Federal Court  Cour fédérale

Date: 20091210

Docket: IMM-2077-09

Citation: 2009 FC 1258

Ottawa, Ontario, December 10, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

TIKVAH BERYL ABRO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of the decision of Immigration Officer Theresa Bason (the Officer) refusing to substitute her evaluation of the Applicant's application for permanent residence in Canada under the federal skilled worker class.

Factual Background

[2] Tikvah Beryl Abro (the Applicant) made an application for permanent residence as a member of the federal skilled worker class to the High Commission of Canada in Pretoria, South Africa. She is a citizen of South Africa and has two adult children who are Canadian citizens. She made her initial application in November 2008 but did not have the requisite number of points to be granted permanent resident status. Consequently, she requested an officer's substituted evaluation under subsection 76(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[3] In her decision dated March 20, 2009, the Officer refused to substitute a positive evaluation and did not grant the application. The Applicant now seeks review of this decision.

Impugned Decision

[4] In both the decision and her CAIPS notes, the Officer indicates that she has considered the Applicant's submissions in support of the evaluation under subsection 76(3) of the Regulations, including the Applicant's extensive work experience, arranged employment, available settlement funds and the support of her children in Canada. However, after a review of the factors, the Officer concludes that the 62 points awarded are an accurate reflection of the Applicant's ability to become economically established in Canada and the use of a substituted evaluation is not appropriate.

[5] The Officer specifies she has come to this determination because the Applicant has run her own business in South Africa since 1986 and has not worked for an employer since that time. Also, the Applicant did not take up employment or establish herself in Canada when she was previously

granted permanent resident status in 1997. Finally, the Officer notes that if the Applicant wishes to take up permanent residence in Canada, she can be sponsored by one of her sons in Canada.

Relevant Legislation

[6] *Immigration and Refugee Protection Regulations*, SOR/2002-227.

76. (3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.	76. (3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

Issue

[7] The Applicant raises only one issue:

a. Did the Officer err in her assessment of the substituted evaluation by failing to take into account relevant facts and the totality of the Applicant's circumstances?

[8] The application for judicial review shall be allowed for the following reasons.

Analysis

Standard of review

[9] Both parties submit and the Court agrees that in accordance with *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and the jurisprudence of this Court, the assessment of an application for permanent residence under the federal skilled worker class involves the exercise of discretion and should be afforded considerable deference (*Wang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 798, [2008] F.C.J. No. 995 (QL); *Requidan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 237, [2009] F.C.J. No. 280 (QL)). Accordingly, the decision attracts a standard of reasonableness and there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at paragraph 47).

Did the Officer err in her assessment of the substituted evaluation by failing to take into account relevant facts and the totality of the Applicant's circumstances?

[10] The Applicant submits that the decision is unreasonable given the evidence before the Officer. She argues that the Officer, as evidenced by her decision, did not analyse the totality of the Applicant's circumstances in refusing to substitute her evaluation. The Applicant does not take issue with the points assessed, only the decision regarding the substituted evaluation.

[11] Moreover, the Applicant argues that the visa officer failed to consider a number of factors in deciding against substituting her evaluation for the points assessed. Specifically, the Applicant contends that the Officer did not analyse how the Applicant's positive Arranged Employment Opinion might increase the likelihood of the Applicant would work for an employer in Canada. She also advances that the Officer did not consider the effect of her available settlement funds. She adds that the Officer failed to analyse the reasons why she previously gave up her permanent resident status and her current motivation for submitting a new application. Lastly, she claims the Officer failed to explain why an application under the skilled worker category instead of under the family class category should lead to a negative substituted evaluation decision.

[12] The Applicant relies on the decision in *Choi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 577, [2008] F.C.J. No. 734 (QL) where it was found that an officer's failure to refer to an applicant's settlement funds and to give no weight to a strong letter from the school that wanted to hire the applicant rendered the decision unreasonable.

[13] The Respondent, on the other hand, states that considering the exceptional nature of a substituted evaluation, written reasons, although desirable, are not required. The officer need only inform an applicant that the request for the substituted evaluation was considered (*Poblado v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1167, [2005] F.C.J. No. 1424 (QL); *Requidan*, above). Accordingly, the Officer need not address each factor separately and her statement that she had considered the request and that she believed that the points assessed are reflective of the Applicant's ability to become economically established is sufficient.

[14] In this case, the Officer states that she considered the request for substituted evaluation but could not act upon it as she felt the points assessed accurately reflected the Applicant’s ability to become economically established in Canada.

[15] The Court finds that the decision is unreasonable because the Officer had in front of her the evidence that the Applicant was issued a Positive Arranged Employment Opinion with Combined Metals Industries Inc. in Toronto that was approved by Service Canada (HRSDC) (Tribunal's record, page 32) and the Applicant had the equivalent of $450,000 Canadian to bring to Canada to become established by selling her house in Johannesburg, South Africa (Tribunal's record, page 37) of which no reference was made by the Officer (*Choi*, at paragraph 22).

[16] The Court also finds that it was unreasonable for the Officer to conclude that the Applicant would not become economically established in Canada because she had run her own business in South Africa since 1986 and had not worked for an employer since that time. There is no basis in the evidence to substantiate such a conclusion.

[17] Although the Officer's decision is a discretionary one, the Court considers that its intervention is warranted.

[18] In its oral argument, the Applicant did not seek costs.

[19] No questions for certification were proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed. The decision is quashed. The matter is remitted back for redetermination by a newly appointed Officer. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2077-09
STYLE OF CAUSE:	**TIKVAH BERYL ABRO** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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