

Federal Court



Cour fédérale

Date: 20130611

Docket: IMM-4881-12

Citation: 2013 FC 636

Ottawa, Ontario, June 11, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MUZAMEIL AL HUSSAIN

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Muzameil Al Hussain (the Applicant) of a decision made by a Visa Officer of the High Commission of Canada (London, UK), dated March 12, 2012, wherein the Visa Officer determined that the Applicant does not meet the requirements for the issuance of a permanent resident visa under the Federal Skilled Worker class.

[2] For the reasons set out below, this application for judicial review ought to be granted.

Facts

[3] The Applicant, born January 3, 1981, is a citizen of Sudan, currently residing in the United Arab Emirates. His wife, Rania Ali, and his two daughters, Rahf Ahmed and Talla Ahmed, are included in his Federal Skilled Worker application.

[4] The Applicant submitted his application on January 30, 2010. He applied in connection with National Occupational Classification (NOC) code 0213, which applies to computer and information systems managers.

[5] The Applicant received an email on March 18, 2010, stating that his application would be recommended to a visa officer for a final determination of eligibility for processing, provided he submitted a full application within 120 days. Pursuant to this first assessment (file number B057412714), the Computer Assisted Immigration Processing System (CAIPS) notes indicated that the Applicant's duties corresponded to the relevant lead statement and/or main duties for NOC 0213 and that he had a minimum of one year of work experience within the past 10 years.

[6] After submitting a completed application on July 10, 2010, the Applicant received a letter dated August 10, 2010, confirming his second file number of B054745913.

[7] The Applicant received a letter refusing his application on March 12, 2012. The CAIPS notes were provided by letter dated June 13, 2012, in response to a Rule 9 request (*Federal Courts Immigration and Refugee Protection Rules* (SOR/93-22)).

Decision under review

[8] The Visa Officer's decision and the CAIPS notes, which are described by the High Commission of Canada as forming part of the reasons for the decision, explain that the application was refused because "the main duties that [the Applicant] listed do not indicate that [he] performed the actions described in the lead statement of the occupation, or that [he] performed all of the essential duties and a substantial number of the main duties, as set out in the occupational descriptions of the NOC."

[9] The letter notes that the Applicant did not provide satisfactory evidence that he had work experience in any of the listed occupations set out in the Ministerial Instructions published November 28, 2008. The CAIPS notes reiterate that the information submitted was insufficient to substantiate that the occupational description was met, adding as follows: "The Applicant's academic qualifications and work experience are equivalent to those of a systems administrator (NOC code 2281). I am therefore not satisfied that [he] actually has one year of experience in this occupation, as per NOC 0213, and this application is not eligible for further processing" [emphasis added].

[10] No further reasons were given for the refusal of the application.

Issues

[11] The primary issue in this case is whether the Visa Officer's decision is reasonable or, in other words, whether the Visa Officer's reasons permit the reviewing court to understand why the

tribunal made its decision and to determine whether the conclusion is within a range of acceptable outcomes.

Analysis

- The standard of review

[12] Both parties agree that the Visa Officer's eligibility determination is subject to review on a reasonableness standard, as it involves questions of mixed fact and law. As such, the intervention of this Court is not warranted so long as the decision falls "within a range of acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47.

[13] On the other hand, it is for the courts to provide the legal answer to procedural fairness questions, and they shall consider all such questions on a standard of correctness, having regard to the context of the decision under review: *Khan v Canada (MCI)*, 2009 FC 302 at para 11; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 100.

- The legal framework for an eligibility determination

[14] As set out by the Respondent, on February 26, 2008, the Government of Canada introduced changes to the Federal Skilled Worker processing scheme under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. The *Budget Implementation Act, 2008* (SC 2008, c 28) amended the IRPA to permit the issuance of "Ministerial Instructions" which may, for example, establish an order, by category or otherwise, for the processing of applications or requests and may set the number of applications or requests, by category or otherwise, to be processed in any year.

[15] On November 29, 2008, the Government published instructions in the *Canada Gazette* issued by the Minister of Citizenship and Immigration under subsection 87.3 of the IRPA (“Skilled Worker Instructions” or “Ministerial Instructions”). These Ministerial Instructions outline eligibility criteria that apply with respect to the processing of all applications for Canadian permanent resident visas made under the Federal Skilled Worker class, as defined in the IRPA, that were received by Citizenship and Immigration Canada on or after February 27, 2008. They also specify that only applicants who have Arranged Employment Offers, who are legally residing in Canada and have been there for at least one year as Temporary Foreign Workers or International Students, or who have work experience in certain listed occupations are eligible to be processed in the Federal Skilled Worker class.

[16] As per the Ministerial Instructions, visa officers must undertake an eligibility determination of an application to determine whether an applicant has work experience in the list of occupations eligible for processing. Occupational experience, as set out in the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [the IRPR], is defined as performing the actions described in the lead statement of the NOC description, and at least a substantial number of the main duties as set out in the description, including all of the essential duties. Furthermore, at least one year of continuous full-time employment experience (or the equivalent in continuous part-time employment) must be shown to have accrued within the 10 years preceding the date of the application for permanent resident visa. The relevant portions of section 75 of the IRPR state as follows:

Immigration and Refugee Protection Regulations
(SOR/2002-227)

<p>Federal Skilled Worker Class</p> <p>Class</p> <p>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.</p>	<p>Travailleurs qualifiés (fédéral)</p> <p>Catégorie</p> <p>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.</p>
<p>Skilled workers</p> <p>(2) A foreign national is a skilled worker if</p> <p>(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;</p>	<p>Qualité</p> <p>(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :</p> <p>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;</p>

(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

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) 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.

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.

...

- Was the Visa Officer's decision reasonable?

[17] In the case at bar, the lead statement for NOC 0213 reads as follows: "Computer and information systems managers plan, organize, direct, control and evaluate the activities of organizations that analyze, design, develop, implement, operate and administer computer and telecommunications software, networks and information systems. They are employed throughout the public and private sectors." While there are no essential duties listed for computer and

information systems managers, they are expected to perform some or all of the following main duties:

- Plan, organize, direct, control and evaluate the operations of information systems and electronic data processing (EDP) departments and companies
- Develop and implement policies and procedures for electronic data processing and computer systems development and operations
- Meet with clients to discuss system requirements, specifications, costs and timelines
- Assemble and manage teams of information systems personnel to design, develop, implement, operate and administer computer and telecommunications software, networks and information systems
- Control the budget and expenditures of the department, company or project
- Recruit and supervise computer analysts, engineers, programmers, technicians and other personnel and oversee their professional development and training.

[18] Based on the information provided to the Visa Office by the Applicant in the form of a description of his job with Ajman Bank, it appears that the purpose of the Applicant's position was to manage and provide support for all Network, Communications and IP Telephone Products and Services, and to perform proactive and remedial actions to ensure maximum availability of services. The list of his duties also appears to directly match the lead statement for NOC 0213 and 5 of the 6 main duties.

[19] Counsel for the Respondent seeks to justify the Visa Officer's decision first by stating that the job description filed by the Applicant appears to be part of a job offer from the bank, and second

by submitting that his actual duties as described in his curriculum vitae are more in line with the main duties of a computer network technician (NOC 2281) than with those of a computer and information systems manager (NOC 0213).

[20] While it may not have been unreasonable for the Visa Officer to conclude that one piece of evidence should be given more weight than another, there is no indication in the CAIPS notes or in the decision letter that this is what has been done. One is therefore left to speculate as to the basis for the Visa Officer's conclusion that the Applicant failed to establish that he performed the actions described in the lead statement, including a substantial number of the main duties.

[21] It is no doubt true, as emphasized by counsel for the Respondent, that great deference must be afforded to visa officers in the exercise of their discretion when assessing applications for permanent residence under the Federal Skilled Worker class. Yet reasonableness cannot only be considered with respect to the substantive decision; a reasonableness analysis must also take into consideration the existence of justification, transparency and intelligibility within the decision-making process: *Dunsmuir*, at para 47.

[22] In the present case, the decision under review utterly fails in this respect as the Visa Officer's reasons do not permit this Court to understand why the decision was made or to assess whether the conclusion is within the range of acceptable outcomes: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 16.

[23] With respect to its comments regarding the similarities between the Applicant's experience and NOC 2281, the Respondent falls into the same trap as the Visa Officer – the question is not whether the Applicant's duties bear more of a resemblance to another category than to the one sought, but whether the Applicant has satisfied the requirements of the category in question.

[24] Although it is not for this Court to re-weigh the Visa Officer's conclusions in this regard, the Applicant is correct to assert that the similarity with NOC 2281 is the sole explanation offered by the Visa Officer in support of his conclusion that the information submitted was insufficient to show that the Applicant satisfied the requirements of NOC 0213.

[25] This Court is not an expert in the technological terms connected with the various NOC codes and cannot be required to assess the sufficiency of the Applicant's application where the Visa Officer has provided no relevant comments or reasons in that regard. The Applicant is correct in his assertion that the fact that duties may "bear more resemblance" to another category is irrelevant where an officer has failed to assess the relevance of the duties in relation to the particular category in question and has provided no analysis comparing the requirements of the two codes mentioned.

[26] As for his academic qualifications, the Applicant is correct in stating that they are not specified as a criterion by the IRPR and that, in any event, they appear to match those described in NOC 0213 and exceed what is required by NOC 2281. The Visa Officer has not explained why this is not the case.

[27] For the above reasons, I find that the application for judicial review should be granted.

[28] While there is, strictly speaking, no need to comment on the question of procedural fairness raised by the Applicant, I shall nevertheless do so for the benefit of the next visa officer who will reassess the application submitted by the Applicant.

[29] The Applicant submits that, to the extent that the Visa Officer had concerns about his employment history, he should have interviewed either him or his supervisor. I agree with the Respondent that this argument is without merit. The Visa Officer was not required to notify the Applicant of any deficiencies in his application. Procedural fairness does not require a visa officer screening an application for whether it is eligible for processing to confront an applicant with his or her concerns relating to the inadequacy of the applicant's supporting documentation, or to point out the evidentiary weaknesses of the application. Furthermore, an applicant is not entitled to a running tally or an interview to correct deficiencies in his or her application. As stated by this Court in *Sharma v Canada (MCI)*, 2009 FC 786 at paras 8 and 12:

[8] Turning my mind to this question of a breach of procedural fairness, I note that the onus rests on the Applicant to provide adequate and sufficient evidence to support his application. A visa officer is under no duty to clarify a deficient application [...]. The imposition of such a requirement would be akin to requiring the visa officer to give advance notice of a negative decision, an obligation that Justice Rothstein (as he then was) expressly rejected in *Ahmed v Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940 (QL).

[12][...] This obligation does not extend to a duty on a visa officer to advise an applicant of every concern or shortcoming in an application.

Conclusion

[30] For all of the above reasons, I find that this application for judicial review should be allowed. No question of general importance will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The Visa Officer's decision is therefore quashed, and the visa application is referred back to a different visa officer for re-determination. No question of general importance is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4881-12

STYLE OF CAUSE: MUZAMEIL AL HUSSAIN v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: March 12, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** de MONTIGNY J.

DATED: June 11, 2013

APPEARANCES:

Howard Eisenberg

FOR THE APPLICANT

John Loncar

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Eisenberg & Young LLP
Hamilton, ON

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Toronto, ON

FOR THE RESPONDENT