Federal Court  Cour fédérale

Date: 20160217

Docket: IMM-2788-15

Citation: 2016 FC 209

Ottawa, Ontario, February 17, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

GODABADDE GEDARA SURESH BANDARA ABEYWARDANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the negative substituted evaluation decision of a visa officer, dated April 10, 2015, concurring with another officer's previous

assessment and refusal of the Applicant's application for permanent residence as a member of the Federal Skilled Worker class.

II. Background

[2] Suresh Bandara Abeywardane Godabadde Gedara [the Applicant], a citizen of Sri Lanka, applied for permanent residence as a member of the Federal Skilled Worker [FSW] class under the occupation of Medical Radiation Technologist (NOC 3215) in April 2014. His wife, also a radiation technologist, was included in the application.

[3] Both parties have diplomas in Diagnostic Radiography, assessed to be equivalent to a 2-year diploma in Radiography in Canada. They each have seven years' experience working as radiation technologists.

[4] The Applicant provided the required supporting documents, met the criteria of the skilled worker program, and surpassed the points requirement.

[5] By letter dated May 15, 2014, the Applicant was advised he received a positive determination of eligibility to be processed in the FSW class, but that the final decision on eligibility would be made by a visa office. The Applicant was requested to attend an interview on March 10, 2015, in Colombo, Sri Lanka.

[6] The decision under review is comprised of:

i. the negative substituted evaluation of the Concurring Officer, communicated by refusal letter dated April 10, 2015;
ii. the Interviewing Officer's decision that the Applicant and his wife had not satisfied her they would be able to become economically established in Canada, and thus did not meet the FSW requirements;
iii. Global Case Management System [GCMS] notes of the Officers' decisions.

[7] The refusal letter explains provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] relating to permanent residence under the Provincial Nominee Program [PNP]. Regulation 87 states that a foreign national may become a permanent resident under the PNP on the basis of their ability to become economically established in Canada. Regulation 87(2) requires that an applicant: (a) be named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister; and must (b) intend to reside in the province that nominated them.

[8] Under Regulation 87(3), if an officer is of the opinion the requirement under Regulation 87(2)(a) is not a sufficient indicator of whether an applicant may become economically established in Canada, and if the officer has consulted the government that issued the certificate, the officer may substitute for the criteria set out in Regulation 87(2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.

[9] This evaluation must be concurred by a second officer (Regulation 87(4)).

[10] The refusal letter states the Concurring Officer reviewed all information in the Applicant's application and agreed with the Interviewing Officer's decision that the Applicant did not meet the eligibility requirements outlined in Regulation 87.

[11] The letter states that although the Applicant met a significant part of the experiential component of the FSW eligibility and selection criteria, the Interviewing Officer was not satisfied the Applicant would be able to successfully establish in Canada, with which the Concurring Officer agreed. The letter states that when this concern was communicated to the Applicant at an interview, the Applicant provided no rebuttal.

[12] The Concurring Officer refused the application, as he was not satisfied the Applicant met the legislative requirements and that he is not inadmissible (subsections 11(1), 2(2) of the Act).

[13] The GCMS notes of the substituted evaluation are almost identical to the refusal letter, except they do not cite the Regulations and they conclude "[r]equest for concurrence in the application of R87(3) of IRPA (negative substituted evaluation) concurred in".

[14] The GCMS notes from March 12, 2015, (one day after the interview) describe the interview with the Applicant and his spouse, who were interviewed separately.

[15] The notes indicate the Applicant told the Interviewing Officer he wanted to immigrate to Canada because it is a good country and he wanted to upgrade his education. The Interviewing Officer learned that the Applicant had never visited Canada or travelled outside of Sri Lanka.

The Applicant has an uncle in Edmonton. When questioned which schools the Applicant looked into for upgrading his education, the Applicant replied he did not know. He explained he had done online research, but could not name any websites. Although the Applicant could name the two Canadian licensing bodies for obtaining his license to work as a radiation technologist, and knew it would take 3 years, he did not know specifically what steps to take.

[16] When asked to describe his daily work, the notes indicate the Applicant gave very basic information from the NOC description and was not able to sufficiently describe daily duties.

[17] The Applicant's spouse gave very similar answers in her interview. She had never visited Canada or left Sri Lanka. She had an aunt living in Toronto. Although her reason for wanting to immigrate to Canada was to upgrade her education, she had not looked into any schools. When asked whether she had researched how to obtain her license to work as a radiation technologist, she named the same two licensing bodies as her husband, but did not know how long it would take to get licenced. She stated she had not done research into immigrating to Canada, and did not know of settlement organizations or how she would go about finding a job. The notes state that the Applicant's wife, after some prompting, could only describe very generic details of her daily duties and indicate she kept looking at her husband throughout the interview.

[18] The GCMS notes convey that the Interviewing Officer explained to both parties that "if you do a job every day you should be able to describe in detail what you do", yet neither party could satisfactorily explain their daily duties, despite having worked as radiation technologists since 2008.

[19] As well, the notes state the current employment letters provided by Applicant paraphrase NOC 3215, and the interview provided the Applicant and his spouse with "the opportunity to explain in their own words what they do."

[20] The Interviewing Officer was of the opinion the Applicant was "very unprepared for immigration despite having almost [one] year to prepare before [the] interview". She was not satisfied the Applicant or his spouse would be able to economically establish in Canada after considering the information submitted, employment letters, lack of preparation for immigration, and inability to adequately explain job duties, and thus recommended a negative substituted evaluation.

[21] The file review in the GCMS notes (dated February 18, 2015) indicates the employment letters, from two different hospitals, are a carbon copy of each other and mimic the NOC duties, which "diminishes the overall credibility of the employment letters". This is what initially prompted the interview. The Applicant had an overall score of 6.5, and his spouse, 7.0.

III. Issues

[22] The issues are:

A. Did the Interviewing Officer breach the principles of procedural fairness by not providing the Applicant with an opportunity to address her concerns regarding his ability to become economically established in Canada?
B. Did the Interviewing and Concurring Officers reasonably exercise negative discretion?

IV. Standard of Review

[23] The parties agree that the standard of review applied to a visa officer's exercise of negative discretion is reasonableness.

[24] Issues of natural justice or procedural fairness are subject to review on a correctness standard. The Applicant submits that the duty of fairness is heightened in cases where an officer exercises discretion in a substituted evaluation. Justice Evans of the Federal Court of Appeal [FCA], held in *Sadeghi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 337 at paras 14, 15, 17 [*Sadeghi*], that:

> a discretionary decision depriving an applicant of his legitimate expectation that, having satisfied the specific statutory selection criteria, most of which are geared towards assessing an applicant's prospects for becoming economically established in Canada, he would be issued with a visa … Decisions removing a person's legitimate expectation of receiving a benefit typically attract greater procedural protection than those where the discretion is at large.

V. Analysis

A. *Did the Interviewing Officer breach the principles of procedural fairness by not providing the Applicant with an opportunity to address her concerns regarding his ability to become economically established in Canada?*

[25] The Applicant submits the Interviewing Officer breached the duty of fairness required in the circumstances. Visa officers have a duty to give applicants an opportunity to answer the specific case against them, which may require officers to convey their concerns and give the applicant an opportunity to disabuse them. The Interviewing Officer did not advise the Applicant

and his wife about her specific concerns relating to their ability to become economically established in Canada and did not disclose she was considering negative substitution, which denied them an opportunity to respond.

[26] CIC's operations manual specifies that concerns underlying an officer's rationale for making a negative substituted evaluation should be provided in writing. The manual states:

> If an officer decides to use substituted evaluation when the applicant did meet all the requirements to become a member of the federal skilled worker class (i.e., negative substituted evaluation), the officer will
>
> > communicate their concerns to the applicant in writing and provide sufficient opportunity for the applicant to respond to those concerns, through correspondence/documentation and/or an interview;

[27] The Applicant submits that officers must communicate their specific concerns to applicants in these circumstances. He relies on *Sharma v Canada (Minister of Citizenship and Immigration)*, 2011 FC 337 [*Sharma*], wherein Justice Richard Boivin determined that a negative substituted decision pursuant to Regulation 76(3) was procedurally unfair, notwithstanding a procedural fairness letter had been sent mentioning the officer was not satisfied of the applicant's ability to become economically established in Canada.

[28] I agree with the Applicant that the Interviewing Officer, in this context, had a duty to advise the Applicant of her concerns and that her failure to clearly communicate concerns regarding the Applicant's ability to economically establish in Canada amounted to a breach of procedural fairness. This aligns with the Federal Court of Appeal decision in *Sadeghi*, above, and with the CIC operations manual.

[29] Visa officers have a duty to convey to applicants their concerns grounded in the credibility, accuracy or genuine nature of information submitted, and must provide applicants with an opportunity to disabuse them. Visa officers are not obligated to convey concerns that arise directly from the requirements of the Act and Regulations or which deal with sufficiency of the evidence (*Liao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1926 at paras 15-17, 23; *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at 22 [*Rukmangathan*]).

[30] On the present facts, I find that the Interviewing Officer had a duty to convey her concerns to the Applicant. Firstly, the content of fairness is heightened in this context. As well, the Interviewing Officer's concerns related to the credibility of the Applicant's documentary and testimonial evidence. The GCMS notes indicate a case analysts' concerns with the employment letters being "carbon copies" and largely imitative of the NOC is what prompted the interview in the first place. Such concerns have been found by this Court to be related to the veracity and credibility of the Applicant's evidence, not its sufficiency (*Patel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 571 at paras 23-27; *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264 at para 29).

[31] As well, the Applicant had met and surpassed the requirements of the FSW class, and in such a case the FCA has determined, "it is important that [officers] raise their concerns with the individual in a way that enables her or him to respond" (*Sadeghi*, at para 17). Although the Applicant knew his eligibility would be assessed at the interview, he was not informed the Interviewing Officer was considering a substituted evaluation under Regulation 76(3), such that

he could discern that his ability to economically establish in Canada was at issue. He also did not have an opportunity to address that concern subsequently.

[32] The affidavits filed by the Applicant and by the Interviewing Officer present opposing accounts of the tone of the interview and whether concerns were specifically communicated. I find the Applicant's affidavit more persuasive and assign it more weight for the following reasons.

[33] I agree with the reasoning in *Rukmangathan,* above, at paras 30, 31, citing *Parveen v Canada (Minister of Citizenship and Immigration),* [1999] FCJ No 660 (Fed TD) [*Parveen*], that "...[v]isa officers deal with many applications, one can expect that they will not have as precise a memory of the event as does the applicant" (*Parveen,* at para 10). The interview took place on March 11, 2015, yet the Officer's affidavit was sworn in December 4, 2015 – approximately nine months later. The extended passage of time and the number of interviews this Officer would have conducted in the interim calls into question the reliability of her attested statements made months later.

[34] As well, the Officer's affidavit essentially reiterates the GCMS notes, adding very little to their substance.

[35] Although the Officer states in her affidavit that she advised the Applicant of her "concerns to become economically established" and gave him an opportunity to address them (para 11), such specificity was not provided within the GCMS notes, which simply state

"[c]oncerns explained to applicants". I agree with the Applicant that the GCMS notes are vague and it is simply not clear what concerns were communicated to the Applicant; were the explained concerns related to the Applicant and his wife's undetailed description of daily job duties, their similar employment letters, or their lack of research into precise steps to get licenced? The Respondent does not indicate anywhere within the GCMS notes, and it is not evident from the record, that the concern regarding the Applicant's ability to become economically established was specifically put to him, in the interview or otherwise, such that he was given an opportunity to respond. A bald, vague statement in the Interviewing Officer's affidavit sworn nine months after the interview should be given little weight.

[36] The Respondent submits that procedural fairness in this case does not require an officer to advise an applicant in writing. Yet, as the Applicant identified, CIC's operations manual states the officer in this circumstance "will communicate their concerns to the applicant in writing and provide sufficient opportunity for the applicant to respond to those concerns, through correspondence/ documentation and/or an interview". While this document is not binding and does not carry the force of law, at a minimum it indicates what procedural duties are expected of visa officers in these circumstances.

[37] I find that the Interviewing Officer breached the duty of fairness owed to the Applicant in this case by not conveying her concerns and thus denying the Applicant with a meaningful opportunity to respond.

B. *Did the Officers reasonably exercise negative discretion?*

[38] The Applicant submits the substituted evaluation decision was unreasonable on two grounds: (i) the Interviewing Officer relied on improper considerations and made unreasonable findings based on the evidence before her; and (ii) the Concurring Officer subsequently prepared an almost incomprehensible decision based on inapplicable legislation and similarly unreasonable findings.

[39] The Respondent submits it was reasonably open to the Interviewing Officer to find that the Applicant and his wife were unlikely to become economically established in Canada. The Officer based such a decision on the following facts, as described in the GCMS notes:

- although wanting to upgrade his education in Canada, the Applicant had not looked into any schools;
- the Applicant said he had researched the job market for radiation technologists online, but could not provide names of any websites visited;
- although he could name two licencing bodies, he stated he did not know what steps to take to obtain a licence;
- Applicant has an uncle in Edmonton and simply shrugged when asked why he had not visited the relative;
- the Applicant's wife's responses to questioning were the same as her husband;
- the Applicant's wife replied she did not know when questioned whether she had done research into Canadian immigration or if she knew of any settlement organizations;
- when the Interviewing Officer's concerns were explained at the interview, both the Applicant and his wife responded by saying they could do more research.

[40] As well, the Respondent submits it was reasonably open to the Interviewing Officer to exercise negative discretion, given the Applicant's lack of preparation when one considers the Decision as a whole and takes into account the GCMS notes. Absence of plans and research for potential work are relevant factors to consider (*Wijayansinghe v Canada (Minister of Citizenship and Immigration)*, 2015 FC 811 at para 45).

[41] Moreover, while the Regulations do not require an applicant to demonstrate they will obtain employment in the qualifying occupation, an officer is justified in considering an Applicant's likelihood of practicing in that profession, as the Applicant would likely rely on these skills to make a living (*Gharialia v Canada (Citizenship and Immigration)*, 2013 FC 745 at para 37).

[42] In this case, the refusal letter and citation of inapplicable regulations to the Applicant's application calls into question: (i) whether the Concurring Officer indeed reviewed all the information in the Applicant's application; and (ii) whether he read the whole assessment with which he concurs. This accordingly casts doubt on the reasonableness of the assessment.

[43] An Affidavit of Kristin Erickson, Immigration Counsellor at the High Commission of Canada in Colombo, Sri Lanka, sworn November 27, 2015, sets out that on April 24, 2015, the immigration office received an email from the Applicant's immigration representative requesting reconsideration of the refusal decision on the basis it had been made pursuant to Regulation 87 (rather than Regulation 76). The Concurring Officer replied by email on April 28, 2015, stating he had reviewed the application and confirmed the assessment was made under the FSW provisions, not under the PNP, and that reference in the refusal letter to the PNP program regulations was inadvertent. He stated the processing of the application and the decision was legally correct. The Affidavit sets out that Regulation 76(3) should have appeared where the Concurring Officer mentioned 87(3), and regardless, the applicable test – whether the Applicant may become economically established in Canada – is the same for both regulations.

[44] Notwithstanding this above information, it is evident that the refusal letter does not simply "inadvertently" substitute Regulation 87(3), where 76(3) should have been. Rather, it describes Regulations 87, 87(2) and 87(3). The refusal letter states the Concurring Officer reviewed all of the Applicant's information, and determined he had "not met the eligibility requirements outlined in R87". This conveys that the Concurring Officer reviewed the information in light of Regulation 87, which has different criteria for admission than the FSW program.

[45] As well, the refusal letter only references "FSW" once, when paraphrasing the Interviewing Officer's GCMS notes. While the Interviewing Officer's decision appears to have been based on the FSW eligibility criteria, it is not clear that the Concurring Officer reviewed the application in light of the correct regulatory regime.

[46] I agree that the PNP and FSW provisions are similar, in that they permit an officer to make negative substituted evaluation notwithstanding an Applicant's fulfillment of other requirements, if previous subsections specific to that Regulation (87(2)(a) or 76(1)(a)) are found to be insufficient indicators of whether the Applicant may become economically established in Canada. However, the provisions for the PNP (Regulation 87) and FSW (Regulation 76) are not identical, nor are the requirements of the substituted evaluation subsections of both Regulations.

[47] I find the decision of the Concurring Officer unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for leave and judicial review is allowed and the matter is remitted back to a different interviewing officer for reconsideration of the Applicant's eligibility;

2. No question is to be certified.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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