Federal Court  Cour fédérale

Date: 20150129

Docket: IMM-6341-13

Citation: 2015 FC 115

Toronto, Ontario, January 29, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JASVIR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of the visa officer's [Officer] decision which refused the Applicant's application for a work permit.

II. Facts

[2] This case concerns the refusal of a work permit application. The Applicant is a citizen of India, who migrated to Italy over 10 years ago and became a permanent resident in Italy. The Applicant was offered a job in Canada, based on his work experience and English ability, as a heavy truck driver. The employer was aware that a high level of English is not required to effectively complete the job duties. Specifically, the job offer stated, "driving and operating trucks, maintaining and reading log books, operate vehicle with all rules and regulations of the road and load being carried" (Job Offer and Contract, Certified Tribunal Record, p 18).

[3] In February 2013, the Applicant applied for a work permit in Canada. He submitted a positive Labour Market Opinion [LMO], job offer and contract, proof of residency in Italy, experience letter indicating current income (citing driving experience in Italy), bank statement, proof of Italian truck driver's license, and IELTS language test results.

[4] The employer was aware that the Applicant would need to convert his Italian truck driver license to a Canadian license and obtain the Air Brake Endorsement once he got to Canada.

III. Decision

[5] On August 29, 2013, the Officer refused the application for a work permit [Decision] because the Applicant failed to demonstrate that he adequately met the job requirements of his prospective employment. The Officer cited:

- insufficient evidence of employment to be satisfied of trucking ability;
- low level of education and no satisfactory evidence of ability to communicate in English to the degree required to perform the job in Canada in a safe and efficient manner; and
- failing to provide a drivers license of the type required in the LMO, nor the Air Brake Endorsement.

[6] The officer was also unsatisfied that the Applicant would leave Canada by the end of the period authorized for his stay.

IV. Issues

[7] The Applicant raised two key grounds in this judicial review:

1. whether there were unreasonable findings of fact; and

2. whether there was a breach of procedural fairness.

V. Parties' Positions

[8] With respect to the unreasonability of the decision (the first issue), the Applicant contends that the language requirements were arbitrarily decided, in that there is no measure that the Officer could point to on the levels required, and that the Officer made the decision arbitrarily, given the Applicant's IELTS scores (average of 4.0 across the four measures).

[9] The LMO confirmation letter says oral and written English is required but does not provide the level of proficiency required. The National Occupation Classification [NOC] description does not require any particular (and certainly not an advanced) level of English. And the duties in the job offer letter only mandated basic English skills.

[10] Second, the Applicant argues that the insufficiency finding with respect to evidence of past job experience was also unreasonable. The Applicant provided evidence of 10 years of truck driving experience in Italy, a letter of employment, and proof of his Italian driver's license.

[11] Third, the Applicant argues that the finding that the Officer was not satisfied the Applicant would leave Canada at the end of the period authorized in the work permit was unreasonable, given that there was nothing in the evidence to suggest that the Applicant would not abide by Canadian immigration law. It was unreasonable for the Officer to provide no basis for his conclusions that the Applicant would remain in Canada. The evidence of his stay in Italy, LMO and ability to apply for the Canadian Experience Class indicated otherwise (see, for instance *Zhang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1381 at para 45).

[12] With regard to the second issue, the Applicant submits that the Officer breached the duty of procedural fairness by failing to provide the Applicant with the opportunity to address the Officer's concerns with respect to the issues above (language, work experience, and temporary intent). The Applicant, in his written materials, relies on *Gedeon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1245 at paras 101-102.

[13] In response to the first issue, the Respondent submits that the Officer's conclusions were reasonable. It was reasonably open to the Officer on the record to find that the Applicant was not a genuine temporary resident because he had not submitted sufficient evidence that he would be able to perform the duties of his prospective job in Canada. Also, since the Applicant failed to establish his ability to perform the duties of his prospective job, it was reasonable for the Officer to conclude that he was not a genuine temporary resident (including that he would not have proper means to support himself).

[14] It was also open to the Officer on the record to conclude that the Applicant had not established that he could perform the duties of his prospective employment. The mere fact of a positive LMO is not determinative of an Applicant's ability to perform the work sought: the visa officer is under a duty to perform an independent assessment of that ability (*Grewal v Canada (Minister of Citizenship and Immigration)*, 2013 FC 627 [*Grewal*]). In this case, there was insufficient evidence of the Applicant's truck driving ability. Further, the Officer's assessment of the Applicant's language ability was relevant to the assessment of the Applicant's ability to perform his job, and the assessment was reasonable. Officers are entitled to determine that an Applicant requires a language ability different from that set forth in the LMO (*Grewal* at para 9; CIC's FW1 Temporary Foreign Worker Guidelines, s 8.3).

[15] On the procedural fairness issue, the Respondent submits that the Applicant was not entitled to an opportunity to address the Officer's concerns, because the Officer's concerns arose directly from the Applicant's failure to satisfy the requirement of *IRPA* and the Regulations, rather than from the credibility, accuracy or genuine nature of the information he submitted

(*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24 [*Hassani*]).

VI. Analysis

[16] I agree with the Respondent's arguments in response to each of these points, namely that the Decision was reasonable on each of the three items raised in issue 1, as well as procedurally fair.

[17] First, it was reasonable for the Officer to request and consider language scores. The job offer stated that the Applicant needed to read and maintain log books, and understand the rules of the road. It was therefore reasonable for the Officer to find that a certain level of English was required, and that the Applicant's language scores were insufficient to do the job in a safe manner.

[18] *Grewal*, above, is on all fours with this case. The same question was being asked in that decision of Justice Mosley, which was whether it was open to the visa officer to determine the language level required for a position. In that case, Mr. Grewal had applied as a temporary foreign worker. His application was rejected as the visa officer was concerned that he might overstay his permit and found that he did not have a sufficient command of English to carry out the duties of the truck driver position. Mr. Grewal had equal or higher IELTS results than the Applicant herein in each of the four domains of listening, reading, writing and speaking (although the average score of 4.0 was somehow identical for both Applicants).

[19] Justice Mosley found that the officer in *Grewal* clearly thought about the language requirements and explained why she considered that a greater level of English ability was required. He found that the visa officer's decision that "for this particular job Bunel 5 was required, did not diverge so far from the predictable as to be procedurally unfair in the absence of a waring letter" (at para. 20 Grewal). Justice Mosley also wrote:

> **17** Findings on language levels for temporary foreign workers are highly discretionary decisions, on which there is little jurisprudence. Part 11 of the IRPR ("Workers", sections 194-209), under which the present case falls, does not provide guidance on assessing language ability. The visa officer was required to make findings based on the evidence before her and there is no evidence in the present case that she exercised her discretion capriciously or unreasonably.

[20] A positive LMO is not determinative of how a visa officer is to exercise his or her discretion, and visa officers are entitled to determine that an applicant requires language ability different from that set forth in the LMO and job offer if relevant to the performance of the job duties. After all, the LMO portion of the process is to test a labour market need, and not the attributes of the individual: that is what the visa application is for: (see Chen v Canada (MCI), 2005 FC 1378, at para. 12; and Chhetri v Canada (MCI) 2011 FC 872, at para. 17).

[21] In addition, I note that in this case, the applicable version of the CIC policy manual at the time of decision states that:

> Immigration officers should not limit their assessment of language, or other requirements to perform the work sought, solely to those described in the [LMO]. However, the language requirements stated in the LMO should be part of the officer's assessment of the applicant's ability to perform the specific work sought because it is the employer's assessment on the language requirement(s) for the job.

> Additionally, the officer can consider:
>
> - the specific work conditions and any arrangements the employer has made […]; and
> - terms in the actual job offer, in addition to general requirements set out in the [NOC] description […]
>
> [Emphasis added] (FW1: Foreign Worker Manual, s 8.3)

[22] I also agree with the Respondent that the other findings of the Officer were reasonable. The job offer letter was insufficient to prove that the Applicant could fulfill the job duties. The letter stated that he worked in Italy only as a driver, not a truck driver, and does not describe his duties in Italy. Therefore, we do not know if the work in Italy was analogous to the intended work in Canada, and/or whether there were English language requirements there.

[23] In terms of the finding on temporary intent, that must be viewed contextually. It cannot be isolated. When one considers the fact that the Officer's finding is that the Applicant would not be able to fulfil the job duties, it follows that he would not be able to fulfill the terms of his temporary residence status. The presumption that foreign nationals seeking to enter Canada are immigrants would therefore not be rebutted (see *Obeng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 754 at para 20; *Danioko v Canada (Minister of Citizenship and Immigration)*, 2006 FC 479 at para 15; *Ngalamulume v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1268 at para 25, and *Grewal* as cited above).

[24] A visa officer does not need to provide extensive reasons (*Pacheco v Canada (Minister of Citizenship and Immigration)*, 2010 FC 347 at para 36. The Officer provided sufficient reasons

in this case (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62).

[25] In terms of the procedural fairness issue, the Applicant was not entitled to an opportunity to address the Officer's concerns, because the Officer's concerns arose directly from the Applicant's failure to satisfy the requirements of *IRPA* and the Regulations (i.e. whether the Applicant was able to perform the work sought (see *Hassani*, above, at para 24)) rather than the "credibility, accuracy or genuine nature of information submitted", which may have required an opportunity to address the Officer's concerns. It was Applicant's onus to put forward sufficient materials to satisfy the Officer that he could fulfil the job duties, and he did not do so.

VII. Conclusions

[26] It is my conclusion that the Decision was reasonable. Ultimately, the mere fact of having a positive LMO is not determinative of the Applicant's ability to perform the work sought, and the Officer properly undertook her duty to perform an independent assessment, including with respect to language and the other factors considered above. Further, there was no breach of procedural fairness in not giving the Applicant an opportunity to address the Officer's concerns in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the Application is dismissed. No questions were raised for certification.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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