

Federal Court



Cour fédérale

Date: 20130408

Docket: IMM-4585-12

Citation: 2013 FC 349

Ottawa, Ontario, April 8, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

JULIUS FRANCIS PINTO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of India and the United Arab Emirates. He sought permanent residence in Canada under the Federal Skilled Worker program and claimed to satisfy the category of Financial Managers - National Occupation Code [NOC] 0111, primarily through his work at HSBC Bank in Dubai as a Manager, Corporate Banking. He provided a detailed job description and three reference letters in support of his application.

[2] In a decision dated March 27, 2012, an Immigration Officer at the Canadian High Commission in London rejected the applicant's application for permanent residence. The Officer's decision is exceedingly brief, and, in terms of reasons, notes only that "the main duties [listed by the applicant] do not indicate that [the applicant] performed the actions described in the lead statement for the occupation, as set out in the occupational descriptions of the NOC or that he performed all of the essential duties and a substantial number of the main duties, as set out in the occupational descriptions of the NOC." The Officer was "was therefore not satisfied that [the applicant was] a NOC-0111 – Financial Manager".

[3] The CAIPS notes prepared by the Officer at the time of the decision (which, under the case law are recognized as forming part of the Officer's decision) reveal a similar rationale. They indicate that the Officer rejected the application because the "duties listed in [the] employment letter do not match [the] duties listed in NOC-0111 [and the employment] letter that gives context of duties [...] do not match lead statement and duties of [the] NOC."

[4] In this application for judicial review, the applicant makes three main arguments in support of his contention that the Officer's decision should be set aside: first, he argues that the reasons are insufficient to reveal why the decision was reached, which is framed both as a procedural fairness and as a reasonableness argument; second, he asserts that the conclusion reached was unreasonable when one compares the NOC to the job description; and finally, he argues that as a matter of procedural fairness he was entitled to an interview to address any concerns the Officer may have had.

[5] In addition to these substantive arguments, the applicant argues that the Officer's affidavit impermissibly seeks to bolster the decision and therefore is inadmissible. However, the applicant cross-examined the Officer on her affidavit and additionally argues that several of statements made by the Officer during her cross-examination further reveal the unreasonableness of her conclusions.

[6] As is apparent from the foregoing, the following issues arise in this matter:

1. Should the Officer's affidavit be struck;
2. Is her cross-examination inadmissible;
3. Does the inadequacy of the Board's reasons provide a basis for intervention;
4. Is the Board's conclusion unreasonable in light of the content of the job description and the relevant NOC Code descriptor; and
5. Did the Officer breach her duty of procedural fairness?

[7] For the reasons set out below, I have determined that the portions of the Officer's affidavit that provide additional reasons for her decision are inadmissible and that any answer given by her on her cross-examination that provides additional reasons for the decision is likewise inadmissible. Nonetheless, I have determined that this application must be dismissed as, in the circumstances, the reasons given were adequate, the result reached was reasonable and there was no requirement for the Officer to have conducted an interview of the applicant or otherwise given him the opportunity to provide further information or clarification prior to rejecting his application. Each of these points is further discussed below.

The Admissibility of the Officer's Affidavit and Cross-Examination

[8] Dealing, first, with the admissibility of the Officer's affidavit, the case law establishes that visa officers may file affidavits in applications to review their decisions so long as the affidavits merely provide background context or contain facts relevant to allegations of a violation of procedural fairness or bias. In contrast, affidavits which seek to bolster the decision by providing new or expanded reasons for the decision are not admissible (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 45-47; *Kalra* at para 15 and *Qin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 at paras 17-18 [*Qin*]).

[9] Here, the bulk of the Officer's affidavit elaborates on the reasons why the Officer made the decision. Further explanations and reasons for the decision are set out in paragraphs 5 and 8 – 13 of the affidavit. These paragraphs of the affidavit are accordingly not admissible as they represent an attempt to bolster the decision; these paragraphs of the Officer's affidavit will therefore be struck and have not been considered by me in making this decision.

[10] Insofar as concerns the transcript of the Officer's cross-examination, the respondent argues that the applicant cannot, on the one hand, seek to strike portions of the affidavit as impermissibly bolstering the decision but then purport to rely on questions and answers that further describe the Officer's bases for her decision. Counsel for the applicant, on the other hand, notes that her cross-examination of the Officer was conducted under reserve of her objection as to the admissibility of the affidavit and argues that her questions were not designed to probe for additional reasons but rather were aimed at testing the Officer's credibility and her understanding of the NOC-0111 and of the evidence submitted by the applicant in support of his permanent residence application. While it

is true that many of counsel's questions were directed to these sorts of issues, certain of them went beyond these parameters and did explore the reasons why the Officer made the decision. Such evidence runs afoul of the same prohibition regarding the allowable scope of visa officers' affidavits and is not appropriately considered by me on this application. Portions of the cross-examination which constitute impermissible bolstering of the Officer's decision are set out at pages 21 – 35 of the transcript of her cross-examination. For the same reasons that the impugned paragraphs of the Officer's affidavit are inadmissible, these portions of the transcript of the Officer's cross-examination are likewise inadmissible and I have not considered them in making this decision. However, even if I had, they would not change the conclusions that I have reached and, if anything, would provide further support for the reasonableness of the Officer's determination as these portions of the evidence show the reasoning process undertaken by the Officer and highlight the differences between the job description for the Manager, Corporate Banking position at HSBC in Dubai and the NOC-0111 descriptor.

Adequacy of the Officer's Reasons

[11] With respect to the adequacy of the Officer's reasons, the Supreme Court of Canada has made clear that so long as some reasons are provided, the requirements of procedural fairness will be satisfied (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 22). Because the Officer did provide some reasons for her decision, the claim that there was a violation of procedural fairness must fail.

[12] The more compelling argument involves the claim that the paucity of the reasons renders the decision unreasonable because one cannot understand how and why the Officer reached her

conclusion. The reasonableness standard of review requires that a decision be justified, transparent, and intelligible, and that the result reached fall within the range of acceptable outcomes which are defensible in light of the facts and applicable law. A reasonableness review, therefore, requires assessment both of the reasoning process undertaken by the tribunal and of the outcome reached. As stated by Justices Bastarache and Lebel, writing for the majority of the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] The analysis of the quality of a tribunal’s reasoning and of the reasonableness of the result are not to be conducted separately. In *Newfoundland Nurses* the Supreme Court stressed that both aspects of a decision – reasoning and result – must be considered together under the reasonableness standard. As Justice Abella, writing for the Court, stated at paras 14 and 15 of that decision:

[...] I do not see *Dunsmuir* as standing for the proposition that the “adequacy” of reasons is a stand-alone basis for quashing a decision or as advocating that a reviewing court undertake two discrete analyses – one for the reasons and a separate one for the result [...] It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.

[...]

[C]ourts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[Citations omitted.]

[14] Thus, a reasonable result will not save a decision that is devoid of adequate reasons, where there is a duty to give reasons and where the reasons cannot be augmented by regard to the record.

[15] Both the Supreme Court and several appellate courts have indicated that the reasons given by the tribunal, when read in context, must allow the reviewing court (and the affected parties) to understand why the decision was made. In *Newfoundland Nurses* at para 16, Justice Abella put the matter the following way:

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion [...] In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the solution is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[16] The Federal Court of Appeal has recently confirmed that to be adequate, reasons must allow the reviewing court to “understand why the [tribunal] made [the] decision and then to determine whether the [tribunal’s] conclusion was within the range of acceptable outcomes” (*Lebon v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 132 at para 18). Other appellate courts have likewise delineated a similar test: see *United States of America v Johnstone*, 2013 BCCA 2 at paras 56-57; *Canadian Property Holdings Inc v The Assessor for the City of Winnipeg*, 2012 MBCA 118 at para 12; *2127423 Manitoba Ltd v Unicity Taxi Ltd*, 2012 MBCA 75 at para 47; *Creelman v Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2012 NSCA 26 at para 29; *Guild Contracting Specialties (2005) Inc v Nova Scotia (Occupational Health and Safety Appeal Panel)*, 2012 NSCA 94 at para 26.

[17] Determination of whether the reasons meet this test is a fact specific inquiry, coloured by the nature of the tribunal, the matters in issue and nature of the submissions made to the tribunal. As Justice Binnie noted in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, the reasonableness standard “takes its colour from the context.”

[18] In terms of context, the Officer in this case was a member of the embassy staff at the Canadian High Commission in London, England, whose job, at the relevant time, was to evaluate applications like that of the applicant in this case. Her evidence indicates that she typically reviewed 15 to 20 applications each day, normally addressing applications under one particular NOC code at a time.

[19] This Court and the Federal Court of Appeal have recognized that visa officers, like the Officer in this case, do not conduct adjudicative hearings but, rather, follow a more administrative process and that the nature of the interests at stake in a case like the present indicates that “the procedural content of the duty [of fairness]” applicable to visa officers is at the “lower end of the spectrum” (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297, [2000] FCJ No 2043 (CA) at para 41. See also *Patel v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55 at para 10 and *Li v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 791 at para 45).

[20] Bearing this context in mind, I turn to the reasons, themselves, which, as noted, are set out in both the letter, communicating the decision to the applicant, and the Officer’s CAIPS notes. These reveal that the Officer rejected the application because the duties listed in the “employment letter”

did not match either the lead statement or the main duties contained in NOC- 0111. The applicant argues that it is not clear which position the Officer was evaluating, because she does not specifically mention the Manager, Corporate Banking position in her notes and because the applicant submitted a job description as opposed to an “employment letter” in support of his claim. In my view, this argument is without foundation because the only details submitted by the applicant regarding any of his previous jobs related to the position of Manager, Corporate Banking. Thus, when read in context, it is apparent that the Officer’s notes and letter concern her analysis of the job description for the Manager, Corporate Banking position at HSBC and comparison of it to the relevant NOC Code.

[21] The Officer’s notes further reveal that she rejected the application for two reasons: first, she determined that the job duties listed in the job description for Manager, Corporate Banking did not match the lead statement in the NOC-0111 descriptor and, second, she held that the duties in the job description likewise did not match the main duties listed in the NOC descriptor. Contrary to what the applicant asserts, these findings are not “conclusions” but, rather, are the basis for the conclusion that the applicant’s application was to be rejected.

[22] In the circumstances of this case, it was not necessary for the Officer to provide greater detail of why and how the lead description in NOC-0111 was not encompassed within the Manager, Corporate Banking job description nor to provide additional detail of which of the main duties in NOC-0111 were not performed by the applicant. Even a cursory comparison of the two indicates that HSBC’s Manager, Corporate Banking is not a financial manager, within the meaning of NOC-0111.

[23] The principal focus of the position held by the applicant was as a manager of a corporate lending department at an HSBC branch. In this job, in addition to making and approving loans, the applicant supervised staff, set a budget for the department and performed other related duties. The principle focus of NOC-0111, on the other hand, is being a manager in a corporate accounting department within an organization, charged with preparation of an undertaking's financial statements, development and application of accounting policies and related matters.

[24] The lead statement in NOC-0111 defines the scope of financial manager jobs in the following terms:

Financial managers plan, organize, direct, control and evaluate the operation of financial and accounting departments. They develop and implement the financial policies and systems of establishments. Financial managers establish performance standards and prepare various financial reports for senior management. They are employed in financial and accounting departments in companies throughout the private sector and in government.

[25] The HSBC job description for the Manager, Corporate Banking position does not contain a similar summary statement setting out the essence of the job. Rather, the entire description must be read to understand the overarching responsibilities of the position. From this, it is clear that the position involves managing the department in an HSBC branch in Dubai, which is charged with making loans to corporate clients of HSBC. Thus, the applicant's job and the requirements of the NOC-0111 are significantly different from each other.

[26] This conclusion is not changed by reason of the fact that certain of the specific job responsibilities in the HSBC job description are described in terms that might match some of the

main duties of a financial manager, as listed in the NOC (such as training, recruiting and supervising staff, developing budgets, tracking adherence to budgets, and reporting on variances from the budget). As counsel for the respondent notes, similar duties are likely performed by the manager of any department in the bank or, indeed, in any organization. This, however, would not make such individuals financial managers within the meaning of NOC-0111.

[27] Thus, a review of the evidence submitted by the applicant and NOC-0111 makes it clear that the applicant was not a financial manager, within the meaning of the NOC. Given the readily apparent nature of this conclusion, it was not necessary for the officer to provide more detailed reasons in support of her determination. The reasons, when read in light of the record, make it clear why the Officer rejected the applicant's application.

[28] In some respects, this case is similar to *Newfoundland Nurses*. There, the arbitrator was called upon to analyze a claim that time worked as casual employees counted towards accrual of years of service for vacation entitlement under the terms of the applicable collective agreement. The arbitrator rejected the claim, merely referring to the relative provisions in the agreement, without any real analysis of why the claim failed. The trial judge characterized the arbitrator's decision as being a conclusion, "completely unsupported by any chain of reasoning" (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2008 NLTD 200 at para 31). This determination, though, was overturned by the Supreme Court of Canada, which upheld the arbitrator's decision as reasonable because "the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes" (*Newfoundland Nurses* at para 26).

[29] The same may be said of the decision in this case.

The Reasonableness of the Officer's Conclusions

[30] As is apparent from the foregoing, the Officer's conclusion is reasonable. Her determination is supported by the evidence and is certainly within the range of the reasonable outcomes, given the dissimilarity of the job performed by the applicant and the requirements of NOC-0111.

Procedural Fairness

[31] Finally, with regard to the issue of whether the Officer had a duty to make further inquiries, I do not believe that this is a case where such a duty arises. This Court has held that where a visa officer's concerns arise directly from the legislative or regulatory requirements, and there are no concerns about credibility or the authenticity of an application, an interview or opportunity to provide further information is not necessary (see *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25 at para 21, citing *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24; and *Qin* at para 38).

[32] Here, the Officer reviewed the applicant's job history and simply concluded that he did not satisfy the requirements of NOC-0111. Such conclusion does not necessitate further inquiry. It is well-established in this regard that the applicant bears the burden of putting forward evidence to demonstrate that he or she satisfies the visa requirements and that failure to furnish adequate evidence will provide grounds for the rejection of an application (*Nagulathas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1159 at para 54; *Mihura Torres v Canada (Minister of Citizenship and Immigration)*, 2011 FC 818 at para 1).

[33] The applicant argues that the Officer's statements on cross-examination reveal that she did not understand some of the duties the applicant fulfilled, and asserts that, due to this fact, the Officer was bound to make further inquiries. I disagree because the duties in question were immaterial to issues before the Officer as they bore no relationship to the NOC-0111 statement. Even if I were to accept that the Officer did not fully understand each of the applicant's duties, a lack of understanding with respect to a peripheral matter does not warrant this Court's intervention (*Rohm & Haas Canada Ltd v Canada (Anti-Dumping Tribunal)* (1978), 22 NR 175, [1978] FCJ No 522 (CA) at para 5; *Buttar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1281 at para 12).

[34] Thus, for the preceding reasons, this application for judicial review is dismissed. No question has been proposed for certification under section 74 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and none is appropriate in the circumstances of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Paragraphs 5 and 8 - 13 of the Affidavit of Stella Sweetman-Griffin are struck;
2. This application for judicial review is dismissed;
3. No question of general importance is certified; and
4. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4585-12

STYLE OF CAUSE: *Julius Francis Pinto v The Minister of Citizenship and Immigration*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 27, 2013

REASONS FOR JUDGMENT AND JUDGMENT: GLEASON J.

DATED: April 8, 2013

APPEARANCES:

Hilete Stein
Kelly Goldthorpe

FOR THE APPLICANT

Stephen Jarvis

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel, LLP
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney, Deputy Attorney
General of Canada
Toronto, Ontario

FOR THE RESPONDENT