Date: 20081117

Docket: IMM-1206-08

Citation: 2008 FC 1270

Ottawa, Ontario, this 17th day of November 2008

Present: The Honourable Mr. Justice Pinard

BETWEEN:

Suresh Terrence LACKHEE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), of the decision of an immigration officer refusing to issue the applicant, a citizen of Trinidad, a permanent resident visa under the Economic – Skilled Worker class.

[2] Ms. S. Tang Fong, the designated immigration officer who rendered the impugned decision, rejected Mr. Lackhee's application for permanent residence because he "obtained insufficient points to qualify for immigration to Canada, the minimum requirement being 67 points".

[3] Her reasons for declining the applicant's request for substituted evaluation are enunciated in the following paragraphs of the refusal letter, dated November 30, 2007:

> Your request for substitution [*sic*] evaluation was also considered. Subsection 75(3) [*sic*] of the regulations permit [*sic*] an officer to substitute their evaluation of the likelihood to become economically established in Canada if the number of points awarded are not a sufficient indicator of whether the skilled worker may become economically established in Canada.
>
> I am satisfied that the points that you have been awarded are an accurate reflection of the likelihood of your ability to become economically established in Canada. The information you have provided and your explanations have not satisfied me that you will be able to become economically established in Canada.

[4] Additionally, the officer's notes include the following remarks about the applicant's request for substituted evaluation:

> Lawyer requested substitution of evaluation. Subject has insufficient points to meet minimum requirements. Subject was given full points for his experience and relatives in Canada. Points for language was [*sic*] based on the results from an approved language testing facility. Points awarded accurately reflect ability to be economically successful in Canada and positive substituted evaluation not appropriate in this case.

[5] In the context of the present review, the applicant does not contest the points awarded to him by the officer. Nor does the applicant argue that the officer did not turn her mind to his request for a

substituted evaluation. Instead, the applicant argues that the officer exercised her discretion in a capricious manner without due regard to the evidence in determining that the units of assessment assigned were an accurate indication of his prospects of becoming established in Canada.

* * * * * * * *

[6] Paragraphs 76(1)(*a*) and (*b*) and subsections 76(2) and (3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") are relevant to the present proceeding:

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

(*a*) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

(i) education, in accordance with section 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

(v) arranged employment, in accordance with section 82, and

(vi) adaptability, in accordance with section 83; and

(*b*) the skilled worker must

(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) l'expérience, aux termes de l'article 80,

(iv) l'âge, aux termes de l'article 81,

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) la capacité d'adaptation, aux termes de l'article 83;

b) le travailleur qualifié :

(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,

(ii) soit s'est vu attribuer le nombre de

family members, or
(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of

(*a*) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;

(*b*) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

(*c*) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(*a*) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.

points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :

a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;

b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)*a*).

* * * * * * * *

[7] Paragraph 76(1)(*a*) of the Regulations establishes the criteria for assessing whether a claimant "will be able to become economically established in Canada", namely, education,

proficiency in the official languages of the country, experience, age, arranged employment, and adaptability. Additionally, under paragraph (*b*), the claimant applying as a skilled worker must demonstrate sufficient available funds, unencumbered by debts or otherwise, to settle in Canada.

[8] These criteria are evaluated relative to the minimum point requirement fixed by the Minister, according to subsection 76(2) of the Regulations. However, failure to meet the point minimum is not an absolute bar to obtaining a visa; subsection 76(3) makes provision for an exercise of discretion by an officer.

[9] The parties submit that the standard of review to be applied in this case is that of reasonableness. Following *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, wherein the majority of the Supreme Court held that "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness", I agree that this is the appropriate standard in this case.

[10] The applicant argues that the officer's reasons amount to a summary dismissal of a case that presents the unusual facts that, according to Justice Blanchard in *Silva v. Minister of Citizenship and Immigration*, 2007 FC 733, call for the exercise of residual discretion under subsection 76(3). Specifically, the Court in *Silva* writes that an officer's "discretion under subsection 76(3) of the Regulations is residual in nature, and should be decisive only in cases that present unusual facts, or where the applicant has come close to obtaining [the required] units of assessment" (see also *Esguerra v. Minister of Citizenship and Immigration*, 2008 FC 413, where Justice de Montigny at

paragraph 16 describes the discretion under this provision as “clearly exceptional”). Indeed, the applicant argues at paragraph 20 of his memorandum:

> . . . The Applicant’s credentials, professional experience, financial establishment and Canadian family members all rank very high. Viewing the facts in their totality reveals this is precisely the kind of case for which the officer’s authority by way of substituted evaluation has been created. . . .

[11] The respondent responds that there is nothing about the facts of the present case that is unusual, nor is the applicant “close” to obtaining the required points (see the officer’s decision regarding the request for substituted evaluation found in her letter of refusal at paragraph 3 above).

[12] In view of the arguable strength of Mr. Lackhee’s application, the applicant views the officer’s reasons as dismissive, and the decision not to exercise her discretion as arbitrary and capricious. The respondent, on the other hand, relies on *Poblado v. Minister of Citizenship and Immigration*, 2005 FC 1167, where Justice von Finckenstein finds at paragraph 7 that it is enough for a visa officer “to inform the applicant that she considered the request for substitution of evaluation”. Written reasons explaining why the request was denied are not required (see also *Yan v. Minister of Citizenship and Immigration*, 233 F.T.R. 161, 2003 FCT 510 at paragraph 18). Accordingly, the respondent argues that the officer’s reasons “far exceed” those required for a decision of this kind.

[13] Although I must agree with the respondent on this point, I am sympathetic to the applicant’s position: Mr. Lackhee is a skilled tradesman with expertise in a field that is in high demand in Canada, and his profile is compelling. It is unclear to me why his relative lack of formal education

and modest score on his language assessment have any bearing on the question of his ability to become economically settled in this country. It is not, however, the role of this Court to substitute its own view for that of the decision-maker, whom the legislation has imbued with broad discretion over this matter.

[14] The applicant's second argument is, in my view, more persuasive. Here, he argues that the officer failed to take into account the updated information submitted in June 2007 regarding the applicant's available settlement funds, which rose from $25,000, the amount cited in his initial application filed in 2004, to approximately $90,000. Additional documentation about annuity and insurance premiums owned by the applicant and his wife were likewise submitted. None of this new information was referred to by the officer, either in her refusal letter or her notes.

[15] According to the respondent, the applicant "merely challenges the officer's weighing of the evidence, a matter on which this Court will not intervene".

[16] I agree that it is not open to this Court to re-weigh the evidence as it sees fit. There is no question however that the Court has a duty to evaluate whether the officer took adequate account in her notes or reasons, if any, of relevant evidence in the record. My colleague Justice Heneghan, in *Hernandez v. Minister of Citizenship and Immigration*, 2004 FC 1398, writes at paragraph 21 of her decision:

> . . . In my opinion, section 76(3) contemplates that an officer would consider and weight <u>all the factors</u> identified in section 76(1), not only the award of points pursuant to section 76(1)(*a*).
>
> (My emphasis.)

[17] Justice Heneghan was referring, in this passage, to the criterion of settlement income established in paragraph 76(1)(*b*) as a factor that is appropriately weighed by the officer in determining whether to exercise her discretion under subsection 76(3). Justice Kelen, in *Choi v. Minister of Citizenship and Immigration*, 2008 FC 577 goes further, finding in that case that a visa officer's failure to give any weight to evidence supporting an offer for employment was unreasonable:

> [22] . . . The Court concludes that the decision under subsection 76(3) of the Regulations was not reasonable since that decision gave no weight to the strong letter from the school or to the $699,000 that the applicant would bring to establish herself in Canada. . . .
>
> (My emphasis.)

[18] Here, although the immigration officer makes reference in her notes to the sum of $25,000 initially noted in the applicant's application, the updated information indicating the availability of dramatically more assets for establishment is nowhere mentioned in either her notes or her refusal letter. I note that in her affidavit dated August 21, 2008, she claims that, at the time she reviewed Mr. Lackhee's application, she "was aware that the Applicant had settlement funds valued at approximately $549,424 TT and $4,296 US, equivalent to $91,987 CDN". In my view, it is not enough that she was aware of this information; she had a duty to reflect this awareness in her notes and/or reasons, in the interests of "justification, transparency and intelligibility" (*Dunsmuir*, *supra*, at paragraph 47, page 221).

[19] According to section 11.3 of Citizenship and Immigration Canada's operational manual for the processing of applications under the skilled worker category ("OP 6"):

> Substituted evaluation is to be considered on a case-by-case basis. The scope of what an officer might consider as relevant cannot be limited by a prescribed list of factors to be used in support of exercising substituted evaluation. There are any number and combination of considerations that an officer might cite as being pertinent to assessing, as per the wording of R76(3): ". . . the likelihood of the ability of the skilled worker to become economically established in Canada. . . ."

[20] The jurisprudence of this Court leaves no doubt that among the considerations pertinent to assessing "the likelihood of the ability of the skilled worker to become economically established in Canada" is settlement income. The officer's failure to make any reference to the considerable assets available to the applicant in either her decision or her notes constitutes a reviewable error warranting this Court's intervention.

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[21] For all the above reasons, the application for judicial review is granted, the decision of the immigration officer, dated November 30, 2007, is set aside and the matter is sent back for reconsideration by a different immigration officer.

JUDGMENT

The application for judicial review is granted. The decision of the immigration officer, dated November 30, 2007, refusing to issue the applicant a permanent resident visa under the Economic – Skilled Worker class is set aside and the matter is sent back for reconsideration by a different immigration officer.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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