

SUPREME COURT OF NOVA SCOTIA

Citation: *Xing v. Nova Scotia (Immigration)*, 2017 NSSC 70

Date: 20170309

Docket: Hfx. No. 451444

Registry: Halifax

Between:

Yifei Xing

Applicant

v.

The Province of Nova Scotia
as represented by The Minister of Immigration

Respondent

Decision

Judge: The Honourable Justice Michael J. Wood

Heard: February 7, 2017, in Halifax, Nova Scotia

Counsel: M. Lee Cohen, QC, and Scott McGirr, for the Applicant
Alison W. Campbell, for the Respondent

By the Court:

[1] Yifei Xing came to Nova Scotia in 2009 to study business and economics at Acadia University. After graduation he moved to Halifax for employment with RCR Hospitality Group. Mr. Xing decided he wanted to become a permanent resident of Canada and the avenue he chose was through the Nova Scotia Nominee Program (“NSNP”).

[2] Immigration is an area of concurrent jurisdiction for the Federal and Provincial Governments. The NSNP is an immigration recruitment and selection program whereby the Government of Nova Scotia is able to nominate individuals for approval as permanent residents by the Canadian government. In deciding who to nominate Nova Scotia identifies individuals who can meet the provincial labour market and economic needs.

[3] The International Graduate stream of the NSNP targets international graduates who are living and working in Nova Scotia and intend to establish their careers here. On February 7, 2013, Mr. Xing submitted an application under this program declaring his intention to settle in the province of Nova Scotia and indicating he had an offer of employment with RCR Hospitality Group in Halifax.

[4] By letter dated April 18, 2013, Mr. Xing was advised his application had been assessed and approved, and that confirmation of his nomination had been sent to Citizenship and Immigration Canada.

[5] The Federal Government approved Mr. Xing’s application for permanent residency, however in order to finalize that process he was required to leave the country. Upon his return he would be “landed” and become a permanent resident.

[6] Mr. Xing returned to China to visit his family and on August 9, 2014, arrived at Pearson International Airport in Toronto. He presented himself to a Canada Border Services Agency (“CBSA”) officer to complete the landing process. Based upon her interview with Mr. Xing the CBSA agent concluded he did not intend to live in Nova Scotia which would be contrary to the terms on which the NSNP nomination had been granted. CBSA informed the Nova Scotia Office of Immigration of the officer’s opinion and Nova Scotia rescinded the nomination on August 28, 2014. This meant Mr. Xing was no longer eligible to receive permanent resident status.

[7] Mr. Xing requested an admissibility hearing under the *Immigration and Refugee Protection Act* to challenge the CBSA report concerning his lack of intention to reside in Nova Scotia and on January 27, 2016, the Board issued a decision in his favour stating the allegations were “not founded in fact or in law”.

[8] Based upon the Immigration and Refugee Board decision Mr. Xing asked the Nova Scotia Office of Immigration to reconsider the decision to rescind his nomination. By letter dated April 14, 2016, the manager of NSNP advised that the Office of Immigration was not prepared to reconsider the August 2014 decision.

[9] Mr. Xing has brought this judicial review proceeding to challenge the reasonableness of that decision.

Positions of the Parties

Yifei Xing

[10] Mr. Xing says the only reason he was not landed as a permanent resident of Canada when he arrived in Toronto in August 2014 was the CBSA officer’s opinion that he did not intend to reside in Nova Scotia. That was the reason for Nova Scotia withdrawing his nomination under the NSNP and once he successfully challenged the CBSA determination his nomination should have been reinstated. By failing to reconsider the decision and reinstate his nomination the manager of the NSNP was acting unreasonably and her decision should be set aside.

The Minister of Immigration

[11] Counsel for the minister says the CBSA officer’s finding was not the sole basis for the decision to rescind Mr. Xing’s nomination. She argues that additional investigations were carried out, including contacting RCR Hospitality who advised in August 2014 that Mr. Xing was no longer employed with them. This raised doubts about whether Mr. Xing continued to be eligible for the NSNP nomination and that he had failed to notify the province of a change in his employment status as required under the program.

[12] The respondent says there were valid reasons to refuse to reconsider the rescission of Mr. Xing’s nomination and, as a result, that decision was not unreasonable.

Analysis

Reasons for Rescission of Mr. Xing's Nomination and the Refusal to Reconsider

[13] In order to assess the reasonableness of the decision not to reconsider the rescission of Mr. Xing's nomination it is important to understand the basis for the initial decision.

[14] The first contact between CBSA and the Nova Scotia Office of Immigration was an email sent on August 18, 2014, with the subject line "RE: Provincial Nominee not intending to live in NS". It stated the CBSA opinion that Mr. Xing did not intend to live in Nova Scotia and asked whether the province was going to uphold the nomination certificate. On August 20, 2014, the manager of the NSNP responded to the CBSA by email as follows:

Dear Jessica:

Further to your email below I was made aware of this matter by Julia Duckworth from CIC on August 19th. I have been advised by the employer on record that Mr. Xing left Nova Scotia some time ago and returned to China. Please be advised that as it is Mr. Xing's intention to no longer reside in Nova Scotia, we will be rescinding his nomination and sending formal notification to Mr. Xing, Julia Duckworth and yourself. As the Manager of the Nominee Program, in future please send such matters to my attention.

Thank you.

Nadene MacAulay
Manager Nominee Program
Nova Scotia Office of Immigration

[15] The advice by the employer, which is referred to, is an email received from RCR Hospitality in response to a request for confirmation of Mr. Xing's current status. The manager of the NSNP advised the employer that they had reason to believe he was no longer employed with them. The email response stated:

No, he left long ago. I believe he went home to China when his visa expired.

[16] On August 28, 2014, the manager of the NSNP sent a letter to Mr. Xing advising of the rescission of his nomination. That letter stated:

I am contacting you regarding your nomination from the Nova Scotia Nominee Program. The Office of Immigration has received additional information and is therefore **rescinding** your nomination, effective immediately.

- We have been notified that on August 19, 2014 you attempted to land at a Point of Entry in Canada and that you informed the Canada Border Services Agent that it was not your intention to go onward to Nova Scotia or to reside in Nova Scotia due to employment in Toronto.
- We have been notified that you left your employment with RCR Hospitality some time ago.

It is clearly explained throughout the application process that a nominee of Nova Scotia is expected to reside in Nova Scotia after receiving permanent resident status. The Nova Scotia Office of Immigration will not uphold nominations for individuals who do not intend to live in Nova Scotia.

[17] On its face this letter seems clear that the reason for rescission of the nomination is the conclusion that Mr. Xing did not intend to reside in Nova Scotia. That is supported by the email exchange leading up to that letter and in particular the message sent on August 20, 2014, to CBSA.

[18] The argument advanced at the judicial review hearing by counsel for the minister, that the lack of employment and failure to advise of a change in employment status was also part of the rationale for the rescission, is not borne out by the record. The first time this issue is mentioned is in August 2015. That month counsel for Mr. Xing advised that the CBSA decision was being challenged and suggested the NSNP decision to rescind was premature. The response from the manager of the program was an email dated August 31, 2015, which stated as follows:

Hi Lee:

In reply to your correspondence dated August 17, 2015, please be advised that the action taken in rescinding the nomination of your client was in keeping with the Nova Scotia Office of Immigration (NSOI) policy and procedure.

On August 18, 2014 the NSOI received information from Jessica Fenn CBSA Border Security Officer that Mr. Xing's stated intention to her was as follows:

1. "not to go onward to Nova Scotia, or ultimately reside in that province", and
2. "to work for Citi Bank in Toronto".

Such statements made to Ms. Fenn clearly indicated that it was not Mr. Xing's intention to settle in Nova Scotia. **Adaptability and Intention to Settle** as you know is one of the eligibility criteria on which Mr. Xing's application would have been assessed and recommended for nomination. Following procedure the August 28, 2014 letter was prepared notifying Mr. Xing that his nomination had been rescinded. This letter was copied to CIC and CBSA.

I would also bring to your attention that on August 19, 2014 the employer (RCR Hospitality Group) who supported Mr. Xing's application under the NSNP International Graduate Stream was contacted to confirm the current status of Mr. Xing's employment. They replied that Mr. Xing was no longer employed with them having left long ago. They were of the belief that he had returned to China when his visa expired.

The NSNP International Graduate Application Guide (May 2012) page 10 places the onus on Mr. Xing to notify the NSNP of any changes in his status or eligibility criteria for the Stream, including change of employer or loss of employment. The file indicates that no such notification was ever received from Mr. Xing regarding changes in either his status or employment.

If you have any further questions on this file please do not hesitate to get in touch with me.

[19] By letter dated January 28, 2016, counsel for Mr. Xing advised the Nova Scotia Office of Immigration of the successful challenge to the CBSA decision. That letter stated in part:

The Board Member found in Mr. Xing's favour on both matters. Mr. Xing was deemed to be a credible witness and established his intentions to live in Nova Scotia both prior to and following the unjustified decision at Pearson Airport on August 18, 2014. For a variety of reasons, the damaging, but skeletal, interview notes provided by the interviewing officer at Pearson were discredited at the hearing. However, in the absence of a letter of nomination, Mr. Xing cannot yet be landed in Canada with the permanent resident status to which he was previously entitled.

Mr. Xing continues to work with the RCR Hospitality Group in Halifax (the company that supported his nomination in the first place), he is studying various securities courses with the hope to someday work in Nova Scotia in the banking sector and, added to that, Mr. Xing has involved himself with the Greater Halifax Partnership and Fusion Halifax as he wants to participate in making Halifax a place of opportunity for Chinese nationals and others.

This letter is intended to bring you up to date on Mr. Xing's recent success before the Immigration Division and to ask the province to reconsider its earlier decision to rescind Mr. Xing's provincial nomination. I am enclosing a copy of the hearing decision for your file.

As you can imagine, Mr. Xing is very anxious to get his PR status resolved and to finally begin living in Nova Scotia with the confidence and certainty that has eluded him since his unhappy return to Canada in August 2014.

We look forward to your reply. Thank you very much.

[20] On February 25, 2016, the manager of the program sent the following email to RCR Hospitality:

In an email you sent to me dated August 19, 2014, in reply to my inquiry as to then employment status of Mr. Xing with RCR, you stated the following: "No he left long ago. I believe he went home to China when his visa expired".

It is our understanding that Mr. Xing is now employed with your company once again. Please confirm if this is correct plus provide the following information in order that we may update our file:

- Position description held by Mr. Xing
- Is the position permanent full time
- Annual salary range paid to Mr. Xing

Thank you in advance for your prompt reply to this email.

[21] There was no response received from RCR Hospitality and no further communication with them to determine Mr. Xing's employment status.

[22] The decision not to reconsider Mr. Xing's nomination was contained in a letter dated April 14, 2016, from the Office of Immigration which stated:

I acknowledge receipt of your most recent correspondence dated April 11, 2016, in support of previous correspondences requesting the re-instatement of Mr. Xing's nomination so that he may proceed to be landed in Canada.

As you are aware, on August 28, 2014, the Nova Scotia Office of Immigration advised Mr. Xing that his nomination was rescinded effective immediately. The Nova Scotia Office of Immigration is not prepared to reconsider its August 2014 decision in this matter.

I note that in your recent correspondence you have indicated that Mr. Xing returned to Nova Scotia and is again employed with RCR Hospitality Group. In these circumstances he may be eligible to apply under another stream of the Nova Scotia Nominee Program such as the Skilled Worker Stream or the Nova Scotia Experience Express Entry Stream, provided of course, he meets all of the related eligibility criteria. Processing times for each of these streams is currently between 4-6 weeks and in some instances a shorter time frame.

Standard of Review

[23] Both counsel agree the standard of review to be applied in assessing the refusal to reconsider the rescission of Mr. Xing's nomination is reasonableness. This means the court should give deference to the decision maker and not simply substitute its own decision for that of the manager of the NSNP. A reasonableness

review requires the court to consider the evidentiary record, the legislative framework and the reasons given. This will allow the court to identify the range of possible and acceptable outcomes available in the circumstances. If the decision falls within that range then it will be reasonable and the court should not interfere.

Reasonableness of the Decision

[24] In argument counsel for the respondent agreed Mr. Xing's intention to reside in Nova Scotia is no longer an issue. She says the reasons for not reconsidering the rescission of his nomination were:

1. He did not have employment and was therefore not eligible for nomination under the program.
2. He had not disclosed the change in his employment status when he stopped work with RCR Hospitality prior to August 2014.

[25] At the time of the request for reconsideration the Office of Immigration was told by Mr. Xing's counsel that he was working with RCR Hospitality. The manager of NSNP sent an email to the employer seeking confirmation but received no response and did not follow up. In the face of this information there does not seem to be any justification for relying on lack of employment as a basis for not reconsidering the rescission of Mr. Xing's nomination.

[26] The letter of April 14, 2016, does not explain why the Office of Immigration was not prepared to reconsider the decision. At that point in time Mr. Xing's intention to reside in Nova Scotia, which was the original basis to rescind his nomination, had been resolved in his favour and he was apparently working with the qualified employer who supported his application (i.e. RCR Hospitality). In light of the lack of explanation in the April 14th letter and the circumstances which existed at that point in time it is difficult to understand the refusal to reconsider the issue.

[27] The only other justification offered by counsel for the respondent was the alleged failure of Mr. Xing to notify the Office of Immigration about his change of employment status with RCR Hospitality in 2014. This was not relied on to support the rescission of the nomination and is first mentioned in the email to Mr. Xing's counsel of August 31, 2015. In that communication it is not described as a reason why the rescission was made nor was it given as an impediment to reinstatement.

[28] The overriding purpose of the NSNP is found in the introduction to the program's Application Guide which is found in the record. That portion of the guide reads as follows:

This guide explains how you can apply to the Nova Scotia Nominee Program (NSNP) through the **International Graduate stream** to be nominated for permanent residence. The NSNP is an immigration recruitment and selection program that allows the Government of Nova Scotia to nominate to the Canadian government individuals who can meet the provincial labour market and economic needs. Nominees, along with their spouses and dependents, approved under this program may become permanent residents of Canada following approval by the Canadian government.

The International Graduate stream assists Nova Scotia employers to hire and retain recent international graduates. This stream targets international graduates who are living and working in the province and intend to establish their careers in Nova Scotia.

[29] Mr. Xing obviously meets all of these requirements since he was nominated under the program. He is the sort of person Nova Scotia wants to attract to the province because they will make a positive contribution to our economy. If the CBSA officer in Toronto had not mistakenly concluded that Mr. Xing did not intend to reside in Nova Scotia he would be a permanent resident. That mistake has now been reversed through the Board decision issued in January 2016. The respondent says the matter should not be reconsidered because Mr. Xing may not have kept the program informed of his employment status in 2014. Mr. Xing was employed with RCR Hospitality through the application process and at the time he requested reconsideration. He was not working for RCR Hospitality in August 2014, however that should not be all that surprising given that the permanent residency process requires the applicant to leave the country before becoming "landed".

[30] I have concluded that the decision not to reconsider the rescission of Mr. Xing's nomination is unreasonable and must be set aside. I say this because the initial justification for the rescission has been demonstrated to be wrong and the additional reasons offered in the course of this judicial review are weak at best. According to the information given to the Office of Immigration, Mr. Xing was employed at the time he asked for reconsideration. The only remaining justification was failure to keep the Office informed about a change in job status in 2014. There was no explanation about the significance of this omission in the context of the principles underlying the NSNP or why it should terminate the nomination process

for an otherwise qualified candidate. In the absence of such information I see nothing in the evidentiary record or structure of the program to show that such a conclusion falls within the range of possible and acceptable outcomes available in the circumstances of this matter.

Disposition

[31] According to counsel the International Graduate stream of the NSNP no longer exists and as a result they asked me to make a determination on the issue of the reasonableness of the decision not to reconsider the rescission of Mr. Xing's nomination which I have now done. Both counsel wanted the opportunity to make further submissions with respect to the appropriate remedy in light of the status of the program. I will give the parties until April 30, 2017, to provide additional briefs on the issue of remedy as well as the cost consequences of this decision. Once I review these materials I will determine whether a further hearing is required.

Wood, J.