Federal Court  Cour fédérale

Date: 20120425

Docket: IMM-2346-11

Citation: 2012 FC 484

Ottawa, Ontario, April 25, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NEWN SHIN LI

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an officer at the New Delhi Immigration Section of the Canadian High Commission (the officer), dated January 27, 2011, wherein the applicant's request for a work permit was denied. This conclusion was based on the officer's finding that the applicant did not meet the necessary language and work experience requirements.

[2] The applicant requests that the officer's decision be quashed and the matter sent back for redetermination by a different officer.

Background

[3] The applicant is of Chinese ancestry and is a citizen of India. He is married and has three dependants. He lives with his family in India.

[4] On December 3, 2010, the applicant submitted an application for a Canadian work permit as a cook of Indian-style Hakka Chinese food.

[5] The application included a positive Labour Market Opinion (LMO) issued on October 27, 2010 to the Royal Chinese Seafood Restaurant, the applicant's proposed employer in Scarborough, Ontario. The letter in which the LMO was issued included a confirmation by Service Canada of the Royal Chinese Seafood Restaurant's offer of employment to the applicant (the LMO-approved employment offer).

[6] The LMO specified that the job required the applicant to have oral and written English. The LMO-approved employment offer stated that the position was for a cook specializing in Indian / Cantonese Chinese Cuisine (Hakka food).

[7] The Citizenship and Immigration Canada (CIC) document checklist for a work permit requires that applicants include "proof indicating you meet the requirements of the job being

offered". To fulfill this requirement, the applicant included the following documentation in his application:

> Language: School certificates from 1989 and 1991 showing passing grades in English; and
>
> Work experience: Letters of recommendation and recent salary slips from Golden Empire Restaurant and Bar in India. The letters indicated that the applicant was employed as head chef at the restaurant for over seven years on a full time basis and described the applicant as a "chef for all seasons" who is "particularly good in Asian foods preparations".

Officer's Decision

[8] In a letter dated January 27, 2011, the officer denied the applicant's request for a work permit (the decision). The decision was based on the officer's finding that the applicant did not meet the language and work experience requirements specified in the LMO.

[9] In the Global Case Management System (GCMS) notes that form part of the decision, the officer acknowledged that the applicant had provided banking documents, pay slips, an income tax form and school records. However, the officer found that the applicant had not provided proof that he met the English requirements specified in the LMO or the requirements of work experience in Indian-style Hakka Chinese food. The officer also found that the letter from the applicant's employer did not state the applicant's qualifications. The officer therefore refused the applicant's application.

Issues

[10] The applicant submits the following point at issue:

Error of Law: Did the respondent err in failing to provide the applicant an opportunity to disabuse the officer's concerns?

[11] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer deny the applicant procedural fairness?
3. Did the officer err in denying the applicant's application?

Applicant's Written Submissions

[12] The applicant submits that he was never given an opportunity to respond to the officer's concerns regarding the language and work experience requirements and that this was a clear breach of procedural fairness. As this is fundamentally a question of law, natural justice and procedural fairness, it attracts a standard of review of correctness.

[13] Nevertheless, the applicant submits that he did provide school documents as evidence of his ability to meet the English requirement. As such, unless the credibility of the documents was at issue, there was no reason for the respondent not to believe that the applicant met the English requirement. The applicant submits that the officer's decision on this point was therefore completely unsupported.

[14] Similarly, the applicant submits that he did provide clear evidence of his experience as a Chinese food chef. Although the letters did not specify that it was Hakka Chinese food, a quick inquiry would have clarified this issue. The applicant refers to case law in which it submits the Court has held that an officer's failure to make simple inquiries was remarkably unfair. The applicant submits that in this case the officer's decision on this point was willfully blind.

Respondent's Written Submissions

[15] The respondent submits that the applicant has not demonstrated an arguable case upon which the application for judicial review may proceed.

[16] The respondent submits that an officer's decision on a work permit application is reviewable on a reasonableness standard. As this type of decision is highly fact-based and discretionary and involves interpretation by the officer of its own statutes and policies, deference is warranted.

[17] The respondent submits that the duty of procedural fairness applicable to these types of decisions varies according to context. As there is no evidence that reapplying with improved information and documentation will cause the applicant hardship, the respondent submits that the procedural fairness required is relatively low.

[18] The respondent also submits that the question of whether the officer should have provided the applicant an opportunity to respond to concerns should be assessed on a standard of correctness. However, in this case, the procedural fairness does not require an officer assessing a work permit to

inform the applicant of concerns regarding inadequacies in the application or to request additional information. In addition, an applicant is not entitled to an interview to correct deficiencies in the application. The burden of establishing the merits of the application rests on the applicant.

[19] The respondent submits that this case does not fall into one of the exceptions where an officer may be required to provide an applicant with the opportunity to respond to its concerns. Rather, the officer's decision shows that the officer assessed the letter from the applicant's employer and the applicant's submission on his English language ability and found that these failed to substantiate his work experience and language ability. It was within the officer's purview to reject the application on these bases.

[20] The respondent also submits that the officer's decision was reasonable. In support, the respondent refers to paragraph 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), which the respondent submits prevents an officer from issuing a work permit if there are reasonable grounds to believe that the foreign national is unable to perform the work sought. The respondent submits that the applicant must establish that there are no reasonable grounds to believe that he will be unable to perform the work.

[21] As the reference letters from the applicant's employer, Golden Empire Restaurant and Bar, do not clearly substantiate that he has experience specifically in Indian-style Hakka Chinese food, the respondent submits that it was reasonable for the officer to find that the applicant had submitted insufficient evidence of his work experience as a cook with that speciality. Similarly, the respondent submits that as there was no evidence specifically addressing the applicant's English abilities, it was

reasonable for the officer to find insufficient proof that the applicant met the English requirements specified in the LMO.

[22] For these reasons, the respondent submits that the officer's decision was reasonable.

Analysis and Decision

Distinguishing Permits: Skilled Worker Class versus Worker

[23] This case pertains to an application for a work permit under Part 11 (Workers) of the Regulations (workers work permit). The associated regulatory regime differs in some significant ways from the skilled worker applications regulated under Division 1 of Part 6 (Economic Class – Skilled Workers) of the Regulations (skilled worker class permit).

[24] Most notably, persons in the skilled worker class may seek permanent residency in Canada (subsection 75(1) of the Regulations) whereas workers work permits only grant holders a temporary stay in Canada until the end date indicated on their permits. As the skilled worker class grants greater access to Canadian residency, specific selection criteria are outlined in the Regulations (sections 76 through 83). For example, points are specified for different levels of education (i.e., secondary, post-secondary, university, etc.). Conversely, the statutory provisions for worker work permits are more general, with few details on actual application requirements.

[25] Provisions under Division 1 of Part 6 (Economic Class – Skilled Workers) have also had greater judicial treatment than those under Part 11 (Workers) of the Regulations. As such, jurisprudence on workers work permit applications has drawn from the case law on skilled worker class permit applications (see *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1306, [2010] FCJ No 1663; and *Randhawa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1294, [2006] FCJ No 1614 at paragraph 12). However, as the two processes and associated rights differ, some care must be taken in applying the jurisprudence of one to the other. In the following analysis, I have therefore noted where cases pertain to skilled worker class permits as opposed to workers work permits.

[26] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[27] Determinations by officers on work permit applications are administrative decisions made within their legislative authority. These fact-based decisions should be granted a high degree of deference and are therefore reviewable on a reasonableness standard (see *Samuel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 223, [2010] FCJ No 256 at paragraph 26; *Randhawa* above, at paragraph 10; and skilled worker class jurisprudence: *Castro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 659, [2005] FCJ No 811 at paragraph 6; and

Akbar v Canada (Minister of Citizenship and Immigration), 2008 FC 1362, [2008] FCJ No. 1765 at paragraph 11).

[28] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraphs 59 and 61).

[29] Conversely, issues that go to the fairness of an impugned decision must be decided on a standard of correctness (see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at paragraph 115; and *Campbell Hara v Canada (Minister of Citizenship and Immigration)*, 2009 FC 263, [2009] FCJ No 371 at paragraph 15).

[30] In this case, the applicant submits that he was not granted an opportunity to respond to the officer's concerns. A denial of the opportunity to respond to an officer's concerns is a procedural fairness issue that is reviewable on a standard of correctness (see *Hara* above, at paragraph 16). No deference is owed to the decision maker and the Court must form its own opinion on this issue (see *Dunsmuir* above, at paragraph 50).

[31] **Issue 2**

Did the officer deny the applicant procedural fairness?

In immigration applications, the onus is on the applicant to satisfy the officer of all parts of the application. As such, it is generally not a procedural fairness requirement that work permit applicants be granted an opportunity to respond to the concerns of officers. This is particularly true where there is no evidence of serious consequences to the applicant (see *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815, [2002] FCJ No 1098 at paragraph 5). A lack of serious consequences has been found in situations where applicants are able to re-apply for workers work permits and there is no evidence that doing so will cause them hardship (see *Masych v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1253, [2010] FCJ No 1563 at paragraph 30).

[32] However, there are exceptions to this rule and, in certain circumstances, the duty to grant applicants an opportunity to respond is warranted. For example, if an officer uses extrinsic evidence to form an opinion or forms a subjective opinion that an applicant could not have known would be used in an adverse way, the officer may be under a duty to grant the applicant an opportunity to respond (see *Li v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284, [2008] FCJ No 1625 at paragraph 36; and *Hara* above, at paragraph 23).

[33] In jurisprudence on applications for skilled worker class permits it has also been held that if the officer has concerns about the veracity of documents, procedural fairness demands that the officer make further inquires (see *Kojuri v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389, [2003] FCJ No 1779 at paragraphs 18 and 19; and *Olorunshola v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1056, [2007] FCJ No 1383 at paragraphs 29 and 33).

[34] However, an officer is generally not under a duty to inform a skilled worker class permit applicant about his concerns when they arise directly from the requirements of the legislation or regulations (see *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501 at paragraphs 23 and 24; and *Gulati v Canada (Minister of Citizenship and Immigration)*, 2010 FC 451, [2010] FCJ No 771 at paragraph 43).

[35] These findings in cases on skilled worker class permits have been approvingly referred to in jurisprudence on workers work permit applications (see *Singh* above, at paragraphs 40 to 42).

[36] In this case, there is no evidence that re-application would cause serious consequences to the applicant. Similarly, there is no indication that the officer had concerns about the veracity of the documents, relied on extrinsic evidence to form his opinion, or formed a subjective opinion that the applicant could not have known would be used in an adverse way.

[37] Nevertheless, relying on skilled worker class permit jurisprudence, it should be determined whether the officer's concerns arose directly from the requirements of the legislation or regulations. If they did not, it is more likely that the procedural fairness required might include an opportunity for the applicant to respond to the officer's concerns in specific circumstances.

[38] As mentioned above, the statutory provisions describing the requirements for workers work permit applications are less specific than those for skilled worker permits. Part 11 of the Regulations only describe minimal requirements for worker work permit applications. Subsection 200(1) of the Regulations states that an officer shall issue a workers work permit to a foreign national if,

following an examination, the officer is satisfied that the applicant meets all of the requirements of that section.

[39] In this case, the applicant applied from outside Canada and had an offer of employment that had been approved in a valid LMO (the LMO-approved employment offer). Subsection 200(1) therefore only required that it be established that the applicant would leave Canada by the end of the period authorized for his stay. No evidence was presented on this issue and the officer's decision does not suggest that this was a concern that led to the denial of the application.

[40] There is little other statutory guidance to inform a workers work permit applicant of the specific application requirements.

[41] Nevertheless, subsection 200(1) of the Regulations must be read in conjunction with subsection 200(3), which lists various exceptions for which an officer shall not issue a workers work permit. An applicant has the onus to establish that there are no reasonable grounds to believe that he or she will be unable to perform the work sought (see *Samuel* above, at paragraph 30). The only exception relevant to this case is paragraph 200(3)(a), which prohibits an officer from issuing a workers work permit if "there are reasonable grounds to believe that the foreign national is unable to perform the work sought".

[42] In this case, the officer found that:

> Subject has not provided proof that he meets the requirement of English according to the LMO or that he meets with the work experience in Indian style Hakka Chinese food. Letter from employer does not state subject's qualifications.

[43] However, in his application, the applicant submitted school records showing passing grades in English in support of the language requirement. Nevertheless, the officer found that the applicant had not provided proof that he met the English requirements “according to the LMO”. The LMO merely stated that the job requires written and oral English. Further, as mentioned above, unlike the skilled worker class, there are no levels of education specified in the Regulations for worker work permits. Although the applicant’s English grades were not high, there was no evidence on which to find them inadequate for the requirements specified in the LMO. In addition, there is nothing in either the statutory provisions or the CIC policies to suggest that school records would be inadequate to establish the applicant’s proficiency in English.

[44] In his application, the applicant also included letters of reference and pay slips in support of his work experience. As noted by the officer, the reference letters do not clearly specify Hakka cuisine. They do, however, speak highly of the applicant as a cook with many years experience and particular skills in Asian foods preparation. In addition, they are from the Golden Empire Restaurant and Bar. Therefore, if there was any confusion on the type of restaurant that the applicant’s previous employer in India was, it could easily have been uncovered that it was likely a Chinese food restaurant. This is further supported by the fact that the applicant holds Indian citizenship but is of Chinese ancestry (as indicated in his work permit application).

[45] The officer also stated that the applicant had failed to establish his work experience in Indian-style Hakka Chinese food. However, the LMO-approved employment offer clearly states that the duties of the position are for a cook specializing in “Indian/Cantonese Chinese Cuisine (Hakka food)”.

[46] The evidence from the applicant's previous employer, his cultural heritage and his nationality renders it difficult to find the reasonable grounds on which the officer could find the applicant unable to perform the work sought.

[47] A comparison of the employment duties listed in the LMO-approved employment offer and the applicant's responsibilities and skills stated in the reference letters from his Indian employer also shows significant similarities:

1. Duties listed in LMO-approved employment offer:

Specialization in Indian/Cantonese Chinese Cuisine (Hakka food); preparing the main sauces and marinades for meat and poultry; cooking, garnishing and presentation of food; preparing and cooking individual dishes and foods; ensuring quality of food; and determining size of food proportions.

2. Reference letter from Golden Empire Restaurant and Bar (India):

Chef for all seasons, and particularly good in Asian foods preparations; training second cooks and junior kitchen staff; taking care of the discipline and neatness of kitchen staff; checking the presentation of food before it is served to the customers; and speaking with customers for food inquiries.

[48] This evidence also contradicts the officer's finding that the reference letters did not state the applicant's qualifications.

[49] In summary, the evidence before the officer, coupled with the limited guidance provided in the statutory provisions relating to workers work permit applications, renders this a situation in

which procedural fairness demands that the officer give the applicant an opportunity to respond to his concerns. Although there is generally no obligation on an officer to make further inquiries when an application is ambiguous, this is an instance where the facts favour an exception to the rule. Therefore, in this case, the officer's failure to grant the applicant the opportunity to respond to his concerns results in a denial of procedural fairness to the applicant.

[50] Because of my finding on Issue 2, I need not deal with the remaining issue.

[51] As a result of the breach of procedural fairness, the officer's decision must be set aside and the matter referred to a different officer for redetermination.

[52] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

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.
200. (1) Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act — an officer shall issue a work permit to a foreign national if, following an examination, it is established that	200. (1) Sous réserve des paragraphes (2) et (3), et de l'article 87.3 de la Loi dans le cas de l'étranger qui fait la demande préalablement à son entrée au Canada, l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments ci-après sont établis :
(a) the foreign national applied for it in accordance with Division 2;	a) l'étranger a demandé un permis de travail conformément à la section 2;
(b) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;	b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;
(c) the foreign national	c) il se trouve dans l'une des situations suivantes :

(i) is described in section 206, 207 or 208,

(ii) intends to perform work described in section 204 or 205 but does not have an offer of employment to perform that work,
(ii.1) intends to perform work described in section 204 or 205, has an offer of employment to perform that work and an officer has determined

(A) that the offer is genuine under subsection (5), and

(B) that during the two-year period preceding the day on which the application for the work permit is received by the Department,

(I) the employer making the offer provided each foreign national employed by the employer with wages, working conditions and employment in an occupation that were substantially the same as the wages, working conditions and occupation set out in the employer's offer of employment to the foreign national, or

(II) in the case where the employer did not provide wages, working conditions or employment in an occupation that were substantially the same as those offered, the failure to do so was justified in accordance with subsection 203(1.1), or

(iii) has been offered employment, and an officer has made a positive determination under paragraphs 203(1)(a) to (e); and

(d) [Repealed, SOR/2004-167, s. 56]

(e) the requirements of section 30 are met.

(i) il est visé par les articles 206, 207 ou 208,

(ii) il entend exercer un travail visé aux articles 204 ou 205 pour lequel aucune offre d'emploi ne lui a été présentée,
(ii.1) il entend exercer un travail visé aux articles 204 ou 205, il a reçu une offre d'emploi pour un tel travail et l'agent a conclu que :

(A) l'offre était authentique conformément au paragraphe (5),

(B) au cours des deux années précédant la date de la réception de la demande de permis de travail par le ministère :

(I) l'employeur a versé à tout étranger à son emploi un salaire ou lui a ménagé des conditions de travail qui étaient essentiellement les mêmes que ceux qu'il lui avait offerts ou lui a confié un emploi qui était essentiellement le même que celui précisé dans son offre d'emploi,

(II) l'employeur qui a versé à tout étranger un salaire ou lui a ménagé des conditions de travail qui n'étaient pas essentiellement les mêmes que ceux qu'il lui avait offerts, ou qui lui a confié un emploi qui n'était pas essentiellement le même que celui précisé dans son offre d'emploi, peut justifier ce manquement conformément au paragraphe 203(1.1);

(iii) il a reçu une offre d'emploi et l'agent a rendu une décision positive conformément aux alinéas 203(1)a) à e);

d) [Abrogé, DORS/2004-167, art. 56]

e) il satisfait aux exigences prévues à l'article 30.

. . .

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;

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Samantha Reynolds	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT