Federal Court  Cour fédérale

Date: 20110512

Docket: IMM-3840-10

Citation: 2011 FC 545

Ottawa, Ontario, May 12, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KIM CHI HOANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a citizen of Vietnam, seeks to overturn the decision made on May 3, 2010 by a visa officer at the Canadian Consulate in Detroit, U.S.A., rejecting her application for permanent residence under the Skilled Worker Category.

[2] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

BACKGROUND:

[3] At the time of her application in March 2009, Ms. Hoang was a resident in the United States, where she was pursuing her Ph.D. She was the principal applicant and her husband and two children were included as dependents.

[4] Ms. Hoang applied under the then Minister's Instructions relating to "In-demand" occupations, namely under the occupation of "College and Other Vocational Instructors": National Occupational Classification ("NOC") 4131. The NOC is a systematic taxonomy of occupations in the Canadian labour market. She indicated that she had worked as a Professional Training Official in Vietnam between 1998 and 2000 and again between 2001 and 2004. The duties described included developing material on environmental management and inspection, professional training on policy, law, regulations of environmental protection and management for provincial staff. She also indicated other duties such as management and coordination on environmental protection projects, conducting inspections and making decisions on environmental management and protection.

[5] Ms. Hoang provided a letter from the Vietnam Environment Administration Department of Conservation and Biodiversity, which stated that she had been employed there from 1997-2004. The letter indicated that her work included designing and implementing environmental inspection plans, scientific research and management, and other duties including teaching and training staff.

[6] An interview with the visa officer was conducted on April 26, 2010. Ms. Hoang received a refusal letter dated May 2, 2010, stating that her application had been rejected.

DECISION UNDER REVIEW:

[7] The refusal letter and the officer's Computer Assisted Immigration Processing System ("CAIPS") notes indicate that the officer was not satisfied that the applicant had the required work experience during the periods stated on her application. In particular, the officer was not satisfied that the applicant performed all of the essential duties and a substantial number of the main duties as set out in the occupational description of a college/vocational instructor under NOC 4131.

ISSUES:

[8] The issues raised on this application are as follows:

a. Should the officer's affidavit be excluded?
b. Did the officer unreasonably fail to award the applicant any points for her work experience?
c. Are the reasons for the decision insufficient?
d. Was the process unfair because the officer relied on extrinsic evidence that was not actually relevant to the applicant's work duties?

ANALYSIS:

Standard of Review

[9] There is no dispute between the parties that the assessment of an applicant for permanent residence under the Skilled Worker Class is an exercise of discretion based essentially on the facts

of each particular application, and that it should be given a high degree of deference. I agree that, overall, the decision should be reviewed on the reasonableness standard: *Khan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 302 at paras. 9 and 10; *Hanif v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 68 at paras. 11 and 12. The decision will be considered reasonable unless it does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. The Court must be satisfied that the officer reached a result that was completely outside the range of available outcomes. That is a heavy burden for an applicant to meet.

[10] For questions of procedural fairness such as reliance on undisclosed extrinsic evidence and sufficiency of the reasons, deference to the decision-maker is not at issue. What constitutes adequate reasons is a matter to be decided in light of the particular circumstances of each case: *Via Rail Canada Inc., v. National Transportation Agency*, [2001] 2 F.C. 25 (FCA). In general, the proper approach is to ask whether the requirements of natural justice have been met. See: *Ontario (Commissioner Provincial Police) v. MacDonald*, 2009 ONCA 805, 3 Admin L.R. (5th) 278 at para. 37 and *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada*, Local 141, 2010 NSCA 19, 3 Admin L.R. (5th) 261 at paras. 30-32.

Should the Officer's Affidavit be excluded?

[11] As a preliminary matter, the applicant has argued that that the affidavit filed by the respondent from the Officer who decided the case should be excluded, at least in part as it is said to provide additional information and reasons for why the visa application was denied. The applicant

relies on the words of Justice Russel Zinn in *Huang v. Canada* (*Canada (Minister of Citizenship and Immigration)*, 2009 FC 135 at para. 18:

> As noted, the respondent put in evidence an affidavit sworn December 15, 2008 by the Visa Officer whose decision is under review. I concur with the observations of Justice Gauthier in Jesuorobo v. Canada (Minister of Citizenship and Immigration), [2007] F.C.J. No. 1680, at paragraph 12, that the respondent cannot rely on new evidence from the Officer to change, explain or add to the refusal letter and the CAIPS notes. It is an attempt by the Officer to pull himself up by his bootstraps where his CAIPS notes may be deficient or too summary in nature.

[12] In the absence of an affidavit attesting to the truth of what was recorded as having been done, CAIPS notes have no status as evidence of the underlying facts on which they rely: *Chou v. Canada* (2000), 3 Imm. L.R. (3d) 212, 190 F.T.R. 78 at para. 13; aff'd 2001 FCA 299, 17 Imm. L.R. (3d) 234.

[13] Here the officer adopted the CAIPS notes as her evidence of what transpired at the interview. As adopted through the affidavit, the CAIPS notes are evidence of the facts to which they refer. The officer could have been cross-examined on those facts had the applicant chosen to do so. In light of the applicant's statements about the manner in which the officer conducted the interview, the respondent was entitled to adduce evidence to counter her allegations.

[14] In my view, the affidavit does not add new arguments to the reasons. Rather, the affidavit confirms the CAIPS notes as evidence of the interview, sets out why the officer made the remarks that she did in the CAIPS notes and indicates how the reasons are based on the evidence and the lack of evidence before her. As the applicant chose not to cross-examine the officer I find it difficult to see how she can now complain about the content of the affidavit. See: *Obeng v. Canada*

(Minister of Citizenship and Immigration), 2008 FC 754, 330 F.T.R. 196 at para. 27. The affidavit is thus admissible.

Did the Officer unreasonably fail to award the applicant any points for her work experience?

[15] The applicant submits that the officer unreasonably failed to award points for her work experience as a vocational instructor. She contends that she had set out in her application forms that she had performed the duties of an instructor, including developing materials and providing professional training. Her employer in Vietnam provided a reference letter stating that she drafted conference materials and arranged and taught about inspection content and environmental protection in State Management training courses for provincial inspectors and staff members.

[16] When asked by the officer how often and for how long she did this, the applicant says she replied that it varied from year to year but was up to 50% of her working time. The applicant submits that if she spent approximately 50% of her time as an instructor, then over the course of her more than five years of experience, she would have obtained about 2.5 years of full-time experience, ample to meet the requirements of NOC 4131.

[17] The officer did not unreasonably fail to award the applicant any points for her work. The CAIPS notes demonstrate that the officer questioned the applicant numerous times and in various ways about her work experience. The onus was on the applicant to demonstrate that she fulfilled the requirements of the particular category of skilled work. The officer specifically referenced the documentary evidence submitted by the applicant, questioned the applicant about her concerns and

was not satisfied with the applicant's responses. That the applicant is unhappy with the result does not demonstrate that it was unreasonable.

[18] As stated by Justice Paul Crampton in *Pan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 838, 90 Imm. L.R. (3d) 309 at para. 28, "a visa officer has no legal obligation to seek to clarify a deficient application […]." In the instant case, the officer went beyond what was required of her by asking the applicant to bring additional information to the interview and by attempting to prompt her with reference to particular laws for which it could be reasonably assumed she would have been called upon to instruct others by her employer in Vietnam. The applicant was not able to identify any new laws or regulations on which she provided training nor could she describe the last formal training she gave and what it entailed.

[19] It is reasonable to infer that the officer would have made note of the applicant's statement that she had spent up to 50% of her working time on training, had it been mentioned during the interview. Unlike the officer's contemporaneous notes, the applicant's affidavit containing this assertion was made several months later. I understand that her recollection of events may differ from that of the officer and that this was an important event for her as opposed to the officer for whom it would have been part of her daily workload. In any event, given the other information before the officer, this particular conflict in the evidence is not determinative.

[20] The officer noted that the applicant's employer listed training as fourth or fifth on the list of tasks accomplished by the applicant. This suggests she viewed training as less of a priority and it may have occupied less of her time than the other tasks mentioned. Furthermore, when first asked to

describe her job, the applicant did not mention training as one of her main duties nor did she answer specific questions regarding the topics for which she provided training.

[21] The officer is assumed to have weighed and considered all the evidence presented to her unless the contrary is shown: *Obeng*, above at para. 35; *Toma et al v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 779 at para. 26. The contrary has not been shown in this application.

Are the reasons for the decision insufficient?

[22] The applicant submits that an officer has a duty to provide a reasonable explanation for a decision and that the reasons provided to the applicant do not provide any explanation as to why the officer was not satisfied with the applicant's qualifications.

[23] I agree with the respondent that the CAIPS notes, which form part of the reasons for the officer's decision, adequately review the applicant's evidence, the officer's concerns and her reasons for determining that the evidence did not support the applicant's claimed experience under NOC 4131. The reasons show that the officer appreciated the relevant law and approached the factual and evidentiary issues before her in a careful and thoughtful manner. As such, the reasons demonstrate the necessary "justification, transparency and intelligibility within the decision-making process" as per *Dunsmuir*, above at para. 47. See also: *Public Service Alliance of Canada v. Canada Post Corporation and Canadian Human Rights Commission*, 2010 FCA 56, 399 N.R. 127 at para. 164.

Was the process unfair because the Officer relied on extrinsic evidence that was not actually relevant to the applicant's work duties?

[24] The officer conducted an internet search for general information concerning Vietnamese environmental law. She found a 1999 decree on water resources which she in turn raised with the applicant. This gave the applicant the opportunity to address the information. The applicant stated that she was not familiar with the decree and says that it was not in fact relevant to the work of her department, which was the Ministry of Science, Technology and Environment, but was within the jurisdiction of the Ministry of Agriculture and Rural Development.

[25] The applicant submits that it is unclear whether the officer understood the distinction between the Ministries. To the extent that the officer may have relied on the applicant's ignorance of this decree in making the final determination, the applicant says that the decision was unfair because it was based on extrinsic evidence that was irrelevant to the case.

[26] Based on the CAIPS notes, however, it does not appear as though the officer refused the applicant's application due to her lack of familiarity with the decree. The decree seems only to have been brought up as an attempt to prompt the applicant to provide additional details as to the type of training that she had performed, as she had not given adequate answers up to that point. In that respect, it cannot be said that the officer relied on extrinsic evidence that was not actually relevant to the applicant's work experience. The authorities cited by the applicant on the use of extrinsic evidence all concern cases where evidence was not put to the applicant during the interview. That was not the case here. The officer communicated her concerns to the applicant, giving her the opportunity to respond fully.

[27] The parties dispute whether or not the applicant had indicated at the interview that the referenced decree was not within the purview of the work of her department. In considering the evidence on this question, the contemporaneous CAIPS notes are a more reliable record of the events of the interview day. In any event, the dispute as to what was said about the decree is not determinative. As stated above, the decree was only raised in order to give the applicant a further opportunity to explain her experience. It was not meant to determine her knowledge of the decree.

[28] On this reasoning, I cannot conclude that there has been any breach of procedural fairness arising from the officer's reference to the 1999 Decree.

[29] In the result, I am satisfied that the decision was not unreasonable and that this application must be dismissed.

[30] Neither party proposed a serious question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3840-10
STYLE OF CAUSE:	KIM CHI HOANG and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 23, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
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