Federal Court  Cour fédérale

Date: 20120328

Docket: IMM-4895-11

Citation: 2012 FC 359

Ottawa, Ontario, March 28, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MIRASH SELMANAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of a Program Support Officer (the Officer), dated July 19, 2011, refusing the applicant's application for permanent residence as a member of the federal skilled worker class. For the reasons that follow, the application is dismissed.

Facts

[2] The applicant, Mirash Selmanaj, is a citizen of Germany. He submitted an application under the federal skilled worker class, in the category NOC-7265 (welders) in April 2011. The applicant

had an Arranged Employment Opinion (AEO) for a position at Bordeaux Welding X-Perts Ltd., a business for which the applicant had previously worked as a welder.

[3] In the submissions in support of the application, the applicant acknowledged that he did not have the minimum required points, but made representations on why substituted evaluation was warranted pursuant to subsection 76(3) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (Regulations), including:

a. The language requirements were in the process of being adjusted to reflect that tradespersons like the applicant did not need a high language proficiency to be successful;
b. The applicant had already worked successfully in Canada for three years and had an offer of employment with the same company;
c. The applicant was found eligible to write the Red Seal examination, which is a welding trade certification allowing the holder to work in all provinces; and
d. Welders are a high demand occupation according to the 26 June 2010 Ministerial Instructions.

[4] By letter dated July 19, 2011, the Officer found that the applicant did not meet the requirements for permanent residence. The Officer awarded the applicant 1 point out of 24 for official language proficiency based on the language test results in the file. The Officer awarded 19 points out of 21 for work experience, because most of his employment documentation:

> …did not provide sufficient evidence that [the applicant] performed the actions described in the lead statement for the occupation or that [the applicant] performed a substantial number of the main duties of the occupation as set out in the occupational description of the NOC-7265, including all the essential duties.

[5] The Officer declined to grant a positive substituted evaluation under subsection 76(3) of the Regulations. The Officer stated:

> I am satisfied that the points accurately reflect your ability to become economically established in Canada. I have made this determination because the factors you indicated for positive substituted evaluation, years of experience and previous work in Canada, have already been considered and assigned a point value. As a result, I am not substituting my evaluation pursuant to subsection 76(3).

Issues

[6] The issues raised by this application are whether the Officer's decision was reasonable and whether the Officer fettered her discretion by concluding that any factor for which points are awarded under subsection 76(1)(a) could not be considered again under subsection 76(3).

Analysis

Issue 1: Was the Officer's decision reasonable?

[7] The parties were in agreement that the adequacy of the reasons must be assessed within the reasonableness analysis and that the Court may refer to the record in determining the reasonableness of the decision, as stated recently by this Court in *Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 39 at para 6:

> The standard of review applicable to the adequacy of reasons is that of reasonableness. To meet that standard the reasons must communicate, with minimal cogency, the rationale for the findings and conclusions. The reasons must be transparent, meaning that the factual and legal analysis which underlies the conclusion or result must be apparent. This does not require that all arguments, jurisprudence and evidence be referenced but it does mean that the reasons, when read as whole and in the context of the record, demonstrate the reasonableness of the decision: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62*.

[8] Applying this analysis to the decision under review, the decision discloses a reasonable rationale for the outcome and there is nothing in the record to support a finding that the outcome was unreasonable.

[9] As the applicant acknowledges, this Court has repeatedly held that there is no duty to give reasons for refusing to exercise discretion under subsection 76(3). Justice Maurice Lagacé stated in *Budhooram v Canada (Minister of Citizenship and Immigration)*, 2009 FC 18 at para 31: "There is no requirement under the regulations, guidelines or jurisprudence that visa officers give reasons for the refusal to exercise discretion. It is clear however from the CAIPS notes forming part of the file that the Officer was not satisfied that the points were an inaccurate reflection of the applicant's ability to become established.": See also *Xu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 418; *Mina v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1182.

[10] The applicant relies on the comments of Justice Judith Snider in *Lee v Canada (Minister of Citizenship and Immigration)*, 2011 FC 617 at para 59, that if an applicant made specific submissions on why substituted evaluation was warranted an officer "may have been obliged to provide further analysis and reasons." However, Justice Snider went on to note at paragraph 61 that the Court has repeatedly held that there is no duty to give reasons in this particular context.

[11] The two other cases upon which the applicant relies; *Beryl Abro v Canada (Minister of Citizenship and Immigration Canada)*, 2009 FC 1258, and *Choi v Canada (Minister of Citizenship*

and Immigration Canada), 2008 FC 577, are not of assistance. In each of those cases the refusal of substituted evaluation was found unreasonable on the particular facts.

[12] In *Choi*, the applicant had an AEO and settlement funds totaling almost $700,000. The officer in that case declined to award any points for arranged employment because the applicant did not meet the language requirements for the position; however, the Court held that this finding overlooked the employer's letter stating they were confident the applicant could perform the job despite her language skills. In *Beryl Abro*, the applicant also had an AEO and considerable settlement funds. The officer refused to substitute his evaluation, however, because the applicant had run her own business and had not worked for an employer since 1986. The Court found that this conclusion was unsubstantiated by the record.

[13] Thus, in each of these cases, the Court found the outcome unreasonable based on the record before the officer. The officer based his or her decision on irrelevant considerations, or ignored compelling considerations presented by the applicant.

[14] In contrast, I find in this case that the Officer's conclusion is reasonable in light of the record. Most of the considerations presented by the applicant for substituted evaluation were already reflected in his score: his work experience in Canada, his training and his arranged employment had all been taken into account in the regular evaluation. The point of subsection 76(3) is to permit the officer to substitute other considerations that would also prove the applicant's likelihood of establishing himself in Canada.

[15] In *Raquidan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 237, Justice Michael Kelen contrasted the case before him to the case in *Choi*, stating at paragraph 31:

> In the case at bar, there is no such clearly unreasonable factor which the visa officer did not consider and which if the visa officer had considered, would be compelling in demonstrating that the applicant would likely become economically established in Canada. I am satisfied that the visa officer's conclusion was reasonably open to the visa officer, namely that the points awarded give an accurate indication of the applicant's "settlement ability".

[16] Similarly in this case, I find that the factors raised by the applicant are not compelling circumstances such that the failure to consider them would render the Officer's decision unreasonable. The fact that welders are in demand does not itself warrant substituted evaluation. All the professions in the skilled worker program are by definition in demand, otherwise Canada would not be seeking workers for those professions. Furthermore, the applicant had already established that he had a job offer, which also proved that his skills were "in demand". If this alone were sufficient to mandate a positive outcome then arranged employment would be the only prerequisite to permanent residence under this class.

[17] Regarding the applicant's submissions about his language skills, the applicant contends that the points system for language was to be changed, and under the proposed changes, tradespeople would be held to a lower standard than professionals because high language proficiency is not necessary for those jobs. However, the Backgrounder issued by the respondent states:

> CIC will consult on increasing the maximum points awarded for proficiency in the first official language from 16 to 20, and on establishing minimum language requirements, depending on the immigrant's occupational skill level. For example, managers or professionals would have a different requirement from tradespeople.

[18] Thus, the proposal is actually to *raise* the standards for language proficiency, at least for some professions, and imposing a minimum language requirement for trades. At best this change would have no effect on applications like the one at issue in this case. Therefore, the failure of the Officer to explicitly address this submission does not render her decision unreasonable.

[19] Finally, insofar as the fact that the applicant was eligible to take the Red Seal certification, the facts before the Officer were simply that. There was no evidence that he had taken it.

[20] I also agree with the respondent that the Officer's assessment of the applicant's work experience was reasonable. Letters submitted to prove past work experience are clearly required to include "full details of your main responsibilities and duties in each position." The applicant was aware of the necessary content for these letters and thus, as the respondent submits, he submitted deficient letters "at his own peril." There is therefore no basis for the Court to intervene.

Issue 2: Did the Officer fetter her discretion?

[21] I am not persuaded by the applicant that the Officer fettered her discretion, as she did not decide that any factor for which points were awarded under subsection 76(1)(a) could not be considered again under subsection 76(3).

[22] It is helpful to reproduce the wording of subsection 76(3):

Circumstances for officer's substituted evaluation	**Substitution de l'appréciation de l'agent à la grille**
76. (3) Whether or not the skilled worker has been awarded the minimum	**76.** (3) Si le nombre de points obtenu par un travailleur qualifié — que celui-

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.	ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — n'est pas un indicateur suffisant de 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).

[23] I agree with the applicant that the legislation permits the officer to look at the totality of the circumstances, including those that were previously assessed under the points system. Thus, substituted evaluation is warranted when the points an applicant receives under subsection 76(1)(a) do not accurately reflect whether he or she will become economically established in Canada. However, as the respondent submits, the Officer did not state that she was prohibited from considering those factors for which points were awarded, but rather she reasonably found that there was nothing that was not captured by the applicant's point score to show that he would become economically established in Canada. In essence, the factual foundation for the argument that the Officer fettered her discretion does not exist.

[24] The cases relied upon by the applicant, which found fettering of discretion, are not therefore applicable to this case, as the Officer considered all the factors "whether or not" they had already been awarded points.

[25] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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