Date: 20081104

Docket: IMM-322-08

Citation: 2008 FC 1226

Ottawa, Ontario, November 4, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

LIUDMILA SKLYAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review is in respect of a decision by an immigration officer denying Ms. Sklyar's application for permanent residence as a skilled worker pursuant to section 75 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (Regulations). The issues in this judicial review include both the reasonableness of the decision as well as the natural justice and

fairness of the procedures. For the reasons outlined, the Respondent's decision must be quashed and the judicial review is granted.

II. FACTS

[2] As indicated above, the Applicant made an application under section 75 of the Regulations, the pertinent provisions of which are as follows:

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	*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

are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix;	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.
[Emphasis added]	[Non souligné dans l'original]

Subsection 80(7) of the Regulations specifies that full-time employment for purposes of the above is considered to be at least 37.5 hours per week.

[3] There is some confusion in the Record as to whether the Applicant applied under three or under five different job categories. The parties seem to have accepted that the proper number is five and, for purposes of this judicial review, the Court will accept that conclusion.

[4] The categories of occupation set forth in an affidavit filed by the responsible immigration officer (Officer) were Economist, Financial Analyst, Economic Development Officer, Economic Analyst and Other Financial Officers.

[5] In October 2007, the Officer informed the Applicant that her application was denied because the Officer was not satisfied that the Applicant had provided sufficient evidence to establish that she had had at least one year of relevant, continuous, full-time experience. The letter is extremely brief in respect of the reasons for the decision at issue.

[6] In addition to the October 2007 letter, the CAIPS notes show that a similar conclusion with respect to the absence of evidence of continuous, full-time experience was reached on October 5, 2006. Subsequently in May 2007 a request was made to the Applicant for updated employment information and for a letter of reference. The CAIPS notes also include a notation of October 9, 2007 that the Applicant's "offshore experience cannot be confirmed is questionable" [*sic*].

[7] The Applicant filed for leave for judicial review and raised as one of the central issues the failure of the Officer, as evidenced by the decision letter and CAIPS notes, to consider all five

categories of occupation which the Applicant had listed. In response, the Officer filed an affidavit in which she attested that she had considered the submitted materials, had noted the five categories the Applicant allegedly applied for, and discussed in detail the Applicant's qualifications regarding only one occupation – that of Economist.

III. LEGAL ANALYSIS

[8] In the post-*Dunsmuir* era (*Dunsmuir v. New Brunswick*, 2008 SCC 9), the appropriate standard of review is reasonableness. However, in considering previous analysis of standard of review in this Court, there is authority for a proposition that a decision in respect of the federal skilled worker class is one which is deserving of a high degree of deference (*Oladipo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 366). There is a considerable degree of experience and expertise involved in this consideration. It is one for which deference is owed and therefore the range of reasonable outcomes which the Officer could reach is broad.

[9] Having said this, there is an important issue of procedural fairness raised in this matter for which the standard of review is correctness.

IV. ASSESSMENT OF OCCUPATIONS

[10] The issue raised is whether the Officer's assessment of the Applicant's work experience was reasonable. In this regard, the Respondent attempted to buttress the decision letter and CAIPS notes with an affidavit attesting to consideration of five occupational categories.

[11] While there may be instances where the reasons for the decision are properly contained in not only the decision letter and the CAIPS notes but also in an affidavit (see *Hayama v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1305), the Court is concerned when the evidence submitted post-filing of an application for judicial review attempts to fill in gaps in the record of decision on the very points in issue and does so by adding major elements to the Record. The attempt to supplement the Record must be approached with caution when attempted by either an applicant or a respondent. If admissible, the Court must assess its weight. In this case, greater weight is given to the pre-application record than to the affidavit.

[12] A central issue in this case was whether the Officer had in fact considered all five occupational categories. It is central because there is a positive obligation on the Officer to assess an applicant's qualifications under all the occupational categories indicated by an applicant (*Hajariwala v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 79 (F.C.T.D.)). It is evident from the Record that the Officer focused virtually all of her attention on the occupation of Economist.

[13] In argument before this Court, the Respondent's counsel outlined a far better assessment of the merits of each of these categories than appears anywhere in the Record. The Record suggests that the Officer based her conclusion with respect to the Economist occupation largely on the fact that the employer's letter of reference, which outlined the tasks actually performed, did not mirror the National Occupational Classification code for Economist. However, there is no indication that the Officer did a detailed analysis or balancing of the evidence of the tasks performed to determine into which of the other four occupational classifications the Applicant may have fallen.

[14] It is my conclusion that the Officer failed to properly assess, or to assess at all, the other occupations relied upon by the Applicant. For that reason alone, this judicial review should be granted.

[15] The Applicant also raised, as a matter of procedural fairness, the absence of any notice of the Officer's concern about the Applicant's work experience. It is well established law that where a visa officer's concern relates to the requirements set out in the legislation, the officer is under no obligation to apprise an applicant of those concerns (*Parmar v. Canada (Minister of Citizenship and Immigration)* (1997), 139 F.T.R. 203 (T.D.); *Ramos-Frances v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 142). However, in this case, it was the Respondent's position that the letter requesting the Applicant to update her employment information and to file a letter of reference was in fact notice to her of concerns with respect to the evidence both as to experience and occupational classifications.

[16] I am unable to find how this Applicant or any applicant would have been put on notice of deficiencies as to experience and occupational classification by receiving a letter simply requesting updated information. The letter was sufficiently vague to have misled the Applicant and the Applicant's counsel, and would have, in my view, misled any other reasonable person. In this instance, the Officer having elected to give notice, that notice was insufficient.

V. CONCLUSION

[17] For all these reasons, this judicial review will be granted, the decision of the immigration officer quashed and the matter is to be referred back to another officer for a new determination. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, the decision of the immigration officer is quashed, and the matter is to be referred back to another officer for a new determination.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-322-08
STYLE OF CAUSE:	LIUDMILA SKLYAR and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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