Federal Court Cour fédérale

Date: 20111014

Docket: IMM-7232-10

Citation: 2011 FC 1151

Ottawa, Ontario, October 14, 2011

PRESENT: The Acting Chief Justice

BETWEEN:

HANA BALOUL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Hana Baloul, the applicant, seeks judicial review of a decision dated October 18, 2010, in which an immigration officer at the Canadian Embassy in Paris refused to grant the applicant status as a permanent resident in the investor class under the provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Leave was granted on July 7, 2011.

I. Background

[2] Ms. Baloul submitted an application for permanent residence at the Canadian Consulate General in Buffalo, New York, in November of 2003. Based on her supporting documentation, Ms. Baloul was deemed to meet the definition of investor for the years 2000 to 2002 (Trial Record at 291, Computer Assisted Immigration Processing System [CAIPS] notes for November 2, 2005).

[3] According to the CAIPS notes on record, the application could not proceed, as the background results for Ms. Baloul's husband were still pending. An interview with Mr. Baloul was scheduled for August 26, 2008, and his attendance was confirmed on June 3, 2008. The interview was held as scheduled, but Mr. Baloul did not attend, unable to secure a visitor visa to the United States. As a result, the file was transferred to the Canadian embassy in Paris, where Mr. Baloul could more easily attend from his home in Brussels, Belgium (Trial Record at 291, 292 and 304, CAIPS notes for September 6, 2006, April 7, June 3, August 26, and September 10, 2008).

[4] The applicant's version of the facts differs from the account found in the Trial Record. Ms. Baloul explains she was asked to attend the interview in Buffalo, was told her interview went well, and that she would be advised of the agent's decision shortly thereafter. But she also indicates being asked near the end of the interview why her husband was absent and that she replied that the notice of interview did not request his presence. It was then suggested that her husband could be interviewed in Europe. At any rate, Ms. Baloul received notice on November 10, 2008, that her application was transferred to the Canadian Embassy in Paris (Applicant's Record at 11-12, Applicant's Affidavit at paras 11-13).

[5] In August of 2010, the applicant received a notice to attend an interview in Paris, scheduled for October 14, 2010. Ms. Baloul and her husband attended the interview and a final decision was rendered by the immigration officer on October 18, 2010.

II. Applicable Law and Impugned Decision

[6] Section 90 of the *Immigration and Refugee Protection Regulations*, SOR 2002/227 [IRPR] provides that a foreign national applying for permanent residency as a member of the investor class must meet the definition of “investor” as set out in subsection 88(1) of the IRPR. The first of three criteria require the foreign national to have “business experience”, defined as a minimum of two years of experience in either “the management of a qualifying business and the control of a percentage of equity of the qualifying business” or “management of at least five full-time job equivalents per year in a business”.

[7] In her decision, the immigration officer wrote that the applicant had not satisfied her of her business experience, failing to demonstrate that she took part in the management of Marwan Oulabi Company: “You, yourself, described yourself as a human resources supervisor and a control quality operator during the interview. You failed to demonstrate that you were fully involved as a decision maker in this company” (Applicant’s Record at 6).

III. Position of the Parties

[8] The applicant’s arguments can be grouped into two categories. First, the applicant questions the immigration officer’s analysis of the evidence, claiming she ignored or misconstrued relevant evidence, made unreasonable inferences, and considered irrelevant and extraneous matters. The

second set of arguments raises questions of procedural fairness, with respect to both the notice given as to the purpose of the interview and the language difficulties and resulting need for translation.

[9] For its part, the respondent submits that the immigration officer's analysis was reasonable, relying on contradictions and inconsistencies emanating from the applicant's oral testimony and evidence. The respondent also contends that there was no breach of procedural fairness. The officer raised her concerns during the interview, the applicant was given the opportunity to respond, and there is no duty to seek further clarification or provide a fairness letter before or after the interview.

IV. Issues and Standard of Review

[10] The following issues will be reviewed by this Court:

1. Did the officer err in determining that the applicant did not have the required management experience?

2. Did the officer fail to make his decision in accordance with the principles of procedural fairness?

[11] The immigration officer deciding whether an applicant possesses the management experience requirement under the IRPR is entitled to a high level of deference (*Nissab v Canada (Minister of Citizenship and Immigration)*, 2008 FC 25, [2008] FCJ 57). As a result, the officer's assessment of the evidence put forward by the applicant is a determination of fact and law reviewable under the standard of reasonableness, while issues raised with respect to procedural fairness are reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

V. Analysis

A. Did the officer err in determining that the applicant did not have the required management experience?

[12] First I would clarify that it is not for this Court to appreciate the applicant's qualifications and that this Court has only to verify the reasonableness of the officer's decision. At issue is the role the applicant played in managing Marwan Oulabi Company or its employees. Ms. Baloul contends that she submitted persuasive evidence and documents regarding her business experience which was ignored, misconstrued or misapprehended. The applicant points to three supporting documents, of which only one offers a third-party description of her role at Marwan Oulabi Company.

[13] A letter signed by the company's accountant states that the management of the company has been run in partnership by Marwan Oulabi, Ms. Baloul, and her husband and that the partners set the policy business goals and make the major decisions as to the operation of the company. The letter adds that: "[b]esides being part of the management team, Ms. Hana Baloul also takes part in supervising the operation of the business on a part time basis and has been doing this since 1995 until 2002" (Applicant's Record at 28). Another document describing Ms. Baloul's role, which she did not raise in her written submissions, states that she was working for the company from 1999 to 2002 and "had done great in completing all the administrative procedures, had good work ethics and was excelled with good manners and conduct [*sic*]" (Trial Record at 564).

[14] In the officer's opinion, the supporting documentation did not allow her to determine the applicant's role in the management of the company (Respondent's Record, Affidavit de Constance Terrier at para 7). Given the somewhat differing and broad descriptions of Ms. Baloul's role, it was

reasonable for the immigration officer to conclude that the documentation did not clearly establish eligibility and that an interview was required (Immigration Manual, OP 9 – Investors at s 5.6).

[15] During the interview, the applicant was asked to describe her role in the management of Marwan Oulabi Company. According to the CAIPS notes (Applicant's Record at 7-9), Ms. Baloul indicated she supervised personnel and controlled production, repeating both terms without providing greater detail. Once a translator was provided, Ms. Baloul was more precise, explaining that she supervised the arrival of employees as well the quantity and quality of their work. After discussing the applicant's presence at the site on a full-time basis from 2000 to 2002, Ms. Baloul was asked once again to describe her role and responsibilities. Again, she explained that she supervised employees and production.

[16] The onus was on the applicant to provide sufficient evidence to satisfy the immigration officer that she met the statutory requirements (*Liu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1025, [2006] FCJ 1289). Subsection 88(1) of the IRPR provides that, to be considered an investor, an applicant must have business experience in either the management of a qualifying business or the management of at least five full-time employees in a business.

[17] The applicant answered no when asked whether she had any responsibility in managing the company's finances; no when asked whether she had any contact with clients or suppliers; and no when asked whether she took any independent decision as to organizing production or hiring employees. The applicant confirmed other individuals were in charge of managing staff and production procedures. The applicant added that her role was to ensure and confirm that the company ran properly so that the money invested by her husband was well utilized.

[18] The onus was on Ms. Baloul to provide sufficient credible evidence in support of her application. Unfortunately, she did not meet that onus. The immigration officer's conclusions were reasonably open to her and respect the principles of justification, transparency and intelligibility (*Dunsmuir*, above, at para 47). The applicant had to satisfy the officer that she fully qualified under the IRPR and possessed management experience, but failed to do so through either supporting documentation or the interview.

[19] Before moving to the issue of procedural fairness, I would like to suggest the following in order to facilitate a proper interpretation of the IRPR. While the IRPR defines both the terms "investor" and "business experience", it does not define the term "management". The Immigration Manual is also silent on this question, breaking down "business experience" into three criteria: qualifying business; time; and role (Immigration Manual, OP 9 – Investors at s 8.2). The first two criteria are examined in greater detail in sections 8.3 and 8.5, but the manual remains silent on the "role" criteria, synonymous with the term "management" left undefined in the IRPR. Without providing any guidance on this point, immigration officers are left to determine on their own the necessary responsibilities fitting the "management" requirement. This has the potential to lead to arbitrary and differing decisions on the same set of facts, especially given the shared meanings of terms such as "managing" and "supervising" and the potential difficulties of translating business terms from one language to another.

B. Did the officer fail to make his decision in accordance with the principles of procedural fairness?

[20] The applicant raises an issue of procedural fairness with respect to language and translation and suggests that these may have played a part in the officer's final determination. The immigration officer is criticized for speaking too quickly and not immediately offering the assistance of an

interpreter when the applicant's difficulty communicating in English became apparent. The qualifications of the person called in to interpret is also put into question, as is the fact that at times, the interpreter and the officer communicated with each other in French, which the applicant does not understand.

[21] The applicant received a notice to attend the interview in the form of a letter, dated August 10, 2010. The two page letter included the following clear instructions (Respondent's Record, Exhibit C at 2):

> **The Immigration Officer will conduct the interview in English or French**. The information you provide to us during the interview plays an important role in determining your ability to qualify to immigrate to Canada. If you cannot communicate easily in either English or French, you must present yourself at the interview with a **professional interpreter** […] capable of reading, writing and speaking either in English or French.
>
> […]
>
> If you decide to come to the interview without a professional interpreter and we determine that you cannot communicate easily in English or French, the Immigration officer will make a decision on your application based on the information contained in your file and the information provided at the interview. If you cannot answer the interview questions posed by the Immigration officer, your application may be refused [emphasis in original].

The applicant had sufficient time to obtain an interpreter, but chose not to. The risks associated with this choice were spelled out in unequivocal terms and the applicant chose to assume these risks. I would add that the onus placed on the applicant to provide an interpreter has been upheld by this Court (*Kazi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 733 at paras 16 -18, [2002] FCJ 969).

[22] At the outset of the hearing, the immigration officer indicates having asked the applicant if she understood her, whether she was speaking too quickly, and whether there were any difficulties

understanding her (Respondent's Record, Affidavit de Constance Terrier at para 18). The applicant admits she did not raise any objections or concerns regarding her language difficulties (Applicant's Additional Affidavit at para 13), incidentally contradicting her earlier statement that she demanded the officer speak more slowly (Applicant's Record at 16, Applicant's Affidavit at para 39).

[23] When it became apparent the applicant was having difficulties understanding and answering the immigration officer's questions, for the benefit of the applicant and though she was not required to, the officer offered to invite a colleague to interpret. The applicant agreed to this suggestion of her own volition and cannot now question the quality of this interpretation when she was well aware of the consequences of not arranging for her own professional interpreter. Furthermore, it is well established law that where there are translation problems, the complainant must raise the problem at the first reasonable opportunity (*Oei v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 466 at paras 40 and 42, [2002] FCJ 600; *Kompanets v Canada (Minister of Citizenship and Immigration*), [2000] FCJ 726 at para 9, 196 FTR 61; which the applicant did not do in this case.

[24] Ms. Baloul also contests the immigration officer's failure to notify her of any of her concerns through a fairness letter, especially in light of the fact immigration officers in Buffalo had already determined she met the definition of investor and she was of the view this second interview in Paris was meant for her husband. On this point I adopt this Court's conclusion in *Shabashkevich v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 361 at para 22, [2003] FCJ 510 [*Shabashkevich*], where faced with a very similar situation, the Court was satisfied that there was no denial of procedural fairness. I am further supported by previous findings of this Court that the principle of *functus officio* applies only to the final decision to issue a visa and that the immigration officer making this final determination is statutorily obligated to assess the applicant's application, regardless of any findings made by previous officers (*Lo v Canada (Minister of Citizenship and*

Immigration), 2002 FCT 1155, [2002] FCJ 1596; *Brysenko v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 1443, 193 FTR 129). Having said that, I note that the CAIPS notes reveal that the immigration officer did raise some concerns about the explanations given and that Ms. Baloul had an opportunity to explain further. I conclude from this that even on the facts of this case, the immigration officer fully assumed her duties.

[25] Finally, regarding any duty imposed on the officer to raise her concerns about the applicant's business experience, I reiterate that the applicant was given ample opportunity over the course of a two hour interview to describe her role managing Marwan Oulabi Company. The applicant was asked repeatedly to provide further details, but was unable to satisfy the immigration officer that she met the IRPR requirements. There was no additional obligation for the officer to clarify the application, reach out and make the applicant's case, apprise the applicant of her concerns relating to whether the requirements set out in the legislation have been met, or to provide the applicant with a "running-score" at every step of the application process (*Pan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 838 at para 28, [2010] FCJ 1037).

[26] As such, the impugned decision that Ms. Baloul did not meet the definition of "investor" as set out in subsection 88(1) of the IRPR is reasonable, there was no denial of procedural fairness, and the application is denied.

[27] Counsels for the parties were asked whether they had a question to propose for certification. None were suggested.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Simon Noël"
Acting Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7232-10
STYLE OF CAUSE:	HANA BALOUL v MCI
PLACE OF HEARING:	Montreal, Quebec
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