Federal Court of Appeal  Cour d'appel fédérale

Date: 20131119

Docket: A-97-13

Citation: 2013 FCA 263

CORAM: **EVANS J.A.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

QIN QIN

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on October 17, 2013.

Judgment delivered at Ottawa, Ontario, on November 19, 2013.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: GAUTHIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

[1] Foreign nationals who are in Canada on a temporary basis may apply for permanent residence as a member of the Canadian Experience Class (CEC). Applicants must satisfy a visa officer that, among other things, they have had at least 12 months work experience in Canada in the preceding 24 months. The program is limited to those who have worked in occupations requiring a relatively high level of skill.

[2] The principal issue raised in this case concerns the evidence that a visa officer may consider in determining if a CEC applicant meets the Canadian work experience requirement. In particular, when deciding whether an applicant was employed to perform duties of the requisite level of skill, may the officer take into account the fact that the applicant's wages are below those prevailing for the occupation in which the applicant was assessed?

[3] This is an appeal from a decision of the Federal Court in which Justice Gleason (Judge) allowed an application for judicial review by Qin Qin, a national of China, to set aside an officer's rejection of her application for permanent residence as a member of the CEC. The officer found that Ms Qin had not demonstrated that she met the Canadian work experience requirement set out in section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations)

[4] The visa officer based his decision in part on the disparity between Ms Qin's wages and the relatively higher minimum wage rates prevailing locally for legal secretaries and translators/interpreters, the occupational categories in which her application was assessed. In addition, the description of Ms Qin's job provided by her employer did not match the duties of Legal Secretaries as described in the National Occupational Classification (NOC).

[5] In a decision reported as *Qin v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 147, the Judge allowed the application for judicial review on the ground that the visa officer had breached the duty of procedural fairness. He had failed to inform Ms Qin that he proposed to consult comparative wage data compiled by Human Resources and Skills Development Canada (HRSDC) as an indicator of whether her employment duties were consistent with those of legal

secretaries, and to give her an opportunity to respond. In this appeal, the Minister of Citizenship and Immigration does not challenge the Judge's finding of procedural unfairness.

[6] The Judge remitted Ms Qin's application for a permanent resident visa as a member of the CEC for redetermination by a different officer. She left it to that officer to decide if Ms Qin met the Canadian work experience requirement on the basis of the NOC codes for Translators, Terminologists and Interpreters (Translators/Interpreters) or Legal Secretaries.

[7] The Judge also held that if the officer had observed the duty of procedural fairness it would have been open to him to take into account HRSDC comparator wage data as an indicator of whether the employment duties performed by Ms Qin were consistent with those in the relevant NOC codes.

[8] The Judge certified the following two questions of general importance under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

> **Question 1:** Is it permissible for a visa officer to consider comparator salary data when assessing the nature of the work experience of an applicant who wishes to qualify as a member of the Canadian Experience Class, as described in section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?
>
> **Question 2:** What standard of review is applicable to a visa officer's interpretation of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 and to the officer's assessment of an application under the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

[9] The parties agree that Ms Qin's CEC application must be redetermined by another visa officer because of the breach of procedural fairness. However, it is clear from the Judge's reasons

that her Order implicitly permits the officer redetermining Ms Qin's visa application to take comparator wage data into account. Hence, the questions of general importance certified by the Judge respecting the interpretation of section 87.1, and the standard of review applicable to the visa officer's implicit interpretation of it, were properly certified under paragraph 74(*d*).

[10] Strictly, however, the second part of the second certified question, namely, the standard of review to be applied to a visa officer's assessment of a CEC application, does not arise for decision in this appeal. The officer's refusal of Ms Qin's application has been set aside on procedural grounds. The standard of review applicable to the assessment of the application will only arise after it has been redetermined. Nonetheless, because the other questions were properly certified, I propose to answer it.

Factual background

[11] Ms Qin has been in Canada since 2002. After graduating from York University in 2009 with a Bachelor of Arts degree she obtained a three-year temporary resident permit that enabled her to take employment. In 2010 she started to work full-time for a small Toronto law firm, K D Associates, as an administrative assistant, and a translator/interpreter for the firm's Chinese clients.

[12] Subparagraph 87.1(2)(*a*)(i) of the Regulations provides that, in order to qualify for permanent residence as a member of the CEC, an applicant's Canadian work experience must be in one or more of the occupations of Skill Type O Management Occupations or Skill Level A or B in the NOC matrix. These occupations are relatively highly skilled and include Translators/Interpreters

(NOC Code 5125) and Legal Secretaries (NOC Code 1242). The NOC sets out a range of tasks that comprise listed occupations, but does not include any wage information.

[13] K D Associates provided a letter of reference, dated September 20, 2011, in support of Ms Qin's application for permanent residence in Canada. The letter stated that she was employed by the firm as a legal secretary/translator, described her duties, and stated her hourly wage rate and annual salary.

[14] In October 2011, more than a year after she had started working for K D Associates, Ms Qin applied for permanent resident status as a member of the CEC. She requested an assessment of her application on the basis that she had been employed full-time for more than 12 months as a Legal Secretary and Translator/Interpreter.

[15] The officer was not satisfied that the reference letter's statement of Ms Qin's work duties adequately matched those contained in NOC Code 1242 (Legal Secretaries). His search of the HRSDC database of local average and minimum wage rates for legal secretaries, and translators/interpreters (NOC Code 5125) revealed that Ms Qin's hourly wage and annual salary were below the minimum prevailing local wage rate and annual salary for these occupations.

[16] A letter from Citizenship and Immigration Canada, dated March 12, 2012, advised Ms Qin that her application had been rejected. The reasons given for the decision were that she had not met the skilled work experience requirement because her salary was not consistent with NOC Codes

5125 or 1242, and the employment duties listed in the letter of reference were not consistent with NOC Code 1242.

Federal Court's decision

[17] I need only describe the two elements of the Judge's decision that are in contention in this appeal.

[18] The first is the standard of review applicable to the officer's interpretation of the Regulations. The second is whether a visa officer may compare a CEC applicant's wages with prevailing local wage rates for the occupational categories in which the applicant was assessed as an aid to determining if the applicant has satisfied the Canadian work experience requirement in section 87.1 of the Regulations. This issue has two parts. First, is comparator salary level factually relevant to whether applicants have performed the employment duties of the NOC codes in which they are assessed? Second, if it is, does the visa officer have the legal authority to take it into account?

[19] On the standard of review, the Judge noted that decisions of this Court (*Khan v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 339 (*Khan*) and *Patel v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 187, [2013] 1 F.C.R. 340 (*Patel*)) had applied the correctness standard to visa officers' interpretations of provisions in the Regulations relating to the work study program and educational requirements.

[20] However, the Judge also stated (at para. 10) that the Supreme Court of Canada had interpreted *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) as deciding that reasonableness is the standard of review presumptively applicable to a tribunal's interpretation of its home statute: see, in particular, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39.

[21] The Judge asked herself (at para. 16) whether *Khan* and *Patel* should still be regarded as having "satisfactorily" resolved the applicable standard of review issue in light of the Supreme Court's post-*Dunsmuir* jurisprudence. Without deciding this question, she applied the correctness standard because *Khan* and *Patel* were directly on point: at para. 13. Moreover, she added, nothing turned on it because the officer's interpretation of the legislation satisfied both standards.

[22] On the substantive issue, the Judge stated that the significant disparity between Ms Qin's wages and the prevailing local minimum wage for legal secretaries and translators/interpreters was relevant to determining the largely factual question of whether she was in fact performing the duties of these occupations as described in the applicable NOC codes. The Judge also held that the visa officer had the legal authority under the Regulations to take wages into account when deciding if a CEC applicant's employment duties were within the applicable NOC code.

Statutory framework

[23] I set out below the material provisions of section 87.1 of the Regulations that were in force at the time relevant to this appeal.

Canadian Experience Class	*Catégorie de l'expérience canadienne*
Class	**Catégorie**
87.1 (1) For the purposes of subsection 12(2) of the Act, the Canadian experience class is prescribed as a class of persons who may become permanent residents on the basis of their experience in Canada and who intend to reside in a province other than the Province of Quebec.	87.1 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie de l'expérience canadienne est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur expérience au Canada et qui cherchent à s'établir dans une province autre que le Québec.
Member of the class	**Qualité**
(2) A foreign national is a member of the Canadian experience class if	(2) Fait partie de la catégorie de l'expérience canadienne l'étranger qui satisfait aux exigences suivantes :
(*a*) they	*a*) l'étranger, selon le cas :
(i) have acquired in Canada within the 24 months before the day on which their application for permanent residence is made at least 12 months of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix, and have acquired that work experience after having obtained	(i) a accumulé au Canada au moins douze mois d'expérience de travail à temps plein ou l'équivalent s'il travaille à temps partiel 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 au cours des vingt-quatre mois précédant la date de la présentation de sa demande de résidence permanente et, antérieurement à cette expérience de travail, a obtenu au Canada, selon le cas
…	[…]

Issues and analysis

(i) ***Standard of review***

[24] As I have already noted, the standard of review of the visa officer's assessment of Ms Qin's application does not strictly arise in this appeal because his decision has been set aside for procedural unfairness. However, since other questions have been properly certified and the issue is not in dispute between the parties, I can deal with it briefly.

[25] A visa officer's refusal of an application for permanent residence on the ground that an applicant's employment was not consistent with an occupation in an NOC code of the required skill level is a question of mixed fact and law at the factual end of the spectrum. Accordingly, it is reviewable on the standard of reasonableness: *Dunsmuir* at para. 53.

[26] Whether comparator wage data are factually relevant to determining if an applicant was employed in the NOC occupation in which she was assessed is a question of fact. Hence, it, too, is reviewable on the reasonableness standard: *ibid.*

[27] The more contentious issue is whether the standard of correctness or reasonableness is applicable to a review of visa officers' interpretations of the Regulations. The question of interpretation at issue is whether section 87.1 of the Regulations permits officers to consult HRSDC prevailing wage data as an aid to determining if a CEC applicant was performing employment duties that correspond to those of the NOC code in which she or he was assessed.

[28] This Court has recently reaffirmed in *obiter dicta* that a visa officer's interpretation of the enabling legislation is reviewable on the correctness standard: *Takeda Canada Inc. v. Canada (Minister of Health)*, 2013 FCA 13 at para. 116 (*per* Dawson J.A.).

[29] After the Judge rendered her decision in the present proceeding, the Supreme Court of Canada held in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (*Agraira*) that a Minister's implied interpretation of the term "national interest" in IRPA, subsection 34(2) is reviewable on the reasonableness standard. Thus, the Court reasoned, when a Minister's decision made under that provision is challenged on the basis of the legal relevance of the factors taken into account, a reviewing court may only set the decision aside if it can be inferred from those factors that the Minister had proceeded on the basis of an unreasonable interpretation of "national interest".

[30] Had it been available to her, *Agraira* might have strengthened the Judge's doubts as to whether, in a post-*Dunsmuir* world, *Khan* and *Patel* should any longer be regarded as having satisfactorily decided that visa officers' interpretations of the statutory provisions that they administer are reviewable for correctness.

[31] For the reasons that I develop below, section 87.1 of the Regulations clearly authorizes a visa officer to take comparator wage information into account when assessing whether a CEC applicant's employment duties match those described in the relevant NOC code so as to satisfy the Canadian work experience requirement. Since the interpretation of section 87.1 implicit in the visa

officer's consideration of the wage information in his assessment of Ms Qin's visa application is correct it cannot be unreasonable.

[32] Indeed, unreasonableness as a possible standard of review of an administrative interpretation of legislation only arises when the statutory provision in question is ambiguous and "there is no one interpretation which can be said to be 'right'": *CUPE, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at 237.

[33] Hence, if a reviewing court concludes that one interpretation is "right", after conducting a textual, contextual, and purposive interpretative analysis of the legislation, and giving careful and respectful consideration to the tribunal's reasons, correctness is the standard of review. In these circumstances, if a tribunal has interpreted the statute in some other way, the court may intervene to ensure administrative compliance with the legislature's clearly expressed intention. The rule of law requires nothing less.

[34] Although not necessary to determine the standard of review in this case because section 87.1 is not ambiguous, I would also note that deference is only due to administrative decision-makers on questions within their statutory power to decide. Adjudicative tribunals, such as labour relations boards, human rights tribunals, and professional disciplinary bodies, normally have express or implied statutory authority to decide any questions of law or fact necessary to dispose of a matter properly before them.

[35] However, not all those entrusted with the exercise of statutory power necessarily have the delegated power to decide questions of law, including the interpretation of their enabling statute. Of course, from time to time all statutory delegates may have to form an opinion on whether the law permits them to take some particular administrative action, including enacting subordinate legislation. But this is not the same as a statutory power to decide definitively the meaning of a provision in an enabling statute, subject only to judicial review on the presumptive standard of reasonableness.

[36] Whether the delegated statutory powers of any given public official or body include the power to decide question of law, including the interpretation of their enabling legislation, may be determined by reference to the factors identified in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504 at para. 48: and see *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2007] 3 F.C.R. 169 at paras. 47-56 (*Covarrubias*); *Shpati v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 286, [2012] 2 F.C.R. 133 at para. 27 (*Shpati*); *Georgia Strait Alliance v. Canada (Fisheries and Oceans)*, 2012 FCA 40 at para. 99.

[37] These factors include the terms of the delegate's statutory mandate, the delegate's relationship with other decision-makers in the statutory scheme, practicality, capacity, and procedure. On this basis, it must be inferred from the reasoning in *Agraira* that the Court was of the view that the Minister had the delegated power to interpret the term "national interest" in IRPA, subsection 34(2).

[38] Because I have already decided for other reasons that correctness is the applicable standard of review in this case, it is not necessary for the disposition of this appeal to decide if post-*Dunsmuir* jurisprudence, including *Agraira*, requires this Court to revisit its decisions holding that immigration officials are not entitled to curial deference on issues of statutory interpretation: see, for example, *Khan* and *Patel* (visa officers); *Shpati* (enforcement officers), and *Covarrubias* (pre-removal risk assessment officers).

(ii) ***May wage rate data be considered in the determination of a CEC application?***

(a) Factual relevance

[39] As I have already indicated, whether an applicant is performing the employment tasks listed in an NOC code is largely a question of fact. Whether evidence is relevant to determining what duties the applicant was performing and, if it is, how much weight should be given to it, are also factual questions. Hence, reasonableness is the standard of review applicable to these aspects of a visa officer's rejection of a CEC application.

[40] I agree with the Judge that it was not clear from Ms Qin's reference letter that her employment duties fell within the applicable NOC codes. Accordingly, it was reasonable for the visa officer to consult the extensive prevailing minimum and average wage data for these occupations compiled by HRSDC and available on its website. Wages generally increase with the complexity of a job. Wage rates may be particularly relevant in assessing a CEC application because the program is limited to those with higher skill levels.

[41] It is not a statutory criterion that an applicant for permanent residence as a member of the CEC must be paid wages that are consistent with prevailing wage rates for the occupation in which the application was assessed. Hence, it will be open to Ms Qin in her representations to show why, in her particular situation, the officer should attach little probative value, if any, to her wages and to the HRSDC wage data when determining whether her employment duties satisfy the Canadian work experience requirement.

(b) The legal issue

[42] Having found that it was reasonable for the visa officer to compare Ms Qin's hourly wage rate and annual salary with the HRSDC data as an indicator of whether she was engaged in the NOC occupations in which she was assessed, I now consider if the Regulations preclude the officer from undertaking this comparison. I share the Judge's view that they do not.

[43] Express statutory authority is not required to enable administrative decision-makers to consider evidence that has probative value to determining a question entrusted to them. It is normally implicit in the grant of legal authority to decide a question of fact that the decision-maker may take into account evidence relevant to making that decision.

[44] The text of section 87.1 of the Regulations is silent on the evidence that visa officers may take into account when deciding a CEC application. Hence, considered alone, it does not rebut the presumption that they have the implied power to consider any evidence relevant to determining whether an applicant meets the skilled work experience requirement.

[45] However, Ms Qin argues that to permit visa officers to take wage information into account when assessing a CEC application would be inconsistent with the statutory scheme. She points to provisions in the Regulations governing the issuance of temporary work permits (TWP), and permanent resident visas to members of the federal skilled worker (FSW) class.

[46] The provisions of the Regulations governing the FSW and TWP programs expressly direct visa officers to approve an offer of employment on the basis of an opinion of an HRSDC officer that, among other things, the wages offered to the applicant by a prospective employer are consistent with prevailing wage rates for the occupation in question: see Regulations, subparagraph 82(2)(*c*)(ii)(C) (federal skilled workers) and paragraph 203(3)(*d*) (temporary work permits). Ms Qin makes two arguments based on these provisions.

[47] First, when Parliament intends comparator wage data to be taken into account in assessing an employment-based application to reside in Canada, it does so expressly. The absence of any such provision in section 87.1, or in the policy manuals, indicates that wages are not a criterion for assessing the work experience of an applicant for a permanent residence visa as a member of the CEC.

[48] I disagree. Under the FSW and TWP programs an opinion is required on the impact on the labour market of granting a visa or work permit. Determining whether an applicant's wages are consistent with those prevailing in the relevant occupation is one of the statutory components of a labour market opinion. In contrast, it is not a statutory condition to the grant of a visa under the CEC program that an applicant's wages must be consistent with the prevailing local wage rates for the

occupation in which the applicant is being assessed. Wages are simply one of the many considerations that may be relevant to determining whether a CEC applicant satisfies the prescribed work experience requirement.

[49] In my view, the visa officer did not treat Ms Qin's low salary as a disqualification in itself, because he also found that the description of her duties in the letter of reference was not consistent with NOC Code 1242: see also paragraph 25 of the affidavit of the visa officer at Appeal Book, p. 171.

[50] On the other hand, if there is satisfactory evidence from an employer that a CEC applicant has the required Canadian work experience, she may be granted a visa even though her wages are below the prevailing wage rates. Indeed, when other evidence is available, the officer may be satisfied that an applicant meets the work experience requirement without having to consider comparator wage information at all. Much depends on the particular facts of an application.

[51] I would not expect the Regulations to attempt to identify the different kinds of evidence that a visa officer may consider in determining if a CEC applicant's work experience falls within a particular NOC code. However, the requirement in the CEC application process for an employer to provide an applicant's wage information may be some indication that wages are relevant to a determination of whether an applicant has satisfied the Canadian work requirement.

[52] Ms Qin's second argument based on the FSW and TWP programs is that it would unduly complicate and confuse the administration of the CEC program if visa officers could take wages into account in assessing an application.

[53] She noted that under the FSW and TWP programs HRSDC officers, not visa officers, give a labour market opinion based on, among other things, whether the individual's wages are consistent with prevailing rates. This is because assessing labour market impact is within the expertise of HRSDC officers. Consequently, she argues, section 87.1 should not be interpreted as authorizing visa officers to make a similar determination with respect to CEC applications because they lack the necessary expertise.

[54] I am not persuaded that permitting visa officers merely to take wage data into account when assessing a CEC applicant's work experience would so disrupt the fair and effective administration of the program as to warrant reading into the Regulations a limit on the power of visa officers to take relevant evidence into account.

[55] Considering comparator wage rates as one indication of whether a CEC applicant's employment duties are consistent with those described in the relevant NOC code is not so complex a task that a visa officer could not perform it, especially with the benefit of applicants' representations. Permitting a visa officer to take account of wage information for this limited purpose is not the equivalent of authorizing a visa officer to prepare a labour market opinion such as that required in connection with FSW and TWP applications.

[56] There is nothing in the record before us to suggest that the use of wage data as an indicator of whether a CEC applicant has the requisite Canadian work experience has caused administrative problems. In any event, visa officers do not work in a vacuum; advice from more experienced colleagues may be available to them if it is required.

Conclusions

[57] For these reasons, I would dismiss the appeal and answer the certified questions as follows:

Question 1: Is it permissible for a visa officer to consider comparator salary data when assessing the nature of the work experience of an applicant who wishes to qualify as a member of the Canadian Experience Class, as described in section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

Answer: Yes

Question 2: What standard of review is applicable to a visa officer's interpretation of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 and to the officer's assessment of an application under the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

Answer: Correctness is the applicable standard in this case for reviewing the visa officer's interpretation of section 87.1 of the Regulations, and reasonableness is the standard of review of a visa officer's findings of fact and application of section 87.1 to the facts of a CEC application.

"John M. Evans"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-97-13

(APPEAL FROM A DECISION OF THE HONOURABLE MADAM GLEASON OF THE FEDERAL COURT DATED FEBRUARY 8, 2013, DOCKET NO. IMM-1543-12)

STYLE OF CAUSE:	QIN QIN V. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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