Federal Court  Cour fédérale

Date: 20160809

Docket: IMM-773-16

Citation: 2016 FC 904

Ottawa, Ontario, August 9, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HARNEK SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of an immigration officer in the Canadian High Commission in India [Visa Officer] dated February 2, 2016, which denied the Applicant's application for permanent residence as a member of the self-employed persons class.

II. BACKGROUND

[2] The Applicant is a 45-year-old citizen of India. He has worked as a farmer for the past several decades in India, cultivating vegetables, wheat and dairy animals on a 30 acre farm.

[3] The Applicant filed an application for permanent residence in Canada under the Business Immigrants, Self-Employed Persons Class, with the intention of setting-up a blueberry farm in the Fraser Valley region of British Columbia.

[4] The Applicant was interviewed by the Visa Officer on February 1, 2016. The interview was conducted in the Punjabi language.

III. DECISION UNDER REVIEW

[5] A Decision sent from the Visa Officer to the Applicant by letter dated February 2, 2016 determined that the Applicant did not qualify for immigration to Canada in the self-employed persons class.

[6] The Visa Officer concluded that the Applicant did not meet the requirements of s 100(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] as he did not come within the meaning of "self-employed person" as set out in s 88(1). The Visa Officer was not satisfied that the Applicant intended to make a significant contribution to any of the economic activities covered by the subsection's definition of "specified economic activities." At the Applicant's interview, the Visa Officer says that the Applicant knew nothing about Canadian

farming practices and had conducted no research into his proposed farming enterprise in Canada. Further, the Applicant knew nothing about his destination and could not explain his business plan. The Visa Officer was unconvinced that the Applicant had the intention and ability to purchase and manage a farm in Canada.

IV. ISSUES

[7] The Applicant raises the following issues in this application:

1. In the circumstances of this case, did the Visa Officer who refused the application for permanent residence under the self-employed category breach the principles of fairness by:

    a. Not giving notice of allegations of fraud and of the Applicant being a member of a terrorist organization which were contained in letters received by Citizenship and Immigration Canada in 2011 and 2013 [poison pen letters] to the Applicant in advance of the interview, and not giving him an opportunity to respond to those allegations;

    b. Not raising the allegations in the poison pen letters of fraud and terrorism at the interview, and not allowing the Applicant to respond to them ;

    c. Not taking into account that it was the Canadian Consulate in Chandigarh that had not allowed the Applicant to go to Canada for an exploratory visit;

    d. Not taking the documents offered by the Applicant to the Visa Officer at the interview despite the fact that it was the Visa Officer who had asked for those very documents;

    e. Using the English words “promotion strategy” and asking the Applicant to explain them when the entire interview was being conducted in Punjabi;

    f. Ignoring the fact that in the absence of an exploratory visit, the Applicant had done the next best thing by hiring an agricultural expert to guide him in his agricultural venture in Canada;

    g. Ignoring the fact that in spite of not having made an exploratory visit to Canada, the Applicant had undertaken sufficient research to settle on a particular farming project which provided good income and employment for Canadians and had hired an agricultural expert to ensure the smooth operation of the farm?

2. In all the circumstances of this case, from a substantive perspective, is the Visa Officer's Decision unreasonable based upon the Visa Officer's failure to consider all the relevant evidence and law?

3. In his arguments, the Applicant also raises bias.

V. STANDARD OF REVIEW

[8] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[9] The first two sub-issues (1a and 1b) raised by the Applicant ask whether the Applicant should have been alerted to several letters on his file and given the opportunity to respond to them. Sub-issue 1e addresses the use of an English term during the Applicant's interview. These are all matters of procedural fairness and attract the standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 15. Correctness will therefore be used to analyze the first set of issues. The issues raised in 1c, 1d,

1f, and 1g are about whether the Visa Officer overlooked or ignored facts and are not procedural fairness issues. They will be assessed on a reasonableness standard.

[10] Moving on to the second issue, a visa officer's assessment of an application for permanent residence involves questions of mixed fact and law and as such is reviewable using the standard of reasonableness: *Canada (Citizenship and Immigration) v Young*, 2016 FCA 183 at para 7; *Odunsi v Canada (Citizenship and Immigration)*, 2016 FC 208 at para 13.

[11] As a matter of procedural fairness, the bias allegations will be reviewed using the standard of correctness in accordance with the governing jurisprudence: *Khosa*, above, at para 43.

[12] 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 para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[13] The following provisions of the Act are relevant in this proceeding:

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	…
If sponsor does not meet requirements	**Cas de la demande parrainée**
(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.	(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage.
…	…
Economic immigration	**Immigration économique**
12 (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	12 (2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[14] The following provisions of the Regulations are relevant in this proceeding:

Definitions	**Définitions**
88 (1) The definitions in this subsection apply in this Division.	88 (1) Les définitions qui suivent s'appliquent à la présente section.
…	…
self-employed person means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada.	***travailleur autonome*** Étranger qui a l'expérience utile et qui a l'intention et est en mesure de créer son propre emploi au Canada et de contribuer de manière importante à des activités économiques déterminées au Canada.
Self-employed Persons	**Travailleurs autonomes**
Members of the class	**Qualité**
100 (1) For the purposes of subsection 12(2) of the Act, the self-employed persons class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada and who are self-employed persons within the meaning of subsection 88(1).	100 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs autonomes est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada et qui sont des travailleurs autonomes au sens du paragraphe 88(1).
Minimal requirements	**Exiges minimales**
(2) If a foreign national who applies as a member of the self-employed persons class is not a self-employed person within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.	(2) Si le demandeur au titre de la catégorie des travailleurs autonomes n'est pas un travailleur autonome au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.

VII. ARGUMENTS

A. *Applicant*

[15] The Applicant submits that the Visa Officer's Decision was both unreasonable and procedurally unfair.

[16] The Visa Officer's conclusion that the Applicant, who had successfully farmed for years, did not have the intention or ability to purchase and manage a farm in Canada is nothing more than speculation. The Applicant demonstrated his intention and ability to carry out farming activities in Canada in several ways: by pursuing his application for permanent residence in the self-employed category for the last six years; by providing evidence of his experience and capital; by pursuing a visitor's visa twice to make an exploratory visit; by hiring an agricultural expert after not being permitted to make an exploratory trip; by gaining the best possible knowledge he could about farming activities in the Fraser Valley; and by demonstrating proof of his net worth of over $800,000.00. Despite being denied a personal visit for research in Canada, the Applicant had done what a prudent self-employed person would do.

[17] The Applicant claims that the visa office that he dealt with in New Delhi has refused 95% of the self-employed category applications which have come before it, demonstrating a level of bias towards this type of application.

[18] Noting that in the Visa Officer's affidavit, the Officer indicates that he does not remember whether he translated the words "promotion strategy" into English, the Applicant

asserts that it would appear that the interview may have been conducted in a mixture of English and Punjabi, making it difficult for the Applicant to answer questions.

[19] The Applicant says that a reasonable visa officer would have given the Applicant prior notice of the allegations in the poison pen letters and provided the Applicant with an opportunity to respond to them. While the Visa Officer might have said that these claims did not sway him in his decision-making, the Applicant says that they would have been at the back of their mind, preventing the Visa Officer from reaching a reasonable decision.

B. *Respondent*

[20] The Respondent says that the Visa Officer's Decision and reasons as detailed in the Global Case Management System [GCMS] notes fully meet the required standard of justification, transparency and intelligibility. The Visa Officer reasonably concluded from the interview that the Applicant knew little about farming in Canada and had done little research on the subject or on his planned location of the new farm.

[21] As regards the "poison pen" letters, the Respondent says that these letters received by Citizenship and Immigration Canada in 2011 and 2013, alleged fraud and misrepresentation, that the Applicant was part of a terrorist organization, that he had previously been in jail, and that his employment and education documents were fraudulent. The Respondent submits that there is nothing to indicate that these letters had any relevance to the Visa Officer's issues of concern in the Decision or played any part in their conclusions, which were reached based on an in-person interview. The Applicant's stated credentials as a farmer had been accepted and there was

nothing to indicate that the Visa Officer considered the Applicant to be a terrorist, a former criminal or suspected him of fraud or misrepresentation.

[22] The Respondent submits that the letters are immaterial and had no bearing on the questions before the Visa Officer. He therefore had no obligation to raise them with the Applicant as extrinsic evidence: *Karakulak v Canada (Citizenship and Immigration)*, [1996] FCJ No 1227 at paras 7-11; *Tareen v Canada (Citizenship and Immigration)*, 2015 FC 1260 at paras 45-46 [*Tareen*]. There is no basis to the Applicant's argument that he was somehow treated unfairly in this process.

VIII. ANALYSIS

[23] The Applicant raises procedural unfairness, bias and unreasonableness as issues for judicial review. I will deal with each in turn.

A. *Procedural Unfairness – Poison Pen Letters*

[24] The Applicant claims that the Visa Officer did not disclose to him the poison pen letters on the file and so did not provide him with an opportunity to respond to them. He argues that "any human being is liable to be swayed by such drastic allegations" and that the "Visa Officer may not have conscientiously (*sic*) been affected but it may have pushed him to come to a negative decision by finding "other" reasons."

[25] As the record and the Visa Officer's affidavit make clear, the Visa Officer did not know about the poison pen letters either at the time of the interview or when she later made the refusal Decision. The Visa Officer only discovered the existence of this correspondence when she prepared the Certified Tribunal Record for this judicial review application, so that it is clear that it did not, and could not, have affected her Decision in any way.

[26] The Applicant attempts to find contradictions in the Visa Officer's affidavit, but there are none. The Applicant simply does not understand what the affidavit says.

[27] If the poison pen letters could have no impact upon the Decision, then there was no procedural unfairness in the Visa Officer's not bringing the correspondence to the Applicant's attention so that he could comment upon it. See *Tareen*, above, at paras 45-46.

[28] Wisely, the Applicant withdrew his allegations of procedural unfairness at the hearing before me on July 20, 2016.

B. *Bias*

[29] The Applicant alleges bias against the New Delhi visa office and says that it "has refused 95% of the self-employed category applications which have come before them." He says further that:

> This high percentage of refusals shows a level of bias towards self-employed category applications in New Delhi. It is particularly exemplified in the current application where the applicant had the necessary capital, the necessary experience and had done the

> necessary work by hiring an agriculture expert. Any decision made through bias, can never be reasonable and in fact is unlawful.

[30] A negative decision is not evidence of bias. As I will discuss later, the Decision is entirely reasonable based upon the evidence before the Visa Officer.

[31] As regards the alleged 95% refusal rate, the Applicant says in his written arguments that his "information comes from statistics that the Department of Immigration has." Argument and assertion are not evidence. In his affidavit, at paragraph 10, the Applicant opines as follows:

> THAT I verily believe that I had the feeling that the Canadian High Commission in New Delhi was already predisposed to refusing the Self Employed Category application that I was making. I subsequently did some research and found out that this particular Canadian High Commission, located in New Delhi refuses 95% of Self Employed Category applications. This is an astronomical percentage and shows systemic bias, perhaps based on some policy directions received from the previous government.

[32] There is no evidence which identifies the source of this statistical information, or the nature of the research. There is insufficient evidence here to support any kind of bias. See *Mohitian v Canada (Citizenship and Immigration)*, 2015 FC 1393 at para 13 and *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8.

[33] Even if the statistic could be substantiated, it is not, *per se*, evidence of bias or even a reasonable apprehension of bias. We don't know what the refusal rate at other visa offices is for this kind of application, and the high rate could just as well reflect the poor quality of applications received as a pre-disposition on the part of the visa officers involved in dealing with them.

[34] The Applicant has not established bias, or even a reasonable apprehension of bias.

[35] Once again, the Applicant withdrew his allegations of bias based upon an alleged 95% refusal rate in the hearing before me on July 20, 2016.

[36] Related to the allegations of bias is the Applicant's assertion that the Visa Officer never took or reviewed the updated documentation he brought to the interview. This allegation is refuted by the Visa Officer in her affidavit that she did accept and review the documentation and by the fact that the Visa Officer included the documents in the Certified Tribunal Record. So, once again, the Applicant's allegation is a bald accusation that is not supported by the record before me. The Applicant withdrew his allegation that the Visa Officer did not take his documentation, but he asserts that she didn't ask him anything about it, so that this is now part of his unreasonableness argument.

C. *Reasonableness*

[37] The Applicant raises a variety of arguments (some of them in his affidavit where they are inadmissible) to try to persuade the Court that the Decision is unreasonable. Some of the arguments, such as the fact that he had been unable to make a personal exploratory visit to Canada, are simply irrelevant for the Decision that the Visa Officer had to make under the Act and ss 88(1), 100(1) and (2) of the Regulations.

[38] At other times, the Applicant disputes parts of the Visa Officer's summary of what occurred at the interview. But the Visa Officer's version of what was said and done is contained

in the GCMS notes which were entered on the system soon after the interview. The Court has consistently made it clear that GCMS notes are to be preferred over affidavits that are sworn at a later date. This is because the notes are contemporaneous – or nearly – and officers have no personal interest that might cause them to make inaccurate entries. See *Oei v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 466 at para 43.

[39] The Applicant also argues that the Visa Officer asked him questions that had no relevance, but here again the Applicant is simply being argumentative. A reading of the GCMS notes reveals that all of the questions have a relevance to the Applicant's aspirations to farm in Chilliwack and the experience and finances he would need to do so. The Visa Officer was reasonable in finding the business plan inexplicable and vague. The Applicant appears to acknowledge that he has little relevant experience or knowledge of farming in British Columbia but seems to think that this is no detriment because he will be able to rely on others. However, the business plan he presented is full of vague strategies that the Applicant did nothing to clarify or supplement at the interview.

[40] Even the Applicant's assertion that he presented "concrete proof of his net worth of over $800,000.00 and surely this was more than enough for buying a farm of only $500,000.00" fails to appreciate that the $500,000.00 would only be a down payment and not the total price for the farm, and that his net worth statement only indicated movable assets of about $35,000 without any indication that he plans to sell his agricultural property in India to purchase a farm in Canada.

[41] Whether or not the Visa Officer used the English phrase "promotion strategy" – as it appears on the business plan – instead of translating it into Punjabi is not material. From all of the questions asked, it was clear that the Applicant did not know or understand his own business plan. In addition, of course, the Applicant demonstrated zero efficacy in either of Canada's official languages.

[42] It is also clear from the GCMS notes that the Visa Officer did question the Applicant on the updated documentation that he brought to the meeting.

[43] In short, the reasons found in the GCMS notes meet the required standard of justification, transparency and intelligibility. The Visa Officer was simply not satisfied that the Applicant had the experience, the wherewithal, or even the intention, to meaningfully engage in farming in Canada. The Decision cannot be said to fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[44] This case is remarkably similar to *Sahota v Canada (Minister of Citizenship and Immigration)*, 2005 FC 856 where the Court had the following to say:

> 10 The Visa Officer was not satisfied that Mr. Sahota had the intention and ability to be self-employed in Canada. Although he had what she deemed to be a comprehensive business plan, he did not know what it meant. The notes of interview indicate that he did not know what crops were suitable to be grown in Ontario, where he intended to locate, and was not aware of geography and climactic conditions. Furthermore, his prior experience had been in growing wheat and rice and he now intended to grow fruit and vegetables. His only experience in that regard was growing vegetables for his own consumption. There are parts of her letter decision, and notes, which are questionable. Although Mr. Sahota appeared to have sufficient assets, she was concerned that most of

> them were fixed assets, i.e. his farm in India which would have to be sold. She was also concerned that he had not previously visited Canada to assess the situation first-hand.
>
> …
>
> 12 Certainly, the fact that Mr. Sahota had not previously visited Canada was not fatal to his application, and I do not read the Visa Officer's decision that way. *(Cheng v. Canada (Minister of Citizenship & Immigration)*, [2001] F.C.J. No. 45 (Fed. T.D.), Dawson J.)
>
> 13 In *Hao v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 296 (Fed. T.D.), Reed J., particularly at paragraphs 25 and 26, held that it was not unreasonable for a visa officer to explore a business plan to assess the applicant's knowledge of the business environment and the cost of doing business. These questions are relevant to the assessment of the seriousness of the applicant's intentions and his ability to carry out those intentions. If the plan is not realistic or is excessively vague, he is unlikely to meet the requirements for an entrepreneur immigrant. I do not draw a distinction simply because Mr. Sahota proposes to be self-employed. He would still be a business immigrant.
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> 14 In *Shehada v. Canada (Minister of Citizenship & Immigration*), 2004 FC 11, [2004] F.C.J. No. 12 (F.C.), Pinard J., relying on earlier jurisprudence, noted that a lack of research with respect to the proposed venture could justify a finding that the plan was not viable. In that case, the applicant was given an opportunity to explain his business proposal, but was unable to do so. The same holds true here.

[45] The same holds here.

[46] Counsel agree that no question for certification arises from this application 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

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