Federal Court  Cour fédérale

Date: 20170119

Docket: IMM-2828-16

Citation: 2017 FC 71

Ottawa, Ontario, January 19, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DAMARIS GUGLIOTTI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Damaris Gugliotti [the Applicant] pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by a Visa Officer [the Officer], dated June 16, 2015, in which the initial refusal of the Applicant's application for permanent resident [PR] status under the Federal Skilled Workers Class for being incomplete, under rules 10 and 12.01 of *Immigration and Refugee Protection*

Regulations, SOR/2002-227 [the *IRPR*], was upheld upon reconsideration [the Reconsideration Decision].

[2] The application for judicial review is dismissed for the reasons that follow.

II. Facts

[3] The Applicant is a 27-year-old citizen of Brazil. Prior to arriving in Canada, the Applicant received a Bachelor's Degree in Science from a post-secondary school in Brazil, which is the equivalent of a four-year post-secondary degree in Canada. While completing her degree in Brazil, the Applicant worked full-time as an administrative assistant at a high school in Sao Paulo, from January 2009 to December 2010.

[4] The Applicant arrived in Canada on January 2011 to continue her studies. She completed the three-year program at George Brown College and received a diploma in Business Administration. The Applicant was issued a 3-year post-graduate work permit which was renewed to October 2016. She worked at the College in an administrative support capacity from January 2012 to July 2014 and then as a Clinical Placement Officer on a part-time continuous basis, averaging 24 hours a week, from August 2014 to March 2016.

[5] On February 20, 2016, the Applicant created an online Express Entry [EE] profile with Citizenship and Immigration Canada [CIC] to apply for PR status. She received what appears to be a standard form letter providing direction as to her next steps, which stated:

> Based on your answers, it looks like you may be eligible to come to Canada as a skilled immigrant.

[6] On February 24, 2016, the Applicant received another letter from CIC, informing her that she had scored an overall point total of 465 and inviting her to apply for permanent residency as a member of the Federal Skilled Workers Class.

[7] On or about March 17, 2016, the Applicant submitted her application for permanent residency online. The same day, she received a standard form letter indicating that CIC had received her application for permanent residency. Of particular importance on judicial review, the Applicant submitted as part of her application the following documents as proof of sufficient funds to immigrate:

- An account statement from TD Canada Trust confirming the Applicant's bank savings, investments, outstanding credit card bills and investments;
- Mutual Fund statements at TD Canada Trust with an 18 month balance history. That Mutual Fund was valued at $18,186.00 CAD and showed a balance from December 1, 2014 of $18,000.00;
- Mutual Fund TFSA at TD Canada Trust with a current balance of $8,251.00 CAD and an 18 month balance history since December 1, 2014;
- Mutual Fund at TD Canada Trust currently valued at $7,727.00 CAD with a balance history since August 2015;
- US Daily Interest Chequing account with a current balance of $774.00 CAD; and
- A TD Every Day Chequing Account with a current balance of $854.00 CAD.

[8] Combined, these documents showed that she had more than $43,000.00 CAD, held in various Canadian accounts. It is not disputed that if what she filed was accepted, she had more than enough to meet the program requirement to have unencumbered funds of approximately $12,000.00.

[9] On May 2, 2016, the Applicant received a letter from CIC advising her that her application had been rejected for failing to provide valid proof of funds.

[10] The Applicant's counsel contacted the Acting Director at CIC's national headquarters on May 3, 2016 inquiring as to the "clear error" in the initial decision: he was instructed to send a "webform enquiry" (or "case-specific enquiry"). The Applicant's counsel submitted this enquiry on May 19, 2016, including a copy of the original proof of funds documents that had been provided previously submitted, and requested a reassessment.

[11] The enquiry was received on May 31, 2016 and on June 16, 2016, the initial rejection of the Applicant's application was upheld on reconsideration [Reconsideration Decision].

[12] By way of sworn affidavit submitted on judicial review, the Acting Director of IRCC indicates that the updated requirement for proof of settlement funds is contained in a text box located on the online application form completed by the Applicant. A screenshot of this pop up help text box is provided as an exhibit to the affidavit.

[13] There is no dispute that the following text box contents were available to the Applicant when she filed her application. The text box states:

> Express Entry – Permanent Residents
>
> If you are applying for permanent residence in Canada you must provide an official letter issued by your financial institution indicating your financial profile. This must
>
> - list of all your bank (chequing and savings) and investment accounts, the account number, dates each account was opened and the balance of each account over the past six months.
> - list all outstanding debts, such as credit cards and loans.
> - Be printed on the letterhead of the financial institution, and include your name and the contact information of the financial institution (address, telephone number and e-mail address).
>
> [emphasis added]

[14] Notwithstanding this notification, the Applicant did not file an "official letter" as required by the online form. Instead, the Applicant filed material downloaded from the website of her financial institution, without any official letter or bank contact coordinates. She did provide all the required financial information, but without the necessary official letter in support.

III. Decision

[15] On May 2, 2016, the Applicant received a letter from Immigration, Refugees and Citizenship Canada [IRCC]. The Decision stated, in relevant part:

> Immigration, Refugees and Citizenship Canada (IRCC) has reviewed your application for permanent residence. We have determined that your application does not meet the requirements of a complete application as described in sections 10 and 12.01 of the

> *Immigration and Refugee Protection Regulations*. Your application is rejected for being incomplete.
>
> Specifically, your application does not include the following elements:
>
> **Proof of Funds:**
>
> > You have not provided valid documentation to show verification of proof of funds. Applications submitted without these mandatory documents cannot be considered complete.
>
> Note: A full review of your application was not performed. There may be other elements, not identified above, which may also be missing or incomplete.
>
> [emphasis in original]

[16] The Decision Letter informed the Applicant that, should she still wish to come to Canada as a skilled immigrant, she would be required to submit a new Express Entry profile online. It advised her that the fees she paid as part of her application would be returned to her.

[17] The relevant Global Case Management System [GCMS] notes state:

> File does not meet R10 requirements. ***AGENT REVIEW*** PROOF OF FUNDS CLIENT DID NOT PROVIDE VALID DOCUMENTATION TO SHOW PROOF OF FUNDS Rejection letter sent via MyCIC. File assigned for refund of fees.

[18] On June 16, 2016, following her request for reconsideration, the Applicant received the Reconsideration Decision from IRCC, informing her that the initial rejection of her application would be maintained. It stated, in relevant part:

> Your application was considered on its substantive merits according to the applicable section of the Immigration and Refugee Protection Act and it was deemed incomplete. Your request for

> reconsideration has been reviewed and a thorough re-examination of your application has taken place. The decision remains the same and your application will not be re-opened.
>
> In order to show valid proof of funds, the applicant should provide, an official letter from one or more financial institutions that lists all current bank and investment accounts as well as outstanding debts, such as credit card debts and loans.
>
> [emphasis added]
>
> A letter explaining the reasons for this rejection was sent to your MyCIC account on May 2, 2016 thereby fully concluding your application.
>
> **Note: Any different or new information that you submit after the original review of your application cannot be taken into consideration**.
>
> [emphasis in original]

[19] It is from the Reconsideration Decision that the Applicant seeks judicial review.

IV. Issues

[20] This matter raises the following issues:

1. Whether the Assistant Director's affidavit should be struck in its entirety?
2. Whether the Officer breached the duty of procedural fairness by failing to alert the Applicant to concerns regarding the genuineness of the financial documents submitted?
3. Whether the Officer fettered her discretion, or unreasonably ignore evidence submitted by the Applicant as proof of settlement funds?

V. Standard of Review

[21] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." An officer's determination of an applicant's application for permanent resident status as a member of the federal skilled worker class is reviewable on the standard of reasonableness: *Patel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 571 at para 18; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2014 FC 678 at para 9 [*Kaur*]. Such decisions should be given a "high degree of deference": *Kaur*, above at para 9.

[22] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[24] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Relevant Provisions

[25] Section 76(1) of the *IRPR*, which governs the selection criteria for the Federal Skilled Workers Class, states:

Selection criteria	**Critères de sélection**
76 (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:	76 (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :
(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection	a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs

(2) on the basis of the following factors, namely,	suivants :
(i) education, in accordance with section 78,	(i) les études, aux termes de l'article 78,
(ii) proficiency in the official languages of Canada, in accordance with section 79,	(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,
(iii) experience, in accordance with section 80,	(iii) l'expérience, aux termes de l'article 80,
(iv) age, in accordance with section 81,	(iv) l'âge, aux termes de l'article 81,
(v) arranged employment, in accordance with section 82, and	(v) l'exercice d'un emploi réservé, aux termes de l'article 82,
(vi) adaptability, in accordance with section 83; and	(vi) la capacité d'adaptation, aux termes de l'article 83;
(b) the skilled worker must	b) le travailleur qualifié :
(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to one half of the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or	(i) soit dispose de fonds transférables et disponibles — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,
(ii) be awarded points under paragraph 82(2)(a), (b) or (d) for arranged employment, as defined in subsection 82(1), in Canada.	(ii) soit s'est vu attribuer des points aux termes des alinéas 82(2)a), b) ou d) pour un emploi réservé, au Canada, au sens du paragraphe 82(1).

[26] Sections 10 and 12.01 of the *IRPR* state as follows (in relevant part):

Form and content of application	**Forme et contenu de la demande**
10 (1) Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall	**10 (1)** Sous réserve des alinéas 28b) à d) et 139(1)b), toute demande au titre du présent règlement :
…	…
(c) include all information and documents required by these Regulations, as well as any	c) comporte les renseignements et documents exigés par le présent règlement

other evidence required by the Act;

…

Marginal note: Required information

(2) The application shall, unless otherwise provided by these Regulations,

(a) contain the name, birth date, address, nationality and immigration status of the applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;

(b) indicate whether they are applying for a visa, permit or authorization;

(c) indicate the class prescribed by these Regulations for which the application is made;

(c.1) if the applicant is represented in connection with the application, include the name, postal address and telephone number, and fax number and electronic mail address, if any, of any person or entity — or a person acting on its behalf — representing the applicant;

…

(d) include a declaration that the information provided is complete and accurate.

et est accompagnée des autres pièces justificatives exigées par la Loi;

…

Note marginale : Renseignements à fournir

(2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :

a) les nom, date de naissance, adresse, nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;

b) la mention du visa, du permis ou de l'autorisation que sollicite le demandeur;

c) la mention de la catégorie réglementaire au titre de laquelle la demande est faite;

c.1) si le demandeur est représenté relativement à la demande, le nom, l'adresse postale, le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique de toute personne ou entité — ou de toute personne agissant en son nom — qui le représente;

…

d) une déclaration attestant que les renseignements fournis sont exacts et complets.

VII. Analysis

Whether the Assistant Director's affidavit should be struck in its entirety?

[27] The leading case in terms of adding to the record on judicial review is *Association of Universities and Colleges of Canada et al. v The Canadian Copyright Licensing Agency* 2012 FCA 22, in which the Court of Appeal confirms that generally judicial review proceeds on the record which may not be supplemented by affidavit evidence that was not before the decision-maker. However, an exception is set out at para 20(b) regarding evidence "necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness … [citations omitted]." In my view, just as evidence of procedural unfairness not on the record may be filed on judicial review, so too may evidence to rebut an allegation of procedural unfairness; otherwise merely alleging procedural unfairness would compel a reviewing court to grant judicial review.

[28] In my respectful view, the portion of the affidavit referred to, i.e, the first paragraph, is admissible to rebut the Applicant's allegation of procedural unfairness. As already noted, the Applicant did not take issue with the fact that the text box required financial information to be submitted along with an "official letter" from the financial institution that was "printed on the letterhead of the financial institution, and include your name and the contact information of the financial institution."

[29] The balance of the affidavit, which is very short, seeks to justify requiring the "official letter" is not admitted; it addresses the merits of the decision and as such is impermissible as new evidence.

Whether the Officer breached the duty of procedural fairness by failing to alert the Applicant to concerns regarding the genuineness of the financial documents submitted?

[30] It was alleged that the Visa Officer should have given the Applicant notice that she had not supplied proof of settlement funds with proper verification by way of a procedural fairness letter: *Naqvi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 503 at para 18; also see *Bakhtiana v Canada (Minister of Citizenship and Immigration)* (1999), 190 FTR 275 (FC) at para 20.

[31] There is no merit to this submission. In my respectful opinion, the Applicant was advised of a need to file an official letter before she submitted her application; she was given that notice in a clear statement in a text box in the online form used to file her material. I am unable to find any unfairness in not specifically alerting the Applicant of a requirement in respect of which she had already been given specific notice.

[32] In any event, it appears that the Respondent did review the matter at the Applicant's request, thereby in effect treating the initial refusal as an opportunity to refile as required. Unfortunately, the Applicant filed the same material the second time as the first; neither filing complied with the requirements outlined in the text box on the online application form.

Whether the Officer fettered her discretion, or unreasonably ignored evidence submitted by the Applicant as proof of settlement funds?

[33] Despite the very able submissions of counsel for the Applicant, I am not persuaded this is either a case of the Officer fettering her discretion, or unreasonably ignoring evidence. Underlying both submissions is the argument that IRCC (the department) lacks the authority to determine the relative weight to be afforded to documents filed on applications for permanent residence status. The argument continues that such pre-determination requires specific regulatory approval.

[34] I agree with the Applicant that the regulations do not specify the manner of proof of the required financial information to be filed. While the regulations do set out the requirement to provide proof of settlement funds, they do not specify what is, or is not accepted as proof; they are silent as to the means by which an applicant may satisfy the obligation to demonstrate sufficient establishment funds. All parties are in agreement to this point as is the Court.

[35] There is no doubt however, and it is trite law to observe, that it is the duty and responsibility of Visa Officers to weigh and assess documentation filed in support of applications. This flows from their duty to decide the merits of an application before them.

[36] It is also trite to observe that if a Visa Officer has concerns with the reliability of documents, and reasonably requests addition information to weigh or assess the evidence filed, an Applicant may either provide that information or be prepared to see his or her application denied. There is no suggestion that a Visa Officer must obtain regulatory approval before

reasonably asking for further and better verification; the authority to demand more, assuming it is reasonably exercised, flows directly from, and in my view is inextricably bound up with, the Officers' duty to weigh and assess the evidence before them.

[37] That is what occurred here. As a matter of policy, IRCC as a department decided that it wished to have certain information (in this case proof of financial information to support the required settlement funds) presented with verification not only by the Applicant (who must verify all information he or she submits) but verified also by the financial institution itself through an "official letter" containing the coordinates of the signing officer. The coordinates would obviously be useful to facilitate any due diligence directly with the financial institution the Visa Officer may decide to undertake.

[38] It seems to me that if a Visa Officer may reasonably request additional verification, the IRCC may do the same.

[39] I should note that no one suggested requiring this extra level of verification is in any way unreasonable; an applicant merely need his or her financial institution to send an official letter in relation to its records which in my respectful view is quite reasonable. It is no different than asking a person who submits a photocopy of a property deed to provide a notarial copy where reasonable, or asking a person who submits a photocopy of a letter to provide the original where reasonable. And it makes no difference, in my view, if requirements for verification are made known before or after the material is submitted, although common sense suggests it is preferable for all concerned that applicants know in advance, as was the case here.

[40] I fully accept that such Officers must take adequate account of relevant evidence in the record, including documentation confirming an applicant's settlement funds: *Lackhee v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1270 at para 16; *Gay v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1280 at paras 29-31. That said, I am unable to see how requiring a particular level of proof in any way constitutes unreasonable failure to take account of relevant information. Likewise I do not see this as a case of fettering of discretion (*Paturel International Company v Canada (Minister of Employment and Social Development)*, 2016 FC 541).

[41] Looking at the decision as an organic whole, and considering it with the record in this case, I have come to the conclusion that the Officer's decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, as required by *Dunsmuir*. I found no breach of procedural fairness.

VIII. Certified Question

[42] Neither party proposed a question to certify and none arises.

IX. Conclusions

[43] The application for judicial review must be dismissed, and there is no question to certify.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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