Federal Court  Cour fédérale

Date: 20120420

Docket: IMM-6002-11

Citation: 2012 FC 466

BETWEEN:

OMER EL-SOURI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] The Applicant, a senior consular officer at the Canadian Embassy in Riyadh, was denied a skilled worker visa to Canada. He seeks judicial review of a decision of a second visa officer (2nd Officer) who did not concur with a first visa officer's (1st Officer) decision to grant the visa application.

II. BACKGROUND

[2] In 2007 the Applicant applied to immigrate to Canada under the "Skilled Worker" category. He did not secure sufficient points to automatically qualify for admission but after an interview by the 1st Officer, that Officer made a positive recommendation for substituted evaluation in accordance with s. 76(3) of the *Immigration and Refugee Protection Regulations* (Regulations).

76. (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.	**76.** (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) — 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)*.

[3] In accordance with the substituted evaluation method, s. 76(4) of the Regulations required that the 1st Officer's evaluation be concurred with by another officer – the 2nd Officer.

76. (4) An evaluation made under subsection (3) requires the concurrence of a second officer.	**76.** (4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.

[4] The major area of concern was the Applicant's business plan and the amount of capital he was prepared or able to invest. The Applicant's plan was to establish a business that would assist students coming from Saudi Arabia and other Gulf countries by arranging for their accommodation

and transportation as well as by meeting them at the Halifax airport. The Applicant had $50,000 to invest.

[5] The 1st Officer, while concluding that the business plan was reasonable, observed that the funds available were “a bit low”. Nevertheless he concluded that the Applicant could economically establish himself.

[6] The 2nd Officer, who did not interview the Applicant but reviewed the file notes and documents and spoke with the 1st Officer, reached a different conclusion. The 2nd Officer was not convinced that the Applicant could establish himself in Canada. He was concerned that the Applicant had no experience as an entrepreneur or in running a business, that the funds were not sufficient and that if the business failed, at age 62, the Applicant would be able to establish himself. The 2nd Officer was aware that the Applicant’s wife was trained as a teacher and that his daughter was established in Canada.

[7] As a result of the 2nd Officer’s refusal to concur, the Applicant’s visa request was denied.

III. ANALYSIS

[8] The Applicant raises (although differently phrased) two issues:

- Was there a denial of natural justice in that there was a breach of the principle of “he who hears must decide” or that the Applicant was denied an opportunity to address the 2nd Officer’s concerns?

- Was the 2nd Officer's decision reasonable given his failure to consider the relevant evidence?

[9] It is well established that the first issue attracts a standard of review of correctness (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, paras 43 and 50). It is also well established that on the second issue the standard is reasonableness (see *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283, para 22).

A. *Natural Justice*

[10] While the Respondent tries to tie a link between s. 87(4), which addresses the issue of concurrence in the context of the provincial nominee class, and the s. 76(4) concurrence provision, those two provisions serve very different purposes and do not assist in the analysis of this first issue.

[11] Fairness must be assessed in the context of the specific case. Section 76(4) neither precludes nor requires the 2nd Officer to conduct an interview or to otherwise follow all the steps of the 1st Officer.

[12] As Mainville J. (as he then was) concluded in *Malik*, above, at paragraph 26, the procedural safeguards in a skilled worker case, where no established rights are diminished, are not extensive. This is particularly so where the Applicant knew that he had not met the required point threshold and was seeking an alternate and discretionary assessment.

> **26** In this case, the Applicant holds no unqualified right to enter and to remain in Canada: *Chiarelli*, *ibid*, at pages 733-34. He applied for permanent residence under the federal skilled worker class and the process under the *Immigration and Refugee Protection Act* and

> the Regulations provides for an assessment of clear and specific criteria under a points system leaving little discretion to visa officers and which does not normally require an interview or other hearing with applicants. The nature of the regulatory scheme, the role of the decision of the visa officer in the overall scheme, and the choice of procedure made do not therefore suggest the need for strong procedural safeguards beyond what is already provided for in the legislation, save the procedural safeguard concerning proper information to applicants as to the criteria used and the documentation required to properly assess their applications. Though the decision to grant or not an application for permanent residence under the federal skilled worker class is obviously important to the individual affected, it is not such as to affect the fundamental freedoms or other fundamental rights of an applicant, such as a criminal proceeding or, in the immigration context, a deportation proceeding might have. In addition, no undertakings are made to applicants as to an interview or as to additional notification if documentation is missing or insufficient, thus considerably limiting expectations of applicants in such matters.

[13] As held in *Silion v Canada (Minister of Citizenship and Immigration)* (1999), 173 FTR 302 at para 11, there is no entitlement to a personal interview. In this case, the 2nd Officer had the benefit of the notes of the interview conducted by the 1st Officer.

[14] With respect to the principle of "he who hears must decide", in fact the final decision maker, the 2nd Officer, did hear the matter through his review of the file, the documents and the notes. The process and procedures followed are consistent with the role a "concurring" officer is to play in this process.

[15] This was not a case involving concerns about credibility or an instance of conflicting evidence which might require a different process; this was a case regarding the sufficiency of the Applicant's business plan, the adequacy of capital and an assessment of the Applicant's ability to establish himself. As such, there was no "fairness" requirement for an interview. This conclusion is

consistent with the reasoning of Justice Mosley in *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, at para 24:

> **24** Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John* and *Cornea* cited by the Court in *Rukmangathan*, above.

B. *Reasonableness*

[16] The Applicant's challenge to the merits of the 2nd Officer's decision is that the Officer failed to consider all the relevant evidence. In particular, the allegation is that the 2nd Officer did not consider the similarity between the Applicant's consular duties and the proposed business, the establishment of the Applicant's daughter in Canada and the Applicant's ability to live with her or the Applicant's wife's experience as a teacher.

[17] There is no evidence that the 2nd Officer ignored evidence; he had the complete file at his disposal. Moreover, the file raised the very concerns which influenced the 2nd Officer including an unstructured business plan devoid of the usual financial analysis for a start-up business. The Applicant failed to file any form of budget, cash flow analysis or market plan. This was open to him to do so. The 2nd Officer is not required to demand such information.

[18] As with the first issue, the real problem was with the sufficiency of the business plan. On these facts it was open to the 2nd Officer to reach the conclusion he did.

[19] This case perhaps illustrates the problem with a "reasonableness" standard where it is reasonable to reach opposite conclusions, as occurred between the 1st Officer and the 2nd Officer. However, that result is clearly contemplated by the s. 76(4) requirement for concurrence.

IV. CONCLUSION

[20] This judicial review will be dismissed. The parties requested that the Court defer making a final order for ten (10) days after the release of these Reasons in order for them to make submissions on a certified question. Each party shall file their submissions, if any, no later than Monday, April 30, 2012.

"Michael L. Phelan"
Judge

Ottawa, Ontario
April 20, 2012

FEDERAL COURT

SOLICITORS OF RECORD

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