

Federal Court



Cour fédérale

Date: 20130903

Docket: IMM-8481-12

Citation: 2013 FC 931

Ottawa, Ontario, September 3, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**ALI ZAHEDI
ELENA PAZIRAIE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ali Zahedi and his wife, Elena Paziraie, seek judicial review of the decision of an immigration officer refusing Mr. Zahedi's application for permanent residence in Canada as a member of the Federal Skilled Worker Class.

[2] Mr. Zahedi asserts that he was denied procedural fairness in the processing of his application for permanent residence as the officer failed to provide him with an opportunity to address the officer's concerns as to the existence of Mr. Zahedi's employer and with respect to his

job duties. Mr. Zahedi further contends that the officer's finding that he had failed to provide sufficient evidence that he had performed the duties of a Construction Manager was unreasonable.

[3] For the reasons that follow, I have concluded that Mr. Zahedi was indeed denied procedural fairness in this matter as he was never provided an opportunity to address the concerns that arose as a result of the immigration officer's independent research regarding the existence of his employer. As a consequence, the application will be granted.

Analysis

[4] Mr. Zahedi and his wife are citizens of Iran. Mr. Zahedi claims to be employed as a Construction Manager with Abadi-O-Tarh-O-Tadbir Consulting Engineers Co. Ltd. ("Abadi-O-Tarh-O-Tadbir").

[5] Mr. Zahedi applied for permanent residence under the Federal Skilled Worker Class in April 2010. He applied under the National Occupational Classification ["NOC"] 0711 as Construction Manager, providing documents in support of his application that included job letters from his employers and Notices of Incorporation and Notices of Resolution from the Iranian Gazette for Abadi-O-Tarh-O-Tadbir.

[6] Mr. Zahedi was never asked to provide any further documentation, nor was he interviewed in connection with his application.

[7] The decision letter states that the refusal was based upon Mr. Zahedi's failure to provide sufficient evidence to show that he had performed the actions described in the lead statement for the Construction Manager occupation, or that he had performed all of the essential duties and a substantial number of main duties of a Construction Manager. The officer further found that the duties described in Mr. Zahedi's employment letter did not match the occupational description in the NOC.

[8] I agree with the respondent that there was no obligation on the immigration officer to go back to Mr. Zahedi to seek additional information with respect to his job duties. The onus is on a visa applicant to provide sufficient evidence to demonstrate that he or she had fulfilled the requirements of the applicable NOC. There is no obligation on immigration officers to make further inquiries in order to allow a visa applicant to shore up an otherwise deficient application: *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 442, at paras. 9-10. The failure of the officer to do so in this case thus did not constitute a denial of procedural fairness.

[9] However, as the respondent notes, the refusal letter has to be read in conjunction with the Global Case Management System [GCMS] notes which constitute the officer's reasons. While it is not evident from the refusal letter, it appears from the GCMS notes that the deficiencies in Mr. Zahedi's documentation was only one of the reasons for refusing his application. The officer clearly had a second concern with respect to the application.

[10] After discussing the extent to which the job information provided by Mr. Zahedi met the requirements of the NOC, the officer then went on in the GCMS notes to state "Moreover, have

made a search for [Mr. Zahedi's] employer on the internet ... and no records were found, which I find unusual".

[11] As this Court noted in *Talpur v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 25, even if the degree of fairness owed to visa applicants is relatively low, visa officers are required to put concerns to an applicant where those concerns relate to the authenticity or credibility of the evidence provided by the applicant: at para. 21.

[12] It is common ground that the officer never put her concerns with respect to Abadi-O-Tarh-O-Tadbir to Mr. Zahedi in order to allow him to try to address those concerns. This constitutes a denial of procedural fairness. Mr. Zahedi could not reasonably have anticipated that the officer would have concerns as a result of her inability to locate a website for his employer, and thus he could not have pre-emptively endeavoured to address those concerns in his original application materials: *Kuhathasan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 457, at paras. 39-41.

[13] The respondent urges me to dismiss the application on the basis that the officer had concluded that Mr. Zahedi had failed to provide sufficient evidence of his work experience and had not demonstrated that he had performed the functions of a Construction Manager. As a consequence, the respondent says that the officer's concerns arising out of the internet search were essentially immaterial to the result.

[14] I do not agree.

[15] The officer's concerns with respect to the existence of Mr. Zahedi's putative employer were sufficiently serious that they were noted in the GCMS notes. Furthermore, the officer's use of the word "moreover" in discussing the results of the internet search suggests that these concerns did indeed form part of the officer's reasons for refusing the visa application.

[16] The officer was clearly sceptical about the legitimacy of Mr. Zahedi's application in light of the fact that an internet search did not disclose any reference to Abadi-O-Tarh-O-Tadbir. We cannot know the extent to which that scepticism may have affected the officer's analysis of the application as a whole.

[17] It further appears from Mr. Zahedi's affidavit that he had an explanation for the fact that no record for the company was found through an internet search. While there is no obligation on a visa officer to accept that explanation, Mr. Zahedi is entitled to at least have the explanation considered.

[18] I also do not accept the respondent's submission that even if there was a denial of procedural fairness in this case, nothing is to be gained by remitting Mr. Zahedi's application for reassessment as it is clear that he had not established that he met the requirements of the Construction Manager NOC.

[19] As a general rule, a breach of procedural fairness will void the hearing and the resulting decision: see *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78. The Supreme Court observed in *Cardinal* that the right to a fair hearing is "an independent,

unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have”: at para. 23. The Court went on in the same paragraph to observe that “[i]t is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a [fair] hearing”.

[20] There is a limited exception to this rule. That is, a reviewing court may disregard a breach of procedural fairness “where the demerits of the claim are such that it would in any case be hopeless”: *Mobil Oil Canada Ltd. et al. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, [1994] S.C.J. No. 14 (QL) at para. 53. See also *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172 N.R. 308 at para. 9 (F.C.A.). This situation may arise where, for example, the circumstances of the case involve a legal question which has an inevitable answer: *Mobil Oil* at para. 52. This is not such a case.

Conclusion

[21] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and Mr. Zahedi's visa application is remitted to a different immigration officer for re-determination.

“Anne L. Mactavish

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8481-12

STYLE OF CAUSE: ALI ZAHEDI ET AL v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 28, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** MACTAVISH J.

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