Federal Court  Cour fédérale

Date: 20120625

Docket: IMM-6655-11

Citation: 2012 FC 791

Ottawa, Ontario, June 25, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DALJIT SINGH SRAN AND
RUPINDER JIT KAUR SRAN

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 26 (hereafter the IRPA) of a decision rendered by an Immigration Officer denying an application for permanent resident status in the provincial nominees' class.

[2] The principal applicant, Mr. Daljit Singh Sran, is a citizen of India born in 1962. He is married to Rupinder Jit Kaur Sran, also a citizen of India, born in 1969. They have two children and are currently living in New Zealand.

[3] Mr. Sran has a high school education, a diploma in Divinity and was a farmer in India. He is working as a store clerk in New Zealand. His wife has a Bachelor of Arts and a Bachelor of Education form India. She worked as a teacher in India for nearly 10 years. Since moving to New Zealand, she obtained a diploma in horticulture and is currently working in that field.

[4] Mr. Sran's parents live in Calgary, Alberta. He was nominated under the Alberta Immigrant Nominee Program (hereafter the AINP) in the Family Stream and approved by the Alberta program office.

[5] The officer did not believe that Mr. Sran has the ability of becoming economically established in Canada. His wife's education and experience was considered to be relevant, but insufficient to overcome the deficiencies in Mr. Sran's application. He had not demonstrated fluency in English, did not speak French and required an interpreter for the interview. The applicant admitted that his divinity credential was of little use in Canada.

[6] The officer found that the applicant earned a minimum wage as a store clerk. The evidence provided about his current employment was vague and inconsistent with his letter of reference. The applicant was not specific, spontaneous or forthcoming during his interview. He did not provide evidence of National Occupational Classification (hereafter NOC) duties. Accordingly, the officer found that the applicant would not qualify as a skilled worker. Moreover, he did not have the

experience to run a business as he hoped to do in Canada. His wife is also not working as a skilled worker in New Zealand.

[7] The officer's decision was reviewed and confirmed by a second officer. That officer added that the farming experience in India was likely not transferable to Canada.

ISSUES:

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

1. Was the officer's decision reasonable?

2. Did the officer breach the duty of procedural fairness?

ANALYSIS:

Standard of review

[9] The officer's decision was factual in nature and is reviewable on a standard of reasonableness: *Pacheco Silva v Canada (Minister of Citizenship and Immigration)*, 2007 FC 733 at paras 6-7; and *Wai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 780 at para 18.

[10] The proper approach to issues of procedural fairness is to ask whether the requirements of the duty of fairness in the particular circumstances have been met: *Singh v Canada (Minister of*

Citizenship and Immigration), 2011 FC 813 at para 9; and *Krishnamoorthy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1342 and at para 13.

Was the officer's decision reasonable?

[11] The framework for permanent residency under the Provincial Nominees Class is established by s. 12 of the IRPA and s. 87 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (hereafter the Regulations). These provisions are set out below:

12. (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	12. (2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.
87. (1) For the purposes of subsection 12(2) of the Act, the provincial nominee class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada.	87. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des candidats des provinces est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada.
(2) A foreign national is a member of the provincial nominee class if	(2) Fait partie de la catégorie des candidats des provinces l'étranger qui satisfait aux critères suivants :
(*a*) subject to subsection (5), they are named in a nomination certificate issued by the government of a	*a*) sous réserve du paragraphe (5), il est visé par un certificat de désignation délivré par le gouvernement

province under a provincial nomination agreement between that province and the Minister; and

provincial concerné conformément à l'accord concernant les candidats des provinces que la province en cause a conclu avec le ministre;

(*b*) they intend to reside in the province that has nominated them.

b) il cherche à s'établir dans la province qui a délivré le certificat de désignation.

(3) If the fact that the foreign national is named in a certificate referred to in paragraph (2) (*a*) is not a sufficient indicator of whether they may become economically established in Canada and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.

(3) Si le fait que l'étranger est visé par le certificat de désignation mentionné à l'alinéa (2)*a*) n'est pas un indicateur suffisant de l'aptitude à réussir son établissement économique au Canada, l'agent peut, après consultation auprès du gouvernement qui a délivré le certificat, substituer son appréciation aux critères prévus au paragraphe (2).

(4) An evaluation made under subsection (3) requires the concurrence of a second officer.

(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.

[…]

[…]

(12) A foreign national who is an accompanying family member of a person who makes an application as a member of the provincial nominee class shall become a permanent resident if, following an examination, it is established that

(12) L'étranger qui est un membre de la famille et qui accompagne la personne qui présente une demande au titre de la catégorie des candidats des provinces devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après sont établis :

a) the person who made the application has become a permanent resident; and	*a*) la personne qui présente la demande est devenue résident permanent;
b) the foreign national is not inadmissible.	*b*) il n'est pas interdit de territoire.

[12] Under this framework, the provinces have signed agreements with the federal government to establish provincial nomination programs. The relevant agreement in this application is the Canada-Alberta Immigration Agreement. Under that Agreement, Alberta established the AINP. In this case, the applicant obtained a provincial nomination certificate under the AINP Family Stream.

[13] The provincial decision to issue a certificate must be accorded deference but is not binding on the officer. Immigration Officers do not have to consider the same criteria as the province and the evaluation of potential economic establishment is linked to the person named in the nomination certificate; in this case that was Mr. Sran.

[14] Subsection 87(3) of the Regulations permits an officer, after consulting with the provincial nomination program, to evaluate the application if the officer is not satisfied that the provincial certificate is a sufficient indicator of the likelihood of establishment in Canada. In the present case, the officer consulted the provincial office and the AINP confirmed its decision to nominate the applicant. The officer's evaluation was then reviewed by a second officer in accordance with subsection 87(4).

[15] It cannot be said that the officer made the decision without regard to the evidence. The Computer Assisted Immigration Processing System notes in the record indicate that the officer considered the decision of Alberta, including the response received from his inquiry, the work experience and education of the applicant and his spouse, the applicant's motivations, the applicant's family living in Canada and the language skills of the applicant.

[16] The key question on this application is whether the officer gave sufficient consideration to the wife's credentials. It is clear that he gave them less weight than that accorded by the province. Was that reasonable?

[17] Departmental policy documents such as operational manuals are not law and the Minister and her agents are not bound by them, but they can be of great assistance to the Court in determining reasonableness: *Canada (Minister of Citizenship & Immigration) v Thamotharem*, 2007 FCA 198 at para 59; and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 72.

[18] Section 7.7 of the Overseas Processing Manual OP 7b states that overaged dependants named in a provincial nomination certificate should, on a case by case basis, be carefully evaluated in their own right. The officer should refuse the application if they have strong reason to believe that the applicant is very unlikely to become economically established even with the assistance of their other family members. It is consistent with the legislation, the policy states, to approve cases where there is some likelihood of successful settlement within a reasonable time.

[19] In the present case, it is clear from the reasons that the officer did not evaluate the spouse in her own right but simply as a relevant factor in considering her husband's settlement prospects. The officer's reasons are clear that he only considered the spouse's credentials as "relevant". The fact that she was not interviewed is another indication that her potential contribution was discounted. This was problematic in two ways: first it was contrary to the AINP Family Stream and, therefore, the ability of Alberta to determine its needs in economic immigration; and, secondly, it did not respect Citizenship and Immigration Canada's own policy to examine overage dependents in their own right.

[20] The applicant also submits that there was insufficient evidence to rebut the presumption created by the provincial certificate. Section 7.8 of OP 7b stated:

> Immigration officers can assume that a candidate nominated by a province does, in the view of the provincial officials, intend to reside in the nominating province and has a strong likelihood of becoming economically established in Canada.
>
> […]
>
> There are three bases upon which a provincial nominee who meets all statutory admissibility requirements can be refused a visa:
>
> - The officer has reason to believe that the applicant does not intend to live in the province that has nominated them;
> - The officer has reason to believe that the applicant is unlikely to be able to successfully establish economically in Canada;
> - The officer has reason to believe that the applicant is participating in, or intends to participate in, a passive investment or an immigration-linked investment scheme as defined in R87(5) to R87(9) of the Regulations.
>
> <u>In each case, the officer must have some evidence to support this belief and overcome the presumptions implied by the provincial nomination.</u> …
>
> [Emphasis added]

[21] Here, the officer's reasons indicate why he does not believe that the applicant is very likely to become economically established in Canada: see *Wai*, above, at para 45. The Court's task is not to reweigh the evidence and substitute its own analysis for that of the officer. Absent a reviewable error, the Court's intervention is not warranted. The assertion that the evidence was insufficient to rebut the presumption does not constitute a reviewable error as it would require that this Court reweigh the evidence.

[22] The officer's duty was to determine if the applicant or his spouse were likely to become economically established in Canada: s.87(3) of the Regulations; and s.5, 7.6, 7.7 and 7.8 of the OP 7b. The IRPA and the Regulations do not define "become economically established". However, the OP 7b, at section 7.7, offers some guidance:

> There is no definition in the legislation of "become economically established," leaving the term open to interpretation. There is also no indication of the exact moment when an applicant must become economically established: immediately upon landing or after an initial period of adjustment. However, it is clear, from the way in which the term is used throughout the economic classes, that to become economically established means to join and participate in the labour market in Canada. It is also clear that the selection criteria do not apply to the provincial nominee class in the same way as they apply to federal skilled workers and that it is the overall intention of the legislation and the Federal-Provincial-Territorial agreements to allow the provinces some latitude in their nomination decisions.
>
> [Emphasis added]

[23] The officer evaluated the competence of the applicant and of his spouse using the NOC, a tool to determine applications from those seeking to be admitted as members of the federal skilled worker category. The OP 7b makes it clear that the federal skilled worker class and the provincial nominee class are two different categories with different criteria.

[24] In my view, the officer erred in relying primarily on the skilled worker classification tool to evaluate the likelihood that the applicant would become economically established in Canada. In comparing the applicant's skills to the NOC criteria, the officer lost sight of the factors that had persuaded the Alberta government that the family could be settled including the wife's education and the parents' willingness to support the family.

[25] As a result, I am satisfied that the decision falls outside the 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; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59.

[26] Considering my conclusion on the unreasonableness of the decision, it is unnecessary to address the procedural fairness issue. Nevertheless, I would have not found that the officer breached his duty of procedural fairness as it is trite law that an officer does not have to apprise an applicant of concerns relating to the requirements of the legislation; in this case the economic establishment of the applicant in Canada: *Madan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1198 at para 6; *Mbala v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1057 at paras 21-22; and *Ayyalasomayajula v Canada (Minister of Citizenship and Immigration)*, 2007 FC 248 at paras 17-18.

[27] No serious questions of general importance were proposed and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter remitted for reconsideration by a different officer. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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