Federal Court  Cour fédérale

Date: 20131113

Docket: IMM-9494-12

Citation: 2013 FC 1134

Ottawa, Ontario, November 13, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOHAMMAD JAVAD KHOSHNAVAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] This Court has repeatedly stated that the duty of fairness only requires disclosure of information to provide an applicant with a meaningful opportunity to fully and fairly present his or her case, and to correct any prejudicial misunderstandings, misstatements, errors or omissions (*Dasent v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 720; *Nadarasa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1112 at para 25; *Pizarro Gutierrez v Canada (Citizenship and Immigration)*, 2013 FC 623). As stated in *Rukmangatham v Canada (Minister of*

Citizenship and Immigration), 2004 FC 284, 247 FTR 147, this duty does not stretch to the point of requiring a visa officer to provide an applicant with a "running score" of the weaknesses in his or her application (at para 23 of that decision; also, specifically, para 2 and 12 of *Hsieh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1524; and, *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65, [2012] 3 SCR 405 at para 3).

II. Introduction

[2] The Applicant seeks judicial review of the refusal of an Immigration Officer to process his application for permanent residence under the federal skilled worker class [PR application].

III. Judicial Procedure

[3] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the Officer's decision, dated July 9, 2012.

IV. Background

[4] The Applicant, Mr. Mohammad Javad Khoshnavaz, is a citizen of Iran, born in 1981.

[5] The Applicant received a Master's degree in Geophysics from Islamic Azad University in 2009.

[6] On July 28, 2010, the Applicant submitted an application for a permanent resident visa as a skilled worker.

[7] In his application, the Applicant indicated he has been working as a Geophysicist for Farayand Sazan Energy Consulting Engineers Co. [Farayand] since 2005. He explained he worked part-time for Farayand from January 2005 to January 2007 and then full-time from January 2007 to July 2010.

[8] The Applicant also performed his compulsory military service in the Iranian army from 2007-2009.

[9] On February 21, 2012, the Officer sent a letter to the Applicant requesting that he provide evidence of his work history for the past 10 years in the form of a statement confirming contributions to a social security plan from the Social Security Organization (SSO) of Iran.

[10] On March 19, 2012, the Applicant's representative replied to this request by submitting a letter from Farayand explaining that "[b]ased on the contents of the contract, he [the Applicant] is free from paying insurance premiums" (Certified Tribunal Record [CTR] at p 13).

[11] The Officer did not accept this explanation and, on April 3, 2012, sent a further letter to the Applicant indicating that he was still not satisfied that the employment references he submitted were genuine or that he had the work experience he alleged as a Geophysicist. The Officer gave the Applicant an additional 30 days to provide a response to his concerns regarding his work experience.

[12] On April 30, 2012, the Applicant responded to the Officer's concerns in a letter stating:

> Please note that as confirmed in a letter from the company the applicant is working for, attached herein for your reference, the applicant is not obliged to pay social security. In Iran, public entities have this requirement for its employees. As far as private companies, such as the one the applicant is working for, they have the option of registering with social security or not. In this case, the Applicant is not subject to social security and therefore cannot provide the evidence you requested as it does not exist[].

(CTR at p 7).

[13] On July 9, 2012, the Officer determined that the Applicant was not eligible to have his PR Application processed.

V. Decision under Review

[14] In his decision, the Officer noted that, according to information from the SSO, "all salaried employees are subject to payment of social security contributions" in Iran.

[15] In the absence of proof that the Applicant made such contributions, the Officer stated that he could not be satisfied that the Applicant had in fact worked for Farayand.

[16] Consequently, the Officer determined that the Applicant had failed to provide sufficient evidence that he met the work experience requirements under subsection 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] and refused to process the PR application.

VI. Issues

[17] (1) Did the Officer breach the rules of procedural fairness by not disclosing to the Applicant that he consulted extrinsic evidence?

(2) Did the Officer err in failing to consider evidence regarding the Applicant's work history?

VII. Relevant Legislative Provisions

[18] The following legislative provisions of the *IRPA* are relevant:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Economic immigration	**Immigration économique**
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.

[19] The relevant provisions of the *Regulations* are:

Class	**Catégorie**
75. (1) For the purposes of	**75.** (1) Pour l'application du

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.

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.

Skilled workers

(2) A foreign national is a skilled worker if

(*a*) within the 10 years before the date on which their application for a permanent resident visa is made, they have accumulated, over a continuous period, at least one year of full-time work experience, or the equivalent in part-time work, in the occupation identified by the foreign national in their application as their primary occupation, other than a restricted occupation, that is listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;

(*b*) during that period of employment they performed the actions described in the lead statement for the

Qualité

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

a) il a accumulé, de façon continue, au moins une année d'expérience de travail à temps plein ou l'équivalent temps plein pour un travail à temps partiel, au cours des dix années qui ont précédé la date de présentation de sa demande de visa de résident permanent, dans la profession principale visée par sa demande appartenant au genre de compétence 0 Gestion ou aux niveaux de compétence A ou B de la matrice de la Classification nationale des professions, exception faite des professions d'accès limité;

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé

occupation as set out in the occupational descriptions of the National Occupational Classification;

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;

(*d*) they have submitted the results of an evaluation — by an organization or institution designated under subsection 74(3) and which must be less than two years old on the date on which their application is made — of their proficiency in either English or French indicating that they have met or exceeded the applicable language proficiency threshold fixed by the Minister under subsection 74(1) for each of the four language skill areas; and

d) il a fourni les résultats d'une évaluation de sa compétence en français ou en anglais — datant de moins de deux ans au moment où la demande est faite — faite par une institution ou organisation désignée en vertu du paragraphe 74(3), et il a obtenu, pour chacune des quatre habiletés langagières, au moins le niveau de compétence applicable établi par le ministre en vertu du paragraphe 74(1);

(*e*) they have submitted one of the following:

e) il a soumis l'un des documents suivants :

(i) their Canadian educational credential, or

(i) son diplôme canadien,

(ii) their foreign diploma, certificate or credential and the equivalency assessment, which assessment must be less than five years old on the

(ii) son diplôme, certificat ou attestation étranger ainsi que l'attestation d'équivalence, datant de moins de cinq ans au moment où la demande

date on which their application is made.	est faite.
...	...
Minimal requirements	**Exigences**
(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.

VIII. Position of the Parties

[20] The Applicant submits that the Officer breached the rules of natural justice by failing to disclose that he consulted extrinsic evidence, namely, the SSO website, in determining that he was not eligible to have his PR application processed. The Applicant submits that, as a result of not being made aware of this extrinsic evidence, he was not granted an opportunity to respond to the Officer's concerns regarding the genuineness of his employment references.

[21] The Applicant states that, contrary to the Officer's belief, not all employees in Iran are compelled to contribute to the SSO; it is possible to be employed on a private contractual basis without contributing to the SSO. The Applicant submits that the Officer, therefore, erred in his understanding of the social security scheme in Iran.

[22] The Applicant also submits that the Officer failed to consider the letter submitted by his employer (Farayand) explaining that the Applicant was employed on a contract-basis and, therefore, not subject to paying for social security (CTR at p 13). The Applicant argues that the fact that the

decision-maker did not mention this specific evidence in his decision demonstrates that it was overlooked or ignored.

[23] The Respondent submits that there was no breach of procedural fairness by the Officer in not disclosing that he consulted extrinsic evidence. The Respondent submits that the Officer reiterated his concerns to the Applicant regarding his employment history several times and the Applicant was fully aware of the Officer's concerns with regard to the lack of evidence on contributions to the SSO (*Nagulathas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1159).

[24] The Respondent also submits that the Officer was not required to mention all of the evidence in his decision, including the Applicant's statement that he is a contract employee and, therefore, is exempt from paying SSO contributions (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708).

[25] The Respondent contends that the evidence presented in the Applicant's affidavit was not before the Officer and cannot be used to assist in demonstrating how the Applicant met the requirements of the *IRPA* and its *Regulations* (*Roberts v Canada (Minister of Citizenship and Immigration)*, 2009 FC 518; *Pacheco Silva v Canada (Minister of Citizenship and Immigration)*, 2007 FC 733; *Nehme v Canada (Minister of Citizenship and Immigration)*, 2004 FC 64, 245 FTR 139).

IX. Analysis

Standard of Review

[26] The first issue advanced by the Applicant is a question of law and warrants review on a standard of correctness. A denial of the opportunity to respond to an officer's concerns is a procedural fairness issue that is always reviewable on a standard of correctness (*Hara v Canada (Minister of Citizenship and Immigration)*, 2009 FC 263, 341 FTR 278 at para 16-17). As a result, the decision-maker is owed no deference (*Malik v Canada (Minister of Citizenship and Immigration*), 2009 FC 1283 at para 23; *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 53).

[27] Conversely, issues regarding an applicant's eligibility for permanent residence as a skilled worker are based on discretionary findings of fact and are therefore reviewed by this Court on a standard of reasonableness (*Samuel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 223 at para 26-27; *Senadheera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 704, 412 FTR 286 at para 6).

[28] In reviewing an officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59).

Preliminary Issue

[29] As part of the Applicant's Record, the Applicant has submitted a personal affidavit that contains information that was not part of the record before the Officer. As this information was not before the Officer, the Court agrees with the Respondent that it should not be considered in the judicial review of the Officer's decision (*Lemiecha (Litigation guardian of) v Canada (Minister of Employment and Immigration)* (1993), 72 FTR 49, 24 Imm LR (2d) 95; *Vong v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1480, 306 FTR 175; *Dezameau v Canada (Minister of Citizenship and Immigration)*, 2010 FC 559, 369 FTR 151).

(1) Did the Officer breach the rules of procedural fairness by not informing the Applicant that he consulted extrinsic evidence?

[30] In *Rukmangathan*, above, this Court held that procedural fairness requires that "an applicant be given an opportunity to respond to extrinsic evidence relied upon by the visa officer and to be apprised of the officer's concerns arising therefrom" (at para 22) (reference is also made to *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25). The duty of procedural fairness owed in the context of visa applications, however, is fairly low (*Farooq v Canada (Minister of Citizenship and Immigration)*, 2013 FC 164). This is particularly so where the Officer's concerns arise directly from the requirements of the *IRPA* or its *Regulations*, as is the case here (*Obeta v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1542 at para 25).

[31] This Court has repeatedly stated that this duty of fairness only requires disclosure of information to provide an applicant with a meaningful opportunity to fully and fairly present his or her case, and to correct any prejudicial misunderstandings, misstatements, errors or omissions (*Dasent*, above; *Nadarasa* , above, at para 25; *Pizarro Gutierrez*, above). As stated in

Rukmangatham, above, this duty does not stretch to the point of requiring a visa officer to provide an applicant with a "running score" of the weaknesses in his or her application (at para 23 of that decision, also; specifically, para 2 and 12 of *Hsieh*, above; and, *Construction Labour Relations*, above, at para 3).

[32] An Applicant has the burden to put together an application that is "not only complete but relevant, convincing and unambiguous" (*Obeta*, above, at para 25). A visa officer is under no duty to complete a deficient application (*Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 786 at para 8).

[33] In the present case, the Court cannot agree with the Applicant that the decision should be overturned due to an alleged breach of natural justice. As it clearly appears on the record, the Applicant was expressly made aware of the Officer's concerns regarding his contributions to the SSO. The Officer expressed these concerns in his April 3 letter to the Applicant (CTR at p 9).

[34] In his letter, the Officer also provided notice of his intention to refuse the application if no further evidence corroborating the Applicant's employment references was received. The Applicant, however, took no steps to address the Officer's concerns. In his response letter, dated April 30, 2012 (CTR at p 7), the Applicant simply replied that he was not obliged to pay social security as he worked on contract for a private company, and, therefore, could not provide proof of contributions to the SSO. The Applicant provided no evidence in support of this proposition nor did he attempt to provide other corroborating evidence in support of his employment references.

[35] In the Court's view, there is no question that the Applicant knew, or should have known, precisely what issues were of concern to the Officer based on this letter. Moreover, in the circumstances of this case, the Court finds that the Officer's review of the SSO website should not be considered to trigger a duty of fairness on the part of the Officer to inform the Applicant. The information retrieved by the Officer in this case was publicly available. The Applicant could, thus, reasonably be expected to have had knowledge of that information; especially as someone who is working in Iran and ostensibly complying with Iranian labour laws.

[36] Similarly, the Applicant should also have reasonably expected that a diligent officer would likely inquire into the rules regarding contributions to the SSO after being informed that the Applicant was exempt from such contributions, without any supporting documentation.

[37] As reminded in *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708:

> [38] The question is not whether the impugned document was available to the Applicant, but whether the information contained in that document was available to the Applicant, and whether the Applicant could reasonably be expected to have knowledge of that information (see *Jiminez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1078 at paras 17-19 (available on CanLII); *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932 at paras 38-39 (available on CanLII))… [Emphasis added.]

[38] On the facts of this case, this Court does not find a breach of procedural fairness in the failure of the Officer to disclose to the Applicant that he had accessed the SSO website in arriving at the decision under review.

(2) Did the Officer err in failing to consider evidence regarding the Applicant's work history?

[39] In the present case, it is evident that the Applicant disagrees with the Officer's weighing of the evidence; however, he does not demonstrate that the Officer committed a reviewable error.

[40] Contrary to the Applicant's allegations, the Officer specifically mentioned that he took the Applicant's letter of April 30, 2012 into consideration in arriving at his decision; however, he indicated that it was not sufficient to disabuse him of his concerns.

[41] It was up to the Officer to weigh this evidence and to make negative findings supported by the evidence (*Antrobus v Canada (Minister Citizenship and Immigration)*, 2012 FC 3). It is not the function of this Court to reweigh the evidence and substitute its decision for that of the Officer (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35).

[42] The Court finds that the evidence on the record reasonably supports the Officer's finding that the Applicant did not provide satisfactory evidence to demonstrate that he had work experience as a Geophysicist.

[43] Consequently, the Court does not find that its intervention is warranted (*Dunsmuir*, above, at para 47).

X. Conclusion

[44] For all of the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS ORDERS that the Applicant's application for judicial review be dismissed with no question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Naseem Mithoowani	FOR THE APPLICANT
Teresa Ramnarine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT