simply said she was unable to make a decision on the point.

[16] That said, could she nevertheless dismiss the permanent residence application on the ground that she could not carry out her duty of assessing Ms. Belkacem's admissibility simply because she was not satisfied with the evidence submitted by the latter of her employment from 2001 to 2006? In her affidavit, the visa officer stated that she was satisfied that the applicant and the members of her family were not inadmissible under sections 36 (criminal record) and 38 (medical reasons) of the IRPA. That left only checks on security, breaches of human or international rights and activities of organized crime.

[17] It is true that as provided in sections 11 and 16 of the IRPA, foreign nationals must show that they are not inadmissible in order to obtain a visa or any other document required by regulation, and to do this must “answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires”. However, is employment evidence information or evidence relevant to determining whether the applicant has engaged in terrorist activities, organized crime or breaches of human rights?

[18] In her affidavit the visa officer stated that she had to deny Ms. Belkacem’s application once she could not determine what her activities were during 2001-2006, as she was not satisfied that she met the admissibility criteria and other requirements laid down in the IRPA. This reasoning appears to the Court to be fallacious. Even assuming that Ms. Belkacem had not worked for the DMW firm during those five years (a question to which I will return in answering the second point at issue), that would not be a basis for drawing any inferences regarding her admissibility to Canada. She could have worked for some other business, could have been self-employed or could simply have left the labour market without in so doing engaging in illegal activities. Conversely, having actually worked for the DMW firm would not prove anything as to her admissibility under sections 34, 35 and 37 of the IRPA.

[19] In her examination on affidavit the visa officer confirmed that the information for determining whether a candidate was involved in an activity covered by sections 34, 35 and 37 of the IRPA ordinarily came from the Canadian authorities. The ENF 1 Manual of the Department of

Citizenship and Immigration on exclusion describes the evidence on which a visa officer may rely for purposes of implementing this legislation. It mentions in particular police reports or secret reports, statements on oath and other documentary evidence such as press articles, learned publications or expert evidence, all things which have nothing to do with evidence of an employment relationship.

[20] In this context, therefore, it seems to the Court that the visa officer erred in terminating the security investigation and dismissing Ms. Belkacem's case even before the Canadian services were able to complete their investigations. The existence or absence of an employment relationship proved nothing in this regard and so it was premature to reject the permanent residence application on the ground that the applicant's admissibility could not be checked. An employment relationship may be relevant in showing that a candidate is part of the "skilled workers" class (s. 76 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227), for example; but it is at most of marginal utility in determining whether a person has committed terrorist acts or has participated in the activities of organized crime or breaches of human rights. In short, this conclusion was not one of the "possible, acceptable outcomes which are defensible in respect of the facts and law", to repeat the language of Bastarache and LeBel JJ. in *Dunsmuir*.

[21] This error by itself is sufficient to dispose of the application for judicial review at bar; but there is more. It appeared from the evidence in the record that the requests made by the visa officer at the meeting of April 2, 2007 created some confusion for the applicant. The latter, thinking that the officer's concerns were solely as to the existence of the DMW company, provided on April 19,

2007, through her consultant, a series of documents showing that the company did in fact exist and was still operating. The officer considered that this new documentation did not establish an employment relationship by the applicant with the DMW company and so dismissed her application.

[22] It seems reasonable to think that the two parties may have had a different understanding of the additional information required of the applicant following the April 2, 2007 interview. It should be borne in mind that the interview was very short (between 5 and 15 minutes, depending on whether one accepts the version of the applicant or the respondent), and the request for additional information was not made in any written communication before or after the interview. As to the CAIPS computerized notes, these are to say the least ambiguous as indicated by the entry made on the day of the interview:

> [TRANSLATION]
>
> I confronted RQ about the pay slips and work certification. RQ assured me this was a genuine company and said she would show me among other things the business register, which was proof of its affiliation with CNSS. The pay slips submitted indicated that there were deductions for CNSS and yet RQ was not reported and this employment was not shown on the CNSS background material.
>
> I asked RQ what she had been doing since 2001 and she assured me she had been working for DMW.
>
> I gave RQ 30 days to provide further docs.

[23] The consultant's letter accompanying the further documentation supplied by the applicant after this interview appears to corroborate the applicant's story that the officer only asked her for clarifications regarding the existence of the DMW company. *Inter alia* the consultant wrote:

> [TRANSLATION]
>
> Our client had to present evidence that her former employer, the company Distribution and Marketing Work, hereinafter referred to by the abbreviation D.M.W., still existed.
>
> …
>
> We now feel that if you had doubts as to the previous or present existence of the DMW company, these several documents should resolve them.
>
> (Panel's record, pp. 18-19)

[24] In her affidavit the visa officer argued, on the contrary, that the thirty-day period given to the applicant was to allow her to present additional documents in order to establish two things: (1) the existence of the DMW company, and (2) her employment relationship with that company for the entire period from January 2001 to December 2006 (affidavit of Karine Roy-Tremblay, para. 30). Nevertheless, at paragraph 28 of that affidavit she stated that she had indicated to the applicant concerns that she had [TRANSLATION] "regarding the existence of the DMW company and thereby her employment with that company" (emphasis added), which rather tends to support Ms. Belkacem's version.

[25] It should further be noted that this affidavit was prepared over six months after the interview, namely on October 24, 2007. The officer had thus done many other interviews in the

meantime, according to her at the rate of 5 or 15 a day. Without questioning the officer’s good faith, it may well be that her memory of the exact language she used to clarify the nature of the documents Ms. Belkacem had to give her could have been deficient. In such circumstances, the CAIPS notes seem to the Court to be more reliable since they were contemporaneous with the interview, and this Court’s earlier decisions have consistently held that less weight should be given to the subsequent affidavit: see *inter alia Kalra* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FC 941; *Alam* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 182; *Abdullah* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185.

[26] I am well aware that in his follow-up letter of June 4, 2007 the consultant provided some support for the respondent’s argument. He wrote, in fact:

> [TRANSLATION]
>
> We would like to know whether the problem which arose in our client’s security interview (the fact that our client had indeed worked for the employer she said she had) has been resolved based on the evidence filed by us to corroborate our client’s statements.
>
> (Panel’s record, p. 17)

[27] All things considered, however, I feel that this letter if possible only increases the confusion surrounding the exact requests made by the visa officer. It certainly could not by itself suffice to resolve the two contradictory versions of the applicant and the respondent as to what was really said at the April 2, 2007 interview.

[28] In this Court the applicant filed new evidence (bank statements and credit notices) to establish her credibility. She submitted it would be illogical to think she would not have submitted these documents if she had known she had to establish not only the existence of the DMW company but also her employment relationship with the company.

[29] The respondent of course objected to the introduction of this new evidence on the ground that reviewing the merits of a decision which is the subject of judicial review must be based on the evidence that was in fact submitted to the administrative decision-maker at the time he or she made the decision. I have to agree with the respondent on this point. The case law is clear that this Court cannot consider evidence which was not before the visa officer: see for example *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 (F.C.A.); *Noor v. Canada (Human Resources Development)*, [2000] F.C.J. No. 574 (C.A.) (QL), at para. 6; *Zolotareva* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274, at para. 36. In any case, I would take the liberty of adding that the new evidence submitted by the applicant did not suffice to establish her employment relationship with the DMW company for the entire period between 2001 and 2006.

[30] In view of the apparent communication difficulty between the applicant and the visa officer, I feel that in all fairness the latter should have given Ms. Belkacem another chance to resolve her concerns by further clarifying what she wanted to see. I have come to this conclusion considering first the cooperation and the promptness demonstrated by Ms. Belkacem throughout the proceeding. Second, the importance of the decision made by the visa officer to the applicant certainly should not be underestimated. It is true that she could always make another application to the Canadian

authorities, but three years have already elapsed since the filing of her initial application and the requirement of making another application would entail further delay. What is more, it cannot be assumed that Ms. Belkacem would be again qualified for selection with the Government of Quebec.

[31] In view of the consequences for the applicant of the visa officer's refusal and the importance which the opportunity to come and settle in Canada had for the applicant and her family, some effort should at least have been made to contact Ms. Belkacem to obtain the desired information, as her consultant suggested in the letter of June 4, 2007. As the Supreme Court wrote in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 28:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision.

[32] In short, I feel that the visa officer did not discharge her duty of procedural fairness when she made her decision without allowing the applicant to clarify the doubtful areas that still existed in her case, since it was clear that the missing information might have resulted from a communication problem at the interview of April 2, 2007. This is therefore a second reason for allowing the application for judicial review.

[33] The visa officer's decision must accordingly be set aside and the matter referred back to another visa officer for the latter to hold a new interview and make a new decision on the matter consistent with these reasons.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed.

"Yves de Montigny"

Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3533-07
STYLE OF CAUSE:	Zineb Belkacem **v.** MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 11, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	THE HONOURABLE MR. JUSTICE de MONTIGNY
DATED:	March 25, 2008

APPEARANCES:

Patricia Guerrero	FOR THE APPLICANT
Isabelle Brochu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sophie Patricia Guerrero 304 rue St-Antoine Est Montréal, Quebec H2Y 1A3	FOR THE APPLICANT
John H. Sims Deputy Attorney General of Canada	FOR THE RESPONDENT