Federal Court  Cour fédérale

Date: 20191218

Docket: IMM-2288-19

Citation: 2019 FC 1630

Winnipeg, Manitoba, December 18, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

KULDEEP KAUR POONI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of India. She applied for a work permit under the Temporary Foreign Worker Program having been offered employment in Canada as a childcare provider.

[2] After conducting an interview, an Immigration Officer at the High Commission of Canada in India rejected her application. The Officer concluded she was unable to perform the

duties of a childcare provider in Canada noting concerns with her inability to understand or speak even simple English sentences; her inability to understand terms related to child issues; and her inability to describe the steps to handle such issues.

[3] The Applicant now seeks judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. She raises two issues:

A. Did the Officer fetter his discretion by requiring a minimum International English Language Testing System [IELTS] score of 5.5?

B. Did the Officer unreasonably refuse the application in the absence of a minimum language requirement?

[4] For the reasons that follow I am not convinced that the Officer fettered his discretion or that the decision is unreasonable. The application is dismissed.

II. Standard of Review

[5] The jurisprudence is somewhat unsettled in respect of the standard of review to be applied where it is alleged an administrative decision-maker has fettered their discretion. The parties have taken the position that the fettering of discretion raises an issue of fairness that is reviewable against a standard of correctness. In *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24 [*Stemijon*], Justice Stratus concluded that the standard of review was reasonableness but held: "A decision that is the product of a fettered discretion must

per se be unreasonable". In considering the fettering submissions, I will apply the *Stemijon* standard of reasonableness.

[6] The second issue, the decision to refuse the application, is reviewable against the reasonableness standard (*Akomolafe v Canada (Minister of Citizenship and Immigration)* 2016 FC 472 at para 9). Reasonableness is a deferential standard. A reviewing court is to be concerned with whether (1) the decision-making process reflects the elements of justification, transparency, and intelligibility; and (2) the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. A reasonableness review recognizes that it is not the reviewing court's role to reweigh or reassess the evidence and that there may be a number of reasonable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, *Grewal v Canada (Minister of Citizenship and Immigration)*, 2013 FC 627 at para 22).

III. Analysis

A. *Did the Officer fetter his discretion by requiring a minimum IELTS score of 5.5?*

[7] I am not convinced that the Officer fettered his discretion in refusing the application.

[8] The Applicant had achieved an IELTS score of 4.5. The *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] do not impose a minimum IELTS score (IRPR para 200(3)(a)).

[9] The Applicant reports in her affidavit that the Officer told her that she required an IELTS score of 5.5. This information is also reflected in notes made during a conversation the Applicant had with her sister in Canada the day following the interview. The Applicant argues that in adopting a minimum score the Officer fettered his discretion warranting the Court's intervention.

[10] The Officer has sworn an affidavit in this proceeding and was cross-examined by the Applicant's counsel. In the affidavit the Officer reports that he does not recall remarks to the effect that a minimum IELTS score was required. On cross-examination the Officer acknowledged that he had no specific recollection on this point. However, relying on his eight years experience, the pattern he follows in conducting visa interviews, knowing that that there is no minimum IELTS score, and having, in the past, approved visas where the IELTS score was low while refusing others where the IELTS score was high, he stated he was confident he did not indicate a minimum score was required.

[11] The evidence on this point is mixed. I note the Applicant's limited English language skills. I also note the Officer's unchallenged practice evidence and recognize that practice evidence while circumstantial is probative (Ronald Joseph Delisle et al., *Evidence: Principles and Problems* at page 209 (Toronto: Thompson Reuters, 2018)). In the circumstances I prefer the Officer's evidence.

[12] Even if I were to accept the Applicant's recollection, the decision and the supporting notes do not lead to me to conclude that the Officer fettered his discretion. The supporting notes report the IELTS score to be low. The Officer then proceeds to assess the Applicant's experience

and skills. These steps would have been unnecessary had the Officer concluded, as argued, that the Applicant had failed to achieve a minimum IELTS score.

B. *The Officer unreasonably refused the application in the absence of a minimum language requirement.*

[13] Subsection 200(3) of the IRPR identifies the circumstances where an Officer shall not issue a work permit. In this case the Officer relied upon paragraph (a) which states:

Exceptions	**Exceptions**
(3) An officer shall not issue a work permit to a foreign national if	(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :
(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	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;
[…]	[…]

[14] The Applicant argues that in concluding she was unable to perform the duties of a childcare provider the Officer failed to assess her language skills within the context of the employment she had been offered: the provision of those services in a Punjabi speaking household where the employer was a member of her extended family.

[15] She notes that she is a trained as nurse, has completed a live-in caregiver course, and has some experience working with children. She submits that her responses to the Officer's questioning demonstrated an ability to solicit help in English in the event of an emergency

involving a child even if her English was not perfect. She submits the Officer's focus on whether her English language skills were at a particular level was not rationally connected with her ability to perform the duties of the position.

[16] The Officer's decision unquestionably identifies concerns with the Applicant's English language skills. However, the decision is not, in my opinion, based upon the Applicant's inability to function in English at a particular level as has been argued. Rather the decision reflects a concern with the ability to function as a childcare provider for various reasons including the Applicant's English language skills.

[17] The Officer notes the following areas of concern: (1) the Applicant had difficulty in understanding and responding to most questions; (2) most questions had to be repeated and translated into Punjabi before the Applicant could say a few words in English or respond back in Punjabi; (3) the Applicant had no experience as a nurse; (4) her experience as a teacher was limited to two or three months; (5) her inability to answer questions on handing emergencies; (6) her inability to handle questions on symptoms of minor ailments; and (7) her lack of understanding of what child abuse is or indications of incidences of abuse.

[18] Unlike the situation in *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 782, the Officer identified the concerns he had. These concerns were linked to the conclusion that the Officer "was not satisfied that she was able to perform her duties in an unsupervised setting in Canada". Finally, the Applicant was provided an opportunity to respond to and address the Officer's concerns.

[19] The cumulative effect of the identified concerns provided a basis upon which the Officer was able to reasonably conclude as he did. Having found that the Applicant had failed to demonstrate she would be able to perform the work offered, subsection 200(3) of the IRPR required that the Officer not issue the visa.

IV. Conclusion

[20] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-2288-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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