Federal Court  Cour fédérale

Date: 20190823

Docket: IMM-397-19

Citation: 2019 FC 1096

Ottawa, Ontario, August 23, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

HASSAN ADNAN HASSAN HASSAN

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Hassan Adnan Hassan Hassan seeks judicial review of a decision by a migration officer [Officer] to refuse his application for a permanent resident visa. Mr. Hassan applied for permanent residence as a provincial nominee under the Prince Edward Island Provincial Nomination Program [PNP].

[2] Each province negotiates its own immigration agreement with Canada regarding provincial nominees. The agreements are not uniform. A migration officer who proposes to substitute his or her own evaluation for that of a nominating province must consider the terms agreed to by Canada and the province, and conduct the analysis accordingly. The Officer did not do so, and the decision was therefore unreasonable. The application for judicial review is allowed.

II. Background

[3] Mr. Hassan is a citizen of Iraq. He lives and works in the United Arab Emirates [UAE], where he owns and operates a printing, design and illustration business. He has more than 25 years' experience in the field. He wants to relocate to Canada with his family and start a similar business in Charlottetown.

[4] In 2010, Mr. Hassan applied for a permanent resident visa as a member of the economic class under s 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. He applied as a "self-employed person" within the meaning of ss 88(1) and 100(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. On November 26, 2014, a migration officer refused Mr. Hassan's application on the ground that his English-language skills, as measured by the International English Language Testing System [IELTS], were insufficient for him to become economically established in Canada.

[5] On May 12, 2015, Mr. Hassan applied for provincial nomination under the PNP's 100% Ownership Stream. The PEI Office of Immigration found that he met all the requirements of the PNP. Mr. Hassan's overall IELTS test score was 4.0, which was the minimum acceptable.

[6] In December 2015, Mr. Hassan travelled to PEI for an exploratory visit. He met with local businesspeople to discuss his plans and learn about the local market. He also met with two PEI immigration officials for an interview. The officials interviewed Mr. Hassan in English, and he did not request or require an interpreter. He was nominated by PEI for permanent residence under the PNP on January 18, 2016.

[7] On January 31, 2016, Mr. Hassan applied to Citizenship and Immigration Canada [CIC] for a permanent resident visa. On April 13, 2016, the Officer sent Mr. Hassan a pre-refusal e-mail message expressing concern about his English language proficiency, as indicated by his IELTS scores. Mr. Hassan responded through counsel on June 19, 2016. In addition to making written submissions, Mr. Hassan's counsel provided documentary evidence of Mr. Hassan's work in English and improved IELTS scores.

[8] Mr. Hassan received no response or communication from CIC for more than two years. He was eventually informed of the Officer's refusal of his application on November 20, 2018.

III. Decision under Review

[9] In his refusal letter, the Officer noted that a provincial nomination is not itself a sufficient indicator that an applicant may become economically established in Canada (citing s 87(3) of the Regulations). The Officer then substituted his evaluation for the criteria found in s 87(2) of the Regulations. The Officer noted that his concerns had previously been communicated to Mr. Hassan in the pre-refusal e-mail message, and acknowledged the response provided by Mr. Hassan's counsel. However, the response did not assuage the Officer's concerns. The Officer confirmed that a second migration officer had concurred in the refusal in accordance with s 87(4) of the Regulations.

[10] According to the notes in the Global Case Management System [GCMS], the Officer acknowledged that Mr. Hassan's business in the UAE was conducted in English; examples were provided of his printed and published work in English; he was able to communicate with his counsel in English; he was able to converse with businesspeople in PEI in English; and his interview with PEI immigration officials was conducted in English. The Officer also acknowledged Mr. Hassan's arguments that he should already have failed in his business if a high level of English was required to operate it, and his language skills would develop fairly rapidly once he moved to Canada.

[11] Nevertheless, the Officer found that Mr. Hassan's ability to conduct business in English in the UAE was not necessarily indicative of his ability to do the same in Canada. The Officer identified instances of grammatically incorrect or stilted English in the examples of Mr. Hassan's

work. The Officer acknowledged the continued support of PEI for Mr. Hassan's application and his improved IELTS scores, but ultimately concluded that Mr. Hassan's English language proficiency was insufficient for him to become economically established in Canada.

IV. Issue

[12] In his oral submissions before this Court, counsel for Mr. Hassan limited his argument to a single issue: whether the failure of the Officer to apply the presumption found in s 3.9 of Annex A to the Agreement for Canada-Prince Edward Island Co-operation on Immigration [Agreement] renders the decision unreasonable.

V. Standard of Review

[13] The Officer's decision to substitute his evaluation for a provincial nomination certificate is subject to review by this Court against the standard of reasonableness (*Parveen v Canada (Citizenship and Immigration)*, 2015 FC 473 at para 14 [*Parveen*]).

[14] Reasonableness is a deferential standard, and is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The Court will intervene only if the decision falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

[15] Section 8 of the IRPA permits the Minister of Citizenship and Immigration [Minister] to "enter into an agreement with the government of any province for the purpose of this Act." Paragraph 8(2)(a) requires "the selection and sponsorship of, and the acquisition of status by, foreign nationals under this Act" to be consistent with federal-provincial agreements. Mr. Hassan submits that, in refusing his application, the Officer acted in a manner that was inconsistent with the Agreement, and therefore the IRPA.

[16] Annex A to the Agreement concerns provincial nominees. Sections 3.1, 3.8, and 3.9 of Annex A provide as follows:

3.1 Prince Edward Island has the sole and non-transferable responsibility to assess and nominate candidates who, in Prince Edward Island's determination:	**3.1** L'Île-du-Prince-Édouard a la responsabilité exclusive et non transférable d'évaluer et de désigner les candidats dont elle estime qu'ils :
a. will be of benefit to the economic development of Prince Edward Island; and	a. contribueront à son développement économique;
b. have a strong likelihood of becoming economically established in Prince Edward Island.	b. pourront très probablement réussir leur établissement économique à l'Île-du-Prince-Édouard.
[…]	[…]
3.8 Upon receipt of the Certificate of Nomination from Prince Edward Island, Canada will:	**3.8** Sur réception du certificat de désignation de l'Île-du-Prince-Édouard, le Canada :
a. exercise the final selection in accordance with the relevant regulations;	a. prend la décision finale en matière de sélection, conformément aux dispositions réglementaires pertinentes;

b. determine the admissibility of the nominee and his or her dependants with respect to legislative requirements including health, criminality and security; and	b. détermine l'admissibilité du candidat et des personnes à sa charge à l'égard des exigences législatives, notamment en ce qui concerne la santé, la criminalité et la sécurité;
c. issue permanent resident visas to Provincial Nominees and accompanying dependants who meet all the eligibility and admissibility requirements of *the Immigration and Refugee Protection Act* and Regulations and of this Annex.	c. délivre des visas de résident permanent au candidat de la province et aux personnes à charge qui l'accompagnent, sous réserve qu'ils répondent à toutes les conditions d'entrée et d'admissibilité prévues par la Loi sur l'immigration et la protection des réfugiés, son règlement d'application, ainsi que la présente annexe.
3.9 Canada will consider a Certificate of Nomination issued by Prince Edward Island as a determination that admission is of benefit to the economic development of Prince Edward Island and that Prince Edward Island has conducted due diligence to ensure that the applicant has the ability and is likely to become economically established in Prince Edward Island.	**3.9** Le Canada considère le certificat de désignation délivré par l'Île-du-Prince-Édouard comme une indication que le candidat contribuera au développement économique de la province, et que celle-ci a fait preuve d'une diligence raisonnable pour s'assurer que le demandeur a la capacité et de bonnes chances de réussir son établissement économique à l'Île-du-Prince-Édouard.

[17] Mr. Hassan emphasizes the mandatory language in s 3.9 of Annex A to the Agreement. Under this provision, Canada must consider a Certificate of Nomination issued by PEI as determinative of two factual matters: (a) that admission of the applicant is beneficial to the economic development of PEI; and (b) that PEI has conducted due diligence to ensure that the applicant has the ability and is likely to become economically established in PEI.

[18] The strong language contained in s 3.9 may be contrasted with the weaker language found in immigration agreements between Canada and other provinces. For example, s 4.9 of

Annex A to the Canada-Saskatchewan Immigration Agreement, 2005 states that "Canada shall consider a nomination certificate […] as initial evidence". Similarly, s 4.11 of Annex A to the Canada-Ontario Immigration Agreement explicitly reserves to federal visa officers the right to request additional documents from provincial nominees and substitute evaluations under s 87(3) of the Regulations.

[19] The Minister maintains that the Officer's decision to refuse Mr. Hassan's application was consistent with the Agreement. Pursuant to s 1.14, Canada is ultimately responsible "for the selection and admission of Immigrants … wishing to reside in Prince Edward Island". Canada's responsibility to exercise the final selection in accordance with the relevant regulations is specifically acknowledged in s 3.8 of Annex A to the Agreement. The jurisprudence of this Court confirms that federal visa officers are not required to consider the same criteria as their provincial counterparts (citing *Chaudhry v Canada (Citizenship and Immigration)*, 2015 FC 1072 at para 28; and *Singh Sran v Canada (Citizenship and Immigration)*, 2012 FC 791 at para 13 [*Sran*]).

[20] Mr. Hassan notes that the IRCC Operational Manual, Overseas Processing 7-B, "Provincial Nominees" (January 2014), 5.0 [OP7-B] states that provincial governments are in the best position to assess whether provincial nominees can become economically established. While operational manuals are not binding on federal visa officers, they may assist the Court in assessing reasonableness (*Sran* at para 17). Justice Robert Barnes held in *Kikeshian v Canada (Citizenship and Immigration)*, 2011 FC 658 at para 14 [*Kikeshian*] that OP7-B creates a

presumption that provincial nominees will be able to become economically established in Canada.

[21] The Minister concedes that PEI's determination that Mr. Hassan possesses sufficient English language skills to become economically established in Canada created a presumption to this effect. When questioned by the Court about the difference in language between the Agreement and similar agreements entered into with other Canadian provinces, counsel for the Minister suggested that the mandatory language found in the Agreement may require more "fulsome" reasons to justify a substituted decision by a federal migration officer.

[22] Neither the refusal letter nor the GCMS notes make any mention of s 3.9 of Annex A to the Agreement. Nor do they mention Canada's agreement to consider a Certificate of Nomination issued by PEI as a determination that Mr. Hassan's admission is of benefit to PEI's economic development. Nor do they acknowledge that, by virtue of the Agreement, PEI is deemed to have conducted due diligence to ensure that Mr. Hassan has the ability and is likely to become economically established in PEI.

[23] I do not foreclose the possibility that, in appropriate circumstances, federal officials may be able to rebut the strong presumption created by the Agreement and substitute their own evaluation of an individual nominated by PEI. However, in this case the Officer failed to acknowledge the mandatory language of s 3.9 of Annex A to the Agreement, and conduct the analysis in accordance with the prescribed standard.

[24] Each province negotiates its own immigration agreement with Canada regarding provincial nominees. The agreements are not uniform. A migration officer who proposes to substitute his or her own evaluation for that of a nominating province must consider the terms agreed to by Canada and the province, and conduct the analysis accordingly. The Officer did not do so, and the decision was therefore unreasonable.

VII. Conclusion

[25] The application for judicial review is allowed, and the matter is remitted to a different migration officer for redetermination. Neither party proposed that a question be 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 migration officer for redetermination.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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