Federal Court  Cour fédérale

Date: 20140227

Docket: IMM-5203-13

Citation: 2014 FC 196

Vancouver, British Columbia, February 27, 2014

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

CHE FANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "IRPA"] of a decision dated June 17, 2013 and rendered by immigration officer Moira Escott [the "Immigration Officer"] refusing the Applicant's application for permanent residence under the Canadian Experience Class [the "Application", the "CEC Application"]. The Immigration Officer was not satisfied that the Applicant met all the requirements pursuant to subsection 87.1(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the "IRPR"].

II. Facts

[2] The Applicant is a 26-year-old citizen of China who entered Canada as a student in 2009. He was granted a work permit on November 4, 2010 which was valid until November 3, 2013.

[3] The Applicant's Application was received on July 5, 2012 and listed "Chartered Financial Advisor" as the Applicant's intended occupation. A letter from New Can Consultants (Canada) Ltd. ["the Employer"] dated June 17, 2012 was submitted in support of the Application. This letter stated that the Applicant had been working full time for this company as a Financial Analyst since November 1, 2010. This letter also listed the Applicant's main duties in the company.

[4] On January 21, 2013, a case analyst of the CEC Unit [the "Case Analyst"] conducted a preliminary review of the Application and entered a note into the Global Case Management System ["GCMS"]. Less than an hour later, the Case Analyst undertook further research on the Applicant's employer and added a new entry in the GCMS notes.

[5] On May 20, 2013, a little under five months later, the Immigration Officer was assigned to the file and reviewed the Application. She noted her concerns in the file's GCMS notes regarding the Applicant's work experience, and she sent on that same day a procedural fairness letter to the Applicant listing her various concerns regarding his work experience and inviting him to submit additional documentation to address her concerns.

[6] On June 17, 2013, the Applicant's response to the procedural fairness letter was received by letter dated May 28, 2013. This letter was accompanied by another letter from the Applicant's Employer confirming and explaining certain elements regarding the Applicant's employment.

[7] On that same day, the Immigration Officer reviewed the Applicant's response to the procedural fairness letter and denied the CEC Application. This refusal is at the heart of this application for judicial review.

III. Decision under review

[8] The Immigration Officer indicated that she was not convinced that the Applicant's Application under National Occupational Classification class 1112 ["NOC 1112"], Financial and investment analysts, met the requirements pursuant to subsection 87.1(2) of the IRPR. In her decision, she reminds the Applicant that she informed him of her concerns regarding his Application in its initial form and invited him to submit further documentation. While acknowledging the Applicant's response to this correspondence, the Immigration Officer nonetheless found that she was not satisfied that the Applicant had the experience stated and had performed the functions of the lead statement and a majority of the main duties under NOC 1112 class. The Immigration Officer added that the Applicant failed to prove having acquired 12 months of full-time skilled work experience in Canada in the last 24 months prior to filing his Application.

IV. Applicant's submissions

[9] First, the Applicant argues that the Immigration Officer breached her duty to provide the Applicant with a meaningful opportunity to address her concerns relating to credibility. These

credibility issues arose from extrinsic evidence, specifically the CBSA investigation of the Applicant's employer, and as such should have been brought to the attention of the Applicant in order for him to address them correctly. Not doing so constituted a breach of procedural fairness. In the present matter, the issues raised by the Immigration Officer are not related to the sufficiency of the evidence but to the credibility of the documents, particularly those emanating from the Employer. This seems apparent given that the Case Analyst, who goes through numerous similar applications, first stated that the supporting documents appear sufficient. The Immigration Officer did not believe the Employer, and she was not convinced that the Applicant was actually working for the Employer. In fact, the Immigration Officer discredited the Employer in her GCMS notes, adding that certain elements of the second reference letter were not in the first letter and that this calls into question the content of the letter. Given that the Applicant did not know that the Immigration Officer had taken issue with the Employer's credibility, he could not know that a second reference letter from said Employer would not suffice.

[10] Second, the Applicant further submits that the Case Analyst exceeded his jurisdiction by making a finding of credibility because he did not have the statutory authority to make this kind of finding with respect to the Applicant's file. Also, the Immigration Officer failed to exercise her jurisdiction by relying on the Case Analyst's finding of credibility without making her own assessment when she had the obligation to undertake this assessment.

[11] Third, the Applicant claims that the Immigration Officer's decision is unreasonable considering the evidence with which she had been presented. The Case Analyst had first indicated that the document seemed sufficient. Also, the first letter of reference provided enough details

regarding his duties, and the second letter of reference provided even more specifics. In addition, the Applicant provided all the required supporting documents.

V. Respondent's submissions

[12] The Respondent argues that there was no breach of procedural fairness given that the duty of fairness owed to the Applicant is minimal where there is a lack of supporting documents and that there was no obligation to inform the Applicant of the concerns arising from his own evidence or of statutory requirements. There were no findings related to the credibility of the Applicant; he simply did not provide enough evidence to show work experience as a financial analyst. In fact, the Applicant had the opportunity to address the Respondent's concerns as he was clearly informed of all these concerns through the procedural fairness letter.

[13] Regarding the issue of jurisdiction, the Respondent claims that the Case Analyst did not make a finding of credibility with respect to the Applicant because this task is out of his jurisdiction. The Case Analyst merely specified in the file that the Employer could be or could have been the object of an investigation by the CBSA, and this is a simple factual circumstance related to the Employer. This is not a credibility finding and, as such, it goes without saying that the Immigration Officer undertook her own assessment of the file.

[14] Moreover, the Respondent submits that the Immigration Officer's decision was entirely reasonable considering the evidence that was in front of her. The second reference letter contained information that had not previously been mentioned in the first letter, and the Applicant did not

submit any evidence to support these claims. The Applicant, who had the onus of proving his claims, simply did not produce enough evidence.

VI. Issues

[15] The case at bar raises the three following issues:

1. Did the Immigration Officer breach procedural fairness by failing to provide the Applicant with a meaningful opportunity to address her credibility concerns regarding the evidence?

2. Does the fact that the Case Analyst made a credibility finding demonstrate an excess of jurisdiction on his part and/or a failure to exercise jurisdiction on the Immigration Officer's part?

3. Was the Immigration Officer's decision reasonable considering the evidence submitted?

As will be seen, it will not be necessary to deal with the third issue since the first one decides the matter. The second will nonetheless be decided because the arguments made call for a clarification.

VII. Standard of review

[16] The parties agree as to the applicable standards of review. The two first issues, related to procedural fairness, are to be reviewed under the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*), 2009 SCC 12 at para 43, [2009] SCJ No 12).

VIII. Analysis

[17] The Applicant applied for permanent resident status under section 87.1 of the IRPR as a member of the Canadian Experience Class. It is well established that in applications presented under Division 1 of Part 6 of the IRPR, the applicant has the "burden to put together an application that is not only "complete" but relevant, convincing and unambiguous" (*Obeta v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1542 at para 25, [2012] FCJ No 1624 [*Obeta*]). The requirements of a CEC Application are set out in subsection 87.1(2) of the IRPR, reproduced below.

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227
Canadian Experience Class	***Catégorie de l'expérience canadienne***
Class	*Catégorie*
87.1 (1) For the purposes of subsection 12(2) of the Act, the Canadian experience class is prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada, their experience in Canada, and their intention to reside in a province other than the Province of Quebec.	**87.1** (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie de l'expérience canadienne est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada et de leur expérience au Canada et qui cherchent à s'établir dans une province autre que le Québec.
Member of the class	*Qualité*
(2) A foreign national is a member of the Canadian experience class if	(2) Fait partie de la catégorie de l'expérience canadienne l'étranger qui satisfait aux exigences suivantes :

(a) they have acquired in Canada, within the three years before the date on which their application for permanent residence is made, at least one year of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix, exclusive of restricted occupations; and

a) l'étranger a accumulé au Canada au moins une année d'expérience de travail à temps plein, ou l'équivalent temps plein pour un travail à temps partiel, dans au moins une des professions, autre qu'une profession d'accès limité, appartenant au genre de compétence 0 Gestion ou aux niveaux de compétence A ou B de la matrice de la Classification nationale des professions au cours des trois ans précédant la date de présentation de sa demande de résidence permanente;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification;

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de la Classification nationale des professions;

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties;

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de la Classification nationale des professions, notamment toutes les fonctions essentielles;

(d) they have had their proficiency in the English or French language evaluated by an organization or institution designated under subsection 74(3) and have met the applicable threshold fixed by the Minister under subsection 74(1) for each of the four

d) il a fait évaluer sa compétence en français ou en anglais par une institution ou organisation désignée en vertu du paragraphe 74(3) et obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence applicable établi par le ministre en vertu du

language skill areas; and	paragraphe 74(1);
(e) in the case where they have acquired the work experience referred to in paragraph (a) in more than one occupation, they meet the threshold for proficiency in the English or French language, fixed by the Minister under subsection 74(1), for the occupation in which they have acquired the greater amount of work experience in the three years referred to in paragraph (a).	e) s'il a acquis l'expérience de travail visée à l'alinéa a) dans le cadre de plus d'une profession, il a obtenu le niveau de compétence en anglais ou en français établi par le ministre en vertu du paragraphe 74(1) à l'égard de la profession pour laquelle il a acquis le plus d'expérience au cours des trois années visées à l'alinéa a).
[…]	[…]

A. *Did the Immigration Officer breach procedural fairness by failing to provide the Applicant with a meaningful opportunity to address her credibility concerns regarding the evidence?*

[18] The first issue in the present matter closely resembles the case addressed by my colleague Justice Bédard in *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264, [2013] FCJ No 284 [*Hamza*] and as such, I shall refer to it extensively.

[19] As stated in *Hamza*, above, and noted by the Applicant in his factum, this Court's process in answering this question is two-fold. First, it must determine whether the Immigration Officer's concerns regarding the evidence were related to the sufficiency or to the credibility of the evidence that the Applicant submitted in order to establish his work experience. Second, should this Court be satisfied that the Immigration Officer's concerns indeed related to the veracity of the evidence, it must determine whether the Immigration Officer should have provided the Applicant with a meaningful opportunity to respond to these concerns. The first step of this process is necessary as

there is no obligation for immigration officers to require additional information in cases where the evidence is insufficient. Conversely, cases where the immigration officer's concerns in fact pertain to "the credibility, the veracity, or the authenticity" of the Applicant's evidence, as opposed to its sufficiency, could very well result in a duty for the immigration officer, albeit at the low end of the spectrum, to provide the applicant with a meaningful opportunity to respond to these concerns (*Hamza*, above, at para 25).

[20] In this regard, Justice de Montigny of this Court stated the following in *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25 at para 21, [2012] FCJ No 22:

> [21] It is by now well established that the duty of fairness, even if it is at the low end of the spectrum in the context of visa applications (*Chiau v Canada (Minister of Citizenship and Immigration)* (2000), [2001] 2 F.C. 297 (Fed. C.A.) at para 41; *Trivedi v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 422 (F.C.) at para 39), require visa officers to inform applicants of their concerns so that an applicant may have an opportunity to disabuse an officer of such concerns. This will be the case, in particular, where such concern arises not so much from the legal requirements but from the authenticity or credibility of the evidence provided by the applicant. After having extensively reviewed the case law on this issue, Justice Mosley was able to reconcile the apparently contradictory findings of this Court in the following way:
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> > 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.

> *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 (FC) at para 24, (2006), [2007] 3 FCR 501 (FC).
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> [Emphasis added.]

[21] In the present matter, I find it difficult to conclude that the Immigration Officer's concerns are not related to the credibility of the Employer's letters. In fact, several elements on the file indicate that the Immigration Officer put into doubt the veracity of the content of these letters. This Court has the clear impression that a dark cloud existed above the Employer. As the GCMS notes indicate, on January 21, 2013, the Case Analyst completely reversed its positive assessment of the Applicant's file after having consulted unidentified materiel that revealed that the Employer was being (or had been) investigated by the CBSA and that its address had been flagged as a "problem address". This information became available to the Immigration Officer. The Certified Tribunal Record [the "CTR"] does not include the originating information on the Employer nor does the supervisor's affidavit filed explain the consultation done, the origin of this information and the documentary information consulted. This Court and the Applicant do not have a complete CTR.

[22] Having said that, and as rightly put by the Applicant in his factum, the extent of what is considered "sufficient" evidence must be determined according to what the Applicant was requested to submit along with his CEC application. As noted, a single letter of reference can be considered sufficient, as Justice Bédard stated in *Hamza*, above, at para 39:

> **[39]** […] Had the Officer been satisfied that the duties listed in the employment letter were actually the duties performed by the applicant, then, there would be no reason, considering that these duties correspond to the main duties set out in the NOC, for the Officer to find this evidence to be insufficient. There is no rule that

> requires an applicant to provide more than one employment letter to establish sufficient work experience. An application can be deemed complete even if the work experience is supported by a single employment letter, as long as the employment letter accurately and completely lists the main duties performed by the applicant. I cannot say that it was unreasonable for the Officer to wonder whether the employment letter accurately reflected the applicant's duties and responsibilities. However, in my view, she should have allowed the applicant an opportunity to address her concerns before rendering her decision.
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> [Emphasis added.]

[23] Here, the Applicant submitted not one but two letters from his Employer. For the purpose of the above-quoted paragraph in *Hamza*, this Court finds, for the following reasons, that the letters actually duly stated the duties performed and that there were no reasons for the Immigration Officer to consider this piece of evidence as being insufficient. Thus, it seems evident that the Immigration Officer did not believe the Employer's letters, most probably because of the notes concerning the Employer that the Case Analyst had written earlier in January. A person reading this kind of information can only be influenced by such remarks.

[24] The main duties of a financial analyst under NOC 1112 for the purposes of paragraph 97.1(2)(*c*) of the IRPR are as follows:

1. Evaluate financial risk, prepare financial forecasts, financing scenarios and other documents concerning capital management, and write reports and recommendations.
2. Plan short - and long-term cash flows and assess financial performance.
3. Analyze investment projects.
4. Advise on and participate in the financial aspects of contracts and calls for tender.
5. Follow up on financing projects with financial backers.

6. Develop, implement and use tools for managing and analyzing financial portfolios.
7. Prepare a regular risk profile for debt portfolios.

8. Assist in preparing operating and investment budgets.

[25] The Applicant provided a first letter from his Employer in which certain of the above-mentioned duties were, to a certain extent, taken directly from this list; the letter also mentioned other duties that did not mirror the NOC 1112 duties list. The Immigration Officer found this information to be insufficient and sent a procedural fairness letter, expressing her serious concerns regarding the Application and inviting the Applicant to submit any additional information. The Applicant replied to this letter by sending another letter from his Employer which provided further details with respect to the duties performed by the Applicant. By letter dated June 17, 2013 the Immigration Officer refused the CEC Application despite the Applicant's response to the procedural fairness letter, finding that the Applicant had failed to demonstrate having acquired sufficient experience.

[26] With respect to his work experience, pursuant to paragraph 87.1(2)(*c*), the Applicant had the burden to establish having performed a "substantial number" of the duties associated with NOC 1112. I find that several of the duties in the Employer's first letter clearly satisfy this criterion as they mirror the duties on that list. Other duties listed in the Employer's two letters can be associated with other duties on the NOC 1112 duties list, e.g. cash flow management and risk analysis.

[27] As for the fact that certain duties were to various levels parallel to the NOC 1112 duties list, this Court has recently stated the following in *Ghannadi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 515, at paras 9-10, [2013] FCJ No 550:

> [9] Firstly, a fair review of that employer's letter does not disclose the type of mindless copying of the NOC description which gives some basis for undermining the weight to be given to that evidence. The letter does not list all of the functions in the NOC description and it separates out what functions were performed in respect of two key projects. Those functions were not identical with each project. This was an unfair and unreasonable characterization.
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> [10] Secondly, as Justice Heneghan held in *Siddiqui v Canada (Minister of Citizenship and Immigration)* (January 26, 2011), Toronto IMM-2327-10 (FC), the use of language in reference letters similar to job descriptions in the NOC Code "is not, per se, grounds for dismissing those reference letters".

The letters did not reproduce all of the NOC 1112 duties, only those that were applicable, and what is more, other duties were added. In any event, I find that the Employer's second reference letter shed light on the first letter and provided additional details, thereby reasonably addressing the Immigration Officer's concerns.

[28] In addition, in the procedural fairness letter, the Immigration Officer expressed her concerns regarding the fact that the Applicant had stated in a previously filed temporary resident visa application having worked for another employer, Wellong International Investment Co ["Wellong"], and that this information was in contradiction with his CEC Application. The Employer's second letter addressed these concerns and confirmed that Wellong is a sister company of the Employer. In her GCMS notes, the Immigration Officer wrote that the Applicant provided "nothing to support" his claims. Given this note, one can assume that the Immigration Officer effectively rejected the Employer's second letter and explanations.

[29] Finally, on the issue of credibility, the Immigration Officer's GCMS notes contain another sentence which, together with the other aforementioned elements, clearly indicates that she took issue with the credibility of the evidence and not its sufficiency. The Immigration Officer noted that some of the information contained in the second letter "was not in reference letter fo [*sic*] 17/6/12 and calls into question the contents of the reference letter." First, I find it odd that an immigration officer would request further information from an applicant and once it is received, use said information against the applicant, stating it was not in the first letter. How could additional information, as requested by the Immigration Officer, be "additional" if it were already in the first letter? This amounts to setting up the Applicant for failure. Second, this sentence makes it clear that the Immigration Officer did not believe the letters.

[30] As stated by Justice Mosley in *Adeoye v Canada (Minister of Citizenship and Immigration)*, 2012 FC 680 at para 8, [2012] FCJ No 672: "[a]lthough the officer did not make any explicit credibility findings, his scepticism about the applicant's claim and supporting documents is apparent from the decision." Such is the case here, and I find that in the case at bar the Immigration Officer's concerns do not arise from the legislative requirements, but from the credibility or the veracity of the evidence submitted by the Applicant in support of his CEC Application, i.e. the two letters from his Employer. Furthermore, the undisclosed negative information on the Employer contained in the GCMS notes and most probably read by the Immigration Officer was the basis for this non-explicit credibility concern.

[31] Contrary to the case in *Obeta*, above, the Applicant's evidence was not void on its face, and the Applicant should have been offered the opportunity to respond to these credibility concerns.

Not to do so amounts to a breach of procedural fairness. Consequently, on this issue alone, the Applicant's CEC Application is to be sent back for re-determination by another immigration officer.

[32] That being said, I will nonetheless briefly answer the other issue in order to clarify the matter.

B. *Does the fact that the Case Analyst made a credibility finding demonstrate an exceeding of jurisdiction on his part and/or a failure to exercise jurisdiction on the Immigration Officer's part?*

[33] First, as asserted by the Respondent, I find that the Case Analyst did not make a credibility finding in the GCMS notes. He simply noted a factual circumstance concerning the Employer and nothing more. The fact that he made two entries in less than an hour shows that he had put importance on the information he collected on the Employer to the point of doing a complete turn around from his previous assessment, done an hour earlier. It is to be said that both parties agree that the Case Analyst does not have jurisdiction to make findings with respect to the applications.

[34] Second, this Court must determine whether or not the Immigration Officer failed to exercise her jurisdiction by relying on the Case Analyst's credibility finding. She did not, because on the one hand, the Case Analyst did not make a credibility finding on which she could have relied, and, on the other hand, she clearly exercised her jurisdiction as she, herself, made an implicit finding of credibility as set out in the answer to the first issue of these reasons.

[35] As such, I find that the Case Analyst did not exceed his jurisdiction and that the Immigration Officer did not fail to exercise hers as it concerns the credibility of the Applicant's evidence.

[36] Consequently, the matter is to be remitted to another immigration officer for re-determination.

[37] The parties were invited to submit questions for certification, but none were proposed.

ORDER

THIS COURT ORDERS that:

1. This application for judicial review is allowed.

2. The Applicant's CEC application is to be sent back to another immigration officer for re-determination.

3. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5203-13
STYLE OF CAUSE:	CHE FANG v MINISTER OF CITIZENSHIP AND IMMIGRATION
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DATE OF HEARING:	February 26, 2014
REASONS FOR ORDER AND ORDER:	NOËL J.
DATED:	FEBRUARY 27, 2014

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