Federal Court  Cour fédérale

Date: 20170824

Docket: IMM-780-17

Citation: 2017 FC 782

Ottawa, Ontario, August 24, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

GAGANDEEP KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant applies for leave and judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") of a Visa Officer's decision of February 15, 2017, in New Delhi, refusing her application for a temporary work permit as an in-home caregiver on the basis that the Applicant was unable to demonstrate that she adequately met the job requirements of her prospective employment.

II. Background

[2] The Applicant, Gagandeep Kaur, is a citizen of India. She submitted an application for a temporary work permit as an in-home caregiver in November 2016.

[3] The Applicant's application was reviewed by the Visa Section of the High Commission of Canada in New Delhi, India, and on December 22, 2016, it was determined that an interview was required to assess the information on file.

[4] The Applicant attended at the High Commission in New Delhi on February 15, 2017, to be interviewed. That interview is described in detail in the Visa Officer's Global Case management System ("GCMS") Notes, and the Visa Officer was not satisfied that the Applicant had the requisite experience, noting that:

> I am not satisfied that she has experience because she was unable to explain her duties in any detail. She was unable to explain what she studied in the stated nanny course. I am, therefore, not satisfied that she has diploma or training as a caregiver. I gave her an opportunity to respond. She said, "I have done the jobs in the home and hospital My employer hire me because they want a Punjabi nanny who teach Punjabi culture and cook Punjabi food." Concerns persist. Refused.

[5] The Visa Officer refused the work permit application by letter dated February 15, 2017, on the basis that the Applicant was not able to demonstrate that she adequately meets the job requirements of her prospective employment.

[6] The Visa Officer also indicated in his electronic notes that he had concerns about the Applicant's English proficiency and the genuineness of her IELTS test scores/certificate.

III. Issues

[7] The issues are:

A. Is the Visa Officer's decision reasonable?

B. Is there a breach of procedural fairness?

IV. Standard of Review

[8] The decision that the Applicant failed to meet the job requirement of English language proficiency or that she was unable to explain her employment duties or what she studied in a nanny course she undertook, involve questions of fact or mixed law and fact and are reviewable on the standard of reasonableness.

[9] The question of breach of procedural fairness is reviewable on the standard of correctness.

V. Analysis

[10] The parties agreed at the outset of the hearing that the applicable section of the *Immigration and Refugee Protection Regulations*, (SOR /2002-227) ("Immigration Regulations"), is section 200 and specifically subsection 200(3) and 200(3)(a), which deals with

exceptions to the issuance of work permits in respect of foreign nationals making applications for work permits.

[11] Subsection 200(3) reads:

Exceptions

(3) An officer shall not issue a work permit to a foreign national if

(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;

(b) in the case of a foreign national who intends to work in the Province of Quebec and does not hold a *Certificat d'acceptation du Québec*, a determination under section 203 is required and the laws of that Province require that the foreign national hold a *Certificat d'acceptation du Québec*;

(c) the work that the foreign national intends to perform is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute;

(d) [Repealed, SOR/2017-78, s. 8]

(e) the foreign national has engaged in unauthorized study or work in Canada or has failed to comply with a condition of a previous permit or authorization unless

(i) a period of six months has elapsed since the cessation of the unauthorized work or study or failure to comply with a condition,

(ii) the study or work was unauthorized by reason only that the foreign national did not comply with conditions imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or

Exceptions

(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :

a) l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé;

b) l'étranger qui cherche à travailler dans la province de Québec ne détient pas le certificat d'acceptation qu'exige la législation de cette province et est assujetti à la décision prévue à l'article 203;

c) le travail que l'étranger entend exercer est susceptible de nuire au règlement de tout conflit de travail en cours ou à l'emploi de toute personne touchée par ce conflit;

d) [Abrogé, DORS/2017-78, art. 8]

e) il a poursuivi des études ou exercé un emploi au Canada sans autorisation ou permis ou a enfreint les conditions de l'autorisation ou du permis qui lui a été délivré, sauf dans les cas suivants :

(i) une période de six mois s'est écoulée depuis soit la cessation des études ou du travail faits sans autorisation ou permis, soit le non-respect des conditions de l'autorisation ou du permis,

(ii) ses études ou son travail n'ont pas été autorisés pour la seule raison que les conditions visées à l'alinéa 185a), aux sous-alinéas 185b)(i) à (iii) ou à l'alinéa 185c) n'ont pas été respectées,

paragraph 185(c);

(iii) section 206 applies to them; or

(iv) the foreign national was subsequently issued a temporary resident permit under subsection 24(1) of the Act;

(f) in the case of a foreign national referred to in subparagraphs (1)(c)(i) to (iii), the issuance of a work permit would be inconsistent with the terms of a federal-provincial agreement that apply to the employment of foreign nationals;

(f.1) in the case of a foreign national referred to in subparagraph (1)(c)(ii.1), the fee referred to in section 303.1 has not been paid or the information referred to in section 209.11 has not been provided before the foreign national makes an application for a work permit;

(g) the foreign national has worked in Canada for one or more periods totalling four years, unless

(i) a period of forty-eight months has elapsed since the day on which the foreign national accumulated four years of work in Canada,

(ii) the foreign national intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents, or

(iii) the foreign national intends to perform work pursuant to an international agreement between Canada and one or more countries, including an agreement concerning seasonal agricultural workers;

(g.1) the foreign national intends to work for an employer who, on a regular basis, offers striptease, erotic dance, escort services or

(iii) il est visé par l'article 206,

(iv) il s'est subséquemment vu délivrer un permis de séjour temporaire au titre du paragraphe 24(1) de la Loi;

f) s'agissant d'un étranger visé à l'un des sous-alinéas (1)c)(i) à (iii), la délivrance du permis de travail ne respecte pas les conditions prévues à l'accord fédéral-provincial applicable à l'embauche de travailleurs étrangers;

f.1) s'agissant d'un étranger visé au sous-alinéa (1)c)(ii.1), les frais visés à l'article 303.1 n'ont pas été payés ou les renseignements visés à l'article 209.11 n'ont pas été fournis avant que la demande de permis de travail de l'étranger n'ait été faite;

g) l'étranger a travaillé au Canada pendant une ou plusieurs périodes totalisant quatre ans, sauf si, selon le cas :

(i) au moins 48 mois se sont écoulés depuis la fin de la période de quatre ans,

(ii) il entend exercer un travail qui permettrait de créer ou de conserver des débouchés ou des avantages sociaux, culturels ou économiques pour les citoyens canadiens ou les résidents permanents,

(iii) il entend exercer un travail visé par un accord international conclu entre le Canada et un ou plusieurs pays, y compris un accord concernant les travailleurs agricoles saisonniers;

g.1) l'étranger entend travailler pour un employeur qui offre, sur une base régulière, des activités de danse nue ou érotique, des services d'escorte ou des massages érotiques;

h) l'étranger entend travailler pour un employeur qui :

(i) soit a fait l'objet d'une conclusion aux

erotic massages; or

(h) the foreign national intends to work for an employer who is

(i) subject to a determination made under subsection 203(5), if two years have not elapsed since the day on which that determination was made,

(ii) ineligible under paragraph 209.95(1)(b), or

(iii) in default of any amount payable in respect of an administrative monetary penalty, including if the employer fails to comply with a payment agreement for the payment of that amount.

termes du paragraphe 203(5), s'il ne s'est pas écoulé deux ans depuis la date à laquelle la conclusion a été formulée,

(ii) soit est inadmissible en application de l'alinéa 209.95(1)b),

(iii) soit est en défaut de paiement de tout montant exigible au titre d'une sanction administrative pécuniaire, notamment s'il n'a pas respecté tout accord relatif au versement de ce montant.

A. *Reasonableness & Procedural Fairness*

[12] The Visa Officer decided that the Applicant was unable to demonstrate that she adequately meets the job requirements of her prospective employment, that her answers to a number of questions were unresponsive and as well demonstrated an inability to communicate effectively in English, contrary to her IELTS English Language test certificate level 5 proficiency rating, which raised credibility concerns.

[13] The Applicant argues that the Visa Officer failed to allow the Applicant an opportunity to address the concerns about the genuineness of the IELTS test scores and that, contrary to the Visa Officer's decision that she showed almost no proficiency in English and was unable to provide details of her work requirements and training, the Applicant in fact did so.

[14] Moreover, the Applicant argues that the glass barrier used in the interview booth prevented her from hearing the Visa Officer clearly and that the Visa Officer spoke very fast, was angry and frustrated when asked to repeat questions, and appeared disinterested in the Applicant's answers generally.

[15] The Applicant also states that the Work Permit Application filed included substantial supporting documents, including objective evidence of her English language proficiency in the form of the IELTS English language test certificate showing she achieved an overall score of CLB 5 for her English Language ability, a diploma certificate confirming that she has successfully completed a live-in caregiver course and reference letter in proof of her past work experience.

[16] The Respondent answers that the Applicant failed to establish that she adequately meets the job requirements of her prospective employment.

[17] Further, while the Applicant argues that the glass barrier in the interview booth prevented her from hearing the Visa Officer clearly, she did not raise this as a concern during the interview, nor does the record show that the Visa Officer's demeanor was unreasonable or gives a reasonable apprehensive of bias.

[18] The essence of the Respondent's argument is that the substantive basis for the Visa Officer's negative decision is that the Applicant could not satisfy the job requirements and her

inability to describe her relevant training – it was the Applicant's job to put her best foot forward and she failed to do so.

[19] It is well settled that the level of procedural fairness owed to visa applicants is low and does not generally require that applicants be granted an opportunity to address a visa officer's concerns. This level of procedural fairness reflects the fact that visa applications do not raise substantive rights, as applicants do not have an unqualified right to enter Canada, and that applicants may reapply for a work permit (*Sulce v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1132 at para 10).

[20] It is also well settled that it is not the Court's role to reweigh evidence.

[21] The problem with the Respondent's position here is that the Visa Officer clearly raised credibility concerns about the Applicant's English language IELTS certificate and her ability to perform her job responsibilities, yet effectively gave her no opportunity to address at least his credibility concerns regarding her English proficiency.

[22] Both parties referred to the Canadian Government guidelines, Integrity concerns with respect to language test results (page 78 of the Applicant's Record) and Foreign workers: Assessing language requirements (pages 90, 91 of the Applicant's Record).

[23] The relevant excerpts are as follows:

> If you are not satisfied as to the applicant's language proficiency, but there is insufficient evidence to establish fraud or malfeasance

> in the testing procedures for the case in question and to substantiate a refusal for misrepresentation, then inform the applicant of your concerns and, in coordination with the testing agency, provide an opportunity for the applicant to take a second test at the testing agency's expense and with visa office supervision. If the applicant refuses the third-party language testing option, then refuse the application for misrepresentation, given the discrepancy between the test scores and the actual language abilities.
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> An applicant's language ability can be assessed through an interview or official testing such as IELTS/TEF or in-house missing testing practice. In deciding to require proof of language ability, the officer's notes should refer to the LMIA requirements, working conditions as described in the job offer and NOC requirements for the specific occupation, in determining what precise level of language requirement is necessary to perform the work sought. System notes must clearly indicate the officer's language assessment, and in the case of a refusal, clearly show a detailed analysis on how the applicant failed to satisfy the officer that they would be able to perform the work sought.
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[24] While these are only guidelines and not legal requirements, the failure to clearly show a detailed analysis on how the applicant failed to satisfy the officer that they would be able to perform the work sought is obviously missing, in that the decision is not justified, transparent and intelligible on this front, such that it is neither reasonable nor correct.

[25] Moreover, contrary to the Visa Officer's conclusion that the Applicant has almost no

proficiency in English, his GCMS notes demonstrate the opposite, particularly when one reasonably and objectively looks at the level 5 proficiency of the IELTS certificate:

Band score	Skill level	Description
5	Modest user	The test taker has an effective command of the language despite some inaccuracies, inappropriate usage and misunderstandings. They can use and understand fairly complex language, particularly in familiar situations.

[26] The Officer's decision was unreasonable.

JUDGMENT in IMM-780-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted back to a different officer for reconsideration;

2. No question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Fritz Gaerdes	FOR THE APPLICANT
Ms. Maia McEachern	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon & Associates Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT