Federal Court  Cour fédérale

Date: 20111213

Docket: IMM-7555-10

Citation: 2011 FC 1411

Ottawa, Ontario, this 13th day of December 2011

Before: **The Honourable Mr. Justice Pinard**

BETWEEN:

DILMURAD KAMCHIBEKOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On December 22, 2010, Dilmurad Kamchibekov (the "applicant") filed the present application for judicial review of the decision of a visa officer of the High Commission of Canada, Immigration Section, in London, England (the "officer"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The officer found that the applicant was not eligible in Canada for permanent residence as a Federal Skilled Worker.

[2] The applicant, a citizen of the United Kingdom, applied for permanent residence in Canada in March 2010 as a Federal Skilled Worker under the National Occupational Classification ("NOC") of Restaurant and Food Service Manager (NOC 0631), as per the Ministerial Instructions ("Ministerial Instructions", "Skilled Worker Instructions", pursuant to section 87.3 of the Act, *Canada Gazette*, Vol. 142, No. 48). At the time, the applicant allegedly possessed two full years of work experience as a Restaurant and Food Manager, having worked as an Assistant Manager at a restaurant called *Azzurro* since 2006.

[3] In his application, the applicant described his main duties as:

- Plan, organize, control and evaluate operations of a restaurant;
- Determine type of services to be offered;
- Set staff schedules;
- Monitor staff performance;
- Resolve customer complaints;
- Control over health and safety regulations;
- Assisted with the training and coaching of new staff members.

[4] In support of his application, the applicant provided a reference letter dated August 14, 2009 from his employer at *Azzurro*, which explained that he worked as a waiter in 2005 and became assistant manager in 2006. In this letter, his employer describes the applicant's duties as follow:

- Plan, organize, control and evaluate the operations of a restaurant;
- Determine the type of services to be offered;
- Set staff work schedules and monitor staff performance;
- Resolve customer complaints;
- Control over health and safety regulations;
- Responsible for balancing the till daily and making bank lodgments, assisted with the training and coaching of new staff members, helped in menu development.

[5] The applicant also provided a notarized copy of his employment contract with the restaurant and copies of the various certificates and diplomas he obtained at the London College of Economics & Sciences, all in the field of tourism and hospitality management.

[6] On October 25, 2010, the applicant received a refusal letter from the officer dated October 22, 2010. On December 22, 2010, the applicant filed the present application for judicial review against the officer's decision refusing his application for permanent residence as a skilled worker.

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[7] The reason for refusal is identified in the letter as there being insufficient evidence of the applicant's work experience in the listed occupation, thereby failing to meet the requirements set out in the Ministerial Instructions:

> . . . the main duties that you listed do not indicate that you performed the actions described in the lead statement for the occupation, as set out in the occupational descriptions of the NOC. I am therefore not satisfied that you are a Restaurant and Food Service Manager (0631).
>
> Since you did not provide satisfactory evidence that you have work experience in any of the listed occupations, you do not meet the requirements of the Ministerial Instructions and your application is not eligible for processing.

[8] The letter concludes by indicating that the applicant will be refunded his processing fee and is invited to reapply.

[9] In the Computer Assisted Immigration Processing System (CAIPS) notes which were communicated on January 5, 2011, it states that the listed duties in the applicant's application are almost an exact copy from the description of tasks in the NOC for Restaurant and Food Service Manager: "The same information is in the JV letter so it is not possible to determine that PA meets MI - not eligible for processing."

* * * * * * * *

[10] The applicant raises the following issues:

i. Is the officer's decision unreasonable?

ii. Did the officer contravene his duty of procedural fairness in not providing sufficient reasons in his decision?

iii. Did the officer breach his duty of procedural fairness in not granting the applicant an interview, denying him the opportunity to address any credibility concerns the officer may have had?

[11] The issue of costs raised by the applicant in his written submissions was abandoned at the hearing before me.

[12] The applicable standard of review to the officer's decision of ineligibility is reasonableness, being a question of mixed facts and law (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 [*Dunsmuir*]). Essentially, a review of the officer's assessment of the evidence must be done according to a standard of reasonableness (*Kuhathasan v. Canada (Minister of Citizenship and Immigration*), 2008 FC 457 at para 17 [*Kuhathasan*]). Therefore, this Court must determine whether

the officer's decision falls within the "range of possible, acceptable outcomes that are defensible in respect of the facts and the law" (*Dunsmuir* at para 47).

[13] However, it is for the courts and not the officer to provide the legal answers to questions of procedural fairness: such questions are reviewed on a standard of correctness (*Kuhathasan* at para 18; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539).

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1. Is the officer's decision unreasonable?

[14] The first error identified by the applicant in the officer's decision is the lack of credibility given to the applicant's description of his main tasks in his application for permanent residence: allegations made by the applicant are presumed true, unless there are reasons to doubt them (*Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302 at 305). However, the respondent rightly asserts that the officer did have reasons to doubt the applicant's description: it was a verbatim copy of the tasks listed in NOC 0631.

[15] According to Operational Bulletin 120 - June 15, 2009, Federal Skilled Worker (FSW) Applications - Procedures for Visa Offices, descriptions of duties taken verbatim from the NOC are to be regarded as self-serving. When presented with such documents, visa officers are entitled to wonder whether they accurately describe the applicant's work experience. Where a document lacks sufficient detail to permit its verification and ensure a credible description, the applicant will not have produced sufficient evidence to establish eligibility: the visa officer must proceed to a final

determination and if the evidence is insufficient, a negative determination of eligibility should be rendered.

[16] Therefore, the officer was entitled to give less weight to the applicant's description of his work experience, being an almost exact replica of the NOC tasks. Nonetheless, the applicant claims that the officer's failure to consider the other documentary evidence he provided constitutes a reviewable error.

[17] The case at hand is in the context of an eligibility determination by a visa officer: it is not the same type of decision as those where an obligation has been imposed on administrative agencies to mention specific evidence in their decisions. Moreover, if the applicant wishes to impose these same obligations on visa officers, it must then not be forgotten that a mere statement by an administrative authority that it considered the evidence in making its decision usually suffices to meet its obligation: the visa officer's statement that the applicant "did not provide satisfactory evidence" would fulfill his would-be obligation (*Cepeda-Gutierrez et al. v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35).

[18] The respondent is right to emphasize that we are in the context of an eligibility determination where visa officers are told to assess an applicant's application as-is and proceed directly to a final determination of eligibility in a timely fashion (see Operational Bulletin 120, above). Therefore, the officer's decision is consistent with these guidelines. The applicant has not established that the officer erred in considering the evidence before him.

[19] The applicant further claims the officer's decision is unreasonable because, in his view, the reason provided in the CAIPS notes is inconsistent with the written reason in his letter of refusal. While the letter states that the "duties that you listed do not indicate that you performed the actions described in the lead statement for the occupation", the CAIPS notes specify that the duties listed are actually an exact copy of the lead statement. The refusal letter however did go on to state that there was insufficient evidence that the applicant had the necessary work experience. When the letter is read in its entirety, it does not contradict what was said in the CAIPS notes: since the applicant's description and his reference letter were a copy of the NOC duties, there was insufficient evidence to establish that he possessed the necessary experience.

[20] Since the applicant's application was a virtual copy of the NOC tasks, as was his reference letter, the officer could not properly evaluate whether the applicant had the requisite work experience as a Restaurant and Food Manager, and consequently declared the applicant ineligible, in conformity with the guidelines (Operational Bulletin 120, above).

[21] Therefore, the officer's decision was not unreasonable. Although this Court may have come to a different conclusion, the officer's decision falls within the possible, acceptable outcomes that are defensible in facts and in law (*Dunsmuir*).

2. Did the officer contravene his duty of procedural fairness in not providing sufficient reasons in his decision?

[22] The officer's reasons are sufficient so long as he gave an explanation to the applicant as to why he did not qualify as a Restaurant and Food Manager (*Adu v. Minister of Citizenship and*

Immigration, 2005 FC 565 at para 14). While the officer's reasons may be brief (*Ali v. Minister of Citizenship and Immigration*, 2007 FC 283), they are clear and enable the applicant to understand why his application was rejected (*VIA Rail Canada Inc. v. National Transportation Agency (C.A.)*, [2001] 2 F.C. 25): his reasons are adequate because they fulfill their function of allowing the applicant to know why he was refused (*Nodijeh v. Minister of Citizenship and Immigration*, 2007 FC 1217 at para 4 [*Nodijeh*]).

[23] Moreover, it has been confirmed by the Federal Court of Appeal in *Minister of Citizenship and Immigration v. Patel*, 2002 FCA 55 at para 10, that the content of the duty of fairness owed by a visa officer is at the lower end of the spectrum (see also *Nodijeh* at para 3; *Dash v. Minister of Citizenship and Immigration*, 2010 FC 1255 at para 27 [*Dash*]; *Fargoodarzi v. Minister of Citizenship and Immigration*, 2008 FC 90 at para 12 [*Fargoodarzi*]). Specifically, in the context of the decision of a visa officer on an application for permanent residence, the duty of fairness is quite low and easily met, "due to an absence of a legal right to permanent residence, the fact that the burden is on the applicant to establish [his] eligibility, the less serious the impact on the applicant that the decision typically has, compared with the removal of a benefit and the public interest in containing administrative costs" (*Fargoodarzi* at para 12). The applicant is not entitled to anything more than the visa officer mentioning the evidence on which his decision was based (*Dash* at para 29).

[24] The officer considered the documents submitted by the applicant with his application, most notably his application form and the reference letter, and concluded that there was insufficient evidence to establish that he possessed the necessary work experience. He was then declared

ineligible and reimbursed his application fees, but invited to reapply. Hence, the applicant knows why his application was denied and even what to correct if he chooses to reapply: the officer's reasons are sufficient and there was no breach of procedural fairness on his part, in this respect.

3. Did the officer breach his duty of procedural fairness in not granting the applicant an interview, denying him the opportunity to address any credibility concerns the officer may have had?

[25] Alternatively, the applicant claims that even if the officer's reasons are sufficient, the latter breached his duty of fairness in not conducting an interview, denying the applicant the right to respond to the officer's concerns as to the veracity of the application, which is the reason his application was rejected. As defined by the applicant, the officer's duty of fairness required the applicant be given the opportunity to respond to the officer's concerns (*Olorunshola v. Minister of Citizenship and Immigration*, 2007 FC 1056 [*Olorunshola*]). Inversely, the respondent emphasizes the context of the decision: at this eligibility stage, notification is not a requirement of procedural fairness and the applicant was not entitled to a running tally or an interview to correct his deficient application (*Kaur v. Minister of Citizenship and Immigration*, 2010 FC 442 [*Kaur*]).

[26] In *Kaur*, procedural fairness did not require the visa officer to notify the applicant of the inadequacies in the materials she had provided: the onus is on an applicant to submit sufficient evidence in support of his application (*Kaur* at para 9). Therefore, in such cases, the applicant is not entitled to an interview to remedy his own shortcomings (*Kaur* at para 9). Moreover, where the visa officer's concerns arise directly from the requirements of the legislation or regulations, he is under no duty to notify the applicant (*Kaur* at para 11; *Rukmangathan v. Minister of Citizenship and Immigration*, 2004 FC 284 at para 23). Relevant work experience is a concern that arises from the

regulations: a visa officer is under no duty to mention his concerns as to the applicant's work experience (*Kaur* at para 12). Ultimately, the visa officer has no obligation to make inquiries where the applicant's application is ambiguous: "there is no entitlement to an interview if the application is ambiguous or supporting material is not included" (*Kaur* at para 10; *Sharma v. Minister of Citizenship and Immigration*, 2009 FC 786 at para 8 [*Sharma*]; *Lam v. Canada (Minister of Citizenship and Immigration*) (1998), 152 F.T.R. 316 at para 4). To hold otherwise would impose on visa officers an obligation to give advance notice of a negative finding of eligibility (*Sharma* at para 8).

[27] In the case at hand, the officer did not have the obligation to hold an interview or to inform the applicant of his concerns with regards to the duplication of the NOC listed duties, much like in *Kaur*. In the words of Justice Danièle Tremblay-Lamer at paragraph 14:

> . . . It did not help that the Applicant's own description of her duties appeared to be copied from the National Occupational Classification. Thus, it was open to the visa officer, on the basis of the scant evidence before him, to find that the Applicant had not established that she had sufficient work experience in her stated occupation, and to reject her application on that basis.

[28] Therefore, the officer did not breach his duty of procedural fairness.

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[29] For the above-mentioned reasons, the present application for judicial review is dismissed.

[30] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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