

Federal Court



Cour fédérale

Date: 20231121

Docket: IMM-513-23

Citation: 2023 FC 1544

Ottawa, Ontario, November 21, 2023

PRESENT: Madam Justice Azmudeh

BETWEEN:

TAJI KESHMIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Decision

[1] The Applicant, Taji Keshmian [the “Applicant”], is seeking a Judicial Review under section 72(1) of the Immigration and Refugee Protection Act [IRPA] concerning the rejection of their application for permanent residence [“PR”] in Canada under the Federal Skilled Trades [“FST”] class.

[2] The Judicial Review is dismissed for the following reasons.

II. Overview

[3] The Applicant, Taji Keshmian is a 41-year-old citizen of Iran and is seeking a judicial review of the refusal of her application for permanent residence in Canada under the FST class, with the intention of working as a Construction Supervisor for Jaswant Framing [the "Employer"] in British-Columbia.

[4] The FST permanent resident application relied on the Applicant's job offer with a letter from the Employer for the position of Construction Supervisor that referred to two National Occupation Classification ["NOC"] codes: NOC 7217 (as per NOC 2006) and NOC 7302 (as per NOC 2011).

[5] Prior to applying for permanent residence, as she was required, the Applicant had obtained a favourable Labour Market Impact Assessment ["LMIA"] issued by Employment and Social Development Canada ["ESDC"] for the same job offer. The favourable LMIA was issued on July 13, 2016 and stated that it was for the position identified with the NOC Code "7217 – Construction Supervisor." This was consistent with the 2006 version of the NOC.

[6] The parties agree that the two NOC versions mentioned in the job offer, 2011 NOC 7302 which replaced the 2006 NOC 7217 have nearly identical job titles, main duties, and job requirements, as also demonstrated by the Respondent's materials:

<p>NOC 7217- Contractors and Supervisors, <u>Heavy Construction Equipment Crews</u></p>	<p>NOC 7302- Contractors and supervisors, <u>heavy equipment operator crews</u></p>
<p>Example titles Index of titles</p> <ul style="list-style-type: none"> • Excavating contractor • Foreman/woman, demolition • Foreman/woman, drilling and blasting - construction • Foreman/woman, logging road construction • Foreman/woman, railway gang • Foreman/woman, railway track maintenance • Paving contractor • Pipeline construction supervisor • Road maintenance foreman/woman • Section foreman/woman, railway • Supervisor, heavy equipment operators • Supervisor, oil field construction • Supervisor, water well drilling • Track foreman/woman - railway 	<p>Example titles Index of titles</p> <ul style="list-style-type: none"> • Excavating contractor • Foreman/woman, demolition • Foreman/woman, drilling and blasting - construction • Foreman/woman, logging road construction • Foreman/woman, railway gang • Foreman/woman, railway track maintenance • Paving contractor • Pipeline construction supervisor • Road maintenance foreman/woman • Section foreman/woman, railway • Supervisor, heavy equipment operators • Supervisor, oil field construction • Supervisor, water well drilling • Track foreman/woman - railway

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<p>Main duties This group performs some or all of the following duties:</p> <p>Contractors and supervisors in this unit group perform some or all of the following duties:</p> <ul style="list-style-type: none"> • Supervise, co-ordinate and schedule the activities of workers who operate cranes and construction, paving, drilling, railway maintenance and other similar heavy equipment • Establish methods to meet work schedules and co-ordinate work activities with other project supervisors or managers • Requisition materials and supplies • Resolve work problems and recommend measures to improve productivity • Train or arrange for training of workers • Recommend personnel actions such as hirings and promotions • Prepare production and other reports • May manage the operations of own company • May also supervise, co-ordinate and schedule the activities of related apprentices, helpers and labourers. 	<p>Main duties This group performs some or all of the following duties:</p> <p>Contractors and supervisors in this unit group perform some or all of the following duties:</p> <ul style="list-style-type: none"> • Supervise, co-ordinate and schedule the activities of workers who operate cranes and construction, paving, drilling, railway maintenance and other similar heavy equipment • Establish methods to meet work schedules and co-ordinate work activities with other project supervisors or managers • Requisition materials and supplies • Resolve work problems and recommend measures to improve productivity • Train or arrange for training of workers • Recommend personnel actions such as hirings and promotions • Prepare production and other reports • May manage the operations of own company • May also supervise, co-ordinate and schedule the activities of related apprentices, helpers and labourers.
<p>Employment requirements</p> <ul style="list-style-type: none"> • Completion of secondary school is usually required. • Several years of experience in the occupation supervised is required. • Journeyman/woman trade certification in a relevant trade may be required. 	<p>Employment requirements</p> <ul style="list-style-type: none"> • Completion of secondary school is usually required. • Several years of experience in the occupation supervised is required. • Journeyman/woman trade certification in a relevant trade may be required.

<p>Additional information</p> <ul style="list-style-type: none"> • There is some mobility between occupations classified in this unit group. <p>Exclusions</p> <ul style="list-style-type: none"> • Supervisors of heavy equipment mechanics (<u>in 7216 Contractors and Supervisors, Mechanic Trades</u>) • Supervisors of logging machinery operators (in 8211 Supervisors, Logging and Forestry) 	<p>Additional information</p> <ul style="list-style-type: none"> • There is some mobility between occupations classified in this unit group. <p>Exclusions</p> <ul style="list-style-type: none"> • Supervisors of heavy equipment mechanics (<u>in 7301 Contractors and supervisors, mechanic trades</u>) • Supervisors of logging machinery operators (in 8211 Supervisors, logging and forestry)
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[7] The Applicant submitted her application under the FST on or about October 31, 2016 with the supporting documents that included the Employer’s job offer and the LMIA. Finally, after multiple inquiries as to the status of the application and filing of a Mandamus application at this Court, an officer from Immigration Refugee Citizenship Canada [(the “Officer”)] rejects the application on July 15, 2022. The basis for the Officer’s refusal was that the Applicant did not meet the requirements under ss. 87.2(3) of the Immigration and Refugee Protection Regulations SOR 2002-227 [“IRPR”].

[8] The Officer assessed the Applicant’s application materials against NOC 7302 and found that she did not have the requisite experience as a Construction Supervisor. The Officer analyzed the offer of arranged employment from the Employer which they deemed to be lacking in specificity and did not clearly indicate alignment with the description found in NOC 7302.

[9] In their written memorandums, both parties limited their argument to the NOC version used by the Officer. The Applicant argues that the Officer should have contacted the Employer, the ESDC or the Applicant to clarify which NOC code they had used. By contrast, the

Respondent submits that because the job offer letter specifically referenced both codes and that the Officer had relied on a nearly identical version of the NOC most recent at the locked in time of the application, their decision to assess the application without seeking further clarifications was reasonable. In a further reply, the Applicant's counsel referred to a more recent NOC update in 2021 without disclosing its content and making submissions on it. In short, counsel had not applied to the Court for leave to disclose the relevant NOC and submits that the Officer should have mentioned the updated version.

[10] At the oral hearing of the Judicial Review, I invited the parties to advise of their positions on whether or how they wished to make submission on the reasonableness of the substance of the Officer's decision. This is because the jurisprudence is clear that a party cannot raise a new argument at a hearing on the basis that it would prejudice the other party: *Kabir v Canada (Citizenship and Immigration)*, 2023 FC 1123 at para 19, *Ali v Canada (Citizenship and Immigration)*, 2021 FC 731, at para 51; *Riboul v Canada (Citizenship and Immigration)*, 2020 FC 263, at para 43; *Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318, at para 81; *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754, at para 14; *Dave v Canada (Minister of Citizenship and Immigration)*, 2005 FC 510 at para 5; and *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, para 39.

[11] Both parties continued to limit their submission on the issue of the version of the NOC used by the Officer. Counsel for the Applicant referred to the various parts of the GCMS notes to in the context of arguing that clarification in the specific NOC version was required.

III. Statutory Framework

[12] The FST class is a prescribed class for the purposes of economic immigration as a permanent resident, and is governed by s 87.2 of the IRPR:

Federal Skilled Trades Class	Travailleurs de métiers spécialisés (fédéral)
Definition of skilled trade occupation	Définition de métier spécialisé
87.2 (1) In this section, skilled trade occupation means an occupation, other than a restricted occupation, in any of the following groups listed in the National Occupational Classification:	87.2 (1) Pour l'application du présent article, métier spécialisé s'entend du métier qui fait partie de l'un ou l'autre des groupes ci-après de la Classification nationale des professions, exception faite des métiers qui sont des professions d'accès limité :
[...]	[...]
Member of class	Qualité
(3) A foreign national is a member of the federal skilled trades class if	(3) Fait partie de la catégorie des travailleurs de métiers spécialisés (fédéral) l'étranger qui :
[...]	[...]
(b) they have, during the five years before the date on which their permanent resident visa application is made, acquired at least two years of full-time work experience, or the equivalent in part-time work, in the skilled trade occupation specified in the application after becoming qualified to independently practice the occupation, and during that period of employment has performed	b) a accumulé, au cours des cinq années qui ont précédé la date de présentation de sa demande de visa de résident permanent, au moins deux années d'expérience de travail à temps plein ou l'équivalent temps plein pour un travail à temps partiel dans le métier spécialisé visé par sa demande après qu'il se soit qualifié pour pratiquer son métier spécialisé de façon autonome, et a accompli pendant cette période d'emploi, à la fois :
(i) the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification, and	(i) l'ensemble des tâches figurant dans l'énoncé principal établi pour le métier spécialisé dans les descriptions des métiers spécialisés de la Classification nationale des professions,
(ii) a substantial number of the main duties listed in the description of the occupation set	(ii) une partie appréciable des fonctions principales du métier spécialisé figurant dans

out in the National Occupational Classification, including all of the essential duties;

[...]

(d) they meet at least one of the following requirements:

[...]

(iv) they do not hold a valid work permit, are not authorized to work in Canada under section 186 on the date on which their application for a permanent resident visa is made and

(A) they have an offer of employment that is for continuous full-time work having a total duration of at least one year after the date on which a permanent resident visa is issued and that is in the skilled trade occupation specified in the application,

(B) the offer is made by up to two employers, none of whom is an embassy, high commission or consulate in Canada or an employer who is referred to in subparagraph 200(3)(h)(ii) or (iii), and

(C) an officer has approved the offer of employment based on a valid assessment — provided to the officer by the Department of Employment and Social Development, on the same basis as an assessment provided for the issuance of a work permit, at the request of up to two employers or an officer — that the requirements set out in subsection 203(1) with respect to the offer have been met, and

[...]

les descriptions des métiers spécialisés de la Classification nationale des professions, notamment toutes les fonctions essentielles;

[...]

d) satisfait à au moins l'une des exigences suivantes :

[...]

(iv) il n'est pas titulaire d'un permis de travail valide, n'est pas autorisé à travailler au Canada au titre de l'article 186 au moment de la présentation de sa demande de visa permanent et les conditions suivantes sont réunies :

(A) il a reçu une offre d'emploi à temps plein — pour une durée continue totale d'au moins un an à partir de la date de délivrance du visa de résident permanent — pour le métier spécialisé visé par sa demande,

(B) l'offre d'emploi lui a été présentée par au plus deux employeurs, autres qu'une ambassade, un haut-commissariat ou un consulat au Canada ou qu'un employeur visé aux sous-alinéas 200(3)(h)(ii) ou (iii),

(C) un agent a approuvé cette offre d'emploi sur le fondement d'une évaluation valide — fournie par le ministère de l'Emploi et du Développement social à la demande d'au plus deux employeurs ou d'un agent, au même titre qu'une évaluation fournie pour la délivrance d'un permis de travail — qui atteste que les exigences prévues au paragraphe 203(1) sont remplies à l'égard de l'offre,

[...]

IV. Issues and Standard of Review

[13] This application for Judicial Review raises the following issue:

A. *Was the Officer's decision to reasonable?*

[14] There is no dispute between the parties that the standard of review in this case is reasonableness, is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at paras 12-13 and 15; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras 8, 63.

V. Analysis

[15] The only issue before me is whether it was reasonable for the Officer to review the application under the 2011 NOC version (NOC 7302) without seeking further clarification from the Employer, the ESDC or the Applicant and to never mentioning a more recent update in 2021.

[16] The Applicant filed her permanent resident application in 2016, i.e. when the 2011 NOC version was in force. The Officer referred to 2016 as the “application lock-in” and decided the application on the basis of NOC 7302, i.e., the 2011 version. The Employer’s job offer letter itself had requested the application to be assessed for the position of Construction Supervisor that referred to the two NOCs: 7217 (as per NOC 2006) and 7302 (as per NOC 2011). It was the Officer’s duty to engage in an independent assessment of the application notwithstanding the positive LMIA.

[17] The two NOC versions are virtually identical, and the Applicant does not raise how she was prejudiced by having the officer assess her file under the 2011 version without seeking further clarification. Nor did the Applicant's counsel argued what, if any facts, needed clarification without which the decision reached was unreasonable. There is no argument before me to suggest how an assessment under the 2006 NOC version could have been different. Without explaining the nature of the prejudice, the Applicant is seeking this Court to favour form over substance.

[18] I agree with the Respondent that the Officer reasonably used NOC 7302 to assess the application. NOC 7302 replaced NOC 7217 in 2011, and it was reasonable for the Officer to use the NOC code that was in force at the time of the application. As already stated, NOC 7217 and NOC 7302 are almost identical, and assessing under NOC 7217 would not have made a difference to the outcome of the Applicant's application.

[19] The Applicant also does not argue how the Officer's decision not to consider the 2021 NOC, when that NOC did not even exist when the Applicant filed her application, was unreasonable.

VI. Conclusion

[20] The Officer's decision is reasonable, as it does exhibit the requisite degree of justification, intelligibility, and transparency. The application for judicial review is therefore dismissed.

[21] Neither party proposed a question for certification and I agree that none arises in this matter.

JUDGMENT in IMM-513-23

THIS COURT'S JUDGMENT is that

1. The Judicial Review is dismissed.

"Negar Azmudeh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-513-23

STYLE OF CAUSE: TAJI KESHMIAN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 7, 2023

REASONS FOR JUDGMENT AND JUDGMENT: AZMUDEH J.

DATED: NOVEMBER 21, 2023

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