Federal Court  Cour fédérale

Date: 20100427

Docket: IMM-4121-09

Citation: 2010 FC 451

Ottawa, Ontario, April 27, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CHANDER MOHAN GULATI

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to Section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision dated June 24, 2009 of a visa officer at the High Commission of Canada in New Delhi, India. The officer refused the applicant's application for permanent residence as a member of the Federal Skilled Worker class.

[2] The officer found that the applicant had not met the requirements of subsection 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Those requirements are threefold:

a. Within the 10 years preceding the date of the application, the applicant must have at least one year of continuous full-time employment in one or more occupations listed in certain categories of the *National Occupational Classification* (NOC) matrix;
b. During that period of past employment, the applicant must have performed the actions described in the lead statement for the relevant NOC;
c. During that period of past employment, the applicant must have performed a substantial number of the main duties set out in the relevant NOC, including all of the essential duties.

[3] Subsection 75(3) of the Regulations provides that if these requirements are not met, the application for permanent residence must be dismissed. No further assessment is required.

[4] The applicant applied to be considered as a skilled worker in an occupation with the NOC code of 6212: Food Services Supervisor ("NOC 6212"). The officer found that he had not performed the lead statement or a substantial number of the main duties of NOC 6212. Accordingly, she refused the application for permanent residence.

BACKGROUND

[5] The applicant is a 33-year-old citizen of India. He came to Canada on a student visa in 2003. In 2005, having made a claim for refugee protection, he successfully applied for a work permit which continues to be valid. The refugee claim was refused in November 2007.

[6] In June 2006, the applicant was hired as a food service supervisor at Nirvana: the Flavours of India (Nirvana), a fine dining restaurant in Mississauga, Ontario. He continues to hold that position.

[7] On October 27, 2008, Nirvana received an Arranged Employment Opinion (AEO) from Human Resources and Skills Development Canada (HRSDC). The general purpose of an AEO is to establish that a person has arranged employment in Canada, as defined in s.82 of the Regulations. It does this by confirming a job offer that the person has received.

[8] The AEO in the case at bar confirmed that Nirvana had made a permanent or indeterminate-length offer of employment to the applicant as a Food Service Supervisor. According to the applicant, this offer was to rehire him to the same position that he has held since June 2006. The annex to the AEO confirms that the offer was for a position falling within NOC 6212.

[9] On December 19, 2008, the applicant submitted the application for permanent residence that is now at issue. The documents submitted with the application included the following:

a. A letter from the Director of Nirvana outlining the applicant's job duties at Nirvana (the Experience Letter);
b. A copy of the applicant's resumé;

c. The AEO;

d. A copy of a formal job offer from Nirvana (the Job Offer) was submitted later, in response to a request from the officer.

DECISION UNDER REVIEW

[10] In Computer Assisted Immigration Processing System (CAIPS) notes, the officer listed the applicant's job duties at Nirvana as they are described in the Experience Letter. The officer concluded, however, that at Nirvana, the applicant performed only 2 of 8 essential duties of NOC 6212. Moreover, the officer found, the Experience Letter did not refer to the number of people the applicant supervised.

[11] The officer also noted that according to its lead statement, NOC 6212 is predominantly found in hospitals and fast food establishments. Nirvana is a fine dining establishment.

[12] For those reasons, the officer was not satisfied that the applicant had performed the functions described in the lead statement or a substantial number of the essential duties of NOC 6212, as required by subsection 75(2) of the Regulations. The officer therefore refused the applicant's application for permanent residence pursuant to subsection 75(3).

[13] In her affidavit, the officer admitted that she had not considered the AEO or the Job Offer in reaching her decision.

ISSUES

[14] The issues on this application are as follows:

a. Did the officer err in failing to consider the AEO, Job Offer and resumé?

b. Did the officer err in finding that the applicant did not satisfy the requirements in s.75 (2) of the Regulations?

c. Did the officer violate principles of procedural fairness?

[15] In addition, the applicant has raised a preliminary issue concerning the admissibility of portions of the officer's affidavit.

ANALYSIS

Standard of Review

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review.

[17] Past jurisprudence establishes that when reviewing an officer's decision on an application for permanent residence, issues of law should be reviewed on a standard of correctness while issues of discretion and of mixed fact and law should be reviewed on a standard of reasonableness:

Kastrati v. Canada (Minister of Citizenship and Immigration), 2008 FC 1141, [2008] F.C.J. No. 1424 (Q.L.); *To v. Canada (Minister of Employment and Immigration)*, [1996] F.C.J. No. 696 (F.C.A.) (Q.L.).

[18] It is tempting to view issue (a) as a question about the legal relevance of the AEO and the Job Offer. However, in my opinion, the real dispute between the parties is whether the officer erred in finding that the applicant does not have experience performing NOC 6212. That dispute is one of fact or mixed fact and law. If it is found that the AEO and Job Offer were relevant evidence which the officer ignored, that may render her findings unreasonable, but it does not turn a factual question into a legal one.

[19] Similarly, issue (b) is a question of mixed fact and law or discretion, which should be reviewed on a standard of reasonableness: *Kniazeva v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 268, [2006] F.C.J. No. 336 (Q.L.); *Patel v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 867, 169 A.C.W.S. (3d) 180. Deference should also be shown to the officer's interpretation of NOC 6212: *Madan v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1198 (T.D.) (Q.L.).

[20] Finally, past jurisprudence establishes that issues of procedural fairness, such as issue (c), should be reviewed on a standard of correctness: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Level (Litigation Guardian) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 227, [2008] F.C.J. No. 297 (F.C.) (Q.L.).

Preliminary Issue

[21] I am satisfied that the affidavit of the officer is admissible. In accordance with this Court's decisions in *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185, 155 A.C.W.S. (3d) 417 at paragraph 15, *Obeng v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 754, 169 A.C.W.S. (3d) 869 at paragraphs 27-30, and *Wai v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 780, 348 F.T.R. 85, the affidavit does not add new arguments to the officer's reasons. It merely, in the words of *bin Abdullah*, "elaborat[es] on cursory reasons for an assessment provided in CAIPS notes," or in the words of *Obeng*, "states why she made the remarks in the CAIPS notes." These uses of an affidavit are acceptable.

[22] As well, contrary to the applicant's submission at the hearing of this matter, there is nothing in *Obeng* to suggest that an officer may only submit an affidavit to answer an allegation of fact made by the applicant. The restriction is that the officer may not add to her reasons, and here she has not.

Failure to Consider the AEO, Job Offer and Resumé

[23] The officer admits in her affidavit that she did not consider the AEO or Job Offer. It is unclear whether she considered the resumé. Ought she to have considered this evidence?

[24] Unfortunately, the jurisprudence offers little guidance on this question. *Randhawa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1294, 152 A.C.W.S. (3d) 702 and

Chen v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 594 (T.D.) (Q.L.) establish that in assessing whether an applicant has the necessary skills to perform a certain job or NOC, the officer must rely on objective evidence. However, the cases do not say what sort of objective evidence should be considered. *Bellido v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 452, 138 A.C.W.S. (3d) 728, cited by the respondent, holds that an AEO is not dispositive of an applicant's skills, but the applicant is not arguing that it should be dispositive. He is only arguing that it should have been taken into account, among other evidence.

[25] Although there is little jurisprudence directly on point, it is trite law that a decision-maker may not make a factual finding without regard to relevant evidence: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35. Accordingly, the question to be answered is whether the AEO, Job Offer and resumé were relevant to the decision.

[26] The decision was made under subsection 75(2) of the Regulations, which requires the applicant to prove that he has experience performing the lead statement and a substantial number of the main duties of NOC 6212, within the ten years preceding his application for permanent residence. In other words, the applicant must establish that he has certain past work experience.

[27] A job offer, and an AEO that confirms it, relate to future employment. Ordinarily, this evidence would be irrelevant to the applicant's past work experience. The case at bar, though, is unusual, because the AEO confirms a job offer for the same job that the applicant has performed for three years. The AEO has classified that job as falling within NOC 6212. In my view, this is relevant evidence that the applicant has performed NOC 6212 in the past. Similarly, the duties listed in the Job Offer are relevant in assessing the applicant's past work experience, because the Job Offer refers to the same job the applicant has performed in the past.

[28] In oral argument, the respondent submitted that the applicant never informed the officer that the Job Offer and AEO referred to a job he was already performing. Accordingly, there was no reason for the officer to believe that this evidence was relevant to the applicant's past experience. The respondent cites differences in salary and in job duties between the past job, as described in the Experience Letter, and the future job described in the Job Offer.

[29] In my opinion, despite these differences, the two job descriptions are substantially similar. They refer to the same employer, the same job title, and almost all of the same duties. Had the officer turned her mind to the question, I am satisfied that she would have recognized that they referred to the same position, or a substantially similar one. Thus, she would have been able to recognize that the AEO and Job Offer were relevant evidence. The officer only failed to recognize this because, unreasonably, she did not consider the AEO or Job Offer at all.

[30] The respondent also submits that it was appropriate for the officer not to consider the resumé or the AEO, because they do not conform to the High Commission's requirements for

evidence. Signed letters from the applicant's employer are required. The applicant was made aware of these requirements before submitting his application.

[31] In *Malik v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283, [2009] F.C.J. No. 1643 (Q.L.), Justice Mainville considered the extent to which non-binding administrative guidelines may dictate what sort of evidence a decision-maker can consider. Justice Mainville held that the guideline at issue in *Malik* was appropriate because it merely notified the applicant that a certain type of evidence would not be deemed "satisfactory proof" of a fact. The evidence could still be considered; it could still be "satisfactory proof" in an unusual case; the guideline was reasonable and inoffensive.

[32] Nothing in Justice Mainville's decision excuses an officer from the obligation to consider all evidence. As Justice Mainville wrote, even evidence that would not be "satisfactory proof" in an ordinary case might be satisfactory in an unusual case. The officer must, therefore, consider all of the evidence to determine whether it is satisfactory in any particular instance.

[33] In this instance, I am prepared to assume that the officer did consider the resumé, and merely found, appropriately, that it was not "satisfactory proof." On the other hand, the officer acknowledged not considering the AEO. Since she failed to consider relevant evidence, her finding that the applicant had not met the requirements in subsection 75(2) was unreasonable and must be set aside.

The officer's decision on the s.75(2) Requirements

[34] The officer held that the applicant had performed neither the lead statement nor a substantial number of the main duties of NOC 6212 in his job at Nirvana.

[35] The applicant's main submission concerning the lead statement is that the officer erred in interpreting it to exclude fine dining restaurants. This is because the lead statement expressly refers to "other food service establishments." The respondent submits that the lead statement contains a list of establishments, including hospitals and cafeterias. It was reasonable, in the respondent's view, for the officer to interpret "other food service establishments" as only including establishments that are analogous to the ones in the list.

[36] I accept that the officer is owed deference in interpreting NOC 6212, and based on the wording of the NOC alone, I would have accepted the respondent's argument. However, in the circumstances of this case, other factors must be taken into account. First, even if the AEO had not been relevant to the applicant's past work experience, it was certainly relevant in interpreting NOC 6212. HRSDC, a body with considerable expertise in occupational classifications, determined that the applicant's offer for a future restaurant job fell within NOC 6212.

[37] Furthermore, NOC 6212 was considered by this Court in *Nathoo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 818, 159 A.C.W.S. (3d) 427. Although *Nathoo* arose in a different factual and legal context from the case at bar, it is relevant in that Justice O'Reilly accepted

that a job managing a restaurant could fall within NOC 6212. In light of this decision, and the HRSDC determination, the officer's interpretation of the lead statement was unreasonable.

[38] The next question is whether the decision was reasonable with respect to the applicant's failure to perform a substantial number of the main duties of NOC 6212. I find this question difficult to answer because of the minimal reasons provided.

[39] The CAIPS notes say that the applicant only performed 2 of 8 essential duties, but they do not specify which 2 he performed, or why he was found not to have performed the other 6. The officer's affidavit says that the Experience Letter only contained general statements, but that is not a sufficient explanation. The Experience Letter was apparently detailed enough to prove that the applicant had performed 2 of the duties; why not the others?

[40] The respondent submits that certain remarks in parentheses in a March 12, 2009 CAIPS entry reveal the 2 duties the officer thought had been performed. However, it appears to me that these remarks, including the parentheses, were copied verbatim from the applicant's application for permanent residence. They do not set out the officer's own findings.

[41] It is impossible to assess the officer's conclusion, that the applicant had not performed a substantial number of the main duties of NOC 6212, without knowing which duties the officer thought had not been performed and why.

[42] According to *Dunsmuir*, above, at paragraph 47, the transparency and intelligibility of a decision are important elements of a reasonableness analysis. I conclude that their absence in the present decision render it unreasonable.

Procedural Fairness

[43] The applicant submits that he should have been notified of the officer's concerns about his past work experience, and given an opportunity to respond. In my opinion, this Court's decision in

Hassani v. Canada (Minister of Citizenship and Immigration), 2006 FC 1283, 152 A.C.W.S. (3d) 898 controls the present case. It says that an officer does not need to give notice of a concern that the applicant lacks work experience, and therefore does not fall within a certain NOC, because that concern arises directly from the Regulations. Accordingly, the officer did not breach her duty of procedural fairness.

[44] In oral argument, the applicant submitted that the present case is distinguishable from *Hassani* because there has been ongoing communication between the officer and the applicant. With respect, I cannot conclude that the officer must give notice of these concerns just because she was also communicating with the applicant about other issues and raising other concerns.

CONCLUSION

[45] I find that the decision was made in a procedurally fair manner. However, I also find that the decision was unreasonable in that it was made without regard to relevant evidence, relied on an

unreasonable interpretation of the lead statement of NOC 6212, and did not meet the standards of transparency and intelligibility. Accordingly, the application for judicial review is granted. The decision is quashed and the matter will be returned for consideration by a different visa officer. The parties have not proposed any questions for certification, and none, in my view, arise from the facts of this case.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. the application is granted and the matter is remitted to the High Commission of Canada in India for reconsideration by another visa officer; and
2. no questions of general importance are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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