Federal Court  Cour fédérale

**Date: 20140509**

**Docket: IMM-1136-13**

**Citation: 2014 FC 447**

**Ottawa, Ontario, May 9, 2014**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**EDITHA MORILLO DE OCAMPO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of the January 2, 2013 decision (the Decision) of a visa officer (the Officer) at the Canadian High Commission in Singapore finding that the Applicant did not meet the requirements for a work permit as a live-in-caregiver under the Live-in Caregiver Program (LCP).

[2] For the reasons that follow, I conclude that the Respondent breached the Applicant's right to procedural fairness. Accordingly, I find that this application for judicial review ought to be granted.

## I. Facts

[3] The Applicant, Editha Morillo de Ocampo, is a citizen of the Philippines and a trained caregiver. The Applicant's sister and brother-in-law (Amy and Gene Paul Pineda) live in Canada. They have two children, aged 7 and 9 at the time of the application, and they both work full-time.

[4] In July 2011, Mr. and Mrs. Pineda (the Employers) entered into an employment contract with the Applicant for caregiver services. They applied to Service Canada for a Labour Market Opinion (LMO) and received a positive LMO confirmation on September 22, 2011. They sent a copy of the confirmation to the Applicant. The Applicant then applied for a temporary work permit in Canada under the LCP on or around March 20, 2012.

[5] On April 16, 2012, the High Commission sent a letter to the Employers (the fairness letter) requesting that they fill out a "Supplementary Information Form for Employer" (the Supplementary Information Form), provide details on their accommodations, and provide information regarding their ability to fulfill the terms of the employment contract. On May 4, 2012, the Employers sent the requested information to the High Commission.

[6] On October 24, 2012, the High Commission e-mailed the Applicant informing her that she was required to attend an interview on November 5, 2012, which she did.

## II. The impugned decision

[7] On January 2, 2013, the Officer refused the Applicant a temporary work permit under the LCP. The Officer concluded that the job offer was not *bona fide*. The relevant part of the Officer's reasons, as recorded in notes entered on January 2, 2013, is as follows:

> HOF interviewed on 05 Nov 2012. Notes entered today. Work Experience: Came to [Singapore] in Sep 2010 to work as do[me]stic helper. Takes care of [Singapore employer's] 5-yr-old child. Job Offer: Cdn [employer] is HOF's sister. Cdn [employer] has 2 children now aged & 7 [sic]. HOF said that her sister is offering her the job to help her out (so that she can support HOF's child). HOF's working hrs: 8AM to 5PM or 7AM to 4PM (Mon to Fri) Children's school hrs: HOF does not know. When asked HOF who is currently taking care of the child, she does not know. Cdn [employer] has not employed another LCG since the last left in Feb 2010. Cdn [employer] has put her children in childcare centre. Accommodation: 3-bedroom with Cdn [employer], spouse & 2 children. My concern with this application is the bona fide of the job offer. I am not satisfied that this job offer from Cdn [employer] is bona fide. Most of HOF's working hours are spent as housekeeper rather than a caregiver, given her work schedule and the children's school hours. The children do not appear to be inconvenienced nor was care not provided for them. I have concluded that the job offer has been put into effect in order for HOF to go to [Canada], that job offer is not bona fide. Case refused.

## III. Issue

[8] The only issue to be determined on this judicial review is whether the Officer breached procedural fairness.

## IV. Analysis

[9] It is well established that the appropriate standard of review on issues pertaining to natural justice and procedural fairness is the correctness standard: see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 53-54; *Mudalige Don v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 4 at para 36.

[10] The Applicant argues that the Officer breached procedural fairness because the Officer based the Decision solely on an issue that it did not raise with the Applicant or the Employers, namely, the *bona fides* of the job offer. I agree with that submission.

[11] First of all, I note that there was a spot for the Employers in the Supplementary Information Form to explain why they needed a caregiver now, but the form also instructed the Employers only to fill that out if they have never previously sponsored a caregiver. As they had, the Employers left that section blank, as per the instructions. At the hearing, counsel for the Respondent acknowledged that the form could be interpreted to mean that a rationale for the need of a caregiver was only required if the Employers had never hired a caregiver before. Such an interpretation is all the more reasonable in light of the fact that the Applicant and the Employers could reasonably assume that Service Canada had already assessed that need when reviewing the application for the LMO. According to Citizenship and Immigration Canada's (CIC's) operational manual, one of the functions, and indeed responsibilities, vested on Service Canada is to review the application for the LMO and determine whether the employer in fact

needs a caregiver: see CIC manual entitled "Overseas Processing 14: Processing Applicants for the Live-in Caregiver Program", section 7, "ESDC/Service Canada roles and responsibilities".

[12] Moreover, the High Commission specifically warned the Employer in its fairness letter that despite the existence of an employment contract, CIC had to be satisfied that the Employers were able to fulfill the requirements of that contract. To that end, the High Commission asked the Employers to submit the Supplementary Information Form, proof of property ownership, official floor plan, and proof of their financial ability to fulfill the employment contract. Nowhere did it mention the *bona fides* of the job offer as a concern.

[13] The Officer could also have sought an explanation from the Employers if it had doubts about the *bona fides* of the job offer. The Employers' covering letter had indicated that "[s]hould [the High Commission] require anything else, please feel free to contact us" and provided email and phone contact information. The Respondent replied that the High Commission interviewed the Applicant and directly questioned her on various issues about her application. Yet, there is no evidence that this issue was raised squarely with the Applicant in the interview. In fact, the Applicant deposes that she "was not asked anything about whether or not my Employer 'demonstrated a need for a caregiver'". In any event, that question ought to have been put to the Employers and not to the Applicant, as they were obviously in the best position to answer any preoccupation the Officer may have had with respect to the genuineness of the job offer.

[14] Procedural fairness requires, at a minimum, that an applicant be given adequate notice of the issue and be afforded an opportunity to make written submissions on it: see, e.g., *Mavi v*

*Canada (Attorney General)*, 2011 SCC 30 at para 79; *PSAC v Canada (Attorney General)*, 2013 FC 918 at paras 57-60. This principle applies with equal force in the immigration context: *Li v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284 at paras 37-38.

[15] Counsel for the Respondent argued that the *bona fides* of a job offer is always a relevant consideration, for which the onus of proof is on the Applicant. Following that thesis, the Supplementary Information Form did not relieve the Applicant of that onus or create a legitimate expectation that the High Commission would not make further inquiries. However, this is not supported by the cases cited by the Respondent, nor by the applicable CIC manual.

[16] The cases cited by the Respondent do not in fact support their submissions. In *Soor v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1344, the applicant's LCP application was also denied on the basis of the *bona fides* of the job offer. However, in that case, the officer had given the applicant notice that the *bona fides* of the offer was at issue (at para 7), and the Court was satisfied that the officer had given the applicant a fair opportunity to address that concern (at para 15). In *Bondoc v Canada (Minister of Citizenship and Immigration)*, 2008 FC 842, the Court dealt with the issue of whether the visa officer's decision (finding that the employment offer was not genuine) was reasonable on the merits; it did not deal with the issue of procedural fairness.

[17] As for the CIC manual, section 5.7 sets out the employment contract requirements. Employers must establish that they have sufficient income to provide the wages and benefits for the live-in caregiver based upon provincial wage rates. The position must be full-time and the

employer must be residing in Canada. The employer has to provide suitable accommodation for the live-in caregiver and should include privacy such as a private room with a lock. The live-in caregiver must reside at the employer's residence to qualify for the program. Of course, these requirements are meant to ensure that the job offer is *bona fides*, and I agree with the Respondent that it is an implicit prerequisite. Once all of the requirements are met, however, I fail to see how an application can be dismissed on the ground that the employment offer was not genuine, especially when the Employer and the Applicant have been given to understand that the only concerns were in relation to the property ownership and the configuration of that property.

[18] For all of the foregoing reasons, I am of the view that the Officer acted unfairly and breached the Applicant's right to procedural fairness. The application for judicial review is therefore granted, the Officer's determination of the Applicant's work permit application is set aside, and the file shall be remitted to a different visa officer for re-determination in accordance with these reasons.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** this application for judicial review is granted, the Officer's determination of the Applicant's work permit application is set aside, and the file shall be remitted to a different visa officer for re-determination in accordance with these reasons. No question is certified.

"Yves de Montigny"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1136-13 |
| **STYLE OF CAUSE:** | EDITHA MORILLO DE OCAMPO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 1, 2014 |
| **JUDGMENT AND REASONS:** | DE MONTIGNY J. |
| **DATED:** | MAY 9, 2014 |

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| Manuel Mendelzon | FOR THE RESPONDENT |

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