Federal Court Cour fédérale

Date: 20190207

Docket: IMM-3083-17

Citation: 2019 FC 159

Ottawa, Ontario February 7, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MARY ANN SIBAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review by Mary Ann Sibal [the Applicant] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by a visa officer at the Canadian Embassy in the Philippines [the Officer]. The Applicant had applied for a work permit to provide child care in Canada [the Work Permit or

Work Visa]. On May 13, 2017, the Officer refused to grant the Applicant's request [the Decision].

[2] For the reasons that follow, I have determined that the application is allowed because the Decision is not reasonable. The Officer made a number of erroneous findings of fact without regard to the evidence in the record.

II. Factual Background

[3] The Applicant is a 28 year old citizen of the Philippines and is a stay at home mother who looks after her two children (ages 6 and 4). The Applicant's common-law spouse, with whom she resides, is the father of her children.

[4] The Applicant applied to come to Canada as a result of being offered employment as a nanny by Ms. Jennifer Mercanti who lives in Oakville.

[5] Ms. Mercanti had received a Labour Market Impact Assessment [LMIA] from Employment and Social Development Canada [ESDC] on December 13, 2016. As a result of the positive LMIA, the Applicant's job offer to act as a nanny for Ms. Mercanti was found to fall within the requirements of the Temporary Foreign Worker Program [TFWP].

[6] The Applicant then applied for a Work Permit in March 2017, stating that she had previous work experience as a nanny in the Philippines from June 2007 to September 2009 for Ms. Jennie Espinosa.

[7] Ms. Espinosa provided a document entitled “Certification” confirming that she employed the Applicant to look after her newborn daughter in the Philippines. She outlined the Applicant’s child-rearing skills and personal qualities. Ms. Espinosa stated that the Applicant was “very reliable, trustworthy, motivated, and able to make herself tune-up with the requirements of family and children. In summary, Ms. Sibal possesses all qualities that make a nanny successful.”

[8] At the time of applying for the Work Permit, the Applicant was residing with her two children and common-law spouse in the Philippines. The Applicant’s mother and a sister were living in Canada. The record shows that the Applicant’s remaining family – her father, three brothers and a sister – all live in the Philippines. The Applicant’s sister in Canada was employed as a nanny in Hamilton, Ontario.

[9] Counsel stated in a letter – accompanying the application for the work permit – that the Applicant had no intention of staying in Canada without status. Her common-law spouse and their two children would remain in the Philippines for the duration of her employment.

III. **The Relevant Legislation**

[10] The *IRPA* requires that a foreign national who is seeking to enter or remain in Canada must establish that they hold the appropriate visa for entry, as required by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *IRPR*].

[11] If entry is sought in order to become a temporary resident, then the *IRPA* also requires that, in addition to holding the necessary visa or other document required by the *IRPR*, the

person seeking entry must establish that they will leave Canada by the end of the period authorized for their stay: *IRPA,* at ss. 20(1)(b).

[12] Issuance of Work Permits is regulated under Part 11, Division 3 of the *IRPR.* The provisions which are relevant in this application are found in subsections 200(1) and (3) addressing the requirements to obtain a Work Permit:

Issuance of Work Permits	Délivrance du permis de travail
Work permits	Permis de travail — demande préalable à l'entrée au Canada
200 (1) Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act — an officer shall issue a work permit to a foreign national if, following an examination, it is established that	200 (1) Sous réserve des paragraphes (2) et (3), et de l'article 87.3 de la Loi dans le cas de l'étranger qui fait la demande préalablement à son entrée au Canada, l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments ci-après sont établis :
(a) the foreign national applied for it in accordance with Division 2;	a) l'étranger a demandé un permis de travail conformément à la section 2;
(b) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;	b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;
[…]	[…]
Exceptions	Exceptions
(3) An officer shall not issue a work permit to a foreign national if	(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :
(a) there are reasonable grounds to believe that the foreign national is unable to	a) l'agent a des motifs raisonnables de croire que l'étranger est incapable

perform the work sought;	d'exercer l'emploi pour lequel le permis de travail est demandé;

IV. **Decision under Review**

[13] The Decision was communicated to the Applicant on May 15, 2017. The reasons for the Decision are found in both a "tick-box" list of reasons and in the Global Case Management System [GCMS] notes.

[14] From the tick-box reasons, the Officer found that: (1) the Applicant was not able to adequately demonstrate that she met the requirements of the job offer; and (2) she failed to satisfy the Officer that she would leave Canada by the end of the period authorized due to the employment prospects in the Philippines and her current employment situation.

[15] The GCMS notes provide additional observations that:

- the Applicant has been unemployed since 2012;
- the Applicant has shown no evidence of educational attainment;
- the LMIA requires 6 months of training or relevant experience;
- the Applicant has not provided evidence of at least 6 months of caregiver training;
- the Applicant claimed to have worked as a nanny from 2007-2009 and provided a letter from Jennie Espinoza but has not provided any supporting third party documents (social security or health benefits letters);
- the Applicant's previous employment, noted by another Officer, was as a sales lady from 2010-2012; and
- the letter from Ms. Espinoza is self-serving and not independently verifiable.

[16] In conclusion the Officer stated that:

> AFTER CAREFUL REVIEW OF ALL INFO AND DOCS ON FILE, I AM NOT SATISFIED THAT SUBJ ADEQUATELY MEETS JOB OFFER REQUIREMENTS OF PROSPECTIVE EMPLOYMENT. I AM ALSO NOT SATISFIED THAT SUBJ HAS DEMONSTRATED STRONG EMPLOYMENT PROSPECTS AND TIES TO HOME COUNTRY TO HAVE INCENTIVE TO RETURN. ON BALANCE, I AM NOT SATISFIED THAT SUBJ WILL LEAVE CDA BY THE END OF AUTHORIZED STAY. REFUSED. R200(1)(B).
>
> [Capitalization in original]

V. **Issues**

[17] The Applicant raises the following issues in her submissions:

1) the Decision was unreasonable as the Officer ignored, or failed to address, relevant contrary evidence including that the Applicant's children and common law spouse were remaining in the Philippines and that she may end up being capable of remaining in Canada in an authorized fashion after working as a live in child caregiver; and

2) the Decision breached procedural fairness as the Applicant was not notified about the Officer's concerns with Ms. Espinoza's letter and whether the Applicant would return to the Philippines at the end of the Work Permit.

[18] The Respondent submits the Decision was reasonable as the evidentiary onus was on the Applicant and she failed to meet the requirements. Specifically, the Respondent submits that the Applicant (1) failed to provide sufficient evidence that she met the requirements for the job offer related to the application for Work Visa. (2) The Applicant did not establish that she would leave Canada when she was no longer authorized to remain.

[19] This application can be determined on the basis of the Applicant's first issue. The second issue need not be addressed.

VI. **Standard of Review**

[20] The applicable standard of review regarding assessing an officer's refusal of work permit application abroad is reasonableness: *Singh v Canada (Citizenship and Immigration)*, 2017 FC 894 at paras 15-16.

[21] In conducting a reasonableness review, the Court should concern itself with whether the decision was justified, transparent, intelligible, and within the range of possible, acceptable outcomes defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [*Dunsmuir*].

[22] If the reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

[23] The Officer was sitting as an administrative tribunal and was not required to consider or comment in their reasons upon every issue raised by the Applicant. The issue for the reviewing court is whether the decision, when viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3.

VII. **Analysis**

A. *The Applicant's Educational Attainment*

[24] The Officer determined that the Applicant did not meet the job offer requirements of the prospective employment. In addition, or perhaps as part of that assessment, the Officer found that the Applicant provided "no evidence of educational attainment."

[25] The Job Information details set out in Ms. Mercanti's approved LMIA at pages 28 – 31 of the Certified Tribunal Record [CTR] indicated the level of education required by the employer was secondary school.

[26] Submitted with the work permit application and found at pages 20 and 21 of the CTR is a copy of the Applicant's high school diploma from Dapdap High School in the Philippines and a transcript of her marks for each of the four years she attended the school prior to graduation.

[27] The Diploma is dated April 1, 2007 and certifies that "Mary Ann S. Sibal has satisfactorily completed the requirements for graduation from the Secondary Education Curriculum prescribed for high schools of the Philippines and is therefore entitled to this Diploma." The Diploma is signed and sealed. It is printed in Tagalog with an English translation in smaller text printed underneath each sentence.

[28] It is not at all clear why the Officer said <u>no evidence</u> of educational attainment was provided. The Officer had to have seen the diploma and the transcript at pages 20-21 of the CTR. Page 19 of the CTR contains the certification letter from the woman who employed the Applicant as a nanny in the Philippines from June 2007 to September 2009. That is the letter

which was impugned by the Officer as being “self-serving.” It is discussed in the following section of these reasons.

[29] The GCMS notes made 10 days earlier, by another officer, indicate that the LIMA requirements are that the Applicant have six months childcare training or relevant experience. Those notes state that the Applicant’s education is “not indicated.”

[30] I will first address the “not indicated” aspect of the Applicant’s education. As noted above, this is clearly wrong. In addition, page 41 of the CTR contains page 3 of the Applicant’s work permit application. Under the heading “Education,” the Applicant has ticked “yes” in answer to the question “[h]ave you had any postsecondary education (including university, college or apprenticeship training)?” In the area below that she wrote that she possesses a “Basic Life Support – CPR certificate.”

[31] It appears from the form that in addition to ticking “yes” in the box inquiring about postsecondary education, perhaps the high school diploma should have been listed as well the CPR certificate. I say “perhaps” as the instruction under the tick box section is “[i]f you answered ‘yes’, give full details of your highest level of postsecondary education.” In that space, the Applicant provided the CPR information. Nonetheless, by including her Diploma and transcript of grades, the Applicant provided the required information.

[32] Neither Officers appear to have noticed in the record that the Applicant confirmed that she had postsecondary education and supplied the corroborative documents in support thereof. If they did notice it, they certainly did not comment upon it. Nor did they indicate why the

Applicant's education was equated to "no evidence of educational attainment" and "education not indicated."

[33] Those conclusions are contrary to the evidence before the Officers and therefore unreasonable.

B. *The LMIA Job Requirements*

[34] The LMIA approval did not stipulate any job requirement other than secondary school education. Annex A to the LMIA authorization indicated at "Job Information" that the National Occupational Classification [NOC] code and title was "4411-Child Caregiver."

[35] The Decision states that the "LMIA requires 6 mos training or relevant experience." The Officer concluded that there was "no evidence of completion of 6-month course related to caregiving" and that previous employment was as a sales lady. That finding was the consequence of the Officer rejecting as "self-serving" the Certificate provided by Ms. Espinosa attesting to the Applicant's work as her nanny for over two years thus eliminating that employment experience.

[36] I have found it is not necessary to address the procedural fairness argument raised by the Applicant with respect to the Certificate. I do, however, note that the Certificate was from a former employer, not a future employer. For the Officer to dismiss it out of hand, without explanation other than to say that it is "self-serving," is unreasonable, since it is unintelligible and not transparent.

[37] In any event, according to the Officer, the Applicant does not require six months training if she has relevant experience. I cannot imagine an experience more relevant to being a nanny

raising someone’s children than being a stay-at-home mother raising her own two children. As shown on the Family Information form at page 35 of the CTR, one child was born May 19, 2012 and the other was born November 8, 2013. By the time the application for the LIMA authorization was submitted on March 20, 2017 the Applicant had accumulated almost nine years of combined relevant child caring experience with her own children.

[38] It is not clear how the Officer determined that a six-month caregiving course or relevant experience was required. There is nothing in the CTR supporting such a requirement. Nor does it contain a copy of the employment requirements set out in NOC 4411. It may be that the Officer was recalling them from memory. If so, the Officer did not accurately recall them.

[39] I find that I can take judicial notice of NOC 4411 as it is publicly available on the Government of Canada website.

[40] The employment requirements under NOC 4411 are located online: Government of Canada, “Job Requirements: Home Child Care Provider”, (online < https://www.jobbank.gc.ca/marketreport/requirements/24770/22437>). They are as follows:

> **Employment Requirements**
>
> This is what you typically need for the job.
>
> - Completion of secondary school <u>may</u> be required.
> - Home child care providers, parent's helpers and foster parents <u>may</u> require completion of a training program in child care or a related field.
> - Child care or household management experience <u>may</u> be required.
> - Demonstrated ability to perform work is <u>usually</u> required.

- First aid certification and CPR (cardiopulmonary resuscitation) training may be required.

[Emphasis added]

[41] Looking at those requirements, none say that the Applicant "shall" or "must" have any of the requirements. None require a "six-month course related to caregiving" which the Officer found was required.

[42] Although it is not required, the Applicant does have, , completion of secondary school, experience in childcare or household management, and a first aid certification and CPR. She also has a demonstrated ability to perform work. Such ability is a general requirement that is not specific to childcare and is noted as being a usual, but not mandatory, requirement.

[43] The Officer's finding that the Applicant is not able to demonstrate that she adequately met the job requirements of her prospective employment is unreasonable since there is no evidentiary basis for it and, other than secondary school education, there are no requirements found in the record.

C. *Would the Applicant leave Canada by the end of her authorized period of stay?*

[44] The Officer relied on two tick boxes in determining that the Applicant had not satisfied the Officer that she would leave Canada at the end of her employment. One reason was "employment prospects in country of residence" and the other reason was her "current employment situation."

[45] The reasons given by the Officer for ticking those boxes was "I am also not satisfied that subj has demonstrated strong employment prospects and ties to home country to have incentive to return."

[46] A third option that was available to the Officer but which was not selected was "family ties in Canada and in country of residence." The Officer did not tick that box. Presumably, this was because for a negative assessment to be made the Applicant would have to have virtually no family in the Philippines and some family in Canada. The Applicant's mother and sister live in Hamilton, Ontario. The Applicant's common-law spouse and two children live in the Philippines with her. The Applicant's father, three brothers and a sister all live in the Philippines.

[47] Given the record, how the Officer determined that the Applicant had not demonstrated strong ties to her home country is unknown. There is no explanation given by the Officer.

[48] There is evidence in the record of the Applicant's many family ties to the Philippines which is her birthplace.

[49] Currently, eight of the Applicant's ten family members live in the Philippines. Her application indicated that none of them were going to accompany her to Canada. A letter, which was submitted with her application, confirmed that the Applicant "had no intention of staying in Canada without status" and that "the children and common-law partner will remain in the Philippines for the duration of [the Applicant's] employment."

[50] There is no evidence that the Applicant would prefer to stay in Canada where her mother and sister are living rather than return to the Philippines to be with her children and spouse and other family members.

[51] The Officer's conclusion is inconsistent with the evidence in the record that the Applicant's two children and common-law spouse were remaining in the Philippines.

[52] It has long been the case that "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'": *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35 at para 17 (FC); *Thomas v Canada (Citizenship and Immigration)*, 2009 FC 1038 at paras 14 and 16.

VIII. **Conclusion**

[53] For the above-noted reasons, I find that the Officer made a number of erroneous findings of fact without regard to the evidence.

[54] The Officer's reasons for those findings were neither transparent nor intelligible resulting in a decision that was not justified and not within the range of possible, acceptable outcomes defensible on the facts and law.

[55] I am unable to understand why the Officer made the decision they did as result of which the *Dunsmuir* criteria have not been met.

[56] The application is allowed and the Officer's refusal of the Applicant's work permit is set aside. The application for a work permit is to be re-determined by another visa officer.

[57] There is no serious question of general importance for certification on these facts.

JUDGMENT in IMM-3083-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed.
2. The refusal of the application for a work permit is set aside and that matter is returned for redetermination by a different Visa Officer.
3. There is no serious question of general importance for certification on these facts.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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