Federal Court Cour fédérale

Date: 20230412

Docket: IMM-2398-22

Citation: 2023 FC 520

Ottawa, Ontario, April 12, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ABIGAIL ADU-DAAKO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Abigail Adu-Daako, seeks judicial review of the decision of a visa officer [Officer] with Immigration, Refugees and Citizenship Canada [IRCC] that refused her application for a permanent residence visa as a skilled worker.

Background

[2] The Applicant is a citizen of Ghana. She sought permanent residence in Canada by way of Express Entry, an electronic application management system for three economic immigration classes, one of which is the Federal Skilled Worker class under which she applied. The Global Case Management System [GCMS] notes indicate that she created an Express Entry Profile on December 16, 2019, which indicated her "Primary Occupation NOC" to be 4164000 (which is also referred to in the record as NOC 4164). NOC stands for National Occupation Class. NOC codes are assigned to occupations in the Canadian labour market. The occupations associated with NOC 4164 are "Social policy researchers, consultants and program officers".

[3] On December 16, 2019, IRCC notified the Applicant that she had been accepted into the Express Entry pool of candidates, and on December 19, 2019, she was invited to apply for permanent residence under the Federal Skilled Worker Class.

[4] On February 15, 2020, the Applicant submitted an application for permanent residence. The GCMS notes indicate that at this time her Primary Occupation NOC was identified as 4163000 (also referred to in the record as NOC 4163). The occupations associated with NOC 4163 are "business development officers and marketing researchers and consultants". She also outlined the following prior work experience:

- Open Beauty, July 1, 2019 – ongoing, NOC 4163, Market Research Analysis;

- Greenling Institute, January 22, 2019 – May 17, 2019, NOC 4164, Policy Consultant;

- Center for Effective Global Action [CEGA], November 5, 2018 – May 17, 2019, NOC 4162, Research Associate;

- Work Bank Group, May 28, 2018 – August 10, 2028, NOC 4163, Summer Consultant; and

- Ghana Investment Promotion Centre, September 7, 2015 – August 31, 2016; September 1, 2016 – July 7, 2017, NOC 4161, Assistant Investment Promotion Officer.

[5] The GCMS notes indicate that on April 9, 2020, a case processing agent at IRCC analyzed the Applicant's application and, based on the documents submitted by the Applicant and the information contained in the file, found that the Applicant did not appear to have one year of continuous work experience in primary NOC 4163. As such, the case processing agent requested review of the file by an officer.

[6] The GCMS notes indicate that the Officer reviewed the application on February 16, 2022. They found that the Applicant had not submitted sufficient evidence to satisfy them that the Applicant had at least one year of continuous fulltime paid work experience, or the equivalent in continuous paid part-time work experience, in the occupation identified as her primary occupation. Therefore, the application was refused because the Officer was not satisfied that the Applicant met the requirements under s 75 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations].

[7] The Officer advised the Applicant of the decision by letter dated February 16, 2022.

Decision Under Review

[8] The February 16, 2022 letter, the decision under review, states that the Officer had completed the assessment of the Applicant's application for a permanent resident visa as a skilled worker, and had determined that the Applicant did not meet the requirements for immigration to Canada.

[9] The Officer set out s 75(2) of the IRP Regulations and stated that they were not satisfied that the Applicant met its requirements because she had not submitted sufficient evidence to satisfy the Officer that she had at least one year of continuous full-time paid work experience, or the equivalent in continuous paid part-time work experience, in the occupation identified in her application.

[10] The Officer then noted that s 75(3) of the IRP Regulations states that if a foreign national fails to meet the requirements of s 75(2), then their application shall be refused and no further assessment is required.

[11] The Officer next referred to s 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and set out s 11.2 of the IRPA. The Officer stated that s 11.2 of the IRPA requires that information provided in the Applicant's Express Entry Profile concerning her eligibility to be invited to apply [ITA] (s 10.3(1)), as well as the qualification on the basis of which she was ranked (s 10.3(1)(h)) be valid both at the time the invitation was issued and at the time the application for permanent residence is received. The Officer stated that as they had

found that the Applicant no longer met the minimum criteria to be eligible to be invited to apply set out in an instrument given under s 10.3(1)(e), she no longer met the requirements of s 11.2 of the IRPA. The Officer was therefore refusing her application.

Issues and Standard of Review

[12] The Applicant submits that two issues arise in this matter:

i. Whether there was undue delay in processing the application that breached the duty of procedural fairness; and

ii. Whether the decision was reasonable.

[13] Issues of procedural fairness are to be reviewed on a correctness standard (see: *Mission Institution v Khela*, 2014 SCC 24 at para 79 and in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, the Federal Court of Appeal held that although the required reviewing exercise may be best – albeit imperfectly – reflected in the correctness standard, issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the Court is to determine whether the proceedings were fair in all of the circumstances.

[14] I agree with the parties that in assessing the merits of the Officer's decision the standard of review of reasonableness applies (*Canada (Minister of Immigration and Citizenship) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). On judicial review, the Court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether

the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

No Breach of the Duty of Procedural Fairness

[15] The Applicant submits that she filed her permanent residence application on February 15, 2020. While it was reviewed by the case processing agent on April 9, 2020, after the start of the COVID-19 pandemic, it was not until two years after she submitted her application that the Officer made the decision. The Applicant submits that the delay is unjustified and renders the decision making process procedurally unfair.

[16] The Respondent notes that the issue of procedural fairness was not raised in the Applicant's initial memorandum submitted in support of her application for leave and submits that the Court should exercise its discretion not to entertain the issue, citing *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22 [*Al Mansuiri*]. However, should the Court decide to exercise its discretion, then the Respondent submits that the Applicant's argument lacks merit because there was no guarantee that the Applicant's application would be processed within six months (the timeframe by which IRCC tries to process most applications submitted under Express Entry), and IRCC advised the Applicant of this. Further, the Respondent submits that the GCMS notes indicate that there was action on the file while it was in progress and until the Officer's final review, and that the Applicant has not demonstrated that there were undue delays that amount to a breach of procedural fairness.

Analysis

[17] *Al Mansuiri* held that it is for the Court to exercise its discretion as to whether to allow issues to be raised for the first time in a party's further memorandum of fact and law. Relevant considerations include:

> (i) Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?
>
> (ii) Is there any suggestion of prejudice to the opposing party if the new issues are considered?
>
> (iii) Does the record disclose all of the facts relevant to the new issues?
>
> (iv) Are the new issues related to those in respect of which leave was granted?
>
> (v) What is the apparent strength of the new issue or issues?
>
> (vi) Will allowing new issues to be raised unduly delay the hearing of the application?

[18] In this case the notice of application is generic in that it states, for example, that "[t]he Officer failed to respond, observe a principal of natural justice, procedural fairness or other procedure that he/she was required by law to observe, or otherwise acted beyond, fettered or refused to exercise his/her jurisdiction". The notice of application is silent as to the now asserted delay and resultant procedural unfairness. And, while Rule 10(2)(vi) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* SOR/93-22 requires applicants to include in the application record a memorandum of argument that contains concise submissions of the facts and the law relied upon by the applicant for the relief proposed if leave is granted, the

initial memorandum filed by the Applicant was also silent as to delay. Rather, it asserted that the decision "was procedurally unfair as the Applicant was denied due to an Officer's error. The Applicant had a legitimate expectation that her application would be properly assessed based on the information provided and the law". More specifically, that the Applicant "did everything correctly, followed the instructions, met eligibility requirements, and had the legitimate expectation that the process to facilitate her application would operate as intended". Essentially, her argument at the leave stage was that the Officer made a mistake in identifying her primary NOC as 4163.

[19] I agree with the Respondent that the Applicant has not shown a valid – or any – reason why she could not have raised the issue of delay on a timely basis. I also note that the Respondent has submitted two affidavits of Hiba Kadhim, the Officer who reviewed and decided the Applicant's application. In these affidavits, the Officer provides general information about the Express Entry system, the Federal Skilled Worker class minimum program requirements, as well as case specific information. It is reasonable to believe that had the Applicant previously raised delay as an issue then the Officer would have also addressed this. Thus, I agree with the Respondent that it has been deprived of the opportunity to investigate and fully explain any asserted processing delay. It is also clear that the issue of delay is not related to the issue for which leave was granted. As the Applicant did not alert the Respondent to an issue of delay, she cannot now assert that the Respondent failed to justify the delay.

[20] On this this basis, I decline to exercise my discretion to consider this new issue. However, even if I had been prepared to do so, this submission cannot succeed.

[21] The Supreme Court of Canada in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*] confirmed the three-step test set out in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] to determine abuse of process as it relates to administrative delay. There, the Supreme Court noted that *Blencoe* described two ways by which delay may constitute an abuse of process. The first concerns hearing fairness, as delay can compromise a party's ability to answer the complaint against them. Second, even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay (*Blencoe*, at paras. 122 and 132).

[22] Regarding the latter instance, the Supreme Court in *Abrametz* stated:

> [43] *Blencoe* sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute: *Behn*, at paras. 40-41.

[23] The Applicant has simply not addressed this test. Although the IRCC indicated in its February 15, 2020 letter to the Applicant that it tries to process most applications submitted under the Express Entry system in six months or less, as the Respondent submits, this is not a guarantee. The Applicant has not demonstrated that the delay in the circumstances of the case was inordinate nor has she submitted or produced evidence that she was directly and significantly prejudiced by the delay (see *Sharif v Canada (Immigration, Refugees and Citizenship*, 2022 FC 745 at para 34).

[24] In her submissions as to the reasonableness of the decision, the Applicant asserts that had she known in a timely a manner that her permanent residence application was found not to be eligible for processing then she would have had the opportunity to re-submit her Express Entry Profile, receive a new ITA and re-submit her permanent residence application "with the correct primary NOC". Resultantly, she argues that the delay is "demonstrative of the overall unreasonableness of the decision-making process" and prejudiced her.

[25] However, the problem with this submission is that the Applicant does not explain how she was actually prejudiced by the delay or why she could not reapply after the decision was rendered. When appearing before me her counsel speculated that, because the Federal Skilled Worker regime is a points-based system, the Applicant's score may have changed over the two-year delay period, for example, because it is possible that the Applicant's work experience may now be different, and as a result that the Applicant "probably" had a better chance of being granted a new ITA had she known earlier that her application was rejected and then reapplied. However, this is not supported by any evidence in the record before me and does not meet the Applicant's onus of demonstrating prejudice due to delay.

[26] Finally, and in any event, even if there had been a breach of procedural fairness, and I have found that there was not, given the relevant facts and law as discussed below, the breach would have not have rendered the decision invalid. This is because the result was legally inevitable (see *Lima v Canada (Citizenship and Immigration)*, 2023 FC 366 at paras 35-36 citing *Canada (Attorney General) v McBain*, 2017 FCA 204 at paras 9-10).

The Decision was Reasonable

[27] The Applicant's basic argument is that the Officer unreasonably assessed her work experience. She asserts that the Officer failed to justify how they reached the conclusion that she had not submitted sufficient evidence to satisfy the Officer that she had at least one year of continuous full-time paid work experience, or the equivalent in continuous paid part-time work experience, in the occupation identified in her application.

[28] The Applicant further submits that the Officer failed to recognize that there was a clear discrepancy between the NOC that she identified in her Express Entry Profile and the NOC she identified in her permanent residence application, and failed to justify "why the Officer would not review the whole application to ensure there have been no errors, human or otherwise, in the allegedly automatic GCMS population process". She submits that there was no reason for her to change her primary NOC because she clearly met the minimum eligibility requirements based on her qualifying employment history under NOC 4164. Under these circumstances, the Applicant further argues that it was unreasonable for the Officer not to have considered a substituted evaluation.

[29] She next submits that "due to the change of one digit in the primary NOC, the Respondent's Further Affidavit confirms that none of the evidence was considered or taken into account", and that the Officer did not consider the possibility that a typo, clerical error or technical glitch could result in the change of one digit in the primary NOC.

[30] Finally, the Applicant submits that the delay in processing her application is demonstrative of the overall unreasonableness of the decision-making process and prejudiced her.

Analysis

[31] In my view, the Applicant's positions are without merit and do not identify a reviewable error.

[32] The Applicant states that when she effected her Express Entry Profile she declared NOC 4164 as her primary occupation NOC. However, she does not address the affidavit evidence of the Officer, which includes screen shots from the GCMS, indicating that on February 15, 2020, when the Applicant submitted her permanent residence application, she entered her primary occupation as NOC 4163. The Officer's affidavit also explains that NOC codes automatically populate into the GCMS upon submission of a permanent residence application. The Applicant also does not address or otherwise challenge the Officer's affidavit evidence that IRCC agents and officers cannot update information within GCMS without there being a record of the employee's initials and the date and time the action was taken, and attached excerpts of the Applicant's GCMS records showing that the Applicant's CGMS records were last updated on February 15, 2020, by her, at which time the NOC was changed. Nor does the Applicant contest the Officer's statement that as of February 15, 2020, the Applicant's "lock in date", she had eight months of continuous employment in NOC 4163.

[33] Rather, she submits that she had provided ample evidence to demonstrate that she had over one year of full-time continuous work experience in NOC 4164 and that, despite the Officer's affidavit evidence, there "is an unease with the fairness and reasonableness of the process". And, when appearing before me, submitted that her position was that despite the GCMS record and the Officer's affidavit evidence, she maintained that she did not change her NOC and it was "unclear" how this occurred.

[34] The relevant legislation and regulatory provisions include s 75(1) and (2) of the IRP Regulations:

> **Federal Skilled Worker Class**
>
> **Class**
>
> 75 (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.
>
> **Skilled workers**
>
> (2) A foreign national is a skilled worker if
>
>> (a) within the 10 years before the date on which their application for a permanent resident visa is made, they have accumulated, over a continuous period, at least one year of full-time work experience, or the equivalent in part-time work, in the occupation that they identified in their application as their primary occupation, other than a restricted occupation, that is listed in TEER Category 0, 1, 2 or 3 of the *National Occupational Classification*;
>
> ….

[35] Based on the information submitted by the Applicant, and her selection of NOC 4163 on February 15, 2020 when she submitted her permanent residence application, the Officer reasonably found that the Applicant had not submitted sufficient evidence to satisfy the Officer that the Applicant had at least one year of continuous full-time paid work experience, or the equivalent in continuous paid part-time work experience in the occupation identified in her application – NOC 4163. The application was refused because the Officer was not satisfied that the Applicant met the requirements under s 75 of the IRP Regulations, which the Officer clearly explained in the decision and is also evident from the GCMS notes, which form a part of the reasons for the decision.

[36] Moreover, the Officer had no discretion to decide otherwise, as is clear from s 75(3) of the IRP Regulations:

> **Minimal requirements**
>
> (3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

[37] As to the Applicant's submission that the Officer should have considered that an unspecified possible error may have resulted in the use of NOC 4163 in her permanent residence application, this is pure speculation. Further, it attempts to shift blame for the change to the Applicant's NOC from 4164 to 4163 to IRCC, without any evidence to substantiate this position. Nor is it supported by the Officer's affidavit evidence explaining how the Express Entry and permanent residence application information is incorporated into the GCMS. That is, it is based on the Applicant's electronic self-declared information.

[38] In any event, s 75(3) also makes it clear that if the minimum requirements are not met then no further assessment is required. I agree with the Respondent that s 75(2)(a) requires officers to consider the work experience obtained in the primary occupation NOC identified by the Applicant under the Federal Skilled Worker class, not to determine which NOC or work experience should have been identified as the primary NOC. The onus was on the Applicant to satisfy the Officer that she met the minimum requirement. The Officer was under no obligation to guess at her intended NOC or make further inquiries in that regard (See *Ekama v Canada (Citizenship and Immigration)* 2020 FC 105; *Zahedi v Canada (Citizenship and Immigration)*, 2013 FC 931 at para 8; *Kamchibekov v Canada (Citizenship and Immigration)*, 2011 FC 1411 at para 26).

[39] I also agree with the Respondent that s 76(3) of the IRP Regulations has no relevance to this matter. Section 76(1) states that, 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 criteria set out in that section. Section 76(3) states that, whether or not the skilled worker has been awarded the minimum number of required points referred to in s 76(2), an officer may substitute for the criteria set out in s 76(1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada. Here, however, the Applicant has been found not to be a member of the Federal Skilled Worker class. Thus, this provision has no application to her. Her submission that the Officer unreasonably failed to consider a substituted evaluation is of no merit.

[40] In conclusion, the Officer's decision was based on the regulatory regime that they were required to apply and the information provided by the Applicant. In other words, "it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). It is therefore reasonable.

JUDGMENT IN IMM-2398-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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