Federal Court  Cour fédérale

Date: 20120109

Docket: IMM-35-11

Citation: 2012 FC 25

Ottawa, Ontario, January 9, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

IRUM RAHIM TALPUR
ABDUL RAHIM TALPUR
MUHAMMAD ISAAC
IZZA RAHIM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of a Visa Officer at the Consulate General of Canada in Sydney, Australia. The Visa Officer refused the Applicants' application for permanent residence under the Federal Skilled Worker category.

1. Facts

[2] The Principal Applicant is Dr. Irum Rahim Talpur. On December 12, 2009, the Canadian Embassy in Australia received her application for permanent residence under the skilled worker category, in which she included her husband, Abdul Rahim Talpur, and her two children, Muhammad Isaac and Izza Rahim, as her dependants.

[3] In her application, the Principal Applicant indicated under the title “work experience”, that she has over three years experience as a general practitioner under the National Occupational Code 3112, “General Practitioners and Family Physicians” (“NOC 3112”). In support of her application, she submitted her Bachelor of Medicine and Bachelor of Surgery, issued in 2002, and a letter from the Ali Medicare Healthcare and Vaccination Centre, signed by Dr. Ali Raza, detailing her work history. Dr. Raza attested that the Principal Applicant had been practising full-time in his clinic as a general practitioner from June 2003 to December 2005. Additionally, the Principal Applicant holds two master’s degrees from Deakin University in Australia, one in public health and the other in health promotion.

[4] The Principal Applicant was interviewed at the Canadian High Commission in Sydney, Australia on August 30, 2010 regarding her experience as a general practitioner. According to the Computer Assisted Immigration Processing System (“CAIPS”) notes, the Visa Officer expressed concern about the attestation written by Dr. Raza, noting that its main part was almost identical to the description of duties set out in NOC 3112. According to her notes, the Visa Officer found that Dr. Talpur's explanation that Dr. Raza does not speak English well and may have done research on

the internet to find proper words to describe her duties did not overcome her concerns about the *bona fides* of the letter.

[5] According to the CAIPS notes, the Officer then asked for other documentary evidence of Dr. Talpur's work experience, such as pay slips. The Principal Applicant declared that in Pakistan, she was paid cash and that there was no accounting system from either the government or the private centre of Ali Medicare.

[6] The Officer then asked questions related to pre-natal and post-natal care, which she considered as Dr. Talpur's main duty as declared in her experience certificate. The Visa Officer noted that the Principal Applicant lacked basic knowledge regarding pre-natal care that a person with experience in NOC 3112 can be reasonably expected to possess. The Principal Applicant explained that she is a "generalist" who would refer any patients to a "specialist" and that "she studied so long ago" and that "she is just out of touch with her work as a Dr". The Visa Officer took notes of these explanations.

[7] The Officer further allowed the Principal Applicant to choose an area that she had specialized knowledge in and to demonstrate that knowledge. Dr. Talpur chose communicable diseases, and she answered a series of questions about malaria and its treatment and prevention.

[8] At the end of the interview, the Officer explained to the Principal Applicant the deficiencies in her application and in particular, the credibility of the reference letter and her lack of convincing knowledge when asked basic questions relating to pre-natal care. The Officer reserved her decision

and allowed the Principal Applicant the opportunity to produce more documents such as documentation from the medical centre or government records, shifts, rosters, pay slips, and bank statements to show salary deposits for time worked or any other information that the Principal Applicant could obtain from the clinic to disabuse her of her concerns regarding the reference letter and overall lack of knowledge on pre-natal care, and to help her substantiate her claim that she met the NOC 3112 experience.

[9] In response, on September 29, 2010 the Principal Applicant submitted her registration in the Physicians Credentials Registry of Canada, a copy of her business card and prescription pad, her certificate of Medical Registration with the Pakistan Medical & Dental Council, and the results of a self-administered examination of the Medical Council of Canada.

[10] On October 27, 2010, upon review of the entire file, the Officer refused the permanent resident application of Dr. Talpur. In her letter to the Applicants, the Officer quotes paragraph 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*Regulations"*), according to which a foreign national is a skilled worker if he or she has at least one year of paid work experience in the occupation applied for within the 10 years preceding the date of application, and has performed the actions described in the lead statement for the occupation as well as a substantial number of the main duties of that occupation as set out in the occupational description of the NOC.

[11] The thrust of the Officer's decision is captured by the following paragraph:

> From my interview with you on 30th August 2010 and from the documentation provided with your application and after the

> interview, I am not satisfied that you meet the criteria set out above. Based largely on your responses to questions during the interview, you were not able to satisfy me that you meet R75(2)(b) or R75(2)(c) of the Regulations. Further, your employment reference letter/s and other supporting employment information has not overcome the concerns I clearly set out for you at interview and after interview or enhanced the credibility of your previous experience in the occupation in which you have been assessed: NOC 3112.

[12] Considering that subsection 75(3) of the *Regulations* states that if a foreign national fails to meet the requirements, his or her application shall be refused and no further assessment is required, the Visa Officer refused the Applicants' application.

2. Issues

[13] The Applicants have raised two issues in this application for judicial review:

a) Did the Visa Officer breach the principles of natural justice?

b) In light of the evidence, was the decision to refuse the permanent residence application unreasonable?

3. The relevant law, regulation and guidelines

[14] Subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*Act*") states that a foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the *Regulations*. Subsection 12(2) of the *Act* states that a foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.

[15] Subsection 75(1) of the *Regulations* prescribes the Federal Skilled Worker class as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada.

Class	Catégorie
75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.

[16] Subsection 75(2) of the *Regulations* states that a foreign national is a skilled worker if, during that period of employment, he or she performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational classification*; and during that period of employment, he or she performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the *National Occupational classification,* including all of the essential duties.

Skilled workers	Qualité
(2) A foreign national is a skilled worker if	(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :
(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time	a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à

employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix;	temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la *Classification nationale des professions* — exception faite des professions d'accès limité;
(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational Classification*; and	b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;
(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the *National Occupational Classification*, including all of the essential duties.	c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

[17] Subsection 75(3) states that if a foreign national fails to meet these requirements, the application shall be refused and no further assessment is required.

Minimal requirements	Exigences
(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.	(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

[18] Finally, section 11 of the OP6 Guidelines on Federal Skilled Workers indicates that officers review the application in detail, considering all the information and documentation provided, and assess it against the following minimal requirements and selections criteria:

> **11.1. Minimal requirements**
>
> The officer reviews the applicant's work experience to determine if the applicant meets the minimal requirements to apply as a skilled worker, as stipulated in R75.
>
> The applicant must have at least one year of continuous full-time paid work experience, or the continuous part-time equivalent, in the category of Skill Type 0, or Skill Level A or B, according to the Canadian National Occupational Classification (NOC).
>
> The work experience which will be assessed for all skilled worker applicants must:
>
> • have occurred within the 10 years preceding the date of application;
>
> • not be in an occupation that is considered a restricted occupation. At the time of printing, there were no occupations designated as restricted. However, for the most up-to-date listing, refer to the Skilled Workers and Professionals Web page at http://www.cic.gc.ca/english/immigrate/skilled/index.asp
> .
> The applicant must have:
>
> • performed the actions described in the lead statement for the occupation (or occupations) as set out in the occupational description of the NOC (R75(2)(b));
>
> • performed a substantial number of the main duties, including all of the essential duties, of the occupation as set out in the occupational description of the NOC (R75(2)(c)).

If …	Then the officer will …
the applicant meets the minimal requirements	• proceed to Section 12
the applicant does not meet the minimal requirements	• not assess the application against the selection criteria; • refuse the application (R75(3)) and proceed to Section 15
	Note: Substituted evaluation (Section 13.3), **cannot** be used to overcome a failure to meet the minimal requirements.

4. Analysis

[19] It is well established that discretionary decisions made by visa officers are entitled to a high degree of deference. Their decisions will not be disturbed unless they are unreasonable or based on irrelevant or extraneous considerations because of their greater expertise in issuing visas than this Court; (*Kniazeva v Canada (Minister of Citizenship and Immigration)*, 2006 FC 268 at para 15, 288 FTR 282; *Tiwana v Canada (Minister of Citizenship and Immigration)* 2008 FC 100, 164 ACWS (3d) 145; *Khan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 302 at paras 9-10). Accordingly, the decision of the visa officer will be held to be reasonable if it falls into the range of possible, acceptable outcomes which are defensible in respect of the facts and the law, and if the decision-making process is transparent and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[20] Issues of procedural fairness, however, are reviewable under a standard of correctness. As a result, the decision-maker is owed no deference, as it is for the courts to provide the legal answer to procedural fairness questions (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100, [2003] 1 SCR 539; *Sketchley v Canada (Attorney General)*,

2005 FCA 404 at para 53, [2006] FCR 392; *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283).

a) Did the Visa Officer breach the principles of natural justice?

[21] It is by now well established that the duty of fairness, even if it is at the low end of the spectrum in the context of visa applications (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 at para 41; *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422 at para 39), require visa officers to inform applicants of their concerns so that an applicant may have an opportunity to disabuse an officer of such concerns. This will be the case, in particular, where such concern arises not so much from the legal requirements but from the authenticity or credibility of the evidence provided by the applicant. After having extensively reviewed the case law on this issue, Justice Mosley was able to reconcile the apparently contradictory findings of this Court in the following way:

> Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John* and *Cornea* cited by the Court in *Rukmangathan*, above.
>
> *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24, [2007] 3 FCR 501.

[22] In the present case, I agree with the Respondent that the Principal Applicant had an opportunity to reply to the Visa Officer's concern with "credibility, accuracy or genuine nature of the information submitted by the applicant". Dr. Talpur was warned in clear and unmistakable

terms of the concerns the Visa Officer had regarding the reference letter provided, the lack of supporting documentation showing that she was paid for her work and her inability to demonstrate to the Visa Officer her work experience using technical language regarding one of her main duties as described in her reference letter and the NOC 3112. The Visa Officer reserved her decision and allowed the Principal Applicant the opportunity to produce more documents to disabuse her of her concerns. In those circumstances, it cannot be said that the Principal Applicant was not afforded a reasonable opportunity to make her case or to demonstrate the genuineness of her application.

[23] Counsel for the Applicants argued that the Visa Officer did not meaningfully attempt to inquire as to whether Dr. Talpur had work experience as a general practitioner as she alleged. She was given the opportunity to submit pay information, even though she had made it clear that none was available as she was paid cash. Yet, a careful reading of the CAIPS notes and of the document request sent to the Principal Applicant's agent reveals that she was asked to provide documentary evidence of her shifts, rosters, payslips, bank statements to show salary deposits for time worked "or any other information" she could obtain from the clinic. Indeed, she did provide a business card, a prescription pad and the results of a self-administered exam provided by the Medical Council of Canada. Therefore, the Principal Applicant was not constrained in the type of documentation she could provide to establish that she did work as a general practitioner at the Ali Medicare Clinic. The Officer could reasonably be suspicious of a professional being paid in cash with absolutely no traceable accounting record, and was entitled to probe the Principal Applicant in this respect. That being said, she did not close the door to any other type of evidence that could have substantiated the Principal Applicant's claim that she had effectively worked at the Clinic.

[24] Counsel for the Applicants also submitted that the Visa Officer had the obligation to make other inquiries and take further steps to establish whether Dr. Talpur had the experience that she claimed. This argument is without merit. The onus is on the applicant to satisfy the visa officer that he or she performed the duties contained in the NOC for the intended occupation. A visa officer is under no duty to seek to clarify a deficient application. As Justice Mosley stated in *Rukmangathan v Canada (Minister of Citizenship and Immigation)*, 2004 FC 284 at para 23, 247 FTR 147, procedural fairness "does not stretch to the point of requiring that a visa officer has an obligation to provide an applicant with a "running score" of the weaknesses in their application".

[25] Finally, counsel for the Applicants contended that the reasons given by the Visa Officer for rejecting Dr. Talpur's application are inadequate as her conclusions cannot readily be reconciled with Dr. Talpur's respectable Medical Council of Canada self-assessed examination result. Once again, this submission is unfounded. The Visa Officer clearly states in her CAIPS notes that she reviewed the complete file after receiving the further documents sent by the Applicants' agent. Her refusal letter explains why she came to the conclusion that the Applicants do not meet the criteria set out in subsection 75(2) of the *Regulations*. She was not required to comment on every single piece of evidence submitted, as long as she considered and assessed them. There is no reason to doubt the Visa Officer's affirmation that she did just that.

[26] For all of the foregoing reasons, I am therefore of the view that the Visa Officer did not breach the principles of natural justice and did afford the Applicants an opportunity to assuage her concerns.

b) In light of the evidence, was the decision to refuse the permanent residence application unreasonable?

[27] Counsel for the Applicants made a number of arguments to demonstrate that the Visa Officer's decision is unreasonable. I believe they can aptly be summarized with the following two propositions. First, the Applicants contend that the Visa Officer applied her own standards to assess the ability of the Principal Applicant to carry out her profession, instead of referring to the duties described in the National Occupation Classification for her profession. Second, it is submitted that the Visa Officer erred in inferring from the Principal Applicant's inability to answer some technical questions that she did not practice as a general practitioner between 2002 and 2006.

[28] In her affidavit, the Visa Officer mentioned that she flagged the Principal Applicant's case for interview because the reference letter of Dr. Raza contained striking similarities with the wording provided in the job description under NOC 3112. It is true that the duties listed by Dr. Raza as those undertaken by the Principal Applicant during her tenure at the Clinic are in some respects similar to the main duties listed in the NOC for general practitioners and family physicians. There can be a number of explanations for these similarities. As suggested by the Applicants' consultant, these similarities may be explained away by the precise nature of a doctor's responsibilities, which leave very little room for variations in the description of their duties. For example, "prescribe and administer medications and treatments", "provide emergency care" and "provide acute care management" are fairly straightforward accounts of what a general practitioner does, and this could explain why Dr. Raza's letter mirrors to some extent the job description found in the NOC. Another possible explanation is that provided by the Applicants, who speculated that

Dr. Raza's English skills being poor, he may have done an internet search to find the correct terminology.

[29] However acceptable these explanations may be, and whether this Court may have been satisfied by them or not, is obviously not the test on judicial review. As already indicated, visa officers are entitled to deference when assessing visa applications. The authenticity of Dr. Raza's letter could reasonably be questioned in these circumstances, especially in light of the fact that the letter was not dated and had no creases or other imperfections in the paper that could have shown it had been written in 2005 or shortly thereafter, as claimed by the Applicants. Accordingly, there was nothing wrong with the Visa Officer looking for a confirmation that the Principal Applicant had effectively worked as a general practitioner in the Ali Medicare Clinic.

[30] The interview went astray, however, when the Visa Officer started asking technical questions aimed at assessing the technical skills of the Principal Applicant. First of all, the questions purporting to deal with pre and post natal care were extremely technical in nature. The Visa Officer could not base her assessment of Dr. Talpur's performance of duties as a general practitioner on her answers to questions regarding her general knowledge of cholestasis, twin pregnancies and trisomy. First of all, contrary to what is indicated in the CAIPS notes, Dr. Talpur's experience certificate from the Ali Medicare Clinic did not indicate that providing pre and post natal care were her main duties, but only one of her main duties, as the Visa Officer accepted on cross-examination. Second, there is no evidence as to how common or uncommon the conditions are about which Dr. Talpur was questioned, and how likely it is that she may have encountered them in her practice. Moreover, Dr. Talpur testified in her affidavit that these English medical

terminologies did not immediately come to her mind because, first, she studied them during her first year of medical school in 1996 and never used them in her subsequent work and, second, in Pakistan, medical practitioners generally speak with their colleagues and patients in Urdu. This explanation does not seem to have been considered by the Visa Officer.

[31] A visa officer must turn his or her mind to a comparison of the experience of an applicant as presented at an interview and as outlined in their employment references with the duties described in the National Occupation Classification for their profession. A lack of knowledge at a selection interview relating to what a visa officer believes a person with experience in a particular profession ought to know about their field, based upon the personal idiosyncratic experience of that visa officer, is not a valid basis for a conclusion that an applicant has or has not performed the duties described in the NOC (see *Haughton v Canada (Minister of Citizenship and Immigration),* 111 FTR 226 at paras 8, 11 and 12 (FCTD), [1996] FCJ No 421 (QL)).

[32] Since the Visa Officer accepted that Dr. Talpur had university credentials and was duly registered as a licensed physician in Pakistan for the entire period during which she alleged she was working at the Ali Medicare Clinic, it was not for her to second-guess her technical abilities. The Visa Officer, even with some background in science and biology, is not in a position to determine whether the Principal Applicant was properly licensed as a general practitioner in her country or whether she truly is a competent physician. Nor is she qualified to assess whether the Principal Applicant should or could be authorized to practice in Canada. As Justice Evans stated in *Dogra v Canada (Minister of Citizenship and Immigration),* (April 23, 1999) IMM-3413-98 at paras 26-28

(FCTD), [1999] FCJ No 560 (QL), this is a task better left to national accreditation committees and provincial licensing authorities.

[33] Being satisfied with the Principal Applicant's education credentials, the only remaining task for the Visa Officer was to verify whether she had at least one year of continuous full-time paid work experience as a general practitioner, pursuant to the requirements of paragraph 75(2) of the *Regulations*. Instead of trying to assess whether the Principal Applicant had carried out the duties of a family doctor, the Visa Officer asked questions aimed at assessing her ability as a physician. On cross-examination, the Visa Officer admitted that the questions "can you describe in technical language what the different types of twin pregnancies", "how fraternal twins form" and "can you explain to me the technical term for high blood pressure during pregnancy" were not specific requests to describe her duties. The same is true, it seems to me, of the questions "can you explain to me in prenatal screening what a trisomy refers to" and "can you tell me, using technical language what the condition of pregnancy called coelestatis is". Far from giving the Principal Applicant an opportunity to demonstrate her duties to examine a patient, to refer patients for screening, to explain the results of that screening, as the Visa Officer would have it, these questions are similarly focussed on the Principal Applicant's medical skills and her ability to use scientific jargon. This is not what the Visa Officer was tasked to ascertain. In other words, she conflated the Principal Applicant's ability to answer questions of a technical nature with the requirement that she did practice medicine for a year between 2002 and 2005. In doing so, the Visa Officer erred and it follows that her decision to refuse Dr. Talpur's application is unreasonable.

[34] As a result of the foregoing, this application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred to a different visa officer for reconsideration. Neither counsel suggested questions for certification, and none arises.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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