

Federal Court



Cour fédérale

Date: 20110614

Docket: IMM-4481-10

Citation: 2011 FC 697

Ottawa, Ontario, June 14, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MAYUKUMAR ZAVERCHAND SHAH

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of an immigration officer (Officer) in the Federal Skilled Worker—Central Intake Office (CIO), dated 14 July 2010 (Decision), wherein the Officer determined that the Applicant's application did not qualify for further processing under the federal skilled worker program.

BACKGROUND

[2] The Applicant is a citizen of the United Kingdom. He filed an application for permanent residence in Canada as part of the federal skilled worker class, indicating that he has experience as an accounts manager. In his affidavit dated 26 August 2010, the Applicant states that the responsibilities of his current job exceeded the space allotted in the standard form entitled “Schedule 3: Economic Classes—Federal Skilled Workers” (Schedule 3). Therefore, he attached an addendum expounding on those duties. This addendum, entitled “Additional Employment Information for Principal Applicant—Mayurkumar Zaverchand Shah” (Addendum), is reproduced in the Application Record (at page 32). It sets out seventeen duties that the Applicant has performed as part of his employment as an accounts manager. The Applicant swears that the Addendum was attached to his application and, therefore, was before the Officer when he was making his Decision.

[3] The Applicant’s application was received by the CIO on 9 April 2010. The Officer assessed the application based on whether the Applicant had work experience in one of the occupations eligible for processing, in this case Financial Auditors and Accountants (which is identified by its National Occupation Code [NOC]: 1111). Contrary to the Applicant’s evidence, the Officer swears in his affidavit dated 12 October 2010 that the Addendum was not before him. Instead, he assessed the application based on the two “main duties” set out in Schedule 3, which formed part of the Applicant’s application and which is reproduced in the Application Record (at page 31). These main duties are: (1) producing statutory financial accounts and management reports; preparing payroll;

and liaising with government bodies, banks and auditors; and (2) producing both management reports and financial accounts; payroll; and dealing with all stakeholders.

[4] The NOC defines the essential duties for financial auditors and for accountants respectively as follows:

Financial auditors perform some or all of the following duties:

- Examine and analyze journal and ledger entries, bank statements, inventories, expenditures, tax returns and other accounting and financial records, documents and systems of an individual, department, company or other establishment to ensure financial recording accuracy and compliance with established accounting standards, procedures and internal controls
- Prepare detailed reports on audit findings and make recommendations to improve individual or establishment's accounting and management practices
- Conduct field audits of businesses to ensure compliance with provisions of the Income Tax Act, Canadian Business Corporations Act or other statutory requirements
- May supervise other auditors or professionals in charge of accounting within client's establishment.

Accountants perform some or all of the following duties:

- Plan, set up and administer accounting systems and prepare financial information for an individual, department, company or other establishment
- Examine accounting records and prepare financial statements and reports
- Develop and maintain cost finding, reporting and internal control procedures
- Examine financial accounts and records and prepare income tax returns from accounting records
- Analyze financial statements and reports and provide financial, business and tax advice
- May act as a trustee in bankruptcy proceedings
- May supervise and train articling students, other accountants or administrative technicians.

[5] According to the Officer's assessment, the Applicant's experience as set out in Schedule 3 did not correspond to the essential duties of a financial auditor or accountant as set out in the NOC description above. This is the Decision under review.

DECISION UNDER REVIEW

[6] The relevant excerpts of the Decision are as follows:

[T]he main duties that you have listed do not indicate that you performed a substantial number of the main duties of the occupation as set out in the occupational description of the NOC, including all of the essential duties. As such, I am not satisfied that your experience corresponds to NOC 1111, Financial Auditors and Accountants.

For the reasons outlined above, your application does not meet the requirements of the Ministerial Instructions and your application is not eligible for processing....

[Y]ou have not satisfied the requirements to apply under the Federal Skilled Worker Class

ISSUES

[7] The Applicant raises the following issues:

- a. Whether the Officer's findings of fact regarding the Applicant's work experience were unreasonable; and
- b. Whether the Officer failed to provide the Applicant with an opportunity to respond to his concerns regarding deficiencies in the Applicant's stated employment duties

as compared to the duties set out in the NOC description, thereby depriving the Applicant of fair process.

STATUTORY PROVISIONS

[8] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2000-227 (Regulations), are applicable in these proceedings:

Federal Skilled Worker Class	Travailleurs qualifiés (fédéral)
Class	Catégorie
<p>75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.</p>	<p>75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.</p>
<p>Skilled workers</p> <p>(2) A foreign national is a skilled worker if</p> <p>(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time</p>	<p>Qualité</p> <p>(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :</p> <p>a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande</p>

employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix;

de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la *Classification nationale des professions* — exception faite des professions d'accès limité;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational Classification*; and

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the *National Occupational Classification*, including all of the essential duties.

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

Minimal requirements

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

Exigences

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

STANDARD OF REVIEW

[9] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, 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. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[10] The Applicant alleges that the Officer erred in his findings of fact. Factual findings fall within the Officer's area of expertise and, therefore, attract a standard of reasonableness. See *Madan v Canada (Minister of Citizenship and Immigration)* (1999), 172 FTR 262, [1999] FCJ No 1198 (QL) at paragraph 24; and *Dunsmuir*, above, at paragraphs 51 and 53.

[11] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision is unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[12] The Applicant alleges that the Officer found him lacking in credibility but did not confront the Applicant, thereby depriving him of fair process. Procedural fairness is reviewable on a standard

of correctness. See *Dunsmuir*, above; and *Khosa*, above, at paragraph 43. When applying the correctness standard, a reviewing court will show no deference to the decision-maker's reasoning process. Rather, it will rather undertake its own analysis of the question.

ARGUMENTS

The Applicant

The Decision Was Unreasonable

[13] The Applicant assumes that the Officer read the Addendum and deemed the Applicant's relevant experience not "credibly commensurate" with the duties set out in the NOC description.

[14] Given the contents of the application, it is difficult to conceive how the Applicant possesses an insufficient number of duties to allow him to apply under the relevant NOC. The Applicant argues that the Decision falls outside the range of reasonableness as defined in *Dunsmuir* and therefore must be set aside.

The Applicant Was Deprived of the Opportunity to Respond

[15] The Computer Assisted Immigration Processing System (CAIPS) notes do not indicate that the Officer put his credibility concerns to the Applicant, as is required. As Justice Richard Mosley of this Court stated in *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at paragraph 24:

Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John and Cornea* cited by the Court in *Rukmangathan*, above.

The Respondent

The Officer's Findings Were Based on the Record and Therefore Reasonable

[16] The application stated that the Applicant had been employed as an accountant since January 1998. However, the description of his "main duties" as set out in Schedule 3, which formed part of his application, failed to include a substantial number of the main duties of Financial Auditors and Accountants as set out in the NOC description, including all of the essential duties.

[17] The Addendum, which sets out seventeen duties that the Applicant has performed as part of his employment as an accounts manager, was not before the Officer when he rendered his Decision on 14 July 2010 and therefore cannot be used to challenge that Decision. Indeed, the evidence found at pages 39-46 of the Application Record was not before the Officer prior to his Decision and should be struck from the record. See *George v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1315 at paragraph 12.

The Officer's Findings Were Based on Fact and Not on Credibility

[18] The Applicant's argument that the Officer found him lacking in credibility and, as such, had a duty to confront him with such concerns is without merit. The Decision is based on the Officer's finding that, according to the evidence before him when he rendered his Decision, the Applicant had not performed a substantial number of the main duties of the occupation as set out in the NOC description, including all of the essential duties. The onus is on the Applicant to provide all necessary material for a positive decision; it is not incumbent on the Officer to ask for clarification. See *Madan*, above, at paragraph 6.

The Applicant's Reply

[19] The Applicant contends that the summary of "main duties" set out in Schedule 3, which formed part of the Applicant's application and which is reproduced in the Application Record (page 31), fits squarely within the intended occupation of accountant. Notwithstanding the Officer's assertion that the Addendum was not before him, the Decision was nonetheless unreasonable based on the summary of "main duties" and on the application as a whole.

[20] The Applicant further argues that the Officer had a duty to question the Applicant regarding his qualification and that this position is supported by the jurisprudence of this Court. Justice Paul Rouleau of this Court observed in *Dhaliwal v Canada (Minister of Employment and Immigration)* (1992), 52 FTR 311, [1992] FCJ No 122 (QL) that:

[g]iven the extremely limited space provided in the application form for a description of an applicant's work history and the discrepancies in the number of years experience attributed to the applicant in the intended occupations by his solicitor, ... fairness demands that the visa officer question the applicant on the duties performed in his previous employment.

ANALYSIS

[21] The Applicant says that when he submitted his permanent residence application in March 2010, he attached an addendum that provided additional information about his past experience:

The occupational basis for my application was my experience working as an Accounts Manager for a London-based Commercial set of Barrister's Chambers. As the considerable responsibilities of this post exceeded the space allotted in the standard form to describe said duties, I attached an addendum to the application to allow for this exposition.

[22] Mr. Patrick Nelson, who works in the office of Applicant's counsel in Toronto says that the Applicant has told him that the package of documents (presumably including the Addendum) was before the Central Intake Office in Sydney, Nova Scotia and that "Mr. Shah informs me and I do believe that these documents were before the CIO."

[23] Mr. Nelson's affidavit adds nothing to the picture. He is simply repeating what the Applicant has told him.

[24] There is very little in the Applicant's affidavit to reassure the Court that the assertions concerning inclusion of the Addendum are reliable evidence and, in any event, all the Applicant can say is that he included the Addendum in the package of documents that he sent with his application.

[25] The Officer says that the additional documents in question were not before him when he made the Decision.

[26] The Court has no reason to believe that either the Applicant or the Officer is not being truthful in his assertions. Neither of them can provide an explanation as to why the Addendum was not before the Officer when he reviewed the Applicant's application for permanent residence. The Officer was cross-examined on his affidavit, and what he said provides scope for speculation about what might have happened but nothing that could assist the Court in arriving at an acceptable conclusion on this issue.

[27] On the Applicant's side, the Court notes that the standard form documentation, which the Applicant completed and which was before the Officer, provides no notification that an Addendum was attached or included in the package. It is also notable that, although the Applicant says that he included an Addendum because the forms provided insufficient space to describe his duties, he nonetheless provided some description under "Main Duties" and did not use up all of the space available. Therefore, there is nothing that would have alerted the Officer to the fact that the Applicant did not regard his description under "Main Duties" as complete or that the Applicant had enclosed an Addendum which completed the picture.

[28] In the end, it is impossible for the Court to say what happened to the Addendum or to come to any conclusions about why it did not come before the Officer. It is impossible to attribute cause or blame in these circumstances. All that the Court can say for certain is that the Officer is clear that he did not have the Addendum before him when he made the Decision and that there was nothing in

the standard forms submitted that would alert him to any missing documents. The Applicant has asked the Court to draw a negative inference based upon the revelations in the cross-examination as to how the file was handled and assembled before it reached the Officer. However, the Court simply does not have sufficient objective evidence of what happened in this case to draw an inference either way.

[29] That being the case, the procedural fairness issue and the reasonableness of the Decision can be assessed only on the basis of the documentation that we know was before the Officer. The Court cannot conduct a *de novo* assessment based upon materials that it cannot say were before the Officer or should have been before the Officer.

[30] As regards procedural fairness, credibility was not an issue in the Decision. The reasons are based upon the information that was before the Officer. Justice Mosley provided a comprehensive review of matters that should be put before the Applicant in *Hassani*, above, at paragraph 24:

Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John and Cornea* cited by the Court in *Rukmangathan*, above.

[31] In the present case, the concerns about the Applicant's past experience arose directly from the requirements of the legislation and related regulation. The issue was simply whether the Applicant's past duties sufficiently corresponded with NOC 1111. This was not about credibility,

accuracy or the genuine nature of information submitted by the Applicant. There was no procedural unfairness.

[32] As regards reasonableness, when I compare the description provided by the Applicant with NOC 1111, I cannot say that the Officer's assessment falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law which is the test established in *Dunsmuir*. As Justice John Evans made clear in *Madan*, above, at paragraph 24, visa officers must be allowed a considerable discretion when it comes to this kind of assessment:

In any event, visa officers should be afforded considerable discretion in determining whether an applicant satisfies the requirements for a given occupation, including their interpretation of the provisions of the NOC. They have a familiarity with and understanding of this document that is at least equal to, and will often exceed, that of a reviewing court.

[33] At the hearing, the Applicant also asked the Court to consider the adequacy of the reasons. I have done that. In my view, given the nature of the paper decision that the Officer had to make, the requirements of what the Applicant had to demonstrate under Regulation 75(3) and the material that was before the Officer, I cannot say that the reasons were inadequate. The Applicant could not help but understand that, assuming his Addendum was not before the Officer, he did not meet the requirements. I can see that the Applicant would think the reasons inadequate if he assumes his Addendum of duties was before the Officer, but that is not an assumption that the Court can make in this case.

[34] Counsel for both parties agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4481-10

STYLE OF CAUSE: **MAYUKUMAR ZAVERCHAND SHAH**

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 12, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT** **Russell J.**

DATED: June 14, 2011

APPEARANCES:

M. Max Chaudhary

FOR THE APPLICANT

John Loncar

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chaudhary Law Office
Barrister & Solicitor
Toronto, Ontario

FOR THE APPLICANT

Myles J. Kirvan
Deputy Attorney General of Canada

FOR THE RESPONDENT