Federal Court  Cour fédérale

Date: 20180115

Docket: IMM-2242-17

Citation: 2018 FC 29

Montréal, Quebec, January 15, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SHAHZAD CHAMMA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] of a decision dated May 15, 2017, by an immigration officer [Officer] of the Consulate General of Canada in New York, United States, refusing the Applicant's work permit application.

II. Facts

[2] The Applicant, aged 41, is a citizen of Pakistan.

[3] The Applicant is married since 2008 and has three children. The Applicant's wife and children are citizens of Pakistan, except for the youngest one: he was born in Canada on June 27, 2016.

[4] The Applicant also has seven siblings. Only one of them lives in South Africa and the others reside in Pakistan.

[5] In 2002, the Applicant had applied for a tourism temporary resident visa to Canada; however, a visa officer refused his application.

[6] The Applicant is the owner and sole proprietor of Chamma Electronics Inc. since 1997. He has also worked as a senior manager since 1997. The company is located in Karachi, Pakistan and sells mobile devices and accessories. As of June 30, 2016, the business has around 20 employees and possesses assets of approximately $2.5 million CAD. On November 18, 2016, Chamma Electronics Inc. was incorporated in Canada. The Applicant owns 75 % of the shares of the company. In order to launch its Canadian operations, Chamma Electronics would like to intra-corporately transfer the Applicant to its start-up affiliate company in Canada and allow him to occupy a similar senior managerial position for an initial temporary period of one year. The

Applicant intends to invest an initial flux of $100,000 CAN for the launching of the Canadian affiliate of Chamma Electronics.

[7] On February 8, 2016, the Applicant submitted a second application for a temporary resident visa. The Applicant entered Canada on March 22, 2016, with his wife and two non-Canadian children. The Applicant states that he came to Canada on an exploratory business visit to investigate opportunities for the expansion of Chamma Electronics into the Canadian marketplace.

[8] On January 18, 2017, the Applicant filed an intra-company transfer work permit application. The Applicant requested a work permit valid for an initial temporary period of one year (March 1, 2017 to March 1, 2018). In his application, the Applicant failed to mention his temporary resident visa refusal from 2002. He also mentioned that his spouse and children would not be accompanying him during his authorized stay in Canada; however, the spouse and children are in Canada and the family, including the Applicant, applied for a visa extension on March 21, 2017. On July 13, 2017, the extension was granted for one month.

III. Decision

[9] On May 15, 2017, under subsection 11(1) of the IRPA, the Officer refused the Applicant's work permit application; the Applicant did not meet the legislative requirements to obtain a work permit. First, the Officer was not convinced that the Applicant had demonstrated that his situation is that of the exceptions of sections 186 or 203 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. As a result, the Applicant required a labour

market impact assessment [LMIA] before a work permit could be issued to him. Second, the Officer was not satisfied that the Applicant had answered all questions truthfully, as required by subsection 16(1) of the IRPA: the Applicant failed to mention that he was previously refused a temporary resident visa for Canada back in 2002. Finally, the Officer found that the Applicant lacked compelling evidence of strong ties to his home country. The Global Case Management System records [GCMS notes] served as reasons for the Officer's decision.

[10] On May 18, 2017, the Applicant filed an application for leave and for judicial review of the Officer's decision. On September 6, 2017, the application for leave was granted by this Court.

IV. Issues

[11] This matter raises the following issue: Did the Officer render a reasonable decision?

[12] The Court finds that the applicable standard of review on issues of fact is that of reasonableness. A refusal of a temporary work permit application is an administrative decision that requires a high degree of deference from this Court because of the visa officers' "unique and localized expertise" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 46; *Arora v Canada (Citizenship and Immigration)*, 2011 FC 241 at para 23; *Samuel v Canada (Citizenship and Immigration)*, 2010 FC 223 at para 26).

V. Relevant Provisions

[13] Subsection 11(1) of the IRPA states:

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.

[14] Subsection 205(a) of the IRPR states:

Canadian interests	**Intérêts canadiens**
205 A work permit may be issued under section 200 to a foreign national who intends to perform work that	**205** Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes :
(a) would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents;	a) il permet de créer ou de conserver des débouchés ou des avantages sociaux, culturels ou économiques pour les citoyens canadiens ou les résidents permanents;

VI. Submissions of the Parties

A. *Submissions of the Applicant*

[15] According to the Applicant, the Officer erred in law by rendering his decision. The Temporary Foreign Worker Guidelines (FW 1) sets out the requirements and eligibility for an applicant to qualify for an intra-company transfer that is LMIA exempt. The Applicant submits that he was exempt from the LMIA requirement under the IRPR and thus allowed to obtain a work permit pursuant to rule 205(a) of the IRPR. The Officer failed to consider the "start-up" nature of the Canadian affiliate by overlooking pertinent evidence and failed to follow the FW 1 Guidelines and the Regulations.

[16] The Applicant submits that there was yet no business in Canada that is fully functional, as it is still a start-up business. The Applicant came to Canada in order to establish the new entity, to find it a place to operate, to hire employees and buy equipment. All this information was in the evidence submitted by the Applicant: in the Submission Letter, the Business Plan, the letters of support from the Manager of Chamma Electronics in Pakistan, as well as corporate tax documents from Pakistan. These pieces of evidence directly contradicted the findings made by the Officer.

> The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency"
>
> (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35 at para 15.)

[17] According to the Applicant, the Officer also erred by making findings such as "there is no clear and compelling evidence Subj was actually employed by the business/managing the business in Pakistan" (Certified Tribunal Record, GCMS notes, p 4) and "it would appear Subj had decided his apparent business in Pakistan should move its headquarters to Cda, but before the apparent business has an office location and equipment or employees" (Certified Tribunal Record, GCMS notes, p 4). Such findings contradict the very nature of a start-up company.

[18] The Applicant further submits that Citizenship and Immigration Canada [CIC] has provided specific guidelines for the assessment of start-up companies in the context of intra-company transfers.

> **Guidelines when assessing Start-Up Companies**
>
> Requirements for the Company
>
> - Generally, the company must secure physical premises to house the Canadian operation, particularly in the case of Specialized knowledge. However, at times, in cases of a Senior Manager/Executive, it would be acceptable that the address of the new start-up has not been secured yet – for example, when it is counsel's address until a time that the executive can purchase or lease a premise. [Emphasis added.]
>
> (FW 1 Temporary Foreign Worker Guidelines, p 63 of 191.)

The Applicant mentioned his residential address in Canada for his business' address, as it is normal at this stage for his company not to have an address or a place of operation. In any event, the Business Plan detailed a proposed location for a kiosk for the company in Canada.

[19] In addition, the Applicant argues that the Officer overlooked additional relevant details in the record and found that there was no qualifying business relationship between the Canadian

affiliate and the company in Pakistan. In the GCMS notes, the Officer concluded that he was "not satisfied there is a qualifying business relationship b/w the entity in Cda and the apparent business in Pakistan". The CIC website clearly defines the qualifying relationship between a Canadian and a foreign employer as:

> […] legal entities that have a *parent*, *subsidiary*, *branch* or *affiliate* business relationship. Both the Canadian and foreign companies must be, or will be doing business. [Emphasis added.]
>
> (International Mobility Program: Canadian interests – Significant benefit – Intra-company transferees – Qualifying relationship between the Canadian and foreign employer [R205(a)] (exemption code C12).)

The Applicant states that there was sufficient evidence to establish the affiliate relationship, such as the business plan, corporate tax documentation from Pakistan and a Canadian certificate of incorporation of the company in Canada.

[20] Moreover, the Applicant argues that the Officer erroneously focused the Applicant's presence in Canada as a tourist, when in fact, he was in Canada for exploratory purposes for the expansion of his business. Also, the date of the death of the Applicant's father and the date of the transfer of the company were irrelevant to consider for the work permit application, because the Applicant currently owns Chamma Electronics in Pakistan as per the evidence that was before the Officer.

[21] Finally, the Applicant states that the Officer failed to provide adequate reasons as to why the Applicant's ties to Pakistan were a basis to deny the application. Applicants should be

allowed to fully understand the decision. In the case at bar, the decision provided no reasons as to the relevance of the factor regarding the Applicant's ties in Pakistan.

B. *Submissions of the Respondent*

[22] The Respondent, on the other hand, argues that the Officer's decision is reasonable. The Officer made use of the FW 1 Guidelines and was not satisfied that the Applicant met all of the requirements based on the evidence before him. The Respondent submits that the Officer raised concerns about the Applicant's desire to stay in Canada, "but not necessarily his qualifications as an intra-company transferee".

[23] The Respondent further submits that the onus rested on the Applicant to have a complete application. The Applicant cannot argue that he is exempt from having to obtain an LMIA. The Officer was able to make a determination in light of the evidence before him. The Respondent reminds the Applicant that he may reapply if he believes he has evidence to satisfy the Officer that he is LMIA exempt to obtain a work permit.

[24] The Applicant argues that the Officer failed to assess the start-up nature of the Canadian affiliate. The Respondent, on the other hand, submits that the Applicant's argument fails to take into account the Officer's concern with respect to whether the Applicant was employed by the management entity of the business in Pakistan. Also, as a start-up company in Canada, the FW 1 Guidelines defines "doing business" as the following:

> **Doing business** means regularly, systematically, and continuously providing goods and/or services by a parent, branch, subsidiary, or affiliate in Canada and the foreign country, as the case may be. It

> does not include the mere presence of an agent or office in Canada. For instance, a company with no employees which exists in name only and is established for the sole purpose of facilitating the entry of intra-company transferees would not qualify. [Emphasis added.]

[25] In response to the Applicant's argument that the Officer overlooked relevant details in the evidence before him, the Respondent argues that the Officer is not only presumed to have considered all of the evidence in the record, but that he did in fact consider these details and they are referenced in his reasons.

> I note the other photos of the apparent business, the untranslated ID cards, and the bank stmts submitted with this WP request. I not the Cdn company was incorporated as of 18/Nov/16 and that Subj holds 75 % of the shares. [...] I see the docs written by the apparent manager of the Pakistani business. I see the Tax ID info for the Pakistani business referencing Shahzad Chamma.
>
> (Certified Tribunal Record, GCMS notes, p 3.)

[26] Unlike what the Applicant is arguing, the Respondent submits that the Officer did not focus on "unnecessary details" in order to render his decision. In fact, the Officer's finding indicating that there was a lack of connection between the Applicant and Chamma Electronics in Pakistan is a significant detail to consider for an intra-company transfer. It was also reasonable for the Officer to consider the Applicant's visa application as a tourist in Canada, because during his initial trip to Canada, his wife gave birth to a boy and the Applicant found a residential address to not only to live in Canada but to also register his business. Consequently, the intra-company work permit application was only filed later on, when the Applicant and his family had already been living in Canada.

[27] Moreover, the Respondent argues that it was reasonable for the Officer to draw a negative inference on the credibility of the Applicant. In fact, the Applicant claims to have made an inadvertent error by failing to mention his temporary resident visa refusal in 2002 in his work permit application; however, the work permit application specifically asks the Applicant if he has ever been refused a visa before and the Applicant checked off the "no" box (Certified Tribunal Record, work permit application, p 12). The Respondent adds that the Applicant was represented at the time; and, thus, cannot possibly argue that he has made a mistake in his application.

[28] Finally, the Respondent submits that a visa officer's duty to provide reasons when rejecting a temporary resident visa is minimal. According to the Respondent, the Officer's reasons are clear and supportive of his conclusions.

C. *Reply*

[29] Although the Officer indicated in his GCMS notes a list of the evidence that was included in the Applicant's work permit application, the Applicant argues that there were insufficient reasons as to why that evidence was not compelling enough to issue the work permit.

[30] The Applicant reiterates the fact that he satisfies the requirements of the FW 1 Guidelines on an objective basis, because he was in fact LMIA exempt in order to obtain a work permit as an intra-company transferee in light of the evidence before the Officer. The Officer thus failed to consider the work permit application with these guidelines.

[31] The onus was on the Applicant to provide the Officer with all of the necessary evidence to convince him that he was LMIA exempt. The Applicant argues that he did in fact submit information to support the facts that were before the Officer.

[32] Finally, the Applicant submits once again that he stayed in Canada for business purposes. It was unreasonable for the Officer to overlook such an important detail and to render his decision based on the Applicant's visitor status in Canada when another visa officer had already his business exploration visit in Canada.

VII. Analysis

[33] For the following reasons, the application for judicial review is dismissed.

A. *Did the Officer render a reasonable decision?*

[34] As recorded to the GCMS, the Court concludes that the Officer's reasons fulfill the standard of reasonableness.

[35] According to the Officer, the Applicant did not submit all the necessary evidence in order to establish that he was in fact a senior manager employed by Chamma Electronics in Pakistan.

> [T]here is no clear and compelling evidence Subj was actually employed by the business/managing the business in Pakistan [no pay stubs or income tax returns; no business ownership docs; no transfer of business docs, etc.]
>
> (Certified Tribunal Record, GCMS notes, p 4.)

When filing an application, the onus is on the Applicant to submit all relevant supporting documentation and to provide sufficient credible evidence in support of his application. The applicant must put his "best case forward" (*Oladipo v Canada (Citizenship and Immigration)*, 2008 FC 366 at para 24).

[36] The Officer had the expertise and the discretion to assess and weigh the relevant factors with regards to the Applicant's work permit application (*Mousa v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1358 at para 10).

[37] The Court finds that the Officer raised valid concerns that led him to a refusal.

> Discrepancies: 1) in the IMM 5645 submitted with this WP, Subj indicates his father passed away on 12/March/1989. However, in paid rep's ltr it is stated Subj's father transferred the Pakistani business to Subj in 1997. 2) Subj does not disclose his prior TRV refusal […]. These discrepancies undermine Subj's overall credibility.
>
> Spouse and 3 children are in CAN (all applied for VR 2017/07/31, except for CAN born child), however Subj states that they will not acp and their residence is in PAK.
>
> (Certified Tribunal Record, GCMS notes, pp 3-4.)

[38] It was reasonable for the Officer to refuse the Applicant's work permit application, because the Officer was not convinced that the Applicant had met the six requirements, except for one, of an Intra-company transferee under Section 5.31 of the FW1 Temporary Foreign Worker Guidelines. In fact, Intra-company transferees may apply for work permits under the general provision if they:

- are currently employed by a multi-national company and seeking entry to work in a *parent*, *subsidiary*, *branch*, or *affiliate* of that enterprise;

- are transferring to an enterprise that has a qualifying relationship with the enterprise in which he or she is currently employed, and will be undertaking employment at a *legitimate* and *continuing* establishment of that company (where 18-24 months can be used as a reasonable minimum guideline);

- are being transferred to a position in a *Executive*, *Senior Managerial*, or *Specialized Knowledge* capacity;

- have been employed continuously (via payroll or by contract directly with the company), by the company that plans to transfer him or her, outside Canada in a similar full-time position (not accumulated part-time) for at least one year in the three-year period immediately preceding the date of initial application. Extensions may be granted up to the five and seven year maximums referred to in the tables at the end of this section (5.31) and in the table in section 11.2. Documented time spent outside Canada during the duration of the work permit can be "recaptured" to allow the ICT five or seven full years of physical presence in Canada.

  TIP: If the applicant has not had full-time work experience with the foreign company, the officer should consider other factors before refusing the applicant solely on this basis, such as:

  - Number of years of work experience with the foreign company;

  - The similarity of the positions. For example, is the applicant coming to work for a short period of time versus coming from a part-time position to a full-time long-term position?

  - The extent of the part-time position (i.e., two days/week versus four days/week);

  - Does it appear to be an abuse of the ICT provision?

- are coming to Canada for a temporary period only;

- comply with all immigration requirements for temporary entry.

(FW1 Temporary Foreign Worker Guidelines, pp 62-63 of 191.)

[39] Finally, subsection 16(1) of the IRPA states that a person who makes an application must answer truthfully all questions put to them for the purpose of the assessment of his or her application. The Court reminds the importance of responding truthfully to the questions in order to assure that the Applicant has provided the Officer with all the necessary information before rendering his final decision. The Applicant was under the duty to be truthful and failed to fully comply with his obligation. The Officer's finding was sufficient to refuse the application in and of itself, because the Applicant neither replied accurately to a box that is on the work permit application form nor did he mention in the form that his family would be accompanying him during his authorized stay in Canada. "Finding that an applicant has failed to uphold the duty of candour imposed by section 16 allows a visa officer to refuse an application under subsection 11(1) of the IRPA for not meeting the requirements of the Act" (*Porfirio v Canada (Minister of Citizenship and Immigration)*, 2011 FC 794 at para 45).

[40] Given the Officer's reasons, the Court concludes that the decision rendered "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VIII. Conclusion

[41] The application for judicial review is dismissed.

JUDGMENT in IMM-2242-17

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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