Federal Court		Cour fédérale

Date: 20110318

Docket: IMM-2658-10

Citation: 2011 FC 337

Ottawa, Ontario, March 18, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

NIRMAL KUMAR SHARMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), of a decision of a Visa Officer of the Consulate General of Canada in Sydney, Australia, dated March 9, 2010. The Officer refused the applicant's application for permanent residence under the Federal Skilled Worker class.

Background

[2] The applicant, Mr. Nirmal Kumar Sharma, born on May 9, 1963, is a citizen of New Zealand and India. Mr. Sharma submitted an application for permanent residence in Canada as a Federal Skilled Worker in December 2006. He was the principal applicant and his wife and two sons were included as dependents.

[3] Mr. Sharma, who was 43 years old at the time he submitted his application, indicated that he worked in the banking field for sixteen years and as of 2004 he was a lawyer and a financial consultant in India. He speaks fluent English and holds two masters degrees and a law degree.

[4] Mr. Sharma immigrated to New Zealand in October 2005. Since that time, he had been engaged in completing the necessary studies to allow himself to be licensed as a lawyer and as an accountant in New Zealand. During that time, Mr. Sharma worked in temporary or unpaid positions.

[5] In the Visa Officer's CAIPS notes, the Officer indicates his concerns about Mr. Sharma's work experience since he did not appear to have worked in a relevant occupation since emigrating from India to New Zealand in October 2005. The Officer therefore decided to call Mr. Sharma for an interview.

Impugned Decision

[6] In his decision rendered on March 9, 2010, the Officer concluded that although Mr. Sharma had obtained 70 points in the assessment of his application for a permanent resident visa as a skilled worker - thus meeting the passing mark set at 67 points - the points awarded did not reflect his

ability to become economically established in Canada. The Officer made a negative substituted evaluation under s. 76(3) of the Regulations. A Senior Visa Officer concurred with the Officer's evaluation.

[7] The Officer based his decision on the fact that he was not convinced that since residing in New Zealand in August 2005, Mr. Sharma had demonstrated that he could integrate the labour market. The Officer noted that during the 4.5 years Mr. Sharma was in New Zealand, he had only filled temporary jobs and although he was successful in having some of his credentials as a lawyer or an accountant recognized and accredited, he had not secured from the respective corporative bodies the authorization to work in these occupations.

[8] In assessing the points for experience, the Officer gave Mr. Sharma a one year experience as a consultant (NOC 1122); no experience as a banker because the Officer determined that the applicant held a clerk's position (NOC 1212); and no experience as a lawyer (NOC 4112).

[9] The Officer concluded that Mr. Sharma's weak economic integration to the labour market in New Zealand was an indication of his potential integration to the labour market in Canada.

[10] The Officer reiterated that Mr. Sharma had the opportunity to address these concerns during his interview but the explanations provided by the applicant did not satisfy the Officer that the applicant could become economically established in Canada.

Relevant Provisions

[11] Subsection 76(1) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (the Regulations) read as follows:

Federal Skilled Workers	*Travailleurs qualifiés (fédéral)*
Federal Skilled Worker Class	Travailleurs qualifiés (fédéral)
Selection criteria	Critères de sélection
76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:	**76.** (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :
(*a*) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,	*a*) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :
(i) education, in accordance with section 78,	(i) les études, aux termes de l'article 78,
(ii) proficiency in the official languages of Canada, in accordance with section 79,	(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,
(iii) experience, in accordance with section 80,	(iii) l'expérience, aux termes de l'article 80,
(iv) age, in accordance with section 81,	(iv) l'âge, aux termes de l'article 81,
(v) arranged employment, in accordance with section 82, and	(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) adaptability, in accordance with section 83; and

(*b*) the skilled worker must

(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or

(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

Number of points

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of

(*a*) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;

(*b*) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

(*c*) the potential, taking into

(vi) la capacité d'adaptation, aux termes de l'article 83;

b) le travailleur qualifié :

(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,

(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

Nombre de points

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :

a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;

b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

c) les perspectives

account economic and other relevant factors, for the establishment of skilled workers in Canada.	d’établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.
Circumstances for officer's substituted evaluation	Substitution de l’appréciation de l’agent à la grille
(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(*a*) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.	(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — n’est pas un indicateur suffisant de l’aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l’agent peut substituer son appréciation aux critères prévus à l’alinéa (1)*a*).
Concurrence	Confirmation
(4) An evaluation made under subsection (3) requires the concurrence of a second officer.	(4) Toute décision de l’agent au titre du paragraphe (3) doit être confirmée par un autre agent.

Issues

[12] The are several issues that arise in this proceeding and they can be summarized as follows:

a) *What is the standard of review?*

b) *Did the Officer err by making findings of fact without regard to the evidence before him?*

c) *Was the decision unfair because the Officer never advised the applicant he was considering exercising a negative substituted evaluation?*

d) *Should the applicant be awarded costs?*

Analysis

a) What is the standard of review?

[13] The parties both agree that the standard to be applied to a decision of a Visa Officer deciding on an application for a permanent residence visa is reasonableness. In the previous jurisprudence of this Court, it was held that the standard of review was reasonableness *simpliciter* (see *Tathgur v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1293, [2007] FCJ No 1662, at para 9; and *Al-Kassous v Canada (Minister of Citizenship and Immigration)*, 2007 FC 541, [2007] FCJ No 731, at para 22).

[14] Since the recent decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the previous standards of review were collapsed into two, correctness and reasonableness. It was held in *Dunsmuir*, *supra*, that questions of fact or discretion as well as questions where the legal issues cannot be easily separated from the factual issues generally attract the standard of reasonableness. Decisions of immigration officers about whether to grant a permanent resident visa are discretionary decisions based essentially on the facts of each particular application. Thus, the immigration officers are entitled to a high degree of deference (see *Roohi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1408, [2008] FCJ No 1834, at para 13). Therefore, the reasonableness standard applies.

[15] However, when it comes to issues of procedural fairness, legal error and legal jurisdiction, the decision is reviewable on the standard of correctness (see *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 1 SCJ No 3). In this case, the applicant alleges that the Officer failed to advise him that he was considering exercising negative discretion and to

give him an opportunity to address the concerns. This is a matter of fairness and no deference is owed to the Officer when considering the issue.

b) Did the Officer err by making findings of fact without regard to the evidence before him?

[16] The applicant submits that the Officer's findings were unreasonable because the Officer unjustifiably concluded that by failing to hold a full-time position in New Zealand the applicant would not be able to become employed in Canada. The applicant further submits that this conclusion disregarded the evidence that the applicant had been studying to obtain accreditation as a lawyer and as an accountant.

[17] Moreover, the applicant alleges that the Officer erred by disregarding the various credentials the applicant obtained in New Zealand, his volunteer activities and other activities, all of which demonstrated that in the medium to long-term, the applicant would be able to work in his chosen fields of law and accounting in New Zealand. The applicant further alleges that by completely ignoring or misconstruing the applicant's accomplishments, the Officer rendered an unreasonable decision and thereby erred in law.

[18] The applicant claims that there was no factual or evidentiary basis for the Visa Officer's findings that the economy and labour market of New Zealand was similar to Canada's in many ways, and therefore the applicant would not be able to find employment in Canada. Thus, the applicant submits that the Officer based his decision on opinion and conjecture rather than the facts before him.

[19] On the other hand, the respondent submits that the Officer conducted a thorough interview during which he asked the applicant to provide details regarding his work experience. The Officer found that the applicant had overstated many of his duties and responsibilities. As an example, the respondent points out that the applicant claimed to have 16 years of experience as a banker but that his position was as a "coin note examiner grade II- clerk gr II". Thus, it was reasonable for the Officer to observe that this was a clerical position and not award points for experience.

[20] The respondent also submits that the Officer was reasonable in determining that the applicant had not established that he had a year of paid experience as a lawyer as he had only been voluntarily assisting his uncle's law practice in India.

[21] The Officer was very thorough in his determination of the applicant's previous work experience. The Officer's reasons for refusing to recognize the applicant's previous work experience are clearly reasonable. More particularly, he explained why he only awarded the applicant the equivalent of one year experience as a consultant (NOC 1122). In the end, the Officer gave the applicant 15 out of 21 points. Thus, in the case at bar, the applicant had the necessary amount of points.

[22] In the CAIPS notes, the Officer determined the following:

> WITH 1 YR EXPERIENCE, HE STILL GETS 70 POINTS. I AM RECOMMENDING NEGATIVE SUBSTITUTION OF EVALUATION FOR THE FOLLOWING REASONS:
>
> MIR: PLEASE CONSIDER THIS RECOMMENDATION AS ACTING MANAGER:

> EVEN THOUGH HE GETS 70 POINTS, I AM NOT SATISFIED HE WILL SETTLE SUCCESSFULLY IN CANADA AND THIS IS NOT REPRESENTATIAVE [sic] OF HIS CHANCES TO MAKE IT. TAKING AS A REFERENCE THE ALMOST 5 YRS HE HAS BEEN RESIDING IN NZ AS PERM RESIDENT AND NOT BEING ABLE TO SECURE JOBS IS REVEALING OF HIS CABABILITY [sic] OF DOING IT ONCE IN CANADA WHERE HE WOULD HAVE TO START THE RECOGNITION OF HIS CREDENTIALS ALL OVER AGAIN. CONSIDERING THAT HE IS NOT GETTING YOUNGER, RUNNING ON HIS 47 NEXT MAY, HE WOLD [sic] HAVE A HARD TIME MAKING IT IN CANADA FOR THE OCCUPATIONS HE LISTED IN APPENDIX 3 EITHER AS A BANKER, OR A FINANCE CONSULTANT OR A LAWYER OR A BANKER.

[23] The Court is of the view that these reasons are reasonable. While the Officer did not mention that the applicant was studying most of the time and could therefore not afford to work full-time, the Court is of the opinion that it does not impact on the outcome of this case. It could also be mentioned that when considering the applicant's situation to become economically established in Canada, it is not unreasonable to conclude that he will have to obtain Canadian accreditation related to some of his occupations e.g. lawyer and accountant.

[24] The Court therefore concludes that the evidence on file provided grounds to the Officer to conclude that the assessment pursuant to s. 76(1) of the Regulations was not a sufficient indication that the applicant would become economically established in Canada. The Court believes that the Officer did not err in deciding to proceed with a substituted evaluation of the likelihood of the applicant's ability to adapt and to become economically established as a skilled worker in Canada.

c) Was the decision unfair because the Officer never advised the applicant he was considering exercising a negative substituted evaluation?

[25] The applicant argues that the decision is unfair because the applicant was never told that the Officer was considering exercising negative discretion.

[26] The respondent submits that there is no obligation by the Visa Officer to inform an applicant that he is developing a negative impression of an applicant as the Officer's concerns arise. The respondent also submits that the CAIPS notes demonstrate that the Officer had put forth his concerns and sought further clarification.

[27] This Court recalls that the duty to demonstrate that an applicant has met the criteria of the occupation under which an assessment was requested, lies with the applicant (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2006] FCJ No 1597, at para 24).

[28] In the case at bar, the Visa Officer unilaterally decided to exercise his discretion, in a negative way pursuant to s. 76(3) of the Regulations. The Court agrees with the respondents that an officer has no obligation to provide the applicant with a running score at each step of the interview (*Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, [2004] FCJ No 317). However, in this case, failing to inform the applicant that a negative discretion was going to be exercised notwithstanding the fact that the applicant had obtained a sufficient amount of points - i. e. three (3) points above the minimum required - resulted in a breach of the duty of procedural fairness.

[29] Based on the evidence of this case, the Officer sent a letter dated March 9, 2010 to the applicant. In his letter, the Officer mentions that he is not satisfied that the points that the applicant has been awarded are an accurate reflection of the likelihood of his ability to become economically established in Canada. He further mentions that this issue was discussed during the interview with the applicant (Application record at p 7).

[30] In his affidavit, signed June 24, 2010, the applicant alleges that he did not know that the Officer was intending to exercise his negative decision and that he was not provided an opportunity to respond to the Officer's concern:

> The officer asked various other questions and I answered them directly and in detail. At no point during the interview did the officer divulge that he intended to exercise negative discretion in my case, nor did the officer provide me with an opportunity to address the concerns he later stated in his refusal letter, i.e. that I had not integrated into the labour market in New Zealand, that New Zealand is similar to Canada in its labour market and economy, and that my weak integration into the labour market in New Zealand was indicative of my ability to establish in Canada.
> (Application Record at p 15, para 11).

[31] The Officer's affidavit dated December 31, 2010 does not address or attempt to address the applicant's allegations. A review of the Officer's CAIPS notes does not indicate that the Officer discussed his concerns with the applicant in the course of the interview. The CAIPS notes dated February 23, 2010 do not reflect the content of his letter dated March 9, 2010. Accordingly, in view of the conflicted evidence and absent clear indication that the Officer's concerns were indeed discussed with the applicant, the Court finds that the applicant was not afforded the opportunity to address the Officer's concern with respect to his settlement plans in Canada. For these reasons, the

Court finds that there has been a breach of procedural fairness in the process. The judicial review is allowed and the matter is referred to a different officer for redetermination.

d) Should the applicant be awarded costs?

[32] At the hearing before this Court, the applicant withdrew his request for costs. There will be no order as to costs. There is no serious question of general importance that would warrant certification of a question.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed;
2. The matter is remitted for reconsideration by another Visa Officer;
3. No costs awarded;
4. No question of general importance is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Matthew Jeffery	FOR THE APPLICANT
Catherine Vasilaros	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Jeffery Law Firm Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT