Federal Court Cour fédérale

Date: 20191203

Docket: IMM-6229-18

Citation: 2019 FC 1548

Ottawa, Ontario, December 3, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DAN SUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Dan Sun (the "Applicant") is a citizen of China born in 1984. While in China, the Applicant spent several years working in the cosmetics and spa industries. On July 17, 2018, the Applicant applied for a work permit to act as the manager for the spa "Signature MediSpa" for a two-year period.

[2] In her visa application, the Applicant requested that her husband and their four-year-old son be included as accompanying family members.

[3] Ultimately, in a decision dated November 7, 2018, a visa officer at the Consulate General of Canada in Hong Kong (the "Officer") dismissed the Applicant's application. In the Officer's view, the Applicant failed to demonstrate that she would be able to perform the work sought in accordance with subsection 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR"*), because she did not provide satisfactory evidence of her English language abilities.

[4] Before this Court, the Applicant argues that the Officer breached her right to procedural fairness and that the Officer's decision refusing to issue a work permit is unreasonable.

[5] I disagree with the Applicant on both counts. Accordingly, this application for judicial review is dismissed.

II. **Background and Decision Under Review**

[6] On May 9, 2018, the Applicant's employer, Ms. Eva Jin, received a positive Labour Market Impact Assessment ("LMIA") for the position of "Spa Manager" (National Occupation Classification ("NOC") 0651 "managers in customer and personal services") on a permanent, full-time, non-seasonal basis. According to the LMIA, the position required verbal and written English skills. The record contains a copy of the Applicant's offer of employment, dated June

14, 2018. The offer sets forth the key duties and responsibilities, annual salary, and the expected work hours.

[7] On July 17, 2018, the Applicant's counsel filed submissions in support of her work permit application. Of particular interest, these submissions noted that the Applicant has one year of spa consulting experience, four years of spa management experience, and previous experience working with the owner of Signature Medispa, Ms. Eva Jin, in China. The Applicant provided reference letters from her previous employers attesting to her spa management experience in China.

[8] In the submissions before the Officer, the Applicant's counsel stated as follows with respect to her previous experience working for Ms. Jin and her English language qualifications:

> [The Applicant] worked for Ms. Jin, the owner of Signature MediSpa (prospective employer in Canada) when Ms. Jin was in China so Ms. Jin is well acquainted with [the Applicant's] skills which is why she reached out to her and offered her the position [...]
>
> The language requirement for this position is English only and Ms. Sun is able to communicate in the English language. As a result she is able to put clients at ease, resolve any disputes and explain procedures and products to them in an effective manner.

[9] According to the Employment and Social Development Canada ("ESDC") description of positions falling within NOC 0651 (managers in personal and customer services), "managers in this unit group perform some or all of the following duties":

> A. Plan, organize, direct, control and evaluate the operations of an establishment providing services such as dry cleaning, hairdressing or residential cleaning, or a school providing non-vocational

> instruction in driving, languages, music, dance, art, cooking or fashion;
>
> B. Establish or implement policies and procedures for staff;
>
> C. Plan and control budget and inventory;
>
> D. Respond to inquiries or complaints and resolve problems;
>
> E. Manage contracts for advertising or marketing strategies;
>
> F. Hire, train and supervise staff.

[10] In her counsel's submissions, the Applicant listed a number of key duties for the position, which included, among others, many of the duties set forth above.

[11] On November 7, 2018, the Officer sent the Applicant a decision-letter dismissing her work permit application. The Officer stated that it dismissed the application because the Applicant was "not able to demonstrate that [she] will be able to adequately perform the work [she] seek[s]". The Officer invited the Applicant to "reapply if you feel that you can respond to these concerns and can demonstrate that your situation meets the requirements."

[12] An entry in the Global Case Management System ("GCMS") Notes also dated November 7, 2018 provides further insight on the Officer's grounds for refusing the application. In this entry, the Officer stated as follows, with my emphasis:

> Cdn job offer as a SPA manager. Noted job offer requires both oral and written English. <u>Thoroughly reviewed duties required for the job offer; satisfied that the language requirement is likely to be imperative for performing duties as a manager at the establishment.</u>

> On the application, applicant failed to present substantiated evidence for her language ability. Based on the info on file, I am not satisfied that applicant presented sufficient substantiated proof to establish that she meets the language requirements for the Cdn job offer. Application refused.

[13] It is well-established that these GCMS notes form part of the reasons for the decision under review (*Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 15).

III. **Issues and Standard of Review**

[14] I agree with the Applicant that this matter raises the following two issues:

1. Did the Officer breach the Applicant's right to procedural fairness by not providing her an opportunity to respond to its concerns?
2. Was the Officer's determination that the Applicant would not be able to perform the work of a Spa Manager due to her English language abilities reasonable?

[15] The procedural fairness issue will be reviewed by this Court on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 43). The second issue will be reviewed on a reasonableness standard as an officer's determination of whether a work permit applicant meets the requirements entails an assessment of mixed questions of fact and law (*Singh Grewal v Canada (Citizenship and Immigration)*, 2013 FC 627 at para 5).

IV. **Analysis**

[16] Before addressing the merits, I will first set forth the provisions at issue in this matter.

[17] Subsection 11(1) of the *Immigration and Refugee Protection Act ("IRPA"*), SC 2001, c 27 provides as follows:

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11 (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[18] Subsection 200(3)(a) of the *IRPR* provides as follows:

200 […] **(3)** An officer shall not issue a work permit to a foreign national if **(a)** there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	**200** […] **(3)** Le permis de travail ne peut être délivré à l'étranger dans les cas suivants : **a)** l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé;

A. Procedural fairness

[19] The Applicant submits that the Officer breached her right to procedural fairness by failing to provide her with an opportunity to address its concerns with her English language abilities. In her view, she was entitled to have an opportunity to provide documentary evidence about her language proficiency or to be interviewed by the Officer. The Applicant refers to the Operational Bulletin ("OB") regarding language assessments in the context of temporary work permit applications, which states that language abilities can be assessed through an interview or official testing.

[20] The Applicant further submits that the Officer "clearly found [her] assessment of her own language abilities not to be credible" (citing *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at paras 24, 28). By doubting the Applicant's evidence about her language proficiency, the Officer was essentially casting doubts on her credibility. In the Applicant's view, given that credibility was in issue, the Officer was required to give her an opportunity to address its concerns, and the Officer's failure to do so amounted to a breach of procedural fairness.

[21] The Respondent submits that there is no substantive right to receive a work permit and since visa applicants do not have an unqualified right to enter Canada, the level of procedural fairness is low. The Respondent further submits that a visa applicant has the burden to provide sufficient information in support of their application. Accordingly, a visa applicant must anticipate adverse inferences contained in the evidence and address them. The Respondent submits that the Applicant failed to do so.

[22] The Respondent notes that according to the OB, a visa officer should assess the language requirement set forth in the LMIA and that the document checklist includes "proof indicating [the applicant] meet[s] the requirements of the job being offered". The Applicant's LMIA required English language proficiency; therefore, so did the checklist by extension and the Applicant should have anticipated that the Officer would assess her language ability. In the Respondent's view, the Officer was not required to remind the Applicant that she had not adduced evidence to show she satisfied the English-language requirements of the job offer, or to provide her with an interview.

[23] I would first observe that this Court has distinguished between findings of adverse credibility and insufficiency of evidence in the context of visa applications. When a visa officer raises doubts about the credibility, accuracy, or genuine nature of information submitted in support of an application, a duty to provide the applicant with an opportunity to address those concerns may arise (*Tine v Canada (Citizenship and Immigration)*, 2017 FC 231 at para 11.

[24] However, where a visa officer's decision is based on the sufficiency of evidence adduced by the applicant, or to requirements of the *IRPR* and the statutory scheme at large, including language ability under subsection 200(3)(a) of the *IRPR*, there is generally no obligation to apprise a visa applicant of those concerns (*Bautista v Canada (Citizenship and Immigration)*, 2018 FC 669 at para 18; *Anenih v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 718 at paras 15-16; *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at paras 8-22). Accordingly, a visa applicant has the onus to put forward sufficient material to satisfy a visa officer that they can fulfill the job duties in question on a balance of probabilities (*Singh v Canada (Citizenship and Immigration)*, 2015 FC 115 at para 25).

[25] In other words, a visa officer is under no obligation to provide a visa applicant with a procedural fairness letter or an oral interview when the officer is simply drawing conclusions from the evidence submitted by the applicant, or the lack thereof (*Alaje v Canada (Citizenship and Immigration)*, 2017 FC 949 at para 19).

[26] In the case at bar, I cannot agree with the Applicant's argument that the Officer breached her right to procedural fairness. Ultimately, it was the Applicant's responsibility to provide the

Officer with sufficient information setting forth that she meets the requirements of the position for which she sought a work permit (i.e., the requirements of subsection 200(3)(a) of the *IRPR*). I am not persuaded by the Applicant's submission that the Officer's conclusion amounts to a credibility finding, that there is any suggestion that she was not believed, or that the Officer raised issues concerning the genuineness of her supporting documents.

[27] Rather, it is apparent from the GCMS Notes that the Applicant had not, in the Officer's view, provided sufficient evidence to prove, on a balance of probabilities, that she would be able to adequately communicate in English as required by the position and subsection 200(3)(a) of the *IRPR*.

[28] The Officer invited the Applicant to "reapply if you feel that you can respond to these concerns and can demonstrate that your situation meets the requirements". These reasons do not suggest that the Officer doubted the credibility of the Applicant's evidence or the genuineness of the documents that she provided. Rather, the Officer found that in addition to her counsel's submissions, objective evidence was necessary to determine if the Applicant met the language requirements of the spa manager position. I see no reason to conclude that the Officer failed to observe procedural fairness in this matter.

B. Reasonableness of the Officer's decision

[29] The Applicant challenges the Officer's conclusion that she failed to demonstrate she has the required English-language proficiency. On this issue, she argues that proof of her language

abilities was not required according to the work permit document checklist and that she confirmed her English language skills through her counsel's submissions. The Applicant submits that in her application and her counsel's submissions, she stated she could communicate in English. The Applicant also submits that she had previously worked for her employer, Ms. Jin, while in China, and her employer was aware of her language skills.

[30] The Respondent submits the Applicant's LMIA explicitly states that the job offer required both written and oral English skills. The fact that proof of language ability is not directly spelled out in the work permit application does not relieve an applicant of their obligation to provide sufficient evidence in support of the application. The Respondent further submits that the employer's knowledge of the Applicant's English language skills is not proof of her English-language proficiency. Also, this statement is only included in the submissions of her counsel before the Officer and is not evidence.

[31] I would first note that the OB regarding language assessments of work permit applicants provides as follows, with my emphasis:

> An applicant's language ability can be assessed through an interview or official testing such as IELTS/TEF or in-house mission testing practice. In deciding to require proof of language ability, the officer's notes should refer to the LMIA requirements, working conditions as described in the job offer and NOC requirements for the specific occupation, in determining what precise level of language requirement is necessary to perform the work sought. <u>System notes must clearly indicate the officer's language assessment, and in the case of a refusal, clearly show a detailed analysis on how the applicant failed to satisfy the officer that they would be able to perform the work sought.</u>

[32] The Officer's reasons do not "clearly indicate" its language assessment as set forth in the OB. In this matter, the Applicant did not provide any objective evidence regarding her English language abilities, apart from the submissions of her counsel that she is "able to communicate in the English language" and the fact that she had previously worked for her employer, Ms. Jin, in China. In my view, the Officer could not undertake a "detailed analysis" on how the Applicant failed to demonstrate that she would be able to perform the work of a spa manager, without objective evidence of her language abilities. Since the Officer was under no general duty to apprise the Applicant of its concerns about whether or not she met the requirements of the regulations, it was incumbent on the Applicant to provide documents attesting to her English language skills for the Officer's assessment.

[33] The principal duties for the spa management position, as set forth in the offer letter and the NOC description, entail communicating with staff members and clients (responding to inquiries, complaints, and resolving problems, hiring, training, and supervising staff, establishing or implementing policies and procedures for staff…), while the LMIA specifies that verbal and written English language skills are required. In this context, it was reasonable for the Officer to conclude that objective evidence of the Applicant's English language skills would be required to determine if the Applicant could perform the work of a spa manager.

[34] In the context of judicial reviews of temporary work permit applications, this Court has held that it is reasonable for a visa officer to expect something more than an English language application and cover letter to verify the applicant's ability to speak and write in English, where

there are reasonable grounds to believe that such language skills are necessary to perform the work sought in accordance with subsection 200(3)(a) of the *IRPR*.

[35] In a similar judicial review of a visa officer's decision refusing to issue a temporary work permit (to work as an ironworker), Justice Barnes held as follows, with my emphasis (*Virk v Canada (Citizenship and Immigration)*, 2014 FC 150):

> [5] …the Officer also found that Mr. Virk had failed to provide evidence of his ability to communicate in English. The Labour Market Opinion clearly stated that the position required basic oral and written English. This requirement is hardly surprising in the context of proposed employment as an ironworker working at various construction sites in Surrey. The Document Checklist also clearly states that an applicant must provide "proof indicating you meet the requirements of the job being offered."
>
> [6] Mr. Virk provided nothing to the Officer to verify his English language skills. I do not accept [counsel's] argument that an English language application and cover letter is any evidence of language proficiency but, even if it was, it was not unreasonable for the Officer to require something more. I also do not accept [counsel's] argument that the Officer had an obligation to seek out the missing evidence. Mr. Virk was informed about the requirement and ignored it, perhaps for the reason that he could not read the instructions. This is the type of evidence that the Applicant is required to submit without being prompted or reminded. There is no breach of procedural fairness in these circumstances and the Officer's finding that an essential aspect of the proposed employment was missing was reasonable.

[36] In another matter, Justice Rennie held that it was reasonable for a visa officer to expect an applicant for a temporary work permit (to work as a kitchen helper) to provide proof that he speaks and writes in English. In this regard, Justice Rennie held as follows with my emphasis (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 360 at paras 12-13):

> [12] ...the applicant must establish that he meets the requirements of the job for which he seeks to come to Canada. In this case, the

> applicant did not meet his burden of establishing that he met the language requirements of the job description. While there was evidence regarding his language ability, including letters from the applicant's superior, an Indian army commander, and his employer at the hotel where he worked, these letters did not confirm an ability to *speak* or *write*, but rather only an ability to understand English.
>
> [13] The Officer's reasons do not explicitly state that the letters are deficient because they do not mention the applicant's written or oral English skills. However, it would be contrary to the guidance of the Supreme Court in *Newfoundland and Labrador Nurses' Union* to require such a statement in the reasons. The Officer considered the letters, but concluded that the applicant's English ability was insufficient to grant the work permit. Based on a review of the record, this conclusion was reasonably open to the Officer, and therefore the application must be dismissed.

[37] Similarly, in the present case at bar, it was reasonable for the Officer to find that evidence of the Applicant's English language ability was lacking notwithstanding her counsel's submission that she is "able to communicate in the English language" and the fact that she previously worked with Ms. Jin in China. I agree with the Respondent that bald statements of a visa applicant's legal representative do not amount to evidence of his or her language abilities. With respect to the Applicant's previous work for Ms. Jin in China, there is no objective evidence in the record that the Applicant performed work for Ms. Jin in the English language, that she is able to speak or write in English, or understand spoken English. Nor did the record contain any indication that Ms. Jin was aware of the Applicant's English language skills or that she was satisfied the Applicant's language skills would be adequate for the position in Canada.

[38] For these reasons, the Officer's conclusion that the Applicant did not "demonstrate that [she] will be able to adequately perform the work" of a spa manager due to the lack of evidence of her English language skills falls within a range of reasonable outcomes, which are defensible

in respect of the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47). While the Officer's assessment of the job requirements and expected English language abilities could have been more detailed, the reasons are supported by the record, allow this Court to understand why the Officer made its decision, and permit this Court to determine if its conclusion is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at paras 12-16).

V. **Certified Question**

[39] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[40] For the foregoing reasons, this application for judicial review is dismissed.

JUDGMENT IN IMM-6229-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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