Federal Court  Cour fédérale

Date: 20150428

Docket: IMM-1666-14

Citation: 2015 FC 538

Ottawa, Ontario, April 28, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

BENJAMIN TRAVIS TOLLERENE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Benjamin Travis Tollerene (the Applicant) has brought an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (the IRPA) of a decision of an immigration visa officer (the Officer) at the Los Angeles office of the Consulate General of Canada. The Officer denied the Applicant's application for permanent residence in

Canada under the Self-Employed Person Class, pursuant to s 12(2) of the IRPA and s 100(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The Officer found that the Applicant did not meet the definition of a "self-employed person" in s 88(1) of the Regulations.

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] The Applicant is a citizen of the United States of America and earns his living by playing poker at a professional level. He applied for a permanent resident visa on April 16, 2013 under the Self-Employed Person Class in accordance with s 88(1) of the Regulations.

[4] On September 4, 2013, the Applicant was asked by Citizenship and Immigration Canada (CIC) to provide further documentation regarding his employment. On November 4, 2013, the Applicant submitted some documentation in response and his file was then transferred to the visa office in Los Angeles for processing. In his correspondence of November 4, 2013 the Applicant also requested that CIC clarify what was required in the way of contracts or invoices.

[5] The Applicant received no further communication from the Los Angeles office of the Consulate General until he was informed on February 25, 2014 that his application was rejected.

III. Issues

[6] The following issues are raised in this application for judicial review:

A. Whether the Applicant was denied procedural fairness because he was not given a sufficient opportunity to respond;

B. Whether the Officer's reasons were adequate; and

C. Whether the Officer's decision was reasonable.

IV. The Officer's Decision

[7] In the written decision provided to the Applicant, the Officer noted the governing provisions of the IRPA and Regulations before deciding that the Applicant did not meet the statutory requirements of the Self-Employed Person Class. Specifically, the Officer considered the definitions of "self-employed person" and "relevant experience" in the Regulations. The Officer concluded as follows:

> I am not satisfied that you meet the definition of a self-employed person set out in subsection 88(1) of the Regulations because information available in your application was not sufficient to clearly demonstrate how your intended activity in Canada, i.e. a professional poker player, will make a significant contribution to specified economic activities in Canada.

[8] According to the Computer Assisted Immigration Processing System Notes (CAIPS Notes), once the Applicant had provided further documentation in response to CIC's request – described in the CAIPS Notes as tax returns, samples of work, FBI clearance and bank account balance – the screening officer concluded that an interview would be required to determine if the Applicant met the definition of a professional athlete and if he would provide a significant economic benefit to Canada. Once the file was transferred to Los Angeles, the CAIPS Notes indicate that the deciding Officer reviewed the Applicant's employment as a professional poker player, which he plays both on the Internet and in person, and observed that the Applicant "appears to have lucrative earnings as a result of his occupation as poker player although history of funds accumulation was not sufficiently established."

[9] The Officer concluded that the Applicant had provided insufficient information to demonstrate how, through his work as a professional poker player, he would enrich Canadian culture and sports. The Applicant was therefore unable to demonstrate that he would make a significant contribution to specified economic activities in Canada.

V. Relevant Provisions

[10] The IRPA provides in s 12(2):

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.

[11] The Regulations provide in s 100(1):

100. (1) For the purposes of subsection 12(2) of the Act, the self-employed persons 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 and who are self-employed persons within the meaning of subsection 88(1).	100. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs autonomes est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada et qui sont des travailleurs autonomes au sens du paragraphe 88(1).

[12] The Regulations provide in s 88(1):

88. (1) The definitions in this subsection apply in this Division.	88. (1) Les définitions qui suivent s'appliquent à la présente section.
[…]	[…]
"relevant experience"	« expérience utile »
« expérience utile »	"relevant experience"
"relevant experience", in respect of	« expérience utile »
(a) a self-employed person, other than a self-employed person selected by a province, means a minimum of two years of experience, during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application, consisting of	a) S'agissant d'un travailleur autonome autre qu'un travailleur autonome sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci, composée :
(i) in respect of cultural activities,	(i) relativement à des activités culturelles :

(A) two one-year periods of experience in self-employment in cultural activities,	(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités culturelles,
(B) two one-year periods of experience in participation at a world class level in cultural activities, or	(B) soit de deux périodes d'un an d'expérience dans la participation à des activités culturelles à l'échelle internationale,
(C) a combination of a one-year period of experience described in clause (A) and a one-year period of experience described in clause (B),	(C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),
(ii) in respect of athletics,	(ii) relativement à des activités sportives :
(A) two one-year periods of experience in self-employment in athletics,	(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités sportives,
(B) two one-year periods of experience in participation at a world class level in athletics, or	(B) soit de deux périodes d'un an d'expérience dans la participation à des activités sportives à l'échelle internationale,
(C) a combination of a one-year period of experience described in clause (A) and a one-year period of experience described in clause (B), and	(C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),
(iii) in respect of the purchase and management of a farm, two one-year periods of experience in the management of a farm; and	(iii) relativement à l'achat et à la gestion d'une ferme, de deux périodes d'un an d'expérience dans la gestion d'une ferme;

(b) a self-employed person selected by a province, has the meaning provided by the laws of the province.	b) s'agissant d'un travailleur autonome sélectionné par une province, s'entend de l'expérience évaluée conformément au droit provincial.
[…]	[…]
"self-employed person"	« travailleur autonome »
« travailleur autonome »	"self-employed person"
"self-employed person" means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada.	« travailleur autonome » Étranger qui a l'expérience utile et qui a l'intention et est en mesure de créer son propre emploi au Canada et de contribuer de manière importante à des activités économiques déterminées au Canada.

VI. Standard of Review

[13] A decision regarding an application for permanent residency as a member of the Self-Employed Person Class is subject to review against the standard of reasonableness (*Griscenko v Canada (Minister of Citizenship and Immigration)*, 2012 FC 614 at para 10; *Kim v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1291 at para 18; *Ding v Canada (Minister of Citizenship and Immigration)*, 2010 FC 764 at para 8). This Court must not intervene provided that the Officer's decision falls within the range of possible, acceptable outcomes which are

defensible in respect of the facts and law. The Court cannot substitute its own opinion simply on the ground that it might have reached a different conclusion (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para 47; *Kim*, *supra*, at para 18).

[14] Whether the Applicant was afforded procedural fairness, in particular whether the Officer was required to grant the Applicant an interview, is subject to review against the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; [2009] 1 SCR 339 at para 43).

VII. Analysis

[15] In *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264, 429 FTR 93 at paras 22 to 25, Justice Bédard said the following about the evidentiary requirements and procedural entitlements that apply to applications for permanent residence:

> 22 First, the onus clearly falls on the applicant to establish that he or she meets the requirements of the Regulations by providing sufficient evidence in support of his or her application (*El Sherbiny v Canada (Minister of Citizenship and Immigration)*, 2013 FC 69 at para 6; *Enriquez v Canada (Minister of Citizenship and Immigration), 2012 FC 1091*, at para 8; *Torres v Canada (Minister of Citizenship and Immigration)*, 2011 FC 818, at paras 37-40; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 758 at para 30; *Oladipo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 366 at para 24; *Ismaili*, v Canada (Minister of Citizenship and Immigration), 2012 FC 351, at para 18).
>
> 23 Second, the duty of procedural fairness owed by visa officers is on the low end of the spectrum (*Farooq v Canada (Minister of Citizenship and Immigration)*, 2013 FC 164 at para 10; *Sandhu v Canada (Minister of Citizenship and Immigration)*,

> 2010 FC 759, at para 25; *Trivedi v Canada (Minister of Citizenship and Immigration*), 2010 FC 422 at para 39; *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, [2002] 2 FC 413, at paras 30-32; *Patel v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55 at para 10*; Chiau v Canada (Minister of Citizenship and Immigration)* (FCA), [2001] 2 FC 297 at para 41, leave to appeal to SCC refused, 28418 (August 16, 2001)).
>
> 24 Third, a visa officer has neither an obligation to notify an applicant of inadequacies in his or her application nor in the material provided in support of the application. Furthermore, a visa officer has no obligation to seek clarification or additional documentation, or to provide an applicant with an opportunity to address his or her concerns, when the material provided in support of an application is unclear, incomplete or insufficient to convince the officer that the applicant meets all the requirements that stem from the Regulations (*Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501, at paras 23-24; *Patel*, above at para 21; *El Sherbiny*, above at para 6; *Sandhu*, above at para, 25; *Luongo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 618 at para 18; *Ismaili*, above at para 18; *Trivedi*, above at para 42; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1306, at para 40; *Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 786 at para 8).
>
> 25 Nevertheless, a duty to provide an applicant with the opportunity to respond to an officer's concerns may arise when the officer is concerned with the credibility, the veracity, or the authenticity of the documentation provided by an applicant as opposed to the sufficiency of the evidence provided.

[16] The Applicant places considerable emphasis on the entry in the CAIPS Notes in which the CIC screening officer expressed the view that an interview was required to determine if the Applicant met the definition of "self-employed person" and would be a benefit to Canada. However, an applicant does not have a right to respond, whether by means of an interview or otherwise, in all cases. An opportunity to respond will, in general, be available only when an officer may base a decision on information that is not known to the applicant, or when there are concerns regarding the applicant's credibility or the authenticity of documents (*Singh v Canada*

(Minister of Citizenship and Immigration), 2009 FC 620 at paragraph 7; *Bahr v Canada (Minister of Citizenship and Immigration)*, 2012 FC 527 at para 37; *Ling v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1198 at para 15; *Salman v Canada (Minister of Citizenship and Immigration)*, 2007 FC 877; *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501).

[17] The Applicant relies on *Li v. Canada (Citizenship and Immigration)*, 2008 FC 1284, which concerned an application for a temporary work permit. The visa officer refused the application because he was not satisfied that that the applicant would return to China upon the expiry of the permit; however, this concern was never communicated to the applicant. Although this Court found in *Li* that the applicant should have been given an interview, the rationale for this conclusion is consistent with the jurisprudence cited in the preceding paragraph. An interview was required in that case because the applicant was unaware that the visa officer had concerns about whether his ties to his homeland were sufficiently strong. Not only was the applicant in *Li* unaware of the visa officer's concerns, but the decision in that case was not based on the evidence that was submitted by the applicant.

[18] Similar reasoning was applied in *Bonilla v Canada (Minister of Citizenship and Immigration)*, 2007 FC 20 at para 27, where this Court overturned a decision of a visa officer that was based on subjective opinion:

> This is not a case in which the applicant's application itself was incomplete, but a situation where the officer subjectively formed an opinion that the applicant would not return to Colombia following the completion of her studies. In my view, the officer in this situation should have allowed the applicant an opportunity to

> respond to his concerns. The applicant had no way of knowing that the visa officer would act upon his view that those in their "formative years" may not study in Canada for a four year period, since they would be unlikely to leave the country. The visa officer's failure to give the applicant an opportunity to respond to his concerns, on the facts of this case, amounted to a breach of the rules of natural justice. [Emphasis added.]

[19] This may be contrasted with the facts of the present case, where the Officer's concerns arose solely from the information submitted by the Applicant in support of his application for permanent residence.

[20] The Applicant complains that the Officer did not respond to his written request for clarification of the documents that were required. However, visa officers are not under an obligation to rectify a deficient application (*Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422, at para 42; *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25, at para 24). A visa officer is not required to apprise an applicant of concerns that arise directly from the requirements of the Act or Regulations (*Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, 247 FTR 147 at para 23); *Sandhu v Canada (Minister of Citizenship and Immigration)* at para 28; *Hassani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501 at para 24). Concerns regarding the sufficiency of an applicant's funds and assets have been found by this Court to arise directly from the requirements of the Regulations (*Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 465 at para 28).

[21] The limited jurisprudence that supports the need for an interview in the context of an application for permanent residency does not assist the Applicant in this case. A determination

that an interview is required places an obligation on the applicant to attend, not on the officer to conduct one. In *Su v Canada (Minister of Citizenship and Immigration)*, (1998) 152 FTR 136; *Voskanova v Canada (Minister of Citizenship and Immigration)*, 167 FTR 258 at para 20.

[22] Despite the view internally expressed by the screening officer who handled the file before it was transferred to Los Angeles, the deciding Officer in this case was not obliged to interview the Applicant. There were no doubts about the authenticity of the documents provided by the Applicant to establish his profession as a poker player, nor were there any concerns about his credibility. The screening officer made a request for supporting documentation on September 4, 2013, and the Applicant was therefore aware that documentation of this nature was required. Once the documentation was received the deciding Officer was not obliged to request additional information to enable the Applicant to demonstrate that he would make a significant contribution to Canada.

[23] The Respondent says that the screening officer's notes were merely a recommendation, and the deciding Officer in the Los Angeles office was not bound to accept it. I agree. The onus was on the Applicant to provide sufficient information to support his application, and he failed to do so.

[24] The Applicant also challenges the adequacy of the reasons, and says that it is impossible to understand why he was found not to meet the requirements of s 88(1) of the Regulations. It is well established that a letter that communicates the decision of a visa officer need not include all of the reasons for the decision, and the CAIPS Notes are understood to form an integral part of

the reasons (*Ziaei v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1169 at para 21; *Veryamani v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1268, 379 FTR 153 at para 28; *Rezaeiazar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 761, 436 FTR 41 at para 59).

[25] In this case, the CAIPS Notes confirm that the Officer considered the absence of a regulatory definition of "significant contribution" before concluding that there was no information provided by the Applicant to demonstrate that his intended activity as a poker player would make a significant contribution to specified economic activities in Canada.

[26] The Applicant referred to CIC's National Occupational Classification (NOC) for athletes, which specifically contemplates that poker players may fall within this category. However, I agree with the Respondent that this NOC is intended for applications under the federal skilled worker scheme, and not the self-employed class. While it is true that the NOC for federal skilled worker applicants in the athletes category may include "chess players and poker players", the Regulations, definitions and guidelines that apply to self-employed immigrants are silent on this point. The applicable guidelines (OP 8) state only the following (at s 11.3):

> The officer must consider the following in assessing an applicant's experience, intent and ability to create their own employment in Canada:
>
> • Self-employed experience in cultural activities or athletics. This will capture those traditionally applying in this category. For example, music teachers, painters, illustrators, film makers, freelance journalists. Beyond that, the category is intended to capture those people who work behind the scenes, for example, choreographers, set designers, coaches and trainers.

> […]
>
> • A person's financial assets may also be a measure of intent and ability to establish economically in Canada. There is no minimum investment level for a self-employed person. The capital required depends on the nature of the work. Applicants must have sufficient funds to create an employment opportunity for themselves and maintain themselves and their family members. They must show you that they have been able to support themselves and their family through their talents and would be likely to continue to do so in Canada. This includes the ability to be self-supporting until the self-employment has been created.

[27] The CAIPS Notes clearly reflect both the screening officer's and the deciding Officer's concern about the insufficiency of the evidence provided by the Applicant regarding his likely contribution to Canada. The CAIPS Notes include the following: "TD account shows [amount] – no history. Interview required to determine if PA meets definition and significant benefit to Canada. To date, has not paid taxes or demonstrated benefit to Canada" and "[…] appears to have lucrative earnings as a result of his occupation as poker player although history of funds accumulation was not sufficiently established". The decision is therefore intelligible and the reasons are adequate.

[28] An immigration officer's decision must be read as a whole (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708 at para. 14). It is entitled to a high degree of deference from this Court. I am satisfied that the Officer's conclusion that the Applicant did not meet the definition of a self-employed person as set out in s 88(1) of the Regulations falls within the range of acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47). There is no basis upon which this Court may legitimately interfere with the Officer's decision.

VIII. Conclusion

[29] For the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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