Federal Court  Cour fédérale

Date: 20150806

Docket: IMM-8012-14

Citation: 2015 FC 945

Ottawa, Ontario, August 6, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

OKSANA SYDORUK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Oksana Sydoruk has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. She challenges a decision of a visa officer [the Officer] to refuse her application for a permanent resident visa under the federal skilled worker class, a category of the economic class referred to in s 12(2) of the IRPA.

[2] For the reasons that follow, I find that the Officer's assessment of the genuineness of Ms. Sydoruk's job offer was not conducted in accordance with the prescribed regulatory scheme, and it was therefore unreasonable. I also find that Ms. Sydoruk was not made aware of the basis for the Officer's suspicion, and she therefore did not have a reasonable opportunity to respond. The application for judicial review is allowed.

II. Background

[3] Ms. Sydoruk is a citizen of Ukraine. In September, 2010, she came to Canada to visit her sister. Ms. Sydoruk's sister works for Koss Aerospace, a Canadian company located in Mississauga, Ontario.

[4] In May, 2011, Ms. Sydoruk was introduced to Drago Kajic, President of Koss Aerospace, who interviewed her for a position as a bookkeeper with the company. Ms. Sydoruk made a positive impression, but Mr. Kajic said that she required additional work experience before he could offer her a job. It was agreed that any hiring decision would be postponed for several months.

[5] Ms. Sydoruk left Canada in July, 2011 and returned to Ukraine. She found employment as a bookkeeper with a company called Plastics Ukraine. Approximately one year later, Ms. Sydoruk had a second interview with Mr. Kajic by telephone.

[6] Mr. Kajic decided to hire Ms. Sydoruk. He obtained a positive Arranged Employment Opinion [AEO] from Service Canada in October, 2012, and a formal offer of employment was extended to Ms. Sydoruk in December, 2012. In February, 2013, Ms. Sydoruk applied for a permanent resident visa as a member of the federal skilled worker class.

[7] In September, 2014, Ms. Sydoruk was invited to attend an interview at the Canadian Embassy in Kiev, Ukraine. During the interview, the Officer questioned the authenticity of the job offer from Koss Aerospace. Ms. Sydoruk was unable to allay the Officer's concerns. In a decision dated September 29, 2014, Ms. Sydoruk was informed that she did not meet the requirements of the federal skilled worker class and her application was refused.

IV. Issues

[8] This application for judicial review raises the following issues:

A. Was the Officer's decision reasonable?

B. Was the Officer's decision procedurally fair?

V. Analysis

[9] A visa officer's determination of an application for permanent residence as a member of the federal skilled worker class involves findings of fact and law, and is to be reviewed by this

Court against the standard of reasonableness (*Patel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 571 [*Patel*] at para 18).

[10] Questions of procedural fairness are to be reviewed by this Court against the standard of correctness (*Patel* at para 18; *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43).

A. Was the Officer's decision reasonable?

[11] Federal skilled workers are described in s 75 of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 [the Regulations] as people who may become permanent residents on the basis of their ability to become economically established in Canada. Visa officers award points to applicants based on the factors listed in s 76(1)(a) of the Regulations. These include education, proficiency in English and French, experience, age, arranged employment and adaptability. Applicants must receive at least 67 points to be eligible for a federal skilled worker visa.

[12] Under s 82(2)(c) of the Regulations, applicants from outside Canada receive ten points for arranged employment provided that the visa officer approves the job offer based on an opinion provided by the Department of Human Resources and Skills Development [HRSDC]. A visa officer is not bound by the HRSDC opinion. It is for the officer to determine whether the job offer meets the requirements of s 203(1) of the Regulations, including whether it is genuine.

[13] Whether a job offer is genuine is determined in accordance with s 200(5) of the Regulations, which at the time of the Officer's decision read as follows:

> 200. (5) A determination of whether an offer of employment is genuine shall be based on the following factors:
>
> (a) whether the offer is made by an employer that is actively engaged in the business in respect of which the offer is made unless the offer is made for employment as a live-in caregiver;
>
> (b) whether the offer is consistent with the reasonable employment needs of the employer;
>
> (c) whether the terms of the offer are terms that the employer is reasonably able to fulfil; and
>
> (d) the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

[14] In this case, the Officer concluded that Ms. Sydoruk's job offer was not genuine and he therefore awarded her no points for her Arranged Employment Offer from Koss Aerospace:

> Following your interview at this Embassy and careful review of all the documentation on your application I cannot conclude that this offer was made in good faith and is genuine pursuant to Regulation 82 of the Immigration and Refugee Protection Regulations. You were given an opportunity to respond to my concerns with respect to your job offer in the course of the interview at the Embassy but failed to do so. No points can be awarded therefore for your Arranged Employment Offer.
>
> You have not obtained the minimum number of points, currently 67, required for a permanent resident visa. You have therefore not satisfied me that you will be able to become economically established in Canada.

[15] The Officer's concerns were further elucidated in the notes contained in the Global Case Management System (GCMS) that were prepared following his interview with Ms. Sydoruk and which form part of the Officer's decision:

> Explained to PA that I had serious concerns with respect to the authenticity of PA's job offer fm CDA; It's not clear how PA was selected for the position of a bookkeeper and what was the selection criteria given that PA had no work experience and did not have fluent English at the time of her interview with the president of the company; PA indicated that she was offered a job as PA's purported employer was planning to expand his business in Eastern Europe and needed new employees for his new office; PA did not know when and where her employer was planning to expand his business and could not explain why he hadn't done it so far; PA advised that her employer was happy with PA's job interview of May, 2011 yet PA failed to visit the place of her potential employment/find out more about nature of its business, meet her future co-workers etc; I suspect that PA's sister who has been working in Cda for the same employer might have come into agreement with MR Cajic [sic] and arranged current job offer in order to facilitate her sister's (PA) entry to Cda; PA could not provide any credible explanation and dispel my concerns that were conveyed to her during the interview; I'm not satisfied therefore that PA's job offer is a genuine one and cannot accredit any points for it; PA has obtained insufficient points to qualify for immigration to Canada, the minimum requirement being 67 points. Application refused.
>
> [Emphasis added.]

[16] The Officer's GCMS notes betray a fundamental misunderstanding. Ms. Sydoruk was not offered a job in May, 2011, and it is therefore hardly surprising that she did not immediately visit the workplace to find out more about the business or meet her future co-workers. The job offer was made in writing several months later when Ms. Sydoruk was in Ukraine acquiring further work experience with Plastics Ukraine.

[17] Quite apart from this factual error, there does not appear to be any correlation between the Officer's assessment of Ms. Sydoruk's job offer and the criteria that he was required to apply pursuant to s 200(5) of the Regulations. The factors enumerated in s 200(5) are primarily concerned with the integrity of the prospective employer. The Officer in this case was preoccupied with the credibility and qualifications of Ms. Sydoruk. It is unclear whether the result would have been the same if the job offer had been properly assessed in accordance with s 200(5). What is clear is that the Officer's conclusion that the employment offer was not genuine was fatal to Ms. Sydoruk's application.

[18] This is not a case where deficient reasons may be rescued in the manner contemplated in *N.L.N.U. v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. The Officer was required to assess Ms. Sydoruk's job offer in accordance with s 200(5) of the Regulations. The criteria are mandatory, not optional. As Justice Moldaver remarked in *British Columbia (Securities Commission) v McLean*, 2013 SCC 67 at para 38, where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision-maker adopts a different interpretation, its interpretation will necessarily be unreasonable; the "range of reasonable outcomes" will necessarily be limited to a single reasonable interpretation and the administrative decision-maker must adopt it.

[19] Because the Officer's assessment of the genuineness of Ms. Sydoruk's employment offer was not conducted in accordance with s 200(5) of the Regulations, his decision cannot be said to fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and

law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The application for judicial review must be allowed.

B. Was the Officer's decision procedurally fair?

[20] The content of the duty of fairness owed by a visa officer when determining a visa application by an applicant in the independent category is at the lower end of the range (*Patel v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55 at para 10). A visa officer has no duty to inform an applicant of any concerns regarding the application that arise directly from the requirements of the legislation or regulations (*Kamchibekov v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1411 at para 26).

[21] Even if the duty of fairness is at the low end of the spectrum, it nevertheless requires visa officers to inform applicants of their concerns so that applicants have an opportunity to respond, particularly where those concerns relate to the authenticity or credibility of evidence provided by the applicant (*Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25 at para 21). In this case, the authenticity of the job offer from Koss Aerospace was in doubt. While it appears from the Officer's GCMS notes that he raised this concern with Ms. Sydoruk during the interview, it is unclear whether he communicated the basis for his suspicion. As mentioned above, the GCMS notes include the following:

> I suspect that PA's sister who has been working in Cda for the same employer might have come into agreement with MR Cajic [*sic*] and arranged current job offer in order to facilitate her sister's (PA) entry to Cda; PA could not provide any credible explanation and dispel my concerns that were conveyed to her during the interview; I'm not satisfied therefore that PA's job offer is a genuine one and cannot accredit any points for it;

[22] There is nothing in the record to indicate that Ms. Sydoruk was made aware of the Officer's suspicion that her sister had conspired with Mr. Kajic to concoct a fraudulent job offer, nor does there appear to be any objective basis for the Officer's suspicion. Ms. Sydoruk was never given an opportunity to disabuse the officer of his unwarranted speculation, and accordingly the Officer's decision was procedurally unfair (*Keryakous v Canada (Minister of Citizenship and Immigration)*, 2015 FC 325 at para 20).

VI. Conclusion

[23] For the foregoing reasons, the application for judicial review is allowed and the matter is remitted to a different visa officer for re-determination. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a different visa officer for re-determination. No question is certified for appeal.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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