Federal Court  Cour fédérale

Date: 20151002

Docket: IMM-3848-14

Citation: 2015 FC 1132

Ottawa, Ontario, October 2, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

TONET SULCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant is a citizen of Albania. In April 2013, he was offered employment as a stucco technician by a construction company located in Saskatchewan. As paragraph 30(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] prevents foreign nationals from working in Canada unless authorized to do so under the Act, the Applicant applied for a

temporary work permit. His application was accompanied by the results of an International English Language Testing System (IELTS) where the Applicant was found to have the language skills of an "extremely limited user". An approved Labour Market Opinion [LMO or LMO confirmation], submitted by the prospective employer, also formed part of the said application.

[2] According to subsection 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], a work permit shall not be issued if there are reasonable grounds to believe that the foreign national is unable to perform the work sought.

[3] In April 2014, the Applicant's temporary work permit application was denied by a visa officer [the Officer] on the ground that his proficiency in the English language was insufficient to perform the employment duties. The relevant part of the Officer's decision reads as follows:

> Applicant has a valid an (sic) positive LMO as stucco technician which indicates the following duties/activities: Able to mix in proper proportions of cement, mortar, plaster, and stucco. Knowledge of safety practices associated with tools of the trade. Knowledge of placement of concrete, masonry, plaster and stucco. Able to read blueprint. The LMO requires basic oral and written English. Applicant submits overall IELTS score of 3.5 which is labelled "extremely limited user" and described as "conveys and understands only general meaning in very familiar situations. Frequent breakdowns in communication occur". I am of the opinion that the applicant's knowledge of English is not sufficient to allow him to meet the requirements of the LMO and to be able to perform the duties activities of the prospective employment. Specifically, I am not satisfied applicant could understand instructions and directions or that he could understand (oral or written) instructions regarding work safety (would be working on construction sites) or that applicant could communicate with first responders in case of emergency. Application refused.

[4] The Applicant is seeking judicial review of this decision pursuant to paragraph 72(1) of the Act.

II. Issues and Standard of Review

[5] The Applicant is challenging the Officer's decision on two grounds. First, he claims that the Officer breached the duty of procedural fairness by failing to provide him with the opportunity to clarify whether his language skills were sufficient to meet the actual requirements of employment. As is well established, issues relating to procedural fairness are to be reviewed on a correctness standard (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]; *Ghasemzadeh v Canada (Citizenship and Immigration)*, 2010 FC 716, [2012] 1 FCR 116, at para 16).

[6] The Applicant further submits that the Officer's decision should be set aside on the ground that the Officer:

a. Concluded that he was an "extremely limited user" of English whereas the IELTS scores revealed that his English language skills were higher than that;

b. Considered his ability to communicate with first responders whereas this ability was not a job requirement;

c. Focussed exclusively on his overall IELTS score without considering his scores for each individual component of the test; and

d. Failed to provide adequate reasons explaining why his language skills were insufficient to perform the duties of the prospective employment.

[7] As is also well-established, the standard of review regarding a determination of eligibility under the temporary foreign worker program is reasonableness (*Dunsmuir; Singh v Canada (Citizenship and Immigration)*, 2010 FC 1306, at para 35; *Grusas v Canada (Citizenship and Immigration)*, 2012 FC 733, 413 FTR 82, at para 13[*Grusus*]; *Huang v Canada (Citizenship and Immigration)*, 2012 FC 145 at para 4; *Grewal v Canada (Citizenship and Immigration)*, 2013 FC 627, 434 FTR 107, at para 5[*Grewal*]). According to this standard of review, the Court shall not interfere with the Officer's decision unless it lacks justification, transparency and intelligibility and falls outside the range of possible, acceptable outcomes, defensible in fact and in law (*Dunsmuir*, above at para 47).

III. Analysis

A. *There was no breach of procedural fairness*

[8] Language proficiency/ability findings are generally made pursuant to paragraph 200(3) of the Regulations within the framework of a visa officer's analysis of whether the foreign national is able to perform the work sought. Since findings of language proficiency are based on the evidence put forward by the temporary work visa applicant, they are intrinsically factual in nature. Moreover, since the Act and Regulations do not provide guidance on assessing language ability of foreign nationals applying under the temporary work permits program, findings on language levels for temporary foreign workers have been held to be "highly discretionary decisions" (*Grewal*, above at para 17).

[9] In *Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1378 [*Chen*], at para 12, Justice Judith Snider described the role of a visa officer when deciding temporary work permit applications:

> [12] In all applications, the visa officer is under a duty to examine all of the relevant evidence before him in order to come to an independent assessment of whether there are reasonable grounds to believe that the Applicant is unable to perform the work (Regulations, s. 200(3)(a)). The officer cannot be bound by a statement by HRDC that English is or is not required; he cannot delegate his decision making function to a third party such as HRDC. Conversely, a statement by an applicant or employer that English is not required cannot be binding on the visa officer. The officer must carry out his own evaluation based on a weighing of all of the evidence before him.

[10] It is well-settled that it is up to a temporary work permit applicant to provide all relevant supporting documentation and sufficient credible evidence to satisfy a visa officer that he can fulfill the job requirements. In other words, it is for the applicant to put his best case forward (*Silva v Canada (Citizenship and Immigration)*, 2007 FC 733, at para 20; *Grusas*, above at para 63; *Singh v Canada (Citizenship and Immigration)*, 2015 FC 115, at para 25[*Singh*]). In such context, and keeping in mind that visa applications do not raise substantive rights since visa applicants do not have an unqualified right to enter Canada, the level of procedural fairness is low and generally does not require that temporary work permit applicants be granted an opportunity to address the visa officer's concerns (*Grusas*, above at para 63; *Ali v Canada (Citizenship and Immigration)*, 2011 FC 1247, 398 FTR 303, at para 85; *Grewal*, above at para 18). This is particularly the case where there is no evidence of serious consequences to the applicant, where for example the applicant is able to reapply for a work permit and there is no evidence that doing so will cause him or her hardship (*Qin v Canada (Minister of Citizenship and*

Immigration), 2002 FCT 815, [2002] FCJ No 1098, at para 5; *Masych v Canada (Citizenship and Immigration)*, 2010 FC 1253, at para 30).

[11] However, in cases where a visas officer's concern does not arise directly from the Act or Regulations but rather relates to the credibility, accuracy, or genuine nature of the information submitted by an applicant, this Court has held that the officer may have a duty to request further information from a temporary work permit applicant (*Singh*, above at para *25; Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283, 302 FTR 39).

[12] The Applicant contends that such a duty did arise in this case as it was unclear from the documentation on file precisely what level of English language skills would be sufficient for the prospective position. He says that the job offer did not specify what the language requirements were whereas the LMO, while it did indicate that oral and written English were part of the position's requirements, did not provide any further insight as to what this meant exactly in terms of actual language proficiency. He submits that in these circumstances, the Officer, instead of relying on his/her own arbitrary idea of what the job required, language wise, ought to have taken steps to clarify these requirements by seeking further information from him or the prospective employer.

[13] I am not convinced that the Officer was under such a duty in this case. Contrary to what was the case in *Li v Canada (Citizenship and Immigration)*, 2012 FC 484, relied upon by the Applicant, no evidence other than the IELTS test results were tendered before the Officer to establish the Applicant's proficiency in the English language. The Applicant did produce a letter

from the prospective employer asserting its confidence that the Applicant had sufficient oral and written English skills for the offered position. However, this letter was not before the Officer when he considered the Applicant's temporary work permit application as it was filed after the Officer's decision had been rendered. Since it was not before the Officer, it is also of no assistance to the Applicant in the context of his judicial review application (*Ali v Canada (Citizenship and Immigration)*, 2011 FC 1247, 398 FTR 303, at paras 59-60).

[14] As I have just indicated, the onus to put forward sufficient materials to satisfy the Officer that he could meet the job requirements was on the Applicant and it is clear from the record that knowledge of oral and written English was a requirement of the offered position. As a result, the Applicant was asked to undergo an IELTS test where he scored 3.0 for listening, 4.5 for reading, 1.5 for writing and 5.0 for speaking, with an overall score of 3.5. The Officer assessed the job duties/activities described in the LMO against these results and concluded that the Applicant's knowledge of English was insufficient to allow him to be able to perform these duties/activities. In particular, the Officer was not satisfied that the Applicant could understand instructions and directions given, orally or in writing, regarding work safety on construction sites, or communicate with first responders in case of emergency.

[15] The Officer found that an overall score of 3.5 amounted, according to the IELTS Categories, to a Level 3, which is that of an "extremely limited user." This level is that of someone who "conveys and understand only general meaning in very familiar situations" and where "frequent breakdowns occur."

[16] As a general rule, procedural fairness, be it in the context of skilled workers or temporary workers classes, does not stretch to the point of requiring that a visa officer be obliged to provide visa applicants with a "running score" of the weaknesses in their applications or to engage in a dialogue with them on whether the Act and Regulations are satisfied (*Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, 247 FTR 147, at para 23; *Chen v Canada (Citizenship and Immigration)*, 2011 FC 1279, at para 22; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1306, [2010] FCJ No 1663, at paras 40-42).

[17] This Court's recent decision in *Singh*, is, I believe, directly on point. In that case, the applicant was refused a work permit on the basis, *inter alia*, that he did not satisfactorily establish that he possessed the ability to communicate in English to the degree required to perform the offered job. As in the present case, the LMO provided that oral and written English was required but did not specify the level of proficiency required. The Court in *Singh* ruled that the applicant was not entitled to an opportunity to address the visa officer's concerns because these concerns "arose directly from the Applicant's failure to satisfy the requirements of the 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 the information submitted", which may have required an opportunity to address the Officer's concerns" (*Singh*, at para 25). Noting that the onus "to put forward sufficient materials to satisfy the Officer that he could fulfil the job duties" was on the applicant, the Court concluded that there had been no breach of procedural fairness in not giving the applicant an opportunity to address the officer's concerns.

[18] I see no reason to rule differently in the present case. As in *Singh*, this is not a case where the "accuracy or genuine nature of the information submitted" was the source of the Officer's concerns. The Officer was instead concerned with whether the Applicant**,** having the language skills of an "extremely limited user," would be able to perform the work sought, according to the Officer's own independent assessment of the evidence before her. As a result, this is not a case where the Officer, in a context where the level of procedural fairness is from the outset at the very low end of the spectrum, was under a duty to provide the Applicant with an opportunity to address her concern in this regard.

[19] The Applicant also submits that the Officer improperly relied on information about the language requirements from the LMO application which went beyond the LMO confirmation by indicating that "basic knowledge" of oral and written English was required for the prospective job. As he was unaware of this information and relying on the case law regarding the improper use of extrinsic evidence, he claims that he should have been provided with an opportunity to respond to it.

[20] As the Respondent correctly points out, a visa officer's assessment is not limited to the LMO confirmation but extends to assessments of other evidence relating to the particular job being offered, including the LMO application. The LMO confirmation made it clear in this case that it was based on the information provided in the LMO application, which was appended to it. In *Grusas*, above, the Court concluded that information contained in LMO applications was relevant to a visa officer's assessment of the temporary work permit application. In that case, the temporary work permit application was denied on the ground that the applicant had not satisfied the officer that

she had three years of experience in the food service industry, a requirement specified, as in the present case, in the LMO application but not in the LMO approval. The Court found that there was no procedural unfairness in that case (*Grusas*, above at para 64).

[21] I agree with the Respondent that the facts in *Grusas* and in this case are not comparable to those in *Mehta v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1073, where the Court found that the rules of procedural fairness require a visa officer to provide a visa applicant with an opportunity to respond to extrinsic evidence. Here, as in *Grusas*, there was no procedural unfairness since the documents relied on by the Officer, including the LMO application, do not fall within the Court's generally accepted definition of extrinsic evidence. In other words, there was nothing for the Applicant to respond to.

[22] That being said, is the Officer's decision nevertheless unreasonable? I am not satisfied that it is.

B. ***The Officer's decision is reasonable***

[23] The Applicant claims that the Officer's assessment of his language skills was unreasonable since (i) the IELTS overall 3.5 score revealed that he was more than an "extremely limited user"; (ii) only the IELTS overall score, as opposed to the scores for each individual component of the test, was considered; (iii) his ability to communicate with first responders was an irrelevant consideration since it was not a job requirement; and (iv) the Officer did not provide adequate reasons to explain why the Applicant's language skills were insufficient to perform the duties of the prospective employment.

[24] On the first point, the Applicant contends that his overall IELTS score showed that he was half-way between a Level 3 (extremely limited user), and a Level 4 (limited user) and that it was unreasonable on the part of the Officer to assess him as a Level 3 user. A "limited user," according to the IELTS Categories, is someone whose basic competence in English is "limited to familiar situations," who "has frequent problems in understanding and expression" and "who is not able to use complex language".

[25] This argument was made – but rejected – in *Bilgutay v Canada (Citizenship and Immigration)*, 2013 FC 625, where the Court emphasized that a visa officer's assessment of the language ability of a temporary work permit applicant is owed deference. In my view, it is not unreasonable to find that someone who gets an overall score of 3.5 is not yet a "limited user," a level of proficiency which requires an overall score of 4.0. It was therefore open to the Officer to find that the Applicant's overall score amounted to a Level 3 and thus to that of an "extremely limited user," and that this was therefore insufficient, for the reasons outlined by the Officer, to perform the duties of the prospective position.

[26] The Respondent adds that even if the Applicant's skills had been assessed to be closer to a Level 4, it would still have been a reasonable exercise of discretion on the part of the Officer to find that someone with this level of language proficiency – that of a "limited user" – would still not be able to perform the prospective employment requirements. Although one could have found differently, I cannot say that this outcome would have been unreasonable either since a Level 4, as indicated previously, is that of someone who only has "basic competence" with "frequent problems in understanding and expression."

[27] The Applicant's second point is that the Officer should have considered not only his overall IELTS score but also the scores of each individual component of the test (3.0 for listening, 4.5 for reading, 1.5 for writing and 5.0 for speaking). Again, this argument was made – but rejected – in *Grewal*, above. In that case, the Court held that findings on language levels for temporary foreign workers were "highly discretionary decisions" and that they should not be disturbed unless it can be established that this discretion was exercised capriciously or unreasonably. Assessing the language proficiency of a temporary work permit applicant by focussing on the overall IELTS score was therefore found not to be unreasonable. I see no reason not to follow *Grewal* on this point.

[28] Thirdly, the Applicant contends that neither the job offer nor the LMO required him to communicate with first responders as part of the prospective job. He says that adding job duties in the job offer is a reviewable error. As the Court held in *Chen*, above, a visa officer is under a duty to conduct an independent assessment of a temporary work permit applicant's ability to perform the work sought, with the result that a statement by the applicant or the prospective employer is not binding on the officer (*Chen*, at para 12). In that case, the applicant claimed that the visa officer had erroneously relied on the applicant's inability to speak English to deny his temporary work permit application, when the knowledge of English was not a job requirement. The Court found that while the visa officer may have erred by stating that English was a job requirement, he was entitled, independently of that fact, to view the ability to communicate in English as relevant to his assessment of whether the applicant in that case would be able to perform the work duties, as long as his findings in that regard were logical and were not based upon irrelevant considerations (*Chen*, at para 13).

[29] In *Singh*, above, the Court re-emphasized that a positive LMO is not determinative of how visa officers are to exercise their discretion (*Singh*, at para 20). Here, as the Respondent points out, the prospective job was in the field of construction and the Officer's concerns were about the Applicant's understanding of instructions regarding workplace safety. Her additional concern regarding the Applicant not being able to communicate with first responders in case of an emergency was, in my view, given the nature of the prospective job, a relevant and logical consideration in the context of the safety of working conditions on a construction site. Again, given that the Officer was not bound by the LMO confirmation and was under a duty to conduct an independent assessment of the Applicant's ability to perform the prospective job duties, I see no basis to interfere with this finding.

[30] Finally, the Applicant claims that the Officer's reasons were inadequate as they did not provide sufficient explanations for the decision. It is now well-settled that the adequacy of reasons is no longer a stand-alone basis for quashing a decision. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, 2011] 3 SCR 708, at para 14, the Supreme Court of Canada held that reasons for decisions must instead be "read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."

[31] In order to be adequate, reasons must make it possible for the reviewing Court to understand why a decision-maker made a decision (*Sok v Canada (Citizenship and Immigration)*, 2014 FC 464, at para 17). Moreover, in *Singh*, above, the Court reiterated that visa officers need not provide extensive reasons (*Singh*, at para 24). Here, the Officer explained that the Applicant's

IELTS score indicated his communication level was limited and breakdowns in communication would occur, with the result that she was not satisfied that the Applicant would be able to understand instructions, in particular with respect to safety practices on a construction site, or communicate with emergency personnel.

[32] As these are realistic and material concerns in assessing the position of a stucco technician working in construction, these reasons, taken as a whole, make it possible for the Court to understand why the decision was made and to determine whether it falls within a range of acceptable outcomes.

[33] In sum, the Officer's decision was both reasonable and procedurally fair. The Applicant's judicial review application is therefore dismissed.

[34] Neither party has proposed a question of general importance. None will be certified.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed; and

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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