Federal Court Cour fédérale

Date: 20180704

Docket: IMM-4926-17

Citation: 2018 FC 686

Ottawa, Ontario, July 4, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

WAQAR HAIDER
SHABNAM TANAJJUM
HUZAIFA HAIDER
ESHAAL HAIDER
HAIDER ZAID

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Waqar Haider, seeks judicial review of the October 2, 2017 decision of a visa officer ("Officer") of the High Commission of Canada in London which, pursuant to s 87(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRP Regulations"),

refused his application for permanent residence in Canada as a member of the provincial nominee class.

[2] For the reasons that follow, I have concluded that there was no breach of the duty of procedural fairness and that the decision was reasonable. Therefore, this application is dismissed.

Background

[3] The Applicant and his wife and children are citizens of Pakistan. The Applicant applied for permanent residence in Canada under the Saskatchewan Immigrant Nominee Program. Following an initial review of his application at the High Commission in London, on November 13, 2015, the Applicant was sent a procedural fairness letter. This indicated, notwithstanding the Applicant's nomination by the province of Saskatchewan, that the Officer was not satisfied the information provided with the Applicant's permanent residence application established he had the ability to become economically established in Canada or that he otherwise met the definition of a provincial nominee pursuant to s 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

[4] As to his English language proficiency, the letter noted that the Applicant's International English Language Testing System ("IELTS") scores had an overall band of 4.5 which was described by IELTS as "Limited user: basic competence is limited to familiar situations. Has frequent problems in understanding and expression. Is not able to use complex language". Further, that the ability to effectively communicate in one of Canada's official languages is

recognized as a vitally important factor in becoming economically established. The Saskatchewan government's website confirmed that English is spoken everywhere in that province and that an immigrant's chances of success improve greatly if they can understand and speak English and, to do most jobs well, a minimum of Canadian Language Benchmark ("CLB") 4 was recommended. The Officer noted that this equates to an IELTS score of listening 4.5, reading 3.5, writing 4.0, and speaking 4.0 and would be considered the most basic level of English language proficiency. The Applicant's test scores were at or a little above the minimum recommended and indicated that his English language proficiency was basic in all four test areas.

[5] In the procedural fairness letter the Officer noted that the occupation in which the Applicant had been nominated was land surveyor and the occupation which he had indicated he intended to pursue in Canada was civil engineering technician. His current employment was as a civil associate engineer. The Employment and Social Development Canada ("ESDC") Job Bank site identified oral communication, reading, document use, and writing as among the essential skills to perform work as a land surveyor, a civil engineering technician and as a civil engineer. The ESDC described the level of complexity for these tasks to range from basic to advanced. The Officer concluded that it appeared reasonable to expect that to be able to perform the full range of tasks in these and related occupations would require a high level of English language proficiency but that the Applicant's demonstrated ability was at the basic level. And, to work in those fields, there may be a requirement of professional certification but that it did not appear that the Applicant had sufficient language skills to obtain the certification or to complete any necessary additional training which may be needed to obtain it.

[6] The Officer also stated in the letter that the Applicant's job history included the duties of a construction manager/supervisor. However, the Officer was not satisfied that the Applicant had the language skills to be able to perform the duties required of a construction manager/supervisor. The tasks for that occupation carried a high level of responsibility to ensure correct standards are adhered to and projects properly completed. Strong communication skills would be essential for understanding the plans and requirements of projects and for working successfully with other involved parties such as architects, consultants, clients, subcontractors and suppliers. Therefore, it appeared reasonable to expect that a greater than basic or moderate level of English language proficiency would be required to accomplish the complex tasks typical of work as a construction manager/supervisor.

[7] The Officer stated that he or she was not satisfied the Applicant would be able to perform the tasks of his intended occupation in which he had been nominated or others in which he indicated as having experience. Therefore, the Officer was not satisfied the Applicant would be able to become employed in Canada or, if he found employment, that it would be of a sufficient level for him to become economically established. And, while his nomination indicated that he might have the support of family members in Canada, support and reliance on other people would not be considered economic establishment and would not be sufficient to outweigh the Officer's concerns about the Applicant's low level of English language proficiency.

[8] The Applicant, through his counsel, made written submissions in response to the procedural fairness letter and attached documentation including a job offer as a construction painter with 7 Seas Painting & Construction Ltd. and a letter of support from that company's

managing director and owner, a supporting letter from the Applicant's brother, a letter from the Applicant indicating that he had funds in the amount of $20,888.57 to support himself and his family and that his wife hoped to upgrade her qualification and planned to get a day care license which would help to support the family, a bank statement, as well as documentation of the Applicant's prior employment and his education. The province of Saskatchewan also responded to the procedural fairness letter and continued to support the Applicant's nomination.

Decision Under Review

[9] In the refusal letter the Officer stated that he or she had completed the assessment of the Applicant's permanent residence visa application as a member of the provincial nominee class and had determined that the Applicant did not meet the requirements for immigration to Canada in that class.

[10] The Officer referenced s 87(3) of the IRP Regulations and stated that he or she was not satisfied that the certificate issued by the province of Saskatchewan was a sufficient indicator of the Applicant becoming economically established because he did not have the language skills to do so. Further, the Applicant's submissions in response to the procedural fairness letter had not overcome the concerns the Officer had identified regarding the Applicant's likelihood of becoming economically established in Canada. The Officer added that the Saskatchewan government had been consulted and that a second officer had concurred in the evaluation.

Issues and Standard of review

[11] The issues raised by the Applicant in his written submissions are as follows:

1. Did the Officer breach the duty of procedural fairness by failing to put his or her concerns regarding Low Income Cut-Offs ("LICO") to the Applicant and providing him with an opportunity to respond?

2. Was the Officer's assessment of the Applicant's ability to become economically established in Canada reasonable?

[12] The standard of review of correctness applies to issues of procedural fairness while the reasonableness standard applies to the Officer's decision relating to permanent residence under the provincial nominee program (*Rani v Canada (Citizenship and Immigration)*, 2015 FC 1414 at para 12 ("*Rani*"); *Singh v Canada (Citizenship and Immigration)*, 2017 FC 808 at paras 10-12 ("*Singh*"); *Yasmin v Canada (Citizenship and Immigration)*, 2018 FC 383 at para 13 ("*Yasmin*")).

Issue 1: Did the Officer breach the duty of procedural fairness by failing to put his or her concerns regarding LICO to the Applicant and providing him with an opportunity to respond?

[13] The Applicant refers to the Officer's entry in the Global Case Management System ("GCMS Notes") which states that the job offered to the Applicant would pay him an annual salary of $33,280.00, which did not appear to be sufficient for the support of a family of four people, given that the LICO for a family of four in 2016 would be $45,206.00. In his written submissions the Applicant took the position that the Officer breached the duty of fairness by failing to disclose to the Applicant that the Officer was concerned with and relying on the LICO to determine that the job offered to the Applicant would not allow him to become economically established (*Sadeghi v Canada (Citizenship and Immigration)*, [2002] FCJ No 675 at paras 14-17 ("*Sadeghi*"); *Rani* at para 18; *Qadeer v Canada (Citizenship and Immigration)*, 2016 FC 285

(“*Qadeer”)*) and by failing to provide the Applicant with an opportunity to respond to that concern. Notice was required as the concern did not arise directly from the requirements of the subject legislation, the IRPA or IRP Regulations as pertaining to provincial nominees (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 (“*Hassani*”)). Further, the Officer imported and imposed the LICO as a prospective income requirement, without raising it as a concern in the procedural fairness letter, and refused the application based on his or her finding that economic establishment requires earning an income at least equivalent to the LICO. The Applicants had no way of knowing the LICO would be used as a minimum income requirement for any job offer.

[14] The Applicant also submitted that the Officer’s substitution of his or her evaluation under s 87 removed the Applicant’s legitimate expectation of being granted permanent residence and therefore attracts a higher degree of procedural fairness (*Sadeghi*). Further, because the Officer relied on extrinsic evidence, the LICO, procedural fairness also required the Officer to disclose that evidence prior to making the decision.

[15] When appearing before me the Applicant acknowledged this Court’s prior decisions in *Yasmin* and *Nisreen v Canada (Citizenship and Immigration)*, 2018 FC 469 at paras 53 and 56 (“*Nisreen*”) which addressed the above positions, but submitted that the LICO was not relevant or, in the alternative, that the Officer unreasonably relied on it as an indicator of the level of income required.

[16] The Respondent submits that the Officer's refusal was not based on the LICO amount but on the Officer's consideration of the Applicant only having demonstrated a basic language proficiency in English, along with his stated intentions concerning his employment, as is demonstrated by the Officer's reasons. The LICO reference was not the determinative factor, it was a reference in acknowledgement of the Applicant's response to the procedural fairness letter. It demonstrated that even if the Applicant was capable of performing the lower skilled position of a painter, this was not a viable path to economic establishment as it was insufficient to support a family of four (*Yasmin* at para 20; *Nisreen* at paras 53 and 56).

[17] As the Respondent points out, I have dealt with essentially the same procedural fairness argument based on very similar facts in *Yasmin*, as did Justice Russell in *Nisreen*.

[18] In *Yasmin*, as in this matter, the Applicant relied on *Sadeghi* to suggest that a decision made pursuant to s 87 of the IRP Regulations attracts a high level of procedural fairness. However, as I pointed out in *Yasmin*, more recent case law has made it clear that the duty of procedural fairness owed by a visa officer to persons applying for permanent residence is at the lower end of the spectrum (*Asl v Canada (Citizenship and Immigration)*, 2016 FC 1006 at para 23, citing *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 23; *Farooq v Canada (Citizenship and Immigration)*, 2013 FC 164 at para 10, citing *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283; *Rani* citing *Canada (Minister of Citizenship and Immigration) v Khan*, 2001 FCA 345 at paras 30-31.

[19] In *Nisreen*, Justice Russell distinguished *Sadeghi* on its facts and found that the applicant's reliance upon it was misplaced. As to the legitimate expectation argument, I agree with Justice Russell that:

> [48] There is nothing in the context or the specific wording of s 87 of the *IRPR* to suggest that an applicant is either "*prima facie* eligible for permanent residence" or that a substitute evaluation removes a "legitimate expectation." The *IRPR* are clear that no rights or expectations accrue to any applicant until such time as the application process – which includes the possibility of substituted evaluation if the officer concludes that the provincial certificate "is not a sufficient indicator" and consults the provincial government concerned – has run its course and a final decision has been rendered. Every applicant who applies under the scheme must be taken to understand that a provincial certificate issued under s 87(2)(a) may not be regarded as a "sufficient indicator" when the application is reviewed under s 87(3) of the *IRPR*.

[20] As was the case in *Yasmin*, here I again do not agree with the Applicant that the Officer breached the duty of procedural fairness. It is apparent from the GCMS Notes, the procedural fairness letter and the refusal letter that the Officer's main concern, and the determinative factor in his or her decision, was whether the Applicant's English language proficiency was sufficient to allow him to become economically established in Canada. The GCMS Notes indicate this as a concern in the initial assessment of his application stating, referencing the IELTS results that the Applicant's demonstrated English language proficiency did not appear sufficient for the Applicant to become economically established.

[21] This resulted in the issuance of the procedural fairness letter which clearly indicated that the Officer's concern was with the Applicant's English language proficiency and provided the Applicant with an opportunity to respond. The subsequent entries in the GCMS Notes address the Applicant's submissions in response to the procedural fairness letter. The notes are detailed,

lengthy and primarily concerned with the Applicant's English language capacity and whether he had demonstrated having the language skills necessary to enable him to become economically established within a reasonable period of time. In the course of reviewing the Applicant's submissions made in response to the procedural fairness letter, the Officer states "I note as well that the job offered to PA wld earn him a pre-deduction annual salary of $33,280, which does not appear sufficient for the support of a family of four people, given that the LICO for a family of four in 2016 is $45,206". The Officer goes on to note that a job offer is not a requirement of the provincial nominee class and the Applicant was not asked to furnish one as evidence of anything. And while a job offer may be a factor to consider in the assessment of an applicant's ability to become economically established, in and of itself, it does not demonstrate this. The notes then resume with the Officer's further assessment.

[22] The decision letter states that the Officer reached the conclusion that the Applicant was not likely to become economically established in Canada because the Officer was not satisfied that the Applicant had the language skills needed to do so and these concerns were not overcome by the Applicant's response to the procedural fairness letter.

[23] As the Applicant submits, the LICO is not a mandated criteria pertaining to the provincial nominee class. However, in my view, the Officer did not reference it as a minimum requirement or income threshold that the Applicant was required to meet and, as noted above, the brief reference to it does not suggest or support that the Officer relied on the LICO as the basis of his or her decision (*Singh* at para 21). Nor, contrary to the Applicant's submission, did the Officer import or impose it as a threshold minimum income requirement (also see *Nisreen* at paras 53

and 56). Rather, it was utilized as a reference point in the context of the ability of the Applicant to become economically established in Canada. I agree with the Respondent that it demonstrated, even if the Applicant was capable of performing the lower skilled position of a painter, this was not a viable path to economic establishment as the income for the job offered was insufficient to support a family of four. In other words, the income submitted by the Applicant did not assist him in meeting his onus that he would become economically established (*Nisreen* at paragraph 35, *Rani* at paragraph 16, citing *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 35).

[24] The Officer did not rely on the LICO, as extrinsic evidence or otherwise (see *Begum v Canada (Citizenship and Immigration)*, 2013 FC 824 at paras 32-36; *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 37, *Singh* at paragraph 21), in reaching his or her decision and, in my view, the Officer's use of the LICO speaks to the reasonableness of the decision, rather than to procedural fairness.

[25] Given this, notice to the Applicant of the Officer's reference to the LICO was not required. And, in any event and as I previously addressed in *Yasmin* concerning the applicant's reliance on *Hassani*, that decision held that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. However, where the issue is not one that arises in that context, such a duty may arise when the "credibility, accuracy or genuine nature of the information submitted by the applicant" is the basis for the officer's concern (*Hassani* at para 24; see also *Kong v Canada (Citizenship and Immigration)*, 2017 FC

1183 at paras 24-25; *Qadeer* at paras 21-25). In other words, the duty of fairness triggers when the officer questions the credibility or veracity or accuracy of the applicant's submitted materials. This, unlike *Rani* and *Qadeer*, is not such a circumstance.

[26] For the reasons above, I find that the Officer did not breach the duty of procedural fairness. That said, in future decisions, officers would be well advised to clearly state the purpose of any LICO reference.

Issue 2: Was the Officer's assessment of the Applicant's ability to become economically established in Canada reasonable?

[27] The Applicant submits that the decision is unreasonable because the Officer dismissed as irrelevant, and consequently gave no weight to, the Applicant's evidence concerning his ability to become economically established, such as his personal savings, his wife's ability to find prospective employment, the Province's assessment of his ability to become economically established and his prospective employer's assessments of whether the Applicant's English language skills are sufficient to perform the duties of the job offered to him. Instead, the Officer relied only on his own unreasonable assessment that the Applicant's language skills are insufficient. Additionally, and as was empathized when appearing before me, the Officer's reliance on the LICO to find that the Applicant's prospective salary is insufficient was unreasonable. Further, the Officer's reasons are not sufficiently justified, transparent and intelligible to allow the Court to understand the underlying rationale for the decision and, therefore, the decision is also unreasonable on that basis.

[28] The Applicant additionally submits that the Officer provided no basis for finding that the Applicant does not have the language skills to work as a construction painter, which job was not a supervisory role, carries less responsibility and complexity, and requires less advanced English skills than a construction manager, the position the Applicant had originally identified. The Applicant submits that the Officer ignored the letter from the Applicant's prospective employer explaining why the Applicant's language ability was sufficient to the job of construction painter and failed to conduct a fresh consideration of the job offered.

[29] As a starting point I note that s 12(2) of the IRPA designates a category of permanent residents as, "economic class on the basis of their ability to become economically established in Canada." Section 87 of the IRP Regulations states that a foreign national is a member of the provincial nominee class when they are named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister, and, they intend to reside in the province that has nominated them. However, under s 87(3), if the fact that the foreign national is named in a certificate is not a sufficient indicator of whether they may become economically established in Canada, and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria (certificate of nomination and intent to reside in the subject province) their own evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.

[30] It is clear from Operational Bulletin 499, which is contained in the record that was before the Officer, that the ability to become economically established applies to the individual making the application for permanent residence in the provincial nominee class and that each such

applicant must be assessed on the merits of their own ability to economically establish. The Bulletin states that an economic applicant relying exclusively on the financial guarantee of their relative residing in the province raises concerns that the applicant is not able to economically establish without such assistance. It goes on to note that in cases where the visa officer is not satisfied that the issuance of a nomination certificate is a sufficient indicator of an applicant's ability to become economically established in Canada, the officer may wish to examine certain factors as part of the overall assessment in determining an applicant's ability to economically establish. These factors may include, but are not limited to, current job or job offer, language ability, work experience, education and training. The weight afforded to these indicia of the ability to economically establish may vary on a case by case basis.

[31] Having reviewed the GCMS Notes in whole, I do not agree with the Applicant that the Officer dismissed as irrelevant the Applicant's evidence concerning his ability to become economically established. The Officer stated that a job offer may be a factor to consider in the assessment of an applicant's ability to become economically established but did not, itself, demonstrate this. The Officer explicitly acknowledged the evidence as to the Applicant's finances and stated while this type of evidence may be relevant to a determination of whether an applicant may or may not be inadmissible for financial reasons, it did not demonstrate that an applicant had the ability to become economically established. Similarly, the support offered by the Applicant's family in Canada as well as the potential of his spouse becoming employed, were explicitly acknowledged. The Officer stated that while such support may demonstrate some of the family members' capacities, it did not demonstrate that the Applicant himself had the ability to become economically established, which ability applied only to him, not to his dependants.

[32] The Officer went on to explain the distinction between settlement and economic establishment as not being interchangeable terms. The Officer stated that an immigrant, such as one in the family class, with the sort of support indicated to be available from the Applicant's family members, may settle successfully in Canada without becoming economically established. However, as clearly stated in the procedural fairness letter, the provincial nominee class is an economic class. Therefore, settlement assistance available to the Applicant does not indicate that he has the ability of becoming economically established in Canada. The Officer noted that the province continued to support the nomination, but found that the availability of many jobs and a strong economy in Saskatchewan were not indicative, in and of themselves, of the Applicant's individual ability to become economically established, nor did the potential support of family or community members or the success of other immigrants. The Officer stated that he was not satisfied that the representations of the province and of the Applicant removed the concerns set out in the procedural fairness letter.

[33] Based on Operational Bulletin 499, it would appear, when s 87(3) is utilized by an officer, that financial resources and other factors can be considered in assessing an applicant's ability to become economically established. Here the Officer did consider the factors described above but ultimately concluded that they were not indicative, in and of themselves, of the Applicant's individual ability to become economically established and that the Applicant's response to the procedural fairness letter did not overcome the Officer's concerns set out in the letter, which pertain to the Applicant's English language ability (see *Chaudhry v Canada (Citizenship and Immigration)*, 2015 FC 1072 at para 38). Although this could have been more clearly expressed, in effect, the Officer weighed the evidence against his or her finding that the

Applicant did not establish that he had the English language ability sufficient to perform the tasks of the job he had been offered so as to become economically established (*Parveen v Canada (Citizenship and Immigration)*, 2015 FC 473 at para 27 ("*Parveen*")).

[34] The Officer also acknowledged the job offer and the supporting letter from the Applicant's potential employer, which stated that the Applicant would be started in an entry level position, as construction painter, so he could get to know his co-workers and how the company worked. The potential employer stated that he was confident that the Applicant's English skills were sufficient for the Applicant to perform the work required. Safety meetings are held weekly and project managers explain any workplace hazards before a project is begun. The letter states that, as the Applicant became more comfortable, his responsibilities would increase. It was intended that he would take a supervising role. After the first few months, the employer would start assigning the Applicant management tasks, at that point he would become a project leader and perform more advanced tasks, including giving safety briefings.

[35] This was noted by the Officer in the GCMS Notes. The Officer stated that while the Applicant may have experience and acquired skills related to the lower-skilled job he had been offered, notwithstanding the submissions of his prospective employer and his representative, it remained unclear whether his demonstrated basic level of English language proficiency would be sufficient to perform the tasks of the job he had been offered. The Officer stated that he or she was not satisfied that basic English language proficiency would be sufficient to accomplish the tasks of a construction supervisor or manager or, significantly in my view, that the Applicant had

demonstrated he could improve his English language proficiency to a level that it would appear reasonable to be required of a supervisory or management level position in Canada.

[36] When appearing before me, the Applicant submitted that the potential employer's letter established that the Applicant had the necessary skills of the job offered as a painter, which the Officer did not dispute. Further, that the lower-skilled job was not supervisory or managerial and that the potential employer's statement that "After the first few months of getting to know how 7 Seas operates and as he becomes more comfortable with English, I will start giving him management tasks." demonstrated that the offer of the lower skill position is not dependent on improved language skills, and the ability of the Applicant to improve his skills was not time limited. The Applicant also submitted that common sense dictates that the Applicant's language skills will improve with time.

[37] I point out that it was the Applicant who, in response to the procedural fairness letter which raised the Officer's concern with the Applicant's English language skills, submitted the employment offer for a lower skill level job. Given the stated intention of the potential employer to have the Applicant, within months, assume a supervisory position with elevated responsibilities, including conducting safety briefings for other employees, and the Officer's above analysis, I do not agree with the Applicant that the Officer failed to assess the Applicant's English language proficiency in the context of the job offered. Moreover, the onus was on the Applicant to demonstrate that his English language skills were sufficient to perform the lower skill level job, which the potential employer anticipated would quickly become a supervisory position. However, as noted by the Officer, the Applicant did not address this in his response to

the procedural fairness letter. He provided no evidence as to how he intended to improve his language skills and, in that regard, I do not accept the Applicant's submission that this is evidenced by common sense which dictates that improvement would follow as a matter of course.

[38] As I have addressed above, the Officer's decision was based on his or her concern as to whether the Applicant's English language proficiency was sufficient to allow him to become economically established in Canada, not on LICO. The reference to the LICO does not render the decision procedurally unfair nor does it render it unreasonable both because it was not the basis for the decision and, in any event, because it was a reasonable reference for the Officer to consider in these circumstances.

[39] While the Applicant does not agree with the Officer's decision, the Officer's reasons are sufficient to permit me to understand how he or she reached his or her conclusion which falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

JUDGMENT IN IMM-4926-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

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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