Federal Court Cour fédérale

Date: 20110705

Docket: IMM-4434-10

Citation: 2011 FC 818

Montréal, Quebec, July 5, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

VIRGINIA MIHURA TORRES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Immigration is a privilege, not a right (*Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711). Applicants for permanent residence bear the burden of demonstrating that they are entitled to a visa. Applicants also bear the responsibility of producing the information and documents that are required in support of their application. (*Baybazarov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 665 at paras 11-12).

[2] The *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], clearly set out the requirements that an applicant must meet in order to be permitted to immigrate to Canada in the Federal Skilled Worker Class. An applicant must demonstrate that he or she has the required work experience in the occupation which he or she intends to pursue in Canada.

[3] In the present case, a letter, dated March 19, 2010, was sent to the Applicant and, in conformity with the statutory regime, asked that the Applicant provide employment letters and a job description from her employer (Tribunal Record (TR) at p 16). In response to that letter, the Applicant submitted documents and provided the required information in relation to her work history and experience. The question is whether the information is such that it can be deemed adequate to respond to the preoccupation in respect of the statutory regime.

II. Judicial Procedure

[4] This is an application for judicial review of a decision of an Immigration Officer of the Citizenship and Immigration Canada [CIC] Case Processing Pilot - Ottawa [CPP-O], rendered on July 21, 2010. The decision specifies that the Applicant's application for permanent residence under the Federal Skilled Worker Class has been denied pursuant to paragraph 11(1) of the *IRPA*, due to the Applicant having provided only one letter of reference from previous employers which does not include details about her duties.

III. Background

[5] The Applicant, Ms. Virginia Mihura Torres, is a 33-year-old citizen of Venezuela who has knowledge of English and holds a Master's Degree in Business Administration and a Bachelor's Degree in Administrative Sciences. The Applicant allegedly accumulated more than five years of continuous full-time employment experience, in Caracas, Venezuela, as a Financial Planning & Profitability Manager for Sodexho, a multinational food services and facilities company.

[6] On March 23, 2007, the Applicant applied to the Canadian Embassy in Caracas for permanent residence under the Federal Skilled Worker Class and received an acknowledgment of receipt of such on April 4, 2007. The letter from the Embassy stated that "[n]o processing will occur on your file for approximately 36 months" (Applicant's Record (AR) at p 20). The letter also specified that the Applicant would be required to provide "[o]riginal Job reference letters/confirmation of employment letters" and a "[d]etailed description of [her] job responsibilities (past and present)" (AR at p 24).

[7] On September 30, 2008, the Canadian Embassy in Caracas invited the Applicant to submit forms and documents in support of her application, namely, "Job reference letters/confirmation of employment letters" and a "[d]etailed description of [her] job responsibilities (past and present)" (AR p 28). The letter specified that if the requested information was not provided, the Immigration Officer "**may not be satisfied that [the Applicant] meet[s] the selection and admissibility requirements**." The letter also explained that documents, not in one of Canada's official languages, must be accompanied by a certified translation by an accredited translator.

[8] Between the months of September 2008 to June 2009, counsel for the Applicant sought an exemption for her “many Venezuela clients” from translating Spanish documents (AR, Memorandum of Facts and Law at para 5). On June 2, 2009, the Applicant’s counsel received an email from the Immigration Program Manager, informing her that the translation requirement would be waived for her clients, instructing her to proceed and submit documents within 120 days (AR at p 36).

[9] On August 6, 2009, the Applicant alleges that she submitted forms and untranslated documents to the Canadian Embassy in Caracas in support of her application.

[10] On March 19, 2010, the Canadian Embassy of Caracas sent a letter to the Applicant, again requesting forms and documents in support of her application, within a 120-day delay, to the CPP-O.

[11] On July 15, 2010, the Applicant submitted the forms and documents in support of her application to the CPP-O.

[12] The Officer reviewed the Applicant’s application at the CPP-O and decided that the Applicant did not meet the requirements for immigration to Canada under the Federal Skilled Worker Class. A letter was sent by email refusing the application on July 21, 2010.

IV. Decision under Review

[13] The Immigration Officer concluded that since the employment letters submitted on behalf of the Applicant provided no details as to her actual duties in the workplace, he was not satisfied that she met the requirements of the Federal Skilled Worker Class. The Officer determined that Ms. Mihura Torres is not a skilled worker as he was not satisfied that she had met the first, second and third parts of subsection 75(2) of the *IRPA* requirements:

> **… you only provide[d] one letter of reference form previous employers (from Sodexho), and the letter has no/no details about your duties. As a result I am not satisfied that you have performed the duties of a manager, financial planning, NOC 0111, as per the description in the NOC handbook. I am therefore not satisfied that you have the minimum one year full-time work experience in a level O, A or B occupation required to be eligible to apply as a Federal Skilled Worker.**

(Immigration Officer's decision, AR at p 4).

V. Position of the Parties

[14] The Applicant submits that she wants to escape the political and economic turmoil in Venezuela and begin a new life in Canada, reunited with her sister. The Applicant argues that the Immigration Officer erred in law, by violating the principles of procedural fairness in making his decision.

[15] According to the Applicant, the Immigration Officer relied more heavily on the instructions provided in a letter issued by the Canadian Embassy in Caracas (the letter dated March 19, 2010) as opposed to the requirements of the *IRPA* and the *IRPR*. In that regard, the Officer, according to the Applicant, did not render an independent decision on her application based on its merits as a result

of constraints stemming from rigid instructions as set out in the letter from the Canadian Embassy in Caracas.

[16] The Applicant submits that she waited over three years for a decision on her application and that the Officer did not provide her with a single opportunity to disabuse him of his concerns regarding her occupational experience and ability to satisfy the National Occupational Classification [NOC] category of Manager, Financial Planning. The Applicant states that she did not at any time receive an email, fax or letter from the CPP-O Officer inviting her to respond to his concerns upon which he based his refusal.

[17] The Applicant also submits that her application was not treated consistently with other similar applications and that she did not receive a fair and equal treatment. It is submitted by the Applicant that the Immigration Officer's treatment of the application resulted in multiple violations of the principles of procedural fairness which negatively impacted his assessment and, thus, prevented Canada from receiving a highly qualified immigrant, precisely the type of immigration Canada seeks to attract.

[18] The Respondent submits that the Immigration Officer did not err and the Applicant has not demonstrated that the intervention of this Court is justified.

VI. Issues

[19] The Applicant proposes three questions in issue:

(1) Did the Officer breach the principles of procedural fairness by improperly fettering his discretion in relying upon the instruction letter for transferring the Applicant's application to the CPP-O to the exclusion of other relevant considerations?

(2) Did CIC breach the principles of procedural fairness by failing to show diligence in processing the Applicant's application for permanent residence under the Federal Skilled Worker Class?

(3) Did the Officer breach the principles of procedural fairness by failing to treat the Applicant's application in a manner consistent with that afforded other similar applications?

[20] Whereas, the Respondent submits that the Court should examine the following two issues:

(1) Was there a breach of procedural fairness in this case?

(2) Was the Immigration Officer's decision reasonable?

[21] A preliminary issue is raised by the Respondent who submits that the Applicant refers to new evidence that was not before the Immigration Officer.

[22] The Court will respond to the questions as a whole in the manner it sees fit so as to resolve the core issues by incorporating them in a comprehensive manner (recognizing that certain aspects were supplementary and superfluous to the core issues at the origin of the matter).

VII. Relevant Legislative Provisions

[23] Pursuant to subsection 11(1) of the *IRPA*, immigration officers have a discretionary power to issue visas, provided that the foreign national is not inadmissible and meets the requirements of the *IRPA*.

Requirements Before Entering Canada	**Formalités préalables à l'entrée**
Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[24] Section 75 and subsection 76(1) of the *IRPR* are directly relevant to this case and provide:

Federal Skilled Worker Class	**Travailleurs qualifiés (fédéral)**
Class	**Catégorie**
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.	**75.** (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.

Skilled workers

(2) A foreign national is a skilled worker if

(*a*) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix;

(*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*; and

(*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.

Qualité

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la *Classification nationale des professions* — exception faite des professions d'accès limité;

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 cette classification;

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 cette classification, notamment toutes les fonctions essentielles.

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.

Exigences

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

Selection criteria

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:

(*a*) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

(i) education, in accordance with section 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

Critères de sélection

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) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) l'expérience, aux termes de l'article 80,

(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 half 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 — 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 the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).	(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

VIII. Standard of Review

[25] As noted in *Chen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 41, 155 ACWS (3d) 168, this Court held that the correctness standard applies to questions of procedural fairness or natural justice (at para 10). Where a breach of the duty of fairness occurs, a decision of an administrative body must be set aside.

[26] As for the discretionary decision of the Immigration Officer, considerable deference must be given to the decision-maker by the Court when reviewing the exercise of that discretion; thus, the standard of review is one of reasonableness (*Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 and *Hanif v Canada (Minister of Citizenship and Immigration)*, 2009 FC 68, 176 ACWS (3d) 509).

IX. Analysis

New evidence

[27] The Respondent submits that the Applicant refers to new evidence that was not before the Immigration Officer.

1) A detailed description of the duties she performs for her employer Sodexho. (This document is undated but the certified translation is dated July 29, 2010, posterior to the consideration of her application.);

2) Allegations that it is difficult to obtain detailed employment letters in Venezuela, and that it is the Applicant's understanding that non-descriptive letters are accepted by the Canadian Embassy;

3) Information concerning the Applicant's sister, Marifran Mihura, who became a permanent resident of Canada in 2009, and her affidavit affirmed on September 14, 2009, as well as affidavits from Luis Angel Soto Rosal and Mr. Alexander Adolfo[] Rendon Barroso, other clients of the Applicant's lawyer who successfully applied for permanent residence in Canada; and,

4) Allegations that another client of the Applicant's lawyer was given an opportunity to disabuse the immigration officer of his concerns.

(Respondent's Supplementary Memorandum of Argument at para 20).

[28] The Respondent submits that, barring exceptional circumstance, evidence that was not before the decision-maker is not admissible before the Court in a judicial review proceeding (*Bekker v Canada,* 2004 FCA 186, 2004 DTC 6404 at para 11).

[29] The allegations and information concerning the Applicant's sister do not necessarily constitute new evidence per say; it is for the Court to determine the weight it will accord the evidence.

[30] As for the description of the duties the Applicant performs for her employer Sodexho, the Applicant submits that, when informed of the refusal of her federal worker application, the Applicant obtained a description of her current professional responsibilities (Applicant's Memorandum of Argument in Reply at para 16).

Procedural Fairness

[31] In a case with regard to an officer's duty of advising an applicant of his concerns, this Court confirmed that there is no such duty on a decision-maker:

> [37] I agree with the Respondent on this issue. It is clear from the record that the Officer asked the Applicant many questions and gave her many opportunities to describe her work experience, job duties etc. It is also well established that an officer has no obligation to notify an applicant about concerns or to allow an applicant the opportunity to respond to those concerns: *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940 (F.C.T.D.). The onus is on an applicant to provide all of the information required for an application of this nature. The Court in *Aqeel v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1498 confirmed as follows:
>
> > 12. The onus is also on the applicant to set out the relevant factors that must be considered on the assessment in order for the officer to find that relevant humanitarian and compassionate grounds exist (IP 5 Manual: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds (the Manual), Citizenship and Immigration Canada, 5.29). In *Owusu v. Minister of Citizenship and Immigration*, 2004 FCA 38, Mr. Justice Evans, for the Federal Court of Appeal, wrote at paragraph 8:
> >
> > > ... And, since applicants have the onus of establishing the facts on which their claim rests, they omit

> pertinent information from their written submissions
> at their peril.

[Emphasis added].

(*Kaur v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1189, 172 ACWS (3d) 195).

An Additional Issue for Consideration - the New Rules

[32] The Applicant also submitted that the letter of March 19, 2010, is not in conformity with the statutory regime, because it clearly mentions that the Applicant's application was transferred to the CPP-O to speed up processing of her application, as part of the Government of Canada's Action Plan for Faster Immigration. According to the Applicant, her application was evaluated under the new rules pertaining to the Government of Canada's Action Plan for Faster Immigration, which should only apply to those federal worker applications received on or after February 27, 2008; whereas, all applications made before this date will be processed according to the rules that were in effect at that time. The Applicant reiterates that she presented her federal worker application on April 4, 2007.

[33] The Respondent's answer is that the new rules were not applied to the Applicant's case. The Respondent introduced as evidence the affidavit of Mr. James McNamee, an acting director at CIC with extensive knowledge of the policy and program context behind the Action Plan for Faster Immigration. Mr. McNamee confirmed that, since the Applicant's application was received on April 4, 2007, her application was assessed in accordance with the eligibility requirements in place prior to the effective date of the ministerial instructions.

Was the Immigration Officer's decision reasonable?

[34] The Applicant argues that her duties at Sodexho are implicit from her title of managerial duties in her work at Sodexho. She also argued that the regime in Venezuela is distinctly unfavourable to business and has generated a climate where job security is always an issue and cannot be taken for granted. According to the Applicant, requesting an employment letter which refers to employment duties as per the CPP-O specifications often raises suspicions about employee loyalty and could possibly constitute grounds for dismissal.

[35] The Applicant also submits that the Immigration Officer did not review every document in her application. The Immigration Officer refers to "only one letter of reference from previous employer (from Sodexho), and the letter has no details"; however, the Applicant claims she submitted a letter from Televen, dated March 11, 2005, and a letter from RCTV, dated November 1, 2006. All of which does not constitute new evidence (Applicant's Memorandum of Argument in Reply at para 6).

[36] The Court also notes that the March 19, 2010 letter asked the Applicant to provide employment letters containing details of the actual employment duties performed. The letter also mentioned that the CPP-O is "…under no obligation to further request detailed employment letters." (TR at p 14).

[37] This case, at first blush, would appear not to fall within the category of cases where a duty to give an applicant an opportunity to disabuse an Immigration Officer of concerns may arise. The Court fully recognizes that applicants for permanent residence in Canada bear the onus of providing

adequate and sufficient information in support of their application (*Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 121, 164 ACWS (3d) 855, at para 14; *Nabin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 200, 165 ACWS (3d) 341, at para 7); however, it certainly is evident that the Applicant had included more information than is specified by the Immigration Officer.

[38] Furthermore, the Court specifies, as is demonstrated in other cases, that when an Immigration Officer resorts to extrinsic evidence, an applicant has no way of knowing whether, in fact, such evidence will be used in an adverse manner; a duty then does exist to ensure that an opportunity is given to an applicant to respond to such evidence. In addition, where credibility, accuracy or the genuine nature of information is in question, a duty also exists to give an opportunity to an applicant to disabuse an officer of any concerns that may arise (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, 152 ACWS (3d) 898, at para 24). Subsequent to the Court's full canvassing of the issues, as is discussed above, this paragraph of the Court is pivotal; and, on it rests the central core of the Court's decision further to the Court's full consideration of all of the issues.

[39] Without omitting to specify that a failure to provide reliable supporting evidence does create a fait accompli that seriously jeopardizes chances of an applicant:

> [24] The case law establishes that the onus is on the applicant to file an application with all relevant supporting documentation and to provide sufficient credible evidence in support of his application. The applicant must put his "best case forward". (*Chen v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1123, para. 26; *Dardic v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 150, [2001] F.C.J. No. 326 (QL); *Tahir v. Canada (Minister of Citizenship and Immigration)* (1998), 159 F.T.R. 109, [1998] F.C.J. No. 1354 (QL);

> *Lam v. Canada (Minister of Citizenship and Immigration)* (1998), 152 F.T.R. 316, [1998] F.C.J. No. 1239 (QL).)

(*Oladipo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 366, 166 ACWS (3d) 355).

[40] In this specific case, the Applicant did appear to provide, under the existing country and personal circumstances of the Applicant, the "sufficient credible evidence in support of [the] application" and the "best case forward" was provided, as specified in the above jurisprudence (*Chen v Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1123 (QL/Lexis), 171 FTR 265 at para 26).

X. Conclusion

[41] The Applicant's arguments demonstrate that serious reasons exist to believe that the Immigration Officer erred in law or that his decision was based on erroneous findings of fact; therefore, the relief requested by the Applicant is granted.

[42] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is remitted for redetermination by a different Immigration Officer.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be granted and the matter be remitted for redetermination by a different Immigration Officer. No question for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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