

Federal Court



Cour fédérale

Date: 20131114

Docket: IMM-11086-12

Citation: 2013 FC 1161

Ottawa, Ontario, November 14, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MOJTABA ESMALI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The applicant in this matter seeks judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], of a decision made by an Immigration Officer on May 16, 2012 denying his application for permanent residence in Canada as a member of the Federal Skilled Worker Class.

[2] For the following reasons, the application is granted.

Background Facts

[3] Mr. Esmaili is an Iranian citizen, born in 1984. He enrolled at Shirvan Azad University in 2004. During his studies, he was hired part-time by the Apasay Kish company as a technical assistant in 2004, then promoted to technical sales advisor in 2006. He graduated in 2007 with a bachelor's degree in computer engineering, then ceased working for the company temporarily and took a master's degree from Girne American University, Cyprus. The head of the Department of Management Information Systems, Professor Christopher Payne, provided a recommendation letter saying that Mr. Esmaili had been "a first-class student" and "a serious, highly intelligent man" with a wide knowledge in his field, who had "regularly achieved the uppermost grade in his courses", had written a thesis (on intelligent software systems) of "publishable quality", and was "perfectly fluent in both written and spoken English." Mr. Esmaili was rehired as a full-time information systems manager by Apasay Kish in 2009 after his masters' degree graduation and remains employed by the company. His sister is a permanent resident of Canada and lives in Newfoundland and Labrador.

[4] In 2011, Mr. Esmaili, then aged 26, applied to come to Canada as an Information System Manager, NOC 0213. He submitted an application, the \$550 processing fee, and documentation of his educational credentials and the required minimum of one year's work experience in the desired occupation. Mr. Shahab Shariatfar, Director Manager of the Apasay Kish company, provided a letter of reference in which he stated that he "highly recommends Mr. Mojtaba Esmaili as a challenging and hardworking staff to any company or institution who would hire him for a similar job position" and provided the following description of his duties:

**2009-02/2010-08 Information System Manager
(Full-time, 40H/W)**

Direct, monitor and organize the work of company's system analysts and computer support specialists, coordinate activities such as installing and upgrading software hardware and network, estimate the risk and substitute new procedures to make competitive advantages based on the potential of the company, deal with the operational and strategic aspects of the company and determine immediate and long-term personnel and equipment requirements, stay informed and tuned with the latest technological and managerial advances.

2006-06/2007-06 Sales Advisor (Part-time, 24H/W)

Assist the Sales Manager in preparing market analysis and developing short-term activities and long-term comprehensive market plans, carry out market research activities as requested, identify new business opportunities and market needs, advise customers to choose their best.

2004-06/2006-06 Technical Assistant (Part-time, 24H/W)

Provide customers with their required services including: fix corrupted computer systems, install software, diagnose and repair software errors, set up network and prepare systems for sharing documents and printers, repair and upgrade hardware, substitute new systems with old systems, guarantee customers' satisfaction through effective handling of customer problems.

[5] The NOC 0213 description online at Human Resources and Skills Development Canada reads:

0213 Computer and information systems managers

Computer and information systems managers plan, organize, direct, control and evaluate the activities of organizations that analyze, design, develop, implement, operate and administer computer and telecommunications software, networks and information systems. They are employed throughout the public and private sectors.

Example Titles

EDP (electronic data processing) manager, computer systems manager, data centre manager, data processing director, information systems manager, manager, data processing and systems analysis manager, management information system (MIS) manager, software engineering software development manager, systems development manager

Main duties

Computer and information systems managers perform some or all of the following duties:

- Plan, organize, direct, control and evaluate the operations of information systems and electronic data processing (EDP) departments and companies
- Develop and implement policies and procedures for electronic data processing and computer systems development and operations
- Meet with clients to discuss system requirements, specifications, costs and timelines
- Assemble and manage teams of information systems personnel to design, develop, implement, operate and administer computer and telecommunications software, networks and information systems
- Control the budget and expenditures of the department, company or project
- Recruit and supervise computer analysts, engineers, programmers, technicians and other personnel and oversee their professional development and training.

Employment requirements

- A bachelor's or master's degree in computer science, business administration, commerce or engineering is usually required.
- Several years of experience in systems analysis, data administration, software engineering, network design or computer programming, including supervisory experience, are required.

[6] The application was screened by a Centralized Intake Officer in Sydney, Nova Scotia, and recommended to the visa office for a final determination of eligibility. An immigration official in Ankara, Turkey, recorded in the Computer Assisted Immigration Processing System [CAIPS] on May 5, 2012 that:

Subject is applying under NOC 0213. BASED ON THE LETTER PROVIDED BY SHAHAB SHARIATFAR DATED 06 SEPT I AM NOT SATISFIED THAT PA HAS PERFORMED [sic] THE ACTIONS DESCRIBED IN THE LEAD STATEMENT OF NOC 0213 OR THE MAIN DUTIES OF NOC 0213. THERE [sic] NOT SATISFIED THAT THE MINISTERIAL INSTRUCTIONS HAVE BEEN MET [sic]. REFUSED ON ELIGIBILITY. ECP PLEASE PREPARE THE LETTER AND REFUND FEES.

[7] On May 16, 2012, a letter refusing the application was issued.

[8] Pursuant to section 72(2) of the IRPA, a person seeking judicial review by the Federal Court of a decision of a Case Officer is required to apply for leave to the Court within 60 days, in the case of a matter arising outside Canada, after being notified of the decision. The applicant exceeded this deadline by more than three months and seeks an extension of time permitting the application to be brought.

[9] The applicant had retained an immigration consultant in Ontario to assist in making his application. After learning that his application had been rejected, the representative wrote to the Canadian embassy in Ankara on June 13, 2012 seeking an opportunity to provide further documents and claiming procedural fairness had been breached.

[10] The embassy did not answer. A note in the Global Case Management System [GCMS] indicated that: "Request for reconsideration was rcvd on June 13, 2012. No reply sent as file is pending litigation." In his affidavit filed in support of the application, the applicant states that he thought the best option was for his consultant to send a letter to the Canadian embassy and that he was not aware of deadlines for filing an application for leave of the court. It was only after his

consultant contacted a law firm to obtain legal advice that he became aware of this requirement whereupon he immediately retained the firm and instructed it to bring a leave application.

[11] A notice of application was filed on October 30, 2012 which included a request for an extension of time. Justice Bédard granted leave on July 18, 2013 without commenting on the request for extension.

[12] The applicant highlights the fact that as of July 1, 2012, the respondent Citizenship and Immigration Canada is no longer accepting applications within this federal skilled worker stream. Applicants must have an arranged offer of employment or fit within the PhD stream in order to apply. The outcome of the present judicial review is therefore highly significant to the applicant.

Impugned Decision

[13] The officer who signed the refusal letter indicated to Mr. Esmaili that: “you have not provided sufficient evidence that you performed the actions described in the lead statement for the occupation, as set out in the occupational description of the NOC that you performed all of the essential duties and a substantial number of the main duties, as set out in the occupational descriptions of the NOC. As such, I am not satisfied that you are a **Computer and Information Systems Manager – 0213**. Since you did not provide evidence that you have work experience in the listed occupations, you do not meet the requirements of the Ministerial Instructions and your application is not eligible for processing.”

Issues

[14] The following issues are raised:

- a. Is the applicant time-barred from bringing this application?
- b. Was the Officer's finding that the applicant did not have the required work experience unreasonable?
- c. Did the Officer's failure to give adequate reasons amount to a breach of procedural fairness?

Standard of review

[15] It is well established in jurisprudence that the standard of review for an Officer's consideration of evidence and the Officer's ultimate decision with regard to whether an applicant meets the criteria of a NOC is reasonableness. (See for instance *Khan v Canada* (MCI), 2013 FC 891, at para 13). The standard of review for an alleged failure to address key evidence, and the standard of review for procedural fairness generally, is correctness. (See for instance *Uluk v Canada* (MCI), 2009 FC 122, at para 16).

Analysis

A. Is the applicant time-barred from bringing this application?

[16] The respondent submits that the applicant should be non-suited for failing to provide a reasonable explanation for missing the deadline by over three months. The fact that Justice Bédard gave leave without speaking to the request for an extension of time is not treated as an implicit granting of an extension. Since the leave order did not explicitly grant the extension of time, the

respondent argues that the Court retains jurisdiction to dismiss the application without a hearing on the merits. (*Villatoro v Canada (MCI)*, 2010 FC 705, at paras 22-23; *Strungmann v Canada (MCI)*, 2011 FC 1229 [*Strungmann*], at para 15; *Chen v Canada (MCI)*, 2010 FC 899 [*Chen*], at paras 30-35). I agree and accordingly must decide whether to grant the extension accordance with the principles governing extensions.

[17] Moreover, it would appear that extensions of time should quite properly be left to the judge conducting the judicial review, inasmuch as the strength of the case is considered the overriding factor in terms of meeting the ends of justice in granting an extension. That consideration is obviously best carried out by the applications judge who conducts the review and has the benefit of more fulsome written and oral submissions.

[18] In my view, Justice Barnes summarizes the law in respect of extensions of time for the purposes of this case in *Washagamis First Nation v Ledoux*, 2006 FC 1300 [*Washagamis First Nation*], as follows:

23 The considerations that are typically applied to the exercise of the discretion to extend time under Rule 8 have been frequently discussed. In 687764 *Alberta Ltd. v. Canada*, [1999] F.C.J. No. 545, 166 F.T.R. 87, Justice Karon Sharlow held as follows:

14 There are no hard and fast rules that will determine in any particular case whether leave will be granted to extend a time limit for the commencement of a legal proceeding. The purpose of the time limit is to give effect to the principle that there must be an end to litigation. On the other hand, giving the court the discretion to extend the time limit recognizes that an extension of time may be necessary to do justice between the parties. These competing considerations must be borne in mind in considering whether to grant the extension: *Grewal v. Minister of Employment and Immigration*, [1985]

2 F.C. 263 (F.C.A.); Consumers' Ass'n (Can.) v. Ontario Hydro [No. 2], [1974] 1 F.C. 460 (F.C.A.).

15 The cases set out the factors to be taken into account. The most important of these is that the applicant must demonstrate an arguable case for the remedy sought or, as is said in some cases, a reasonable chance of success. In addition, the delay should be explained or justified, and there should be evidence that the applicant exercised reasonable diligence in asserting its rights. Usually this consists of evidence of a bona fide intention, in existence within the statutory time limits, to seek redress for the impugned decision, and evidence of the steps taken to pursue the matter. Any prejudice to the respondent or third parties must be taken into account.

24 More recently in *Jakutavicius v. Canada (Attorney General)*, [2004] F.C.J. No. 1488, 2004 FCA 289, Justice Marshall Rothstein confirmed the relevant considerations for extending time as noted above by Justice Sharlow. He went on to state that this list of considerations was not exhaustive and should not be applied mechanically. He also confirmed that the weight to be applied to the factors may well vary from case to case.

[Emphasis added]

[19] In addition, Martineau J noted in *Strungmann* at para 9 “an extension of time may still be granted if one of the criteria is not satisfied”, citing *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41, at para 33.

[20] With respect to clients’ responsibility for errors committed by lawyers, in this case by an immigration consultant, Justice Barnes in *Washagamis First Nation* summarized his conclusions at paragraph 33 as follows:

33 I am inclined to the view that where a litigant establishes that it clearly instructed its counsel to proceed on a timely basis and that the failure to do so was solely the result of an error by counsel, the litigant should not be constructively held to have been a party to the error. Such an approach is also consistent with that adopted by other

courts in dealing with solicitor error and missed limitation periods: see *Woudstra v. Piston*, [2004] O.J. No. 594, [2004] O.T.C. 160 (S.C.J.); *Dreifelds v. Burton* (1998), 38 O.R. (3d) 393, [1998] O.J. No. 946 (C.A.) and *Tait v. CNR* (1984), 11 D.L.R. (4th) 460, 64 N.S.R. (2d) 187, [1984] N.S.J. No. 398 (S.C.).

[Emphasis in original]

[21] I interpret the foregoing passage to indicate generally that clients should not be held responsible for their representatives' errors so long as they do not contribute to the actions causing delay.

[22] Applying these principles in this matter, I conclude that the extension should be granted. First, because I find that the applicant should succeed, he obviously has a more than an arguable case. As Justice Sharlow pointed out, this is the most salient factor in determining whether to extend time.

[23] Second, I am also satisfied that the applicant was blameless in relying on his consultant, particularly in the circumstances of someone living in a foreign country and unaware of how the Canadian legal system functions.

[24] Third, I am of the view that the Officer contributed to the problem by not responding to the consultant's letter on the basis of pending litigation. This is not an appropriate reason not to show the common courtesy to others that our public service is known for. This left the consultant, who was highly deficient in protecting his client's interests, adrift and stymied wondering if some response was forthcoming as an explanation for a good part of the delay. It was only upon the consultant's consulting lawyers that his errors became apparent.

[25] Fourth, I am satisfied that the applicant's intention throughout was to challenge the decision. Why else would his consultant be seeking further information from lawyers as to what to do, which information was acted upon immediately once the appropriate procedure was known? I conclude in the interest of justice that the extension should be granted.

B. Was the Officer's finding that the applicant did not have the required work experience unreasonable?

[26] I find first of all that the respondent is attempting to supplement the Officer's reasons by explaining what the letter did not mention that it should have mentioned in order to be sufficient. The Officer did not say anything about lacking information about the duties of the NOC, merely that he was not satisfied (for some reason) that these duties had been performed. Second, acknowledging the existence of the letter does not constitute analysis of its contents. The Officer provided no reasons at all for rejecting the letter as proof of the required year of work experience and this was clearly unreasonable. Third, it is impossible to confirm whether the Officer in fact mistook the Director Manager's name for the company name, further casting doubt on the quality of his consideration of the letter, but this is immaterial given the total absence of justification for the finding that he was not satisfied that the applicant had performed either the lead statement tasks or the main duties tasks of the NOC.

[27] Finally, the decision appears clearly unreasonable on its face. The applicant had a bachelor's and master's degree in his field, as well as a glowing recommendation from a professor at the graduate studies level. He had risen through the ranks at his company over the course of four and a half years, performing various functions in the general area of information systems management,

and had documentation showing a year and a half's experience as a full-time information systems manager directing employees and running the IT operations of the organization. In the absence of any explanation from the Officer, it is neither transparent nor intelligible why this was not thought to be sufficient, and the decision does not represent a possible, acceptable outcome.

C. Did the Officer's failure to give adequate reasons amount to a breach of procedural fairness?

[28] The applicant submits that CAIPS notes can constitute reasons, but only where they contain enough detail for the applicant to know why his request was denied (*Ogunfowora v Canada (MCI)*, 2007 FC 471, at para 60). In the present case, the CAIPS notes provide no explanation of why the list of duties given by the employer was not sufficient to show that the applicant had performed the duties required under NOC 0213. The Officer had the obligation to provide reasons which were clear, precise, and intelligible, and he did not do this (*Mehterian v Canada (MEI)*, [1992] FCJ No 545 (QL) (FCA); *Saha v Canada (MCI)*, 2003 FC 1325, at para 8; *Jogiat v Canada (MCI)*, 2009 FC 815, at paras 39-41).

[29] The respondent argues that the applicant has not explained what more he would have needed to know, saying that the requirements of NOC 0213 are publicly accessible and therefore the Officer's reasons stating that he did not meet them were clear and adequate. As recently stated by this Court in *Kamchibekov v Canada (MCI)*, 2011 FC 1411, at para 22, "The officer's reasons are sufficient as long as he gave an explanation to the applicant as to why he did not qualify [. . .] While the officer's reasons may be brief [. . .] they are clear and enable the applicant to understand why his application was rejected."

[30] The requirement to provide sufficient reasons is not onerous. I reproduce reasons which were challenged for being inadequate, but were found by Justice Strickland at para 5 of her decision in *Khowaja v Canada (Minister of Citizenship and Immigration)*, 2013 FC 823 to be sufficient for the same occupation:

The GCMS Notes state, in part:

The information submitted to support this application is insufficient to substantiate that client meets the occupational description and/or a substantial number of the main duties of NOC 0213. Client submitted a work reference letter from TRG in Pakistan. The letter describes client as a Project Manager, Data Entry and Data Processing Dept. No explanation is provided as far as the essence of the projects in which client was involved is concerned. No budgetary responsibilities or recruitment of its analysts, engineers, programmers is mentioned, only hiring of supervisors and data entry processing teams, who appear to be employees who are simply recording data in data bases. The job description provided appears to more closely resemble the one of a Data Entry Supervisor as per NOC 1211. In view of all of the concerns mentioned above, I am not satisfied that client completed a period of one year of experience in NOC 0213. Am not satisfied on basis of the information on file that client performed the duties specified in NOC 0213.

Conclusion

[31] I find that being able to “understand why his application was rejected” is precisely what was lacking in this case. The Officer’s decision is unreasonable, it lacked transparency and intelligibility. For the above reasons, the application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted and the applicant may submit a new application with the appropriate fees etc, to be considered under the legislation as it was at the date of his first application by another Officer; and
2. There is no question of general interest to certify.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT:** ANNIS J.

DATED: NOVEMBER 14, 2013

APPEARANCES:

Krassina Kostadinov

FOR THE APPLICANT

Asha Gafar

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates
Barristers & Solicitors
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney,
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT