Date: 20080228

Docket: IMM-1169-07

Citation: 2008 FC 265

Ottawa, Ontario, February 28, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ALKA NIZAMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of the decision of a visa officer (the officer) dated January 16, 2007, wherein the officer denied the applicant's application for permanent residence under the skilled worker category.

[2] The applicant requests that the decision be set aside and the matter referred back to a different visa officer for redetermination.

Background

[3] Alka Nizami (the applicant) is a citizen of India. She is married to Syed Nizami and has two children. The applicant submitted an application for permanent residence in Canada under the skilled worker category on May 9, 2001. Because her application was submitted while the *Immigration Act, 1978* (the Former Act) was in force, the applicant was entitled to a dual assessment under both the Former Act and IRPA.

[4] The occupation under which the applicant applied was that of physiotherapist, National Occupational Classification (NOC) 3124. Her application was reviewed on January 18, 2005 and the officer found that there was insufficient evidence of the claimed work experience and therefore a letter was sent to the applicant requesting a list of additional sources. The applicant submitted the requested documents and the file was reviewed again on March 22, 2005. The officer reviewed the file and once again determined that documents were missing. As such, the officer ordered an interview in order to assess the applicant's qualifications and work experience. The applicant was invited to an interview held November 20, 2006, which she attended. However, the applicant arrived without any further documentation as to her work experience and as a result, was advised that the interview would be rescheduled to provide her another opportunity to submit further documentation.

[5] The applicant alleges that she was told she would be advised of the new interview date within four to six weeks. However, she alleged that before receiving notice, she received a decision from the officer dated January 16, 2007 rejecting her application.

[6] The respondent alleges that the applicant was sent a letter dated the same day as the first interview (November 20, 2006) advising her that another interview had been scheduled for January 8, 2007. The applicant failed to appear for this interview, and as such, the file was assessed as it was without further documentation or a second interview.

[7] This is the judicial review of the officer's decision dated January 16, 2007 rejecting the applicant's application for permanent residence in the skilled worker's category.

Officer's Decision

[8] In the January 16, 2007 decision, the officer determined that the applicant did not meet the requirements for immigration to Canada. The officer noted that by letter dated November 20, 2006, the applicant was requested to attend an interview on January 8, 2007 in relation to her application. The officer also noted that the letter informed the applicant that if she failed to attend the interview, her application would be assessed based on the information and documentation in her application alone. Moreover, the letter warned the applicant that as her interview had been scheduled "to address concerns with the information in her file, failure to attend [would] likely lead to the refusal of [the applicant's] application and no additional interview [would] be scheduled."

[9] The officer went on to note that the applicant's application had been given a dual assessment as per subsection 361(4) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the IRP Regulations). With regards to the assessment under the Former Act, the officer awarded the applicant 59 points. The officer noted that pursuant to subsection 11(1) of the Regulations, a visa officer cannot issue a visa to an immigrant who has not been awarded any units of assessment under the factor "experience" unless they have arranged employment. The officer awarded zero points for both "experience" and "occupational factor" on the basis that the applicant had not proven her work experience and as such, the officer was not satisfied that she had at least one year of experience as a physiotherapist, NOC 3124. Moreover, the officer did not award the applicant any units of assessment for "personal suitability" as the applicant had not attended the interview.

[10] With regards to the assessment under the IRP Regulations, the officer noted subsection 75(2) and its three requirements to successfully become a member of the federal skilled worker class. The officer was not satisfied that the applicant met these requirements on the basis that she did not attend her interview and therefore had not proven her work experience.

[11] The officer's CAIPS notes provide more insight into the findings made regarding the applicant's work experience. Specifically, the officer's notes read:

> Based on the evidence on the file, I am not able to assess whether the PI has performed a substantial number of the main duties of this occupation as set out in the National Occupational Classification, including the essential ones and therefore has the necessary experience in the occupation. The reference letters refer only to titles with no explanation of the duties performed or responsibilities held. There are no reference letters for work performed in Saudi Arabia and USA.

[12] Based on the above analysis, the officer rejected the applicant's application.

Issues

[13] The applicant submitted the following issues for consideration:

1. Did the officer breach his/her duty to act fairly by refusing the applicant's application without providing her an interview and by failing to provide adequate reasons for the refusal?

2. Did the officer err in ignoring relevant evidence and refusing to award any points to the applicant for work experience?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer breach procedural fairness?

3. Did the officer err in finding that the applicant did not have sufficient work experience, and therefore rejecting her application?

Applicant's Submissions

[15] The applicant submitted that the officer breached the duty of fairness by rendering a decision before holding an interview. Visa officers have a duty to give applicants the opportunity to answer the specific case against them, which may require an interview (*Liao* v. *Canada (Minister of*

Citizenship and Immigration), [2000] F.C.J. No. 1926 at paragraphs 15 to 17). It was also submitted that the *Citizenship and Immigration Canada Overseas Processing Manual* states that applicants must be provided with an opportunity to disabuse an officer of any concerns (*CIC Manual OP1*, at paragraph 8). Moreover, paragraph 8 of *CIC Manual OP1* states that "officers should give applicants adequate notice regarding the process of the interview that will result or lead to a decision." The applicant submitted that she was not given the benefit of an oral hearing or an interview with the officer that determined her case and as such the duty of fairness was breached. The applicant accepted that as per *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, procedural fairness does not always require an oral interview. However, it was submitted that in the present case, the officer felt that an interview was necessary in order to assess the details of the applicant's work experience. Therefore, in this case a fair hearing required that an interview be held before a decision was rendered.

[16] The applicant also submitted that the officer's decision to award zero points for work experience was patently unreasonable as it failed to consider all the relevant material. It was submitted that the officer was presented with ample evidence as to the duties performed by the applicant during her fourteen years of employment as a physiotherapist. The documentation included numerous letters of reference and certificates of membership which evidenced the scope of her employment and her responsibilities. It was submitted that this documentation supported the finding that the applicant had indeed met the requirements of the lead statement for NOC 3142.

Respondent's Submissions

[17] The respondent submitted that the appropriate standard of review is one of patent unreasonableness (*Lim* v. *Canada (Minister of Employment and Immigration)*, [1991] 121 N.R. 241 (F.C.A.) at 243). Where statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere (*To* v. *Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 696.

[18] As to the content of procedural fairness owed to the applicant, the respondent submitted that it is located towards the lower end of the range (*Chiau* v. *Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.)).

[19] The respondent submitted that what is really at issue in this case is whether the applicant had a meaningful opportunity to participate in the process. The respondent submitted that the applicant has no guaranteed right to an interview (*Ahmed* v. *Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940). Moreover, it is the applicant that bears the onus of satisfying the officer fully that she has met the requirements of the application. It was argued that the applicant was given two interview opportunities, and three opportunities to provide further documentation. The respondent submitted that while the applicant claims that she never received notice of the second interview, the CAIPS notes indicate that a letter inviting the applicant to an interview on January 8, 2007 was in fact sent out to the applicant on November 20, 2006. The respondent also

noted that nowhere in the CAIPS notes does it show that the letter was returned as undeliverable. The respondent alleged that the applicant has had a meaningful opportunity to participate in the process and no violations of procedural fairness have occurred.

[20] With regards to the officer's finding that the applicant deserved zero points for work experience, the respondent submitted that the officer considered all of the evidence on record and found that the applicant did not meet the requirements. The respondent argued that as the applicant had failed to satisfy the officer that she had performed a substantial number of the main duties listed in NOC 3142, the officer was bound to make the decision rendered. The officer's finding is one of fact and attracts the highest deference owed.

Applicant's Reply

[21] With regards to the respondent's reliance on *Chiau* above, for the proposition that the contents of procedural fairness owed is at the low end of the spectrum, the applicant noted the case of *Ha* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49. In *Ha* above, the Federal Court of Appeal stated at paragraph 56:

> . . . simply because visa officers are not obliged to interview all applicants in all cases does not diminish the procedural protections that they owe to those applicants whom they do decide to interview. Once visa officers decide to conduct an interview, they must do so in accordance with the duty of fairness.

[22] The applicant also submitted that while the CAIPS notes indicate that a letter was sent and was not returned as undeliverable, there is no copy of the alleged letter found anywhere in the respondent's Rule 9 disclosure. The applicant submitted that if the respondent wishes to rely on evidence before this Court, such evidence must be produced. It was further submitted that a note in the CAIPS notes does not create a presumption that the letter was sent. Moreover, given the applicant's active participation in the application process throughout, it is unreasonable to assume that she would simply have ignored the letter and failed to appear at the interview on purpose.

Analysis and Decision

[23] **Issue 1**

What is the appropriate standard of review?

The respondent submitted that the appropriate standard of review is one of patent unreasonableness based on the authority of *Lim* above. That case involved an officer's determination on whether the appellant was qualified to be a personnel officer in Canada and the Federal Court of Appeal held that "this was a pure question of fact entirely within the mandate of a visa officer to resolve." The question in the present case is whether the officer erred in finding that the applicant did not have any of the required work experience as a physiotherapist. This is also a question of fact and I am satisfied that the appropriate standard of review with regards to the experience assessment is patently unreasonable.

[24] With regards to questions of procedural fairness, as Justice Richard Mosley stated in *Hassani* v. *Canada (Minister of Citizenship and Immigration)*, [2007] 3 F.C.R. 501 at paragraph 13:

> Questions of procedural fairness should be assessed on a correctness standard: *Ellis-Don Ltd.* v. *Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, at paragraph 65. Where a breach of the duty of fairness is found, the decision should generally be set aside: *Benitez* v. *Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 107 (F.C.), at paragraph 44; *Sketchley* v. *Canada (Attorney General)*, [2006] 3 F.C.R. 392 (F.C.A.), at paragraph 54 (*Sketchley*).

I would adopt this statement of the law.

[25] **Issue 2**

Did the officer breach procedural fairness?

The decision in question was very important to the applicant. Moreover, the nature of the decision and the decision-making process, while not adjudicative, does involve making a decision based on a set of objective criteria (*Chiau* above at paragraphs 42 and 43). The factual context of this case also calls for a somewhat more than minimal level of procedural fairness. The officer was of the opinion that an interview was necessary to fully understand the applicant's work experience. As such, I find that there was a requirement that proper notice be given to the applicant concerning the rescheduled interview in order for her to meaningfully participate in the process.

[26] In my opinion, the crux of this case is whether or not the applicant was given notice of the January 8, 2007 interview. The applicant alleges that she was not given notice. She claims that when she attended the November 20, 2006 interview, the immigration agent informed her that she would be contacted within four to six weeks to advise her of the date for the rescheduled interview. The

applicant submitted that she was never contacted regarding the rescheduled interview. She submitted that the letter dated November 20, 2006 that was allegedly sent to her was never received. In fact, the applicant appears to be arguing that the letter was never sent in the first place given that a copy of the letter was not included in the Rule 9 disclosure. The applicant also argued that as the decision was successfully delivered to her residence, there is proof that the immigration officer had the correct mailing address on file. She argued that given her dedication to this process and her past responsiveness to requests for information and interviews, it is illogical to think that she received notice and simply did not attend.

[27] The respondent on the other hand submitted that the CAIPS notes clearly show that a letter was sent on November 20, 2006 to the applicant indicating that the rescheduled interview would take place on January 8, 2007. Moreover, the respondent noted that there is no note in the CAIPS notes to show that the letter was not received.

[28] Having reviewed both parties' arguments, I find that the applicant never received the letter. I am particularly persuaded by the fact that a copy of the letter was not included in the file. The officer's CAIPS notes are in no way absolute proof that the letter was sent. Given the applicant's responsiveness and genuine interest to immigrate to Canada, I am of the opinion that she did not simply receive the letter and fail to appear. In light of this finding, I also find that the applicant was not given sufficient notice of the interview. As a result, I believe that the applicant was not given a meaningful opportunity to participate in the process as required by even the low end of the procedural fairness spectrum. As there has been a breach of the duty of procedural fairness, the

application for judicial review must be allowed and the matter is referred to a different officer for redetermination.

[29] Because of my finding on this issue, I need not deal with the remaining issue.

[30] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[31] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for reconsideration.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Regulations*, SOR/2002-227:

75(1) For the purposes of 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.	75(1) Pour l'application du 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.
(2) A foreign national is a skilled worker if	(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :
(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;	a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, 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 — exception faite des professions d'accès limité;
(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and	b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé 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.

(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.

FEDERAL COURT

SOLICITORS OF RECORD

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