Federal Court  Cour fédérale

Date: 20200115

Docket: IMM-2651-19

Citation: 2020 FC 53

Vancouver, British Columbia, January 15, 2020

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

FAN ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

UPON HEARING this application for judicial review at Vancouver, British Columbia on Wednesday, January 8, 2020;

AND UPON hearing counsel for the parties and reviewing the materials filed;

AND UPON reserving this decision;

AND UPON determining that the application be allowed for the following reasons:

[1] This is the second application for judicial review brought by Fan Zhang in response to refusals by visa officers to accept her application for a work permit authorizing her arranged employment in Vancouver as a childcare worker. The first refusal decision was set aside on consent of the parties.

[2] The decision that is the subject of this application was rendered by an unidentified visa officer (Officer) on March 27, 2019. Upon completion of an interview with Ms. Zhang, the Officer denied her application on two grounds:

(a) that she had failed to establish that she was able to adequately perform the work required; and

(b) that, based on her purpose for coming to Canada, she represented a risk of an unauthorized overstay;

The notes accompanying the Officer's decision express the following additional concerns:

> In view of your lack of paid experience as a caregiver, the reasons you provided for why you want to work as a caregiver in Cda, and the plan you described, I am not satisfied that you meet the requirement for issuance of a work permit. I am not satisfied that you are a bona fide temporary worker. Hence, I am inclined to refuse your application. [I think being a caregiver is a relationship between you are your employer. I want to work for an employer for 2 years. If it did not work out, I would have to look for another employer. After a few years, if I want to improve myself, it is natural. Self-improvement is natural.] Based on our conversation and information presented before me, I am not satisfied that you are a genuine temporary worker in Cda. I am also not satisfied that you demonstrated ability to perform duties required by the job offered in Cda. Your application is refused. Do you have any questions?

[3] Ms. Zhang argues that the Officer's decision was unreasonable because it failed to account for reliable evidence that she was well qualified to perform the work required and that she did not represent a risk of overstaying the term of the requested visa.

[4] The determinative issues raised by the Applicant are evidence-based and must be assessed on the standard of reasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] SCJ No 65 (QL), the Supreme Court of Canada recently affirmed that judicial review is primarily focussed on the reasons given by the decision-maker in support of its conclusion. This does not generally permit the reweighing and reassessing of evidence considered by the decision-maker, in part, because of its advantageous position (see para 125). On the other hand, "the reasonableness of a decision may be jeopardized where the decision-maker has fundamentally misapprehended or failed to account for the evidence before it", or where its conclusions were not based on the evidence presented (see para 126).

[5] The balance to be achieved between the obligations of respectful deference and "responsive reasons" is further discussed at paras 127-128:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading

> to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[6] The Officer's concerns about Ms. Zhang's intentions are, to the extent considered, unfocussed. The Officer may have had reservations about Ms. Zhang's employment plan but the key question he had to decide was whether she presented a risk to stay in Canada without lawful authority. Ms. Zhang clearly expressed an intention to pursue permanent residency if it was available, but having a dual purpose is not a matter of any concern. Furthermore, misgivings about the wisdom of an applicant's employment choices do not directly equate with the risk of an unauthorized overstay. What is clear from the record was that Ms. Zhang met all of the stipulated requirements of the proposed employment and had entered into an employment contract. There is nothing in the record or in the Officer's reasons suggesting that she did not intend or was unlikely to fulfill her employment obligations. Indeed, if her ultimate goal was to obtain permanent residency, it was unlikely she would breach the conditions of her initial entry into Canada as a temporary worker.

[7] The Officer may also have been concerned about Ms. Zhang's language proficiency, and it appears on the record she did have some difficulty understanding some questions. For instance, when the Officer asked if she was "currently employed", she asked that the question be repeated. When the Officer eventually got around to asking "Are you working right now?", Ms. Zhang had

no difficulty answering. She also confused the word “depart” with “deport”, initially misunderstood the word “related” and had some difficulty with the Latin expression “*bona fide*”. Overall, Ms. Zhang was reasonably responsive when the Officer employed simpler language. To the extent that the Officer harboured any doubts about Ms. Zhang’s English proficiency, the problem was more in the initial framing of the questions posed by the Officer than in the answers she provided.

[8] The Officer’s stated reservations about the risk of an overstay arose mainly out of the following exchange about Ms. Zhang’s intentions for the future:

> What would you do if the job in Cda did not turn out to be what you expected? [Sorry. Can you repeat the question?] (Repeated question.) [I know this situation can probably happen. I will try my best to finish my job. I want to meet the requirement for the employer. For a long period I estimate, I try my best, but if I cannot meet the employer’s requirement with my effort, my job, maybe I will transfer to another family.] Do you understand that if you were to be issued a work permit, it is meant for you to work for that specific employer in Cda? [I will work. Maybe they will not extend, I will look for another employer. I will change the LMIA, labour market impact assessment. I will get some help from agency.] Regardless, you will stay in Cda? [Yes.] You have never worked overseas. [I was in UK.] Did you work in UK? [No.] You never worked overseas. I am concerned that you will not depart Cda once you enter. [Deport? Would you give a brief explanation.] Depart. It means leaving. I am concerned that you will not leave Cda once you enter. I am concerned that you are not a bona fide temporary worker. [Yes, temporary worker in Cda. After 2 or 3 years, I will continue my education in pre-school education.] Where? In Cda? [Maybe next to my workplace. Yes, in Cda.] Based on the responses you provided at this interview, I am concerned that you are not a genuine temporary worker who will leave Cda at the authorized stay. You sounded like you want to stay in Cda for much longer than the 2 years for this work permit. If your intention is to study, you could have applied for a study permit. [I want to study abroad, it will cost. If I work as a caregiver, I can earn money and I can go to school. If I apply for a study visa, it is a financial burden for my family.]

[9] There is nothing in these answers remotely supporting a concern about an ulterior motive to remain in Canada without authorization. Every one of Ms. Zhang's responses indicated that she would take appropriate steps to preserve a lawful immigration status in Canada. Ms. Zhang's answers reflect a dual but entirely lawful intent to obtain temporary worker status and thereafter to pursue available options to obtain permanent residency. Her situation is markedly similar to the one described in *Bondoc v Canada (Citizenship and Immigration)*, 2008 FC 842, [2008] FCJ No 1063 (QL), at para 29:

> Having reviewed the entirety of the evidence before the visa officer, this Court agrees with the applicant that this finding is not supported by the evidence and that the visa officer had no basis to make it. In fact, the visa officer's appears to ignore the applicant's close ties to the Philippines including the fact that her husband and young child resided there. It is also an error for the visa officer to ignore in his decision the dual intent nature of the LIC Program. The visa officer does not have to be satisfied that the applicant has a temporary purpose in coming to Canada, but instead that the applicant will not remain illegally in Canada if her application for permanent residence under the LIC class is rejected.

Moreover, there were a number of considerations the Officer ignored that detracted from a suspicion that she represented a risk to remain in Canada without authorization. Her husband and child remained in China and she had family assets there. This was unlike the situation in *Pisarevic v Canada (Citizenship and Immigration)*, 2019 FC 188, 302 ACWS (3d) 611, where the applicant had severed all of his ties to his home country. Ms. Zhang had lived lawfully in England for eleven months and had no prior history of immigration problems. She had no family members in Canada. These were matters the Officer was required to consider, particularly in the face of the negative characterization of her interview answers.

[10] The Officer's concerns about Ms. Zhang's ability to carry out the childcare responsibilities of the proposed employment are similarly misplaced and unreasonable. If anything, Ms. Zhang was over-qualified for the job. She has a university degree and a lengthy history of employment as a teacher of Chinese traditional medicine. She successfully completed an internship in a Chinese kindergarten program with a focus on children with disabilities. More recently, she successfully completed a program for a diploma as an in-home Caregiver. She had also raised her own child.

[11] Most of these accomplishments were ignored completely by the Officer. To the extent that any are mentioned in the reasons, they are discounted on spurious grounds. The fact that Ms. Zhang's experiences working with children were unpaid says nothing whatsoever about whether she was able to handle the responsibilities of child care. Furthermore, the Officer's suggestion that Ms. Zhang's responsibilities as a mother were somehow irrelevant to working as a paid childcare provider to another child is illogical: see *Sibal v Canada (Citizenship and Immigration)*, 2019 FC 159, 302 ACWS (3d) 376, at paras 39-43.

[12] The Officer had a legal obligation to engage with all of the evidence and not to selectively choose only those things that supported a refusal. Furthermore, suspicions based largely, if not wholly, on speculation about an applicant's motives or about the wisdom of taking on low-paid child care employment do not provide a reasonable foundation for a negative decision when measured against reliable actual evidence supporting the opposite conclusion. This decision is unreasonable for the reason that it fails to account for a significant body of relevant evidence that supported the granting of a visa: see *Vavilov* at para. 126.

[13] Ms. Zhang argues that in the face of two deficient decisions, the Court should now direct the Minister to grant a work visa. She points out that her application has been held up for two years and her arranged employment is in jeopardy. I do not accept that the Court should, in these circumstances, grant that form of extraordinary relief. Notwithstanding the strength of Ms. Zhang's visa application and the paucity of reasons provided to refuse one, this is a decision that is dependant on a potentially changing factual landscape where Ms. Zhang's continuing eligibility is not assured. For instance, with the passage of time, her arranged employment could lapse or her health status could change. In short, the award of a visa is not inevitable. Nevertheless, given the mishandling of this application on two occasions, I expect the Minister to give the reconsideration of this case priority.

[14] This is also not an application that warrants costs.

[15] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT in IMM-2651-19

THIS COURT'S JUDGMENT is that this application is allowed with the matter to be redetermined on the merits and in conformity with these reasons by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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