Federal Court  Cour fédérale

Date: 20111202

Docket: IMM-1529-11

Citation: 2011 FC 1402

Ottawa, Ontario, December 2, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

LUIS MONTEVERDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Luis Monteverde, is a citizen of Venezuela. He seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 26 (the Act) of the decision rendered by an immigration officer dated January 21, 2011, denying his application for permanent resident status as a Federal Skilled Worker.

[2] For the reasons that follow the application is granted.

BACKGROUND

[3] On July 17, 2007, the applicant submitted an application for permanent residence under the Federal Skilled Worker category at the Canadian Embassy in Caracas, Venezuela. Mr. Monteverde is a project manager with a professional certification and a Masters Degree in the field. He is also a qualified System Engineer.

[4] On October 30, 2008, the applicant received a letter from the Embassy requesting updated documentation to be sent by March 2, 2009 confirming his work experience. The documents requested included:

a. Photocopy of Job reference letters/confirmation of employment letters;
b. Pay slips issued from your present employer;
c. Detailed description of your job responsibilities (past and present).

[5] Mr. Monteverde submitted the required documentation to the Embassy on February 26, 2009.

[6] On September 16, 2010, the applicant was advised that his file was transferred from the Embassy to the Case Processing Pilot in Ottawa (the CPP-O) for further processing. He was requested to provide updated documentation including the following:

> 4. Work experience documents
>
> Provide employment letters, contracts, pay-slips and job descriptions endorsed by your employer's personnel department covering the period from 10 years prior to your application date until today. Please make sure that the employment letters have details of your duties and clearly show the start and end dates (if relevant) of your employment. CPP-O is under no obligation to further request

> detailed employment letters, and your work experience review will be based solely on the documents initially provided.

[7] The applicant received a letter dated December 3, 2010, providing him with further information with respect to the processing of his application. He forwarded his documentation to CPP-O on December 2010.

[8] By letter dated January 21, 2011, Mr. Monteverde was advised that he did not meet the requirements for immigration to Canada. In an email dated February 4, 2011, he requested a reconsideration of his application; this request was denied on February 9, 2011.

DECISION UNDER REVIEW

[9] In the decision letter dated January 21, 2011, the officer concluded that the applicant failed to meet the requirements for permanent residence under the Federal Skilled Worker class, as set out under subsection 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The officer indicated that the applicant failed to provide detailed employment confirmation letters. As such, the officer was unable to determine if the applicant performed work in any of the occupations on the Canadian National Occupational Classification (NOC) list.

ISSUES

[10] This judicial review raises the following issues:

1. Did the Officer breach a duty of fairness by failing to provide the applicant with an opportunity to correct the deficiencies in his documentation?

2. Did the Officer breach principles of procedural fairness by failing to provide adequate reasons in support of his conclusion?

RELEVANT LEGISLATION

[11] Section 75 of the Regulations reads as follows:

75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.
(2) A foreign national is a skilled worker if	(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :
(*a*) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix;	*a*) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la *Classification nationale des professions* —

	exception faite des professions d'accès limité;
(*b*) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational Classification*; and	*b*) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;
(*c*) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the *National Occupational Classification*, including all of the essential duties.	*c*) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.
(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.	(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

ANALYSIS

[12] As the issues in question relate to procedural fairness a standard of review analysis is not required. The decision maker is owed no deference, as the officer has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty (*Grewal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 167; *Dash v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1255 at para 13; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53).

[13] The content of the duty of fairness owed to applicants for permanent residence status as members of the Federal Skilled Worker class is limited: *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422. Applicants bear the onus of providing adequate and sufficient information in support of the application, there is no requirement that visa officers engage in a form of dialogue as to the completeness or adequacy of materials filed, or for visa officers to provide the applicant with a "running score" in respect of his or her application: *Pan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 838 at para 27; and *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 442.

[14] In some circumstances, however, procedural fairness will require that an applicant be given the opportunity to respond to an officer's concerns. See for example *Li v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284 at para 35; and *Grewal*, above at para 15. The respondent concedes this but argues that those circumstances should be limited to questions relating to the credibility, accuracy or genuine nature of the information submitted by the applicant: *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24; and *Roberts v Canada (Minister of Citizenship and Immigration)*, 2009 FC 518 at para 20.

[15] Here, the respondent argues that the applicant was provided clear and unambiguous instructions to provide employment letters that detailed his job duties. I don't agree. From my reading of the correspondence on the record, it appears that the applicant was held to different requirements by the Embassy and by the CPP-O to confirm his work experience and those requirements were confusing, unclear and conflicting.

[16] I note that the document requirements imposed by the CPP-O did not arise directly from the Act or Regulations but from a change of procedure or policy. The failure to take that into consideration may in itself constitute a breach of procedural fairness. See *Noor v Canada (Minister of Citizenship and Immigration)*, 2011 FC 308.

[17] The applicant was first requested by the Embassy to provide a "photocopy of job reference letters/confirmation of employment letters". The applicant was then requested by the CPP-O to provide "employment letters, contracts, pay-slips and job descriptions endorsed by your employer's personnel department covering the period from 10 years prior to your application date until today."

[18] The applicant submitted employment letters with certified translations and a detailed description of his job responsibilities as required in the Document Checklist provided by the Caracas Embassy. The Checklist did not require the detailed description of his job responsibilities to be confirmed by the employer or to be included in the employment reference letters, as was later set out in the CPP-O correspondence. In that correspondence, however, the applicant was also advised that "[i]f you have already submitted the documentation referred to in the letter sent by our visa office in Caracas, there is no need to resend them".

[19] In 2009 the applicant, following the Embassy Checklist, submitted a complete application with independent documentation supporting his assertions. He included letters from his past employers and listed his responsibilities as he had been asked to do. On the face of that documentation the applicant did not fall short of the minimum requirements for admission to Canada as a permanent resident under the Skilled Worker class.

[20] When he was asked to provide updated information in 2010 the applicant forwarded his documentation to CPP-O without amending the employment letters, as he was under the impression, reasonably held, that he was to follow the requirements provided earlier by the Embassy.

[21] This case is distinguishable from *Tineo Luongo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 618 and *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283 cited by the respondent. In *Malik*, the applicant had received prior specific written notice that the type of documents he relied upon would not be considered sufficient proof that he had relatives in Canada. He was also notified in writing that if documentation were missing the immigration authorities would not request additional documentation to support his application.

[22] In *Tineo Luongo*, the applicant was not obliged to observe two different standards and the evidence was that she had received clear notice of the documents required. The record, including the officer's Computer Assisted Processing System ("CAIPS") notes, clearly disclosed that the decision maker concluded that the low probative value of the evidence provided was insufficient to justify further inquiry. There was no "objective evidence that was clearly relevant" to be considered, unlike in the present matter.

[23] I note in passing that the concerns about administrative efficiency, finality and fairness to all visa applicants in the context of a burdened system attributed in *Tineo Luongo* at paragraph 18 to Justice Mainville in *Malik* appear in his recital of the respondent's arguments and not in his own analysis.

[24] Justice Mainville recognized, at paragraph 33 in *Malik*, that treating policy as immutable without considering other factors which may apply to the particular circumstances of a given case may result in a finding that the decision maker had fettered the discretion authorized by law. The same point has been made recently by the Federal Court of Appeal in a different context in *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at paragraphs 20-25 and 60.

[25] Here, it appears that the officer looked no further than the employment letters to determine whether the applicant had met the requirements and failed to consider the application as a whole. This is not a case, as in *Tineo Luongo*, where the officer considered that the documentation submitted as a whole was insufficient. He applied the work experience requirements set out in the September 16, 2010 correspondence as an immutable policy that must be observed rather than as an aide to administrative decision making. As stated in *Stemijon Investments*, above at paragraph 60:

> …An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

[26] The applicant also submits that the officer's reasons for the decision are inadequate. As the Federal Court of Appeal has stated, adequate reasons are those that serve the functions for which the duty to provide them was imposed: *VIA Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25 (CA) at para 21. The duty of fairness requires visa officers to provide reasons that are "sufficiently clear, precise and intelligible so that a claimant may know why his or her claim has failed": *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2004 FC 687 at para 4; and *Grapendaal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1221 at para 29. That standard was not met in this case.

[27] It is not clear from the decision letter or the CAIPS notes why the application failed. The officer merely states that the employment letters submitted by the applicant did not provide sufficiently detailed duty descriptions. Neither the decision nor the CAIPS notes refer to the document provided by the applicant detailing his employment responsibilities and the other objective evidence submitted in support. It appears that the officer simply disregarded the remainder of the evidence when he found that the employer's letters did not contain the expected information.

[28] In the particular circumstances of this case, the officer owed Mr. Monteverde a duty to consider all of the information in the application including the description of his employment duties and supporting documentation that was provided in accordance with the Embassy Checklist. If there was any doubt as to the accuracy or genuineness of that information, which is not apparent on the face of the record, fairness required that the officer provide the applicant an opportunity to correct any deficiencies.

[29] The application is granted. This matter will be remitted for reconsideration. In accordance with the requirements of procedural fairness, the applicant shall be provided with an opportunity to complete his application and address any deficiencies in the documentation submitted thus far.

[30] No serious questions of general importance were proposed by the parties and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for consideration by a different decision maker in accordance with these reasons. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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