Federal Court  Cour fédérale

Date: 20121220

Docket: IMM-2293-12

Citation: 2012 FC 1521

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

GHANAI GHAZELEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of Iran who applied to immigrate to Canada under the federal skilled worker class. She seeks judicial review of a decision of an immigration visa officer (the Officer) denying this application. The Officer was not satisfied that the applicant had a genuine offer of employment in Canada and therefore determined that she did not meet the minimum requirements for permanent residence under this category.

[2] The Officer also rejected a request for a substituted evaluation based on her application and $600,000 in funds said to be available to her to support her transition to Canada.

[3] In *Gill v Canada (Citizenship and Immigration)*, 2010 FC 466, Justice Sean Harrington observed that whether a visa officer is entitled to override an opinion by the Department of Human Resources and Skills Development that an arranged offer of employment was genuine was a question "best left for another day". That day has arrived.

[4] For the reasons that follow the application is dismissed.

Applicable Regulations

[5] Section 75 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*) describes federal skilled workers as those who may become permanent residents on the basis of their ability to become economically established in Canada.

[6] Immigration officers award applicants points on the basis of factors listed in paragraph 76(1)(a) of the *Regulations*: education, proficiency in English and French, experience, age, arranged employment and adaptability. Applicants must be awarded at least 67 points to be eligible for a federal skilled worker visa.

[7] Under paragraph 82(2)(c), applicants from outside of Canada are entitled to ten points for arranged employment, provided that:

(i) The employer has made an offer to employ the skilled worker on an indeterminate basis once the permanent resident visa is issued to the skilled worker; and

(ii) An officer has approved that offer of employment based on an opinion provided to the officer by the Department of Human Resources and Skills Development at the request of the employer or an officer that:

(a) the offer of employment is genuine;

(b) the employment is not part-time or seasonal employment; and

(c) the wages offered to the skilled worker are consistent with the prevailing wage rate for the occupation and the working conditions meet generally accepted Canadian standards;

[8] Under subsection 76(3), the immigration officer has the discretion to undertake a substituted evaluation if the officer determines that the number of points awarded is not a sufficient indicator of the applicant's ability to become economically established in Canada.

Decision Under Review

[9] The applicant obtained an offer of employment as a technical sales specialist from a company in North Vancouver, British Columbia. Human Resources and Skills Development / Service Canada (HRSDC) considered this offer and provided her with a positive determination of eligibility for processing, also known as a positive Arranged Employment Opinion (AEO).

[10] The applicant provided evidence in support of her application, including:

- International English Language Testing System results with an overall score of 5.5 out of 9;

- The positive AEO and offer of employment;
- Evidence of her current employment as a production manager;
- A letter indicating that she had studied French for one year;
- University transcripts and her bachelor's degree;
- Evidence that her brother lived in Canada;
- Banking information.

[11] The Officer considered this evidence and awarded the applicant 65 points, two less than the minimum requirement. The applicant received high scores for age, education and experience. She received five points out of a maximum ten for adaptability because she has family in Canada. The Officer credited her English language ability but did not award any points for French because she had not submitted test results.

[12] However, the applicant received no points for arranged employment. The Officer was not satisfied by HRSDC's positive assessment of the employment offer, had concerns about the company's ability to employ the applicant and requested the company's tax information which revealed substantial losses in 2010.

[13] The Visa Officer wrote to the applicant's representative who conceded that they could not alleviate the Officer's concerns. No further information came to light in response to a subsequent fairness letter. The applicant did, however, request a substituted evaluation of her ability to be economically established in Canada under subsection 76(3) of the *Regulations*. Therefore, the representative requested an opportunity to provide French test results. In the alternative, the

representative requested substituted evaluation in light of the applicant's net worth and immediate family living in Canada.

[14] The Officer did not invite the applicant to submit further evidence. The Officer also declined to conduct a substituted evaluation having concluded that the points awarded accurately reflected her ability to become established in Canada.

Issues

[15] The applicant raises three issues:

(i) Whether the Officer was entitled to consider the genuineness of the employment offer;

(ii) Whether the Officer reasonably assessed the evidence; and

(iii) Whether the Officer breached the duty of procedural fairness.

[16] Questions of jurisdiction and procedural fairness are reviewed on the standard of correctness, whereas the Officer's overall assessment attracts substantial deference and is reviewed based on reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

Analysis

Jurisdiction

[17] The applicant submits that the Officer must accept HRSDC's assessment as to whether the employment offer is genuine. The applicant refers to the *Regulations*, which state that an immigration officer shall award points for arranged employment if the officer "has approved that offer of employment based on an opinion provided to the officer by the Department of Human

Resources and Skills Development". The applicant argues that the *Regulations* did not permit the Officer to look beyond the AEO.

[18] HRSDC's opinion is the first step in the validation of an employment offer; it does not end the inquiry. Under section 82 of the *Regulations*, an immigration officer must approve of employment offers and consider whether applicants are "able to perform and are likely to accept and carry out the employment".

[19] As Justice Judith Snider explained in *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at paragraph 21:

> HRDC validation is not, as the Applicant submits, sufficient evidence of arranged employment. Such validation does not remove the obligation of the Visa Officer to assess whether the Applicant is able to perform the job described in the validation.

[20] An applicant cannot, in the language of section 82 of the *Regulations*, accept, perform and carry out an employment offer that does not exist, or, as in this case, could not be implemented because of the employer's financial circumstances. A visa officer must be satisfied that the criteria specified in section 82 of the *Regulations* are met. Furthermore, in my view, HRSDC's opinion is just that, an opinion, it is not determinative of whether a visa should issue. The immigration officer is the ultimate decision maker.

[21] It is true that HRSDC has a different mandate than that of a visa officer. Its specialization lies in the identification of deficiencies in the labour market and providing an opinion that the position is genuine. However, an immigration officer has the overriding discretion to refuse a visa,

in appropriate circumstances. Indeed, it would be incumbent on a visa officer to do so if they became aware of facts or circumstances which questioned the legitimacy of the offer.

[22] The authority to grant access to Canadian territory is vested in the Minister of Citizenship and Immigration, and specifically, to the visa officer. Subsection 11(1) of the *IRPA* provides:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[23] It is the Minister of Citizenship and Immigration who is accountable, legally, for the decision to grant a visa. To conclude that he was bound by the HRSDC opinion would be either an impermissible delegation of the Minister's statutory obligations under the *IRPA* or a fettering of the Minister's discretion. To conclude, it is the Minister of Citizenship and Immigration who makes the decision, not the Minister of HRSDC. HRSDC rather, offers an opinion.

Procedural Fairness

[24] The applicant submits that the Officer's refusal to conduct a substituted evaluation violated her right to procedural fairness. The applicant argues that she should have been given the opportunity to prove her ability to become established in Canada based on her age, relatives in Canada and her and her husband's combined net worth.

[25] The applicant was already awarded points for her age and relatives in Canada. With regard to her claimed net worth of $600,000, the Officer gave brief reasons for deciding that a substituted evaluation was not warranted.

[26] The applicant is obligated to provide the best evidence demonstrating her ability to become economically established in Canada. There was no unfairness in the Officer's assessment of the evidence as presented, without inviting further submissions, the decision, regardless of its conclusionary nature, was reasonable. The adequacy of the reasons needs to be assessed in light of the information in front of the Officer, which in this case was simply a bold statement that she had a net worth of $600,000. The reasoning was commensurate with the scant and superficial nature of the evidence before her in support of the request for a substituted evaluation.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2293-12
STYLE OF CAUSE:	**GHANAI GHAZELEH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, ON
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