Federal Court Cour fédérale

Date: 20131129

Docket: IMM-3407-13

Citation: 2013 FC 1201

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 29, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MAMADY BADRA KABA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, who is self-represented, has applied for judicial review of a decision by a Citizenship and Immigration Canada officer who refused his application for permanent residence under the Canadian Experience Class. This class is dealt with at section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The application for judicial review was brought under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] The applicant is a citizen of Guinea who wishes to become a permanent resident now that he has completed his university studies in Canada. For the applicant to meet the conditions of the Regulations, it must be shown that he has acquired in Canada at least twelve months of full-time work experience in one or more occupations that are listed in the National Occupation Classification [NOC].

[3] In this case, the applicant applied on the basis of NOC 6221, or "Technical Sales Specialists – Wholesale Trade". In support of his application, he submitted a certificate of employment stating that he was responsible for a number of different tasks. The certificate of employment referred specifically to [TRANSLATION] "Job Classification: Telecommunications sales representative (NOC 6221)". Comparing his certificate of employment to his main tasks, Mr. Kaba claims to fulfil the main duties identified under NOC 6221. He argues that the immigration officer did not perform this comparative examination, thereby making her decision reviewable. In his view, such a comparison would show that he is a technical sales specialist. It is undisputed before this Court that the applicant meets the educational requirements of this classification.

[4] The impugned decision can be summarized as follows:

> [TRANSLATION]
> . . . On the basis of this letter, I am not satisfied that the duties correspond to the lead statement of NOC 6221, Technical Sales Specialists – Wholesale Trade. More specifically, you do not sell technical goods and services such as scientific, farming and industrial equipment or telecommunications, electricity and computer services, in national and international markets. According to your letter of employment, you telephone existing and potential clients to promote Bell Canada's products and

> services (Bell Internet Fibe and Bell Fibe TV, Bell telephone, Bell Internet and Bell television).

[5] It is important to clarify something at this stage. This Court's role is neither to determine whether the letter of employment corresponds to the main duties described in NOC 6221, nor to determine whether it meets the NOC 6221 standard. Its role is to determine whether the decision was lawful. The parties agree that the applicable standard of review is reasonableness. This implies that the decision warrants deference. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, describes the qualities that make a decision reasonable:

> [47] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[6] Therein lies the problem. A person is entitled to know why his or her application is determined to be ineligible. The reasons need not be long or particularly detailed, but they must have at least some substance. The Supreme Court wrote the following in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708:

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts 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.

[7] I examined the file as it was at the time of the decision to determine whether the reasons showed these qualities of reasonableness. In response, counsel for the respondent, who otherwise

valiantly defended the respondent's interests, could point only to a reply given by the respondent to a question regarding the affidavit filed two months after the decision was rendered.

[8] This approach strikes me as problematic. The respondent's affidavit was filed in support of his memorandum concerning the application for judicial review. The affidavit, which was filed under Rule 11 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 (the Rules), is being used to attempt to buttress the impugned decision. The "wholesale trade" aspect is not mentioned anywhere in the decision, while the affidavit mentions it for the first time at paragraph 12.

[9] It is well established that an affidavit filed under Rule 11 cannot be used to supplement a decision (*Barboza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1420). However, that is precisely the situation here.

[10] The applicant, who is not a lawyer, wished to examine the witness regarding the affidavit. In response to the first question, the respondent not only tried to explain that the applicant's tasks showed that he worked in the residential sector, but also added an explanation of the decision not found elsewhere. It was new. The last paragraph of the response is reproduced below:

> Following a review of the letter of employment dated June 13, 2012, I was not satisfied that the applicant sold technical goods and services on a wholesale level. As noted above, the duties listed are descriptive of a residential clientele, and not a wholesale trade technical sales specialist as described in the lead statement of NOC 6221. As a result, I was not satisfied applicant met the employment criteria of the Canadian Experience as set out in R87.1 and the application was refused.

[11] Not only do we learn that the lack of wholesale experience was key to the decision, but we are told that the description found at the beginning of NOC 6221 is the "lead statement".

[12] The additions to the respondent's affidavit and the cross-examination on the affidavit are clearly being relied upon to buttress a decision that seems to be based on scant reasons. These additions may not be introduced now. They are not part of the file that is subject to judicial review.

[13] The reasons for the decision, even when read in light of the file resulting in the decision of April 25, 2013, do not support a finding that the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It would have been necessary to clearly establish the parameters of NOC 6221, with its lead statement that had to be respected and, if the standard was not met in this case, an explanation of why not. The applicant is entitled to that. The affidavit presented by the respondent and the cross-examination on the affidavit, the content of which would have fulfilled the legal obligations in question had it been part of the decision, came after the fact. I would add that filing an affidavit in support of an opposition to an application for judicial review in order to explain a decision is to be avoided. Using an examination on an affidavit to further explain and articulate a decision should also be proscribed, in my opinion. In this case, the applicant is self-represented, and the question he asked during the cross-examination on the affidavit, which was quite specific, did not require the type of response that was provided.

[14] The applicant relied heavily on the decision of my colleague Justice Elizabeth Heneghan in a case that seems to bear a close resemblance to the matter under consideration. In *Ye v Canada (Citizenship and Immigration)*, 2012 FC 652, the Court held as follows in a very brief judgment:

> [6] NOC 6221 includes the following example titles that may describe a position within that category: "technical support specialist", "telecommunications sales representative" and "telecommunications salesperson".
>
> [7] In my opinion, the Officer erred by failing to address the evidence before her that the Applicant's responsibilities and work experience were described in terms of one of the example titles in the NOC 6221 category.

[15] The applicant hoped that this decision would be binding on me through the doctrine of *stare decisis* and that the respondent would therefore be forced to concede. That doctrine does not apply to the decisions of colleagues. One may, of course, be influenced by a decision's persuasiveness, but in this case, the decision is so short and lacking in detailed reasons that its persuasive value is limited. However, I take comfort in the fact that my colleague opted to refer the matter back for reconsideration in circumstances that are, as far as can be determined, analogous to the circumstances of this case.

[16] At the hearing I made it very clear to the applicant that the Court would not make a finding that his position made him eligible under NOC 6221. The new decision will consider the lead statement. One might think that when the decision of an administrative tribunal is referred back for redetermination on the basis that it is unreasonable, only an outcome opposite to the initial outcome could be reasonable. This would be an error.

[17] As I have tried to explain, this Court is not rendering a decision on the merits. It is possible that once the file has been examined correctly, the decision maker will reasonably conclude that the position held by the applicant does not qualify under NOC 6221. My decision is based only on the fact that the reasons and the file before the tribunal are insufficient to support a finding that the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. The applicant was confused, and it is easy to understand why when considering the file as a whole. A new decision must therefore be rendered by somebody other than the immigration officer who rendered the original decision in this matter. I would add that, given the particular facts of the case, it would be appropriate to allow the applicant to present his point of view again. This would include providing him with the opportunity to present examples of employment that, in his view, correspond better to that which he occupied and that fall under NOC 6221 (*Friesen Dental Corp v Director of Companies (Manitoba)* (2011), 341 DLR (4th) 83 (C.A. Man.); *Canada (Minister of Citizenship and Immigration) v Pinnock* (1996), 122 FTR 68). Conversely, the Minister would have the opportunity to explain more precisely the requirements of NOC 6221. A new decision maker will be able to reach a decision on the basis of all of this evidence and any submissions made.

[18] The applicant insisted that there be an order with respect to costs. The rule in an immigration context is that no costs are to be awarded absent special reasons. Rule 22 of the Rules reads as follows:

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

22. Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d’autorisation, la demande de contrôle judiciaire ou l’appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[19] His request is not outlandish. However, the applicant's complaints seem to be mainly related to the refusal to change the decision rendered by the officer on April 25, 2013. His application for judicial review was handled expeditiously, and just because it was successful does not mean that it would be appropriate to award costs when that is permitted only for special reasons. I am not of the view that mere eagerness to defend a position is sufficient to warrant an order of costs, even if the *ex post facto* additions through the affidavit and the cross-examination on affidavit were ill advised (*Ndungu v The Minister of Citizenship and Immigration*, 2011 FCA 208).

[20] Accordingly, the application for judicial review is allowed without costs. There is no question for certification.

JUDGMENT

The application for judicial review is allowed without costs. The matter is referred back to Citizenship and Immigration Canada for redetermination by someone other than the immigration officer who decided this matter on April 25, 2013. Given the particular facts of the case, it would be appropriate to allow the applicant to present his point of view again. This would include providing him with the opportunity to present examples of employment that, in his view, correspond better to that which he occupied and that fall under NOC 6221. Conversely, the Minister would have the opportunity to explain more precisely the requirements of NOC 6221. A new decision maker will be able to reach a decision on the basis of all of this evidence and any submissions made.

There is no question for certification.

"Yvan Roy"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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