Federal Court  Cour fédérale

Date: 20130731

Docket: IMM-2763-12

Citation: 2013 FC 838

Ottawa, Ontario, July 31, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

FAN WU

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 by a case officer of Citizenship and Immigration Canada (the officer) dated February 28, 2012, denying the applicant's application for permanent residence under the Canada Experience Class.

[2] The applicant requests that the officer's decision be set aside and the application be referred for redetermination by a different officer.

Background

[3] The applicant is a citizen of China. She came to Canada as an international student and was working in Canada on a post-graduate work permit at the time of her application.

Officer's Decision

[4] In a letter dated February 28, 2012, the officer informed the applicant that her application had been rejected on the basis that the job duties in her letter of reference were not contained in the duties listed under NOC 1112, Project Analyst. Therefore, the officer was not satisfied she had obtained 12 months of full-time work experience in an occupation with a NOC skill type of 0 or skill level of A or B.

[5] The officer's notes indicate he or she had also telephoned the applicant's employer:

> According to application, PA [the applicant] works as a Project Analyst (NOC 1112) for Scotia Asset Management from 01AUG10 to present. However, on 28FEB12 at 14h00, I spoke with Farah Khan who signed letter of reference for PA. She stated that PA performed administrative duties and not project analysis duties. While involved in reports, PA was not doing any programming or project development. As such, PA does not meet job duties listed under NOC 1112. Duties in letter of reference do not match NOC 1112.

Issues

[6] The applicant submits the following points at issue:

1. Did the officer err at law by failing to properly assess the applicant's occupational experience as it related to her intended occupation in Canada, and further, breach the rules of procedural fairness by failing to provide the applicant with a full opportunity to provide additional evidence and/or information regarding the officer's concerns?

[7] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer violate procedural fairness?
3. Did the officer err in refusing the application?

Applicant's Written Submissions

[8] The applicant points out that the occupation title for NOC 1112 is "Financial Analyst", not "Project Analyst". The applicant's reference letter listed her general responsibilities, but prefaced that description by stating the job was not limited to the responsibilities enumerated in the letter.

[9] The applicant concedes the onus was on her to provide a well-documented application, but the officer had an obligation to give the applicant an opportunity to confront the officer's concerns. There was non-disclosure to the applicant of information concerning the basis on which the opinion was rendered.

Respondent's Written Submissions

[10] The respondent argues the reference to wrong occupation title is not determinative. The proper NOC code number was referred to and this has no bearing on how the officer assessed the application. The listed duties under NOC 1112 contrast with those duties set out in the reference letter, which are administrative in nature. This was confirmed by the applicant's employer. An officer is under no obligation to provide a running score of weaknesses in an application. The applicant was responsible for putting her best foot forward in the application. The onus was on the applicant and the officer's decision was discretionary. It was not a lack of specifics that concerned the officer, but the nature of the work. The standard of review is reasonableness.

Analysis and Decision

[11] **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 at paragraph 57, [2008] 1 SCR 190).

[12] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798 at paragraph 13, [2008] FCJ No 995 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC

12, [2009] 1 SCR 339 at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[13] **Issue 2**

Did the officer violate procedural fairness?

The respondent is correct that in a visa application, the onus is on the applicant to present a well-documented application. The respondent is also correct that this is generally done on the basis of a single submission by the applicant, instead of a series of back-and-forth between the officer and the applicant (see *Thandal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 489 at paragraph 9, [2008] FCJ No 623). The duty of fairness required by visa officers is at the low end of the spectrum (see *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25 at paragraph 21, [2012] FCJ No 22).

[14] This case, however, is unlike those relied on by the respondent concerning an officer's alleged failure to give an applicant a chance to respond to concerns relating to his or her application. Rather, this officer relied on information that was not in the applicant's submissions. The officer spoke to the applicant's employer.

[15] Where an officer has access to information of which the applicant is unaware, the applicant should be given an opportunity to disabuse the officer of any concerns arising from that evidence (see *Xie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1239 at paragraph 20, [2012] FCJ No 1367). Neither the existence nor the content of this call were disclosed to the applicant. Indeed, the officer's letter misleadingly omits any mention of the call, giving the

applicant the untrue impression her application had been decided solely based on the record she submitted. It was only upon the disclosure of the certified tribunal record in this proceeding that the applicant learned of the existence of the call and the officer's reliance upon it.

[16] Given that an applicant must decide whether to pursue the costly step of initiating an application for judicial review before gaining access to the certified tribunal record, I would encourage visa officers to be transparent with an applicant about the reasons for refusing an application.

[17] This is a textbook example of a violation of the duty of fairness. I need not decide the third issue. The application for judicial review is granted and the matter should be returned to Citizenship and Immigration Canada for redetermination.

[18] 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 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.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2763-12
STYLE OF CAUSE:	FAN WU - and - THE MINISTER OF CITIZENSHIP & IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 7, 2013
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	July 31, 2013

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