Federal Court  Cour fédérale

Date: 20130611

Docket: IMM-10747-12

Citation: 2013 FC 627

Ottawa, Ontario, June 11, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SWARANJIT SINGH GREWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 72(1), of a decision that the applicant did not meet the requirements of the Temporary Foreign Worker Class.

[2] Mr. Grewal is an Indian national. This is his third application for a temporary work permit. He initially trained as a caregiver, but an application under the Live-in Caregiver program was rejected in November 2007. After retraining and acquiring experience working for a trucking company, he applied as a truck driver but was rejected in July 2011. Mr. Grewal then secured a

Labour Market Opinion (LMO) for a job in British Columbia and in September 2012 again applied to come to Canada on a temporary work permit as a long-haul truck driver. His application was rejected on October 1, 2012. The visa officer was concerned that he might overstay his permit and found that he did not have sufficient command of English to carry out the duties of the position.

ISSUES:

[3] The issues before the Court were:

a. What is the standard of review?

b. Did the visa officer err in basing her assessment of the required language skills on the general duties of NOC 7211 as listed on the Service Canada website rather than on the specific duties for the position listed in the offer of employment?

c. Did the visa officer err in concluding that the position required an IELTS overall band level of five or by not explaining why the applicant's CLB scores were insufficient?

d. Did the visa officer fail in procedural fairness by not providing the applicant with an opportunity to address her concerns?

e. Did the visa officer err in concluding that the applicant would not leave Canada at the end of his authorized stay without considering the relevant fact that the applicant's immediate family were all in India?

[4] The legislative and regulatory framework applicable to this case is section 11 of IRPA and section 200 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]:

Immigration and Refugee Protection Act
S.C. 2001, c. 27

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Loi sur l'immigration et la protection des réfugiés
L.C. 2001, ch. 27

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

Immigration and Refugee Protection Regulations
SOR/2002-227

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

(*a*) the foreign national applied for it in accordance with Division 2;

(*b*) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

(3) An officer shall not issue a work permit to a foreign national if

Règlement sur l'immigration et la protection des réfugiés
DORS/2002-227

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) l'étranger a demandé un permis de travail conformément à la section 2;

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;

(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :

(*a*) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	*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;

A. Standard of review;

[5] The standard of review for an officer's determination of eligibility under the temporary foreign worker program, including the interpretation of *Immigration and Refugee Protection Regulations* SOR/2002-227 section 200(3)(*a*), has been found in jurisprudence to be reasonableness ((*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 57; *Khosa*, 2009 SCC 12, at paragraph 59; *Grusas v Canada (MCI)*, 2012 FC 733 at paras 11-16). The standard of review for procedural fairness is correctness (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)* 2003 SCC 29, at para 100; *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53).

A. Did the visa officer err in basing her assessment of the required language skills on the general duties of NOC 7211 as listed on the Service Canada website rather than on the specific duties for the position listed in the offer of employment?

[6] The applicant argued that several of the duties for NOC 7411 which the officer listed in her reasons for decision were not duties for the specific job he was offered, including obtaining permits for international cargo moves, using an on-board computer, completing loading manifests and company bills of lading, reading U.S. customs forms to find transport restrictions on particular

products, and filling in forms to explain why shipments could be unloaded when there had been a mix-up in delivery instructions.

[7] He argued that this Court has found that adding job duties not specified in the offer of employment was an error (*Tan v Canada (MCI)*, 2012 FC 1079, at para 42). Section 8.3 of CIC's *Temporary Foreign Worker Guidelines* manual (available online at http://www.cic.gc.ca/english/resources/manuals/fw/fw01-eng.pdf) states that while an officer's assessment is not limited to the LMO, the officer should consider the particular job being offered. In addition, the offer of employment in the present case indicated that the position required driving as part of a two-person team or part of a convoy. The Officer should have considered what impact being accompanied by other drivers would have on the position's language requirements.

[8] The respondent argued that it was within the officer's discretion to assess the job duties by referring to the NOC description as well as to the actual job offer and the LMO. There was no contradiction or difference between these different sources. The Court has found that a visa officer is under a duty to conduct an independent assessment of the applicant's ability to perform the work, pursuant to IRPR 200(3)(*a*). A statement by the employer or by the applicant cannot be binding on the officer (*Chen v Canada (MCI)*, 2005 FC 1378 at para 12).

[9] Furthermore, the respondent argued, Mr. Grewal acknowledges that section 8.3 of the CIC *Temporary Foreign Worker* manual specifically says that the visa officer should not limit the assessment to the LMO. Therefore, a visa officer may determine that an applicant requires language ability different from that set forth in the LMO and job offer if relevant to the performance of the

job duties. The LMO and job offer are not determinative of how the discretion will be exercised; they are procedural preconditions to the exercise of discretion and part of the factual landscape against which the application is assessed (*Chhetri v Canada (MCI)*, 2011 FC 872 at para 17).

[10] I find that the officer clearly thought about the language requirements and explained why she considered that a greater level of English ability was required. Even if I might have concluded otherwise, I believe that this was a transparent, intelligible conclusion which fell within the range of possible outcomes.

B. Did the visa officer err in concluding that the position required an IELTS overall band level of five or by not explaining why the applicant's CLB scores were insufficient?

[11] The Canadian Language Benchmarks (CLB) are the national standard for describing, measuring, and recognizing the English language proficiency of adult immigrants and prospective immigrants for living and working in Canada. The IELTS are one of several language tests which have been designated as being acceptable to assess an applicant's CLB score.

[12] The applicant argued that the Officer based her assessment solely on the IELTS two-word phrases and on the applicant's overall proficiency, without considering the applicant's differing abilities in listening, speaking, reading, and writing. His scores were:

Date	Listening	Reading	Writing	Speaking	Overall
13/04/2011	5.5	4.0	4.0	5.0	4.0

[13] The IELTS website gives the following descriptions (http://www.ielts.org/test_takers_information/getting_my_results/my_test_score.aspx):

> **Band 4 – Limited User**: basic competence is limited to familiar situations. Has frequent problems in understanding and expression. Is not able to use complex language.
>
> **Band 5 – Modest User**: has partial command of the language, coping with overall meaning in most situations, though is likely to make many mistakes. Should be able to handle basic communication in own field.

[14] The CLB *Companion Tables to the Canadian Language Benchmarks 2000* (http://www.language.ca/display_page.asp?page_id=550) are more detailed, providing descriptions of the competencies at each level with examples of many tasks which a person would be able to perform

[15] The applicant argued that the visa officer simply decided that he was a Limited User and did not consider properly whether he could meet the actual job requirements.

[16] The respondent argued that Mr. Grewal is asking the Court to reinterpret his IELTS score based on the criteria for the Federal Skilled Worker Class and the Canadian Experience Class, criteria which are not applicable to the temporary foreign worker program. An application for a temporary work permit comes under a regulatory regime which differs significantly from the above-mentioned classes. The Court has previously cautioned that as the two processes and the associated rights differ, care must be taken in applying the jurisprudence from one to the other (*Li v Canada (MCI)*, 2012 FC 484 at paras 23-25).

[17] Findings on language levels for temporary foreign workers are highly discretionary decisions, on which there is little jurisprudence. Part 11 of the IRPR ("Workers", sections 194-209), under which the present case falls, does not provide guidance on assessing language ability. The visa officer was required to make findings based on the evidence before her and there is no evidence in the present case that she exercised her discretion capriciously or unreasonably.

C. Did the visa officer fail in procedural fairness by not providing the applicant with an opportunity to address her concerns?

[18] The applicant noted that it is not generally a procedural fairness requirement that work permit applicants be granted an opportunity to respond. However, he argued, there are exceptions, for instance, where an officer's concerns do not arise directly from the IRPA or IRPR, when such an opportunity might be appropriate (*Li v Canada (MCI)*, 2012 FC 484). In this case, the Service Canada website does not list any specific language requirements for NOC 7411. The applicant included documentation of his secondary and post-secondary courses in English, which was not referred to by the Officer in the reasons for decision, and he included his IELTS results. He argued that there was nothing to suggest that the Officer assessed the requirement by any objective standard; instead, she decided on her own what level of English was required and that the applicant did not have this level. Accordingly, procedural fairness required that she give him an opportunity to respond.

[19] The respondent argued that the onus was on the applicant to satisfy the visa officer of all elements of the application. Work permit applicants are not generally granted an opportunity to

respond, particularly when there is no evidence of serious consequences, which has been found to be the case when applicants are able to re-apply and there is no proof that doing so will cause them hardship. Mr. Grewal presented no evidence to suggest that being forced to re-apply would cause any serious consequences (*Qin v Canada (MCI)*, 2002 FCT 815 at para 5; *Masych v Canada (MCI)*, 2010 FC 1253 at para 30; *Li v Canada (MCI)*, 2012 FC 484 at para 31).

[20] I find that the visa officer's decisions that first, the applicant's IELTS results equated to Band 4, not Band 5, and second, for this particular job Band 5 was required, did not diverge so far from the predictable as to be procedurally unfair in the absence of a warning letter. It is not obvious what other information the applicant could have provided that would have altered her findings as to the language requirement. In addition, there is no lasting consequence from this refusal, as the applicant can apply again if he wishes.

D. Did the visa officer err in concluding that the applicant would not leave Canada at the end of his authorized stay without considering the relevant fact that the applicant's immediate family were all in India?

[21] The applicant argued that the visa officer did not provide sufficiently clear reasons for concluding that Mr. Grewal would not leave Canada. He argued that she appeared to have concluded that because he was young and single, and Canada is wealthier than India, he would automatically breach Canadian law and stay on, and this even though his family is all in India, he has maintained stable employment in India, and he is educated. He submitted that the failure to substantiate her conclusion rendered it unreasonable, being neither transparent nor intelligible.

[22] The respondent argued that the Officer considered all the relevant information. She assessed his work experience in India, his young age, his being single, his being mobile, and his socio-economic incentive to remain in Canada. The evidentiary onus was on him and the visa officer was entitled to examine the totality of circumstances. The weight assigned to the factors is discretionary; the officer is assessing the broader picture (*Nguyen v Canada (MCI)*, 2005 FC 1087 at paras 5-7; *Ayatollahi v Canada (MCI)*, 2003 FCT 248 at para 23).

[23] I find that the visa officer's exercise of her discretion in assessing whether the applicant was likely to leave on schedule was in line with the factual evidence and the guiding jurisprudence. Her finding was not outside the range of possible, acceptable outcomes and was, therefore, not unreasonable.

CERTIFIED QUESTION:

[24] The applicant has proposed that the following question be certified as a serious question of general importance:

> Where an officer has concerns over whether an applicant is able to perform and carry out the employment of a job offer, what are the standards, if any, that an officer must use in determining a position language requirement?

[25] The respondent opposes certification of these questions on the grounds that there is no genuine disagreement on the standard and that an answer would not be dispositive in this case. I agree and do not certify a question.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is denied. No question is certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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