Federal Court Cour fédérale

Date: 20140527

Docket: IMM-11768-12

Citation: 2014 FC 507

Ottawa, Ontario, May 27, 2014

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

SHUSHAN KOTANYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered by a visa officer of the Embassy of Canada in Moscow [the Officer] rejecting the Applicant's application for permanent residence under the federal skilled worker class. The decision dated November 13, 2012 was

based on the fact that the Applicant failed to meet the National Occupational Classification [NOC] requirements.

II. Facts

[2] The Applicant is a citizen of Armenia who applied in Moscow, Russia, for permanent residence in Canada as a skilled worker on August 15, 2011.

[3] In her application, the Applicant claimed to have worked as an Assistant Restaurant Manager (under NOC 0631 – Restaurant and food service manager) from April 2007 to September 2009, and as a Product Manager (under NOC 0611 – Sales, Marketing and Advertising Managers) between December 2009 and the time she filed her application.

[4] After the Officer talked to her employers, the Applicant was convoked to an interview on October 16, 2012 to address the Officer's concerns with respect to her application.

III. Decision under review

[5] After having spoken with both the Applicant's previous and current employers, the Officer was not satisfied that the Applicant met the requirements set out in paragraphs 75(2)(*b*) and (*c*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. According to the Officer, the Applicant performed neither "the actions described in the lead statement for the occupation as set out in the occupational descriptions" of NOC 0631 and NOC

0611 nor a "substantial number of the main duties of the occupation as set out in the occupational descriptions of [NOC 0631 and NOC 0611], including all of the essential duties" (paragraphs 75(2)(*b*) and (*c*) of the IRPR). She further indicated that while her concerns were to be addressed with the Applicant during the interview held on October 16, 2012, the Applicant nonetheless failed to provide satisfying answers.

[6] Ultimately, the Officer found that the Applicant was not an assistant manager, but rather a manager's assistant (in other words, an assistant to the manager).

IV. Decision under review

[7] The Applicant contends that the Officer's decision is unreasonable. First, the Officer made an error in assessing the Applicant's duties, omitting to consider the Applicant's duties in organizing banquet events in the restaurant. During the conversation between the Applicant's employer and the Officer, the employer stated that the Applicant was a Manager's Assistant, but he rectified his statement in a "Statutory Declaration" wherein it is explained that this error had to do with translation and that the Applicant was indeed an Assistant Manager. The Applicant's explanation and the evidence submitted, including the Statutory Declaration, were consistent.

[8] Second, the Officer breached procedural fairness by adopting a selective approach with respect to the evidence submitted, because she preferred her own interpretation of the Applicant's interview rather than the evidence submitted and she failed to provide adequate reasons.

V. Applicant's further memorandum

[9] The Applicant further submits that the Officer failed to appropriately consider the evidence with which she had been presented. More particularly, she failed to refer to an important piece of evidence that contradicts her finding, namely the Applicant's employer's above-mentioned Statutory Declaration. Also, the Officer appeared to have a "closed mind" in respect to the Applicant's claim. In addition, the Officer failed to address the verifiable and credible evidence submitted by the Applicant the October 16, 2012 interview to the effect that she indeed performed the duties as an assistant manager, i.e. banquet planning activities.

VI. Respondent's reply

[10] The Respondent claims that the Officer's decision is reasonable. Considering that her affidavits were never sworn, the Applicant submitted no evidence in support of her allegations that there are inconsistencies between her version of the October 16, 2012 interview and what was reported about this interview in the Global Case Management System notes [GCMS notes]. The Officer did consider the Statutory Declaration in the GCMS notes but reasonably decided to put more weight on the Applicant's actual statements and that of her employer in relation with the duties performed by the Applicant, and it was certainly open for the Officer to do so.

[11] In addition, the Officer's reasons are entirely sufficient and the assessment made was reasonable considering the circumstances of the case and the evidence on file.

VII. Issue

[12] Did the officer err in rejecting the Applicant's application for permanent residence under the federal skilled worker class?

VIII. Standard of review

[13] As recently confirmed by Justice O'Keefe of this Court, a visa officer's determination of an "applicant's foreign skilled worker application is a finding of fact and law, reviewable on a reasonableness standard" (see *Butt v Canada (Minister of Citizenship and Immigration)*, 2013 FC 618 at para 13, [2013] FCJ No 695; see also *Anabtawi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 856 at para 28, [2012] FCJ No 923; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] SCJ No 9 [*Dunsmuir*]).

[14] Accordingly, this Court shall intervene only if the Officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence with which it had been presented (*Dunsmuir*, above, at para 47). Under this standard, it is not up to the Court to reweigh the evidence or "to substitute its own view of a preferable outcome." (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] SCJ No 12)

IX. **Analysis**

[15] The Applicant applied under NOC 0631 and NOC 0611. That being said, in her written submissions as well as at the hearing, she takes issue only with the fact that her application for permanent residence as an Assistant Restaurant Manager was rejected. As such, the analysis herein shall focus only on the Officer's analysis of the application as it concerns NOC 0631, and for the reasons set out in the following paragraphs, I find that the Officer's decision was entirely reasonable and does not warrant the intervention of the Court.

[16] According to the Officer, the Applicant failed to satisfy paragraphs 75(2)(*b*) and (*c*) of the IRPR, which set out some of the requirements to be satisfied in order for a foreign national to be considered a federal worker:

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection de réfugiés*, DORS/2002-227
PART 6 **ECONOMIC CLASSES**	**PARTIE 6** **IMMIGRATION ECONOMIQUE**
Division 1	**Section 1**
Skilled Workers	**Travailleurs qualifiés**
Federal Skilled Workers	***Travailleurs qualifiés***
[…]	[…]
Skilled workers	*Qualité*
75. (2) A foreign national is a skilled worker if	**75. (2)** Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :
[…]	[…]

(*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;

(*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;

[…]

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) 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;

[…]

[17] The lead statement for *NOC 0631 – Restaurant and food managers*, for the purposes of paragraph 75(2)(*b*) of the IRPR, is as follows:

> Restaurant and food service managers plan, organize, direct, control and evaluate the operations of restaurants, bars, cafeterias and other food and beverage services. They are employed in food and beverage service establishments, or they may be self-employed.

[18] The main duties associated with *NOC 0631 – Restaurant and food managers*, for the purposes of paragraph 75(2)(*c*) of the IRPR, are the following:

- Plan, organize, direct, control and evaluate the operations of a restaurant, bar, cafeteria or other food or beverage service;
- Determine type of services to be offered and implement operational procedures;

- Recruit staff and oversee staff training;
- Set staff work schedules and monitor staff performance;
- Control inventory, monitor revenues and modify procedures and prices;
- Resolve customer complaints and ensure health and safety regulations are followed;
- Negotiate arrangements with suppliers for food and other supplies;
- Negotiate arrangements with clients for catering or use of facilities for banquets or receptions.

[19] Contrary to what is being argued by the Applicant, the Officer did not adopt a selective approach with regard to the evidence in the present case. In fact, I find that she appropriately assessed the evidence.

[20] On October 14, 2012, the Officer met with the Applicant's previous employer at the restaurant where they discussed the Applicant's employment in the business. During this encounter, the employer stated that the Applicant was a manager's assistant at the restaurant and he assimilated her duties to those of a waitress, e.g. greet customers, take orders and to serve food (see GCMS notes, Certified Tribunal Record [CTR], at page 5). During the October 16, 2012 interview, as reported in the GCMS notes, the Applicant indicated that she had been hired after seeing an ad for an opening as a manager's assistant (and not an assistant manager). Also during this interview, the Applicant was questioned with respect to whether or not, in her opinion, a manager's assistant and an assistant manager are the same positions, to which she answered: "They are the same thing in my opinion." (see GCMS notes, CTR, at page 4)

[21] The Applicant claims that during the October 16, 2012 interview, she gave evidence to the effect that she had been an assistant manager at the restaurant and to have indicated to the Officer that she planned banquets or private functions. While this may be the case, it should be noted that the Applicant, who had the burden of proving her claims (see for example *Oladipo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 366 at para 24, [2008] FCJ No 468), based her assertions on evidence that was weak even non-existent, as she submitted only un-sworn affidavits despite having had over a year to correct the situation. The Applicant did not even produce an affidavit from herself which would have given her sworn version of the interview.

[22] After the October 16, 2012 interview, specifically on November 2, 2012, the Applicant sent to the Officer the Statutory Declaration from her previous employer who indicated that she was in fact an assistant manager and not a manager's assistant. This Court notes that the Officer explicitly considered the Statutory Declaration, as well as the documents submitted along with it, in the GCMS notes, stating that despite these documents, and keeping in mind the conversations held with the Applicant herself and the Applicant's previous employer – the essence of which is describe above –, the Officer remained unsatisfied that the Applicant met the NOC 0631 requirements.

[23] This finding is reasonable. Indeed, it is vastly recognized that the assessment and weighing of the evidence lies at the heart of a visa officer's jurisdiction, and as stated above it is not open to this Court to reweigh the evidence:

> [11] The visa officer has the responsibility of determining whether an applicant has in fact performed the duties of the NOC. Considerable discretion is afforded to the officer in this respect, including interpretation of the NOC. The weight to be assigned the various pieces of evidence is the task of the visa officer and it is not for the court to reweigh the evidence. The onus is on the applicant to satisfy the visa officer that she performed the duties contained in the NOC for the intended application. <u>It is within the visa officer's discretion to assess an applicant's experience on the basis of the applicant's representations at the interview and to assign less weight to the written documents</u>. See *Kalia v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 731, [2002] F.C.J. No. 998, *Atangan v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 752, [2002] F.C.J. No. 1017 and *Malik v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1050. [My emphasis.]
>
> [*Kianfer v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1061 at para 11, [2002] FCJ No 1439]

[24] It is also established that a visa officer is presumed to have considered all the evidence with which he or she is presented unless the contrary is proven (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1; see for example *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1083 at para 34, [2013] FCJ No 1180). What is more, the Officer had no obligation to refer to every piece of evidence that is contrary to the decision's finding, and the reasons therein are not to be read hypercritically (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16, 157 FTR 35). In this regard, the Applicant asserts that the Officer failed to mention the employer's Statutory Declaration and the portion of the October 16, 2012 interview related to the banquet-planning duties assumed by the Applicant. However, as stated above, these elements of contradictory proof, which are indeed crucial to the reasonableness of the decision, were actually

addressed by the Officer, who indicated in the GCMS notes that they did not suffice to establish that the Applicant was an assistant manager and not a waitress or manager's assistant.

[25] In a nutshell, while evidence to the contrary was submitted – and duly addressed – the Officer's finding as it relates to the fact that the Applicant was more a manager's assistant or a waitress than an assistant manager in the restaurant was based on a reasonable assessment and weighing of the evidence which constitutes the role of the Officer and not that of the Court. As such, contrary to the Applicant's assertion, the Officer did not have a closed mind and, by way of consequence, did not commit an error in assessing the Applicant's duties.

[26] As for the adequacy of the Officer's reasons, this issue must also be considered under the standard of reasonableness (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22, [2011] 3 SCR 708; see for example *Sidhu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 176 at para 17, [2014] FCJ No 183 [*Sidhu*]). In the case at bar, I find that the reasons read along with the GCMS notes – which form part of the reasons (see for example *Khowaja v Canada (Minister of Citizenship and Immigration)*, 2013 FC 823 at para 3, [2013] FCJ No 904) – were well done, sufficient and adequate as envisioned by case law, as they explain why the permanent resident application failed:

> **[20]** The test of adequacy of reasons has been articulated by this Court numerous times, including recently in *Canada (Minister of Citizenship and Immigration) v. Jeizan*, 2010 FC 323, 386 F.T.R. 1:
>
>> [17] Reasons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was reached. Adequate

> reasons show a grasp of the issues raised by the evidence, allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision: see *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] S.C.J. No. 23 at para. 46; *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.); *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (F.C.A.), [2001] 2 F.C. 25 (C.A.), at para. 22; *Arastu*, [2008] F.C.J. No. 1561, above, at paras. 35-36. [Emphasis added.]
>
> [21] While there is no question that an officer's reasons can be brief, they must serve the functions for which the duty to provide them is imposed – they must inform the Applicant of the underlying rationale for the decision (*VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 at para 21-22 (CA)).
>
> [*Sidhu*, above, at paras 20-21]

[27] In the end, it comes down to whether or not the Officer's finding that the Applicant did not meet the requirements for NOC 0631 falls within the range of acceptable outcomes based on the evidence, and it does. As such, the Officer's decision to reject the Applicant's application for permanent residence as a skilled worker was more than reasonable and this application for judicial review shall be dismissed.

[28] The parties were invited to submit a question for certification, but none were proposed.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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