Date: 20080506

Docket: IMM-3224-07

Citation: 2008 FC 577

Ottawa, Ontario, May 6, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

KYUNG HEE CHOI

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by visa officer Moonho Lee at the Canadian Embassy in Seoul, Korea dated July 12, 2007, refusing the applicant's application for permanent residence in Canada. The visa officer's basis for refusing the application was that the applicant failed to accumulate sufficient points as a skilled worker and will not likely become economically established in Canada.

FACTS

[2] The applicant, Kyung Hee Choi, is a 38-year-old citizen of Korea. In February 2005, she filed an application for permanent residence under the economic class, skilled worker category. She wished to be assessed in the occupation of "Secondary School Teacher."

[3] On March 19, 2007, the applicant received an offer of employment as a music teacher at Cambridge International College of Canada in Toronto (the school). The offer required both oral and written proficiency in English and was open for a two-year period from the date of issue.

[4] On May 14, 2007, the applicant submitted documentation of her employment offer, as well as the results of her language proficiency exams. The language results established that the applicant had "no proficiency" in English with respect to speaking, listening and writing, and that she possessed only "basic" English proficiency with respect to reading.

[5] In response to the results, the visa officer issued a letter of concern, dated June 8, 2007, which stated in part:

> On May 22, 2007, you requested points for arranged employment in Canada based on the positive opinion of Service Canada on a job offer for you as music teacher. However, it appears that you do not qualify for this job offer because you do not meet its language requirement: The arranged employment opinion #7225456 specifies that both oral and written English as requirement. However, your IELTS score indicates that you have no proficiency in speaking, listening, and writing, and only basic proficiency in reading of English. Therefore, you do not warrant any points for arranged employment in Canada.

The applicant was given 30 days to respond to the visa officer's concerns.

[6] In a letter dated June 18, 2007, the applicant responded to the letter, stating that while the visa officer's concerns were "understandable," she nevertheless believed that she was "capable of teaching within an English speaking community." In a letter dated June 19, 2007, the principal at the school, Irwin Diamond, also addressed the visa officer's letter by explaining why he extended the offer of employment to the applicant despite her demonstrated lack of proficiency in English. In the letter, Mr. Diamond stated that the applicant possessed "all the fundamental skills necessary to make [her] an excellent addition to Cambridge's diverse community," and stated a belief that the applicant's English would be "sufficiently improved" by the time she began teaching. Both letters were received by the Canadian Embassy on June 28, 2007. The letter from the school principal stated, in part:

> … allow me to explain why I decided to offer her this placement regardless of the … lack of concrete experience teaching in English …

The principal cites the reasons why the applicant is, in his opinion, an excellent music teacher:

> … Her attitude is one of a person that is not afraid of the challenge and hard work; already she is making the effort to further develop and polish her English skills, taking private lessons and taking conversation classes. Overall, she left our meeting having made a strong impression, convincing me of her ability in teaching the subject and desire to learn the language and customs of Canadian society; in this case, both parties of students and teacher, will benefit from the experience … therefore I am certain her English will be sufficiently improved by the time she begins instruction at our school. …

[7] On July 3, 2007, the visa officer considered the submissions from both the applicant and Mr. Diamond. In the Computer Assisted Immigration Processing System notes (the CAIPS notes), the visa officer recorded the following observations:

> Above letters reviewed. Both PI and employer state PI "will" have her English sufficiently improved by the time she begins teaching at the school. -> As of today, PI does not meet the language requirements specified in the LMO thus does not warrant ARE pts.
>
> PI obtains 61 total pts. Am satisfied pts awarded is a good indicator of PI's likelihood to become economically established in Cda. S [substituted] of E [evaluation] per R76(3) not warranted.
>
> Refused.
>
> [Emphasis added.]

[8] Accordingly, by letter dated July 12, 2007, the applicant was notified that her application for permanent residence had been refused. The letter stated, in part:

> You have obtained insufficient points to qualify for immigration to Canada, the minimum requirement being 67 points. I awarded no points for arranged employment in Canada because, as of today, you do not meet the language requirements specified in the arranged employment opinion for your Canadian job offer. You have not obtained sufficient points to satisfy me that you will be able to become economically established in Canada.

ISSUE

[9] The sole issue raised in this application is whether the visa officer erred in concluding that the points awarded were a sufficient indicator of the applicant's ability to become economically established in Canada.

STANDARD OF REVIEW

[10] In *Kniazeva v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 268, 288 F.T.R. 282, Mr. Justice de Montigny addressed the appropriate standard of review to apply to a visa officer's decision under the skilled worker category, stating at paragraph 15:

> ¶ 15 … This Court has consistently held that the particular expertise of visa officers dictates a deferential approach when reviewing their decisions. There is no doubt in my mind that the assessment of an Applicant for permanent residence under the Federal Skilled Worker Class is an exercise of discretion that should be given a high degree of deference. To the extent that this assessment has been done in good faith, in accordance with the principles of natural justice applicable, and without relying on irrelevant or extraneous considerations, the decision of the visa officer should be reviewed on the standard of patent unreasonableness….

[11] However, in light of the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), it is clear that the standard of patent unreasonableness has now been eliminated, and that courts conducting a standard of review analysis must now focus on two standards, those of correctness and reasonableness.

[12] Accordingly, the "high degree of deference" referred to by Mr. Justice de Montigny in *Kniazeva* supports a reasonableness standard of review and implies, as the Supreme Court held at paragraph 49 of *Dunsmuir*, that courts will give "due consideration to the determinations of decision makers" when reaching a conclusion.

RELEVANT LEGISLATION

[13] Subsection 12(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 states that a foreign national may be selected for permanent residence under the economic class on the basis of their ability to become economically established in Canada:

12. (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	**12. (2)** La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[14] Also relevant to this matter is section 76 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227, as amended (the Regulations), which provides for the criteria against which an economic class application is assessed, and includes the discretion of the visa officer. The section has been attached to the end of this decision as Appendix "A."

ANALYSIS

Issue: <u>Did the visa officer err in concluding that the points awarded were a sufficient indicator of the applicant's ability to become economically established in Canada?</u>

[15] Under subsection 76(3) of the Regulations, a visa officer may substitute the points assessment with his or her own evaluation of an applicant's likelihood of becoming economically established in Canada. Such a power is discretionary under the Regulations and may be performed "if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada."

[16] In *Nayyar v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 199, 62 Imm. L.R. (3d) 78, Mr. Justice Gibson held that it was a breach of procedural fairness for a visa officer to fail to consider the use of discretion under subsection 76(3) when requested to do so. However, in the case at bar, the applicant does not allege that the visa officer erred in failing to consider the use

of discretion. Rather, the applicant argues that the visa officer was unreasonable in refusing to exercise positive discretion given the evidence before him.

[17] In arguing that it was unreasonable for the visa officer to refuse to exercise positive discretion under subsection 76(3), the applicant relies on two facts contained within her application for permanent residence: 1) that she possessed an offer of employment validated by Service Canada; and 2) that she had settlement funds totalling approximately CDN $699,000. According to the applicant, these facts demonstrate the unreasonableness of the visa officer's refusal, since it would be "impossible for a reasonable person to conclude that a person arriving in Canada with $699,000 and an offer of employment will not be able to become 'economically established in Canada'."

[18] With respect to the applicant's offer of employment, while the offer was validated by Service Canada in an "Arranged Employment Opinion Confirmation" dated April 19, 2007, the visa officer was clear in stating that no points were awarded for arranged employment because the applicant did not meet the language requirements of the position. However, the visa officer did not give any weight to the principal's letter dated June 19, 2007, which assured the visa officer that the applicant would be able to fulfill the requirements of the job and that her English ability would soon rise to the requirements of the job. In the Court's view, it was unreasonable for the visa officer not to give this letter some weight as a sufficient indicator of the applicant's ability to perform this job to the satisfaction of the principal of the school. This was a factor that the visa officer did not consider in deciding whether to substitute his evaluation for the likelihood of the applicant becoming economically established in Canada. In fact, this is a letter from the school's principal

stating that, having met personally with the applicant, he was confident that her English would be satisfactory by the time she began teaching. Further, the letter stated that the school very much wants to hire the applicant as a music teacher.

[19] In relation to the settlement funds possessed by the applicant, this Court has concluded that a visa officer can consider settlement funds when deciding whether to exercise positive discretion under subsection 76(3): see *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1398, 43 Imm. L.R. (3d) 63. In *Hernandez*, Madam Justice Heneghan concluded that it was an error for the visa officer to fail to consider the applicant's settlement funds when refusing to exercise discretion under the Regulations.

[20] Subsection 76(3) of the Regulations has been amended since *Hernandez*. Before the amendment, subsection 76(3) read, in part:

> … an officer may substitute for the criteria set out in paragraph (1) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada …

Since *Hernandez*, subsection 76(3) now reads:

> … 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 …

In my opinion, the amendment of "paragraph (1)" to "paragraph (1)(a)" does not restrict the criteria that the visa officer can consider in his or her substituted evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada. Such a restrictive reading does not make sense. The clear intent of subsection 76(3) is to allow the visa officer to substitute their

evaluation taking into account a number of factors, and not just the factors listed in paragraph 76(1)(a) as contended by the respondent.

[21] I agree with Madam Justice Heneghan's conclusion 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. In this case, there is no evidence that the visa officer considered those funds in refusing to exercise his discretion to substitute his evaluation.

[22] The visa officer had received a strong letter from the school principal that the school wants to hire the applicant and is confident that her language skills will be satisfactory in short order. I note that the principal of the school has personally met with the applicant to make this assessment. The applicant has $699,000 to bring to Canada to become established, to which no reference was made by the visa officer. The Court concludes that the decision under subsection 76(3) of the Regulations was not reasonable since that decision gave no weight to the strong letter from the school or to the $699,000 that the applicant would bring to establish herself in Canada. For these reasons, the visa officer's decision in this case must be set aside and the matter remitted to another visa officer for redetermination.

CERTIFIED QUESTION

[23] The Court is satisfied that this case does not raise any question that should be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed;

2. The decision of the visa officer dated July 12, 2007 is set aside; and

3. The matter is remitted to another visa officer for redetermination.

"Michael A. Kelen"
Judge

Appendix "A"

Immigration and Refugee Protection Regulations, S.O.R./2002-227, as amended.

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

(*a*) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

(i) education, in accordance with section 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

(v) arranged employment, in accordance with section 82, and

(vi) adaptability, in accordance with section 83; and

(*b*) the skilled worker must

(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) l'expérience, aux termes de l'article 80,

(iv) l'âge, aux termes de l'article 81,

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) la capacité d'adaptation, aux termes de l'article 83;

b) le travailleur qualifié :

(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,

(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du

(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of

(*a*) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;

(*b*) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

(*c*) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

(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.

paragraphe 82(1).

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :

a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;

b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

(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) — ne reflète pas 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*).

FEDERAL COURT

SOLICITORS OF RECORD

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