Federal Court  Cour fédérale

Date: 20200211

Docket: IMM-4320-19

Citation: 2020 FC 232

Ottawa, Ontario, February 11, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

AVNI PONICAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a second refusal for a work visa to be employed as a painter in Calgary by an Immigration Officer with the Embassy of Canada's Visa Section in Vienna, Austria. The Officer refused the application because Mr. Ponican failed to show he met the language, training, and experience requirements.

II. Background

[2] Mr. Ponican is a 33-year-old citizen of Kosovo. Mr. Ponican applied for a work permit as a painter with Artan Painting Ltd. in Calgary under the Temporary Foreign Worker Program.

[3] His first application was refused on March 4, 2019. The first refusal indicates "I am not satisfied that you have truthfully answered all questions…" and makes particular reference to a section on past visa refusals. The first refusal also indicated "you were not able to demonstrate that you will be able to adequately perform the work you seek." The first decision told him he is welcome to reapply. He judicially reviewed the first refusal, but leave was refused.

[4] On May 14, 2019, Mr. Ponican reapplied. Mr. Ponican's application was made in the Labour Market Impact Assessment ("LMIA") stream. Verbal and written English language skills were listed on the LMIA as necessary skills.

[5] On his second application, he indicated his native language as Albanian, but said he is able to communicate in English even though he checked "no" to the question of whether he had taken any language testing and he filed no other proof of English language skills.

[6] In the prior employment section, he indicated he had been a painter since 2013. In the education section, all Mr. Ponican included was a 6-month painting course in Gjakove, Kosovo called "Vocational Training Centre," and he attached a certificate from this training course. His form indicates he is a furniture store owner as well as a painter.

[7] Mr. Ponican submitted a reference letter from Letaj KS in Kosovo regarding his painting experience. The letter stated that he has been working for Letaj since January 7, 2013, earning 570 euros per month as a painter. It is not clear whether the reference letter was also attached to Mr. Ponican's first work visa application but given the date of February 20, 2019, it would appear that it could have been submitted on the first application. Additionally, he submitted a letter from counsel stating Mr. Ponican's prior painting experience since January 2013 and raising several issues with the first refusal decision including that he did not have an opportunity to address credibility concerns.

[8] On May 21, 2019, the Officer rejected Mr. Ponican's second request. The Officer indicated after a review of the evidence and the LMIA requirements:

> I have reviewed the requirements of the LMIA and the support documents provided by the appellant in this application: Certificate of professional training completed in DEC18 submitted. According to info provided by applicant, this is a 6 months course. I am not satisfied that this equivalent to completion of secondary school or three to four year apprenticeship as notes (*sic*) on the LMIA. No documents provided to demonstrate that the applicant has any knowledge of English …A reference letter signed by a private person is not a reliable proof of experience in itself if not supported by "independent/third party" documents such as bank statement showing salary or social security insurance / pension plan print out showing employer's name. Applicant has submitted a copy of his bank statement. No regular deposit seen. On the other hand, applicant states he also has been furniture owner while working as painter. The "important" cash deposits… are more in line with ownership and operation of furniture business (fewer sales but for bigger amounts of money). I am not satisfied that applicant has the training, language competencies or experience to perform the tasks as describe in the LMIA.

III. Issues

[9] The issues are:

A. Was the Officer's decision to deny Mr. Ponican's work visa application unreasonable?

B. Was the decision procedurally fair?

IV. Standard of Review

[10] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], does not change the selection of standard of review agreed upon by the parties in their initial memorandums, even though *Vavilov* changed the framework. There is now a presumption of a reasonableness review and the exceptions do not apply (*Vavilov* at para 17). The standard of review remains correctness for the procedural fairness issue even after *Vavilov* (*Ntamag v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 40 at para 7; *Ennis v Canada (Attorney General)*, 2020 FC 43 at para 18).

V. Analysis

A. *Was the Officer's decision to deny Mr. Ponican's work visa application unreasonable?*

[11] Section 200(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, says "An Officer shall not issue a work permit to a foreign national if… there are reasonable grounds to believe the national is unable to perform the work sought" (see Annex A for the full text of relevant legislation).

[12] The Officer's reasons state three specific shortcomings in Mr. Ponican's work visa application that suggested he was unable to perform the work. First, the Officer found Mr. Ponican provided no supporting documents to show he has any knowledge of English. Second, the training course certificate provided by Mr. Ponican did not align with the educational requirements noted on the LMIA. Third, he lacked any reliable documents showing he has the experience needed for the position, as his reference letter was not "reliable proof" and the bank deposits showed he was not drawing a regular salary.

[13] Mr. Ponican puts forward a few perceived flaws in reasoning to suggest the Officer made an unreasonable decision.

(1) English

[14] Mr. Ponican's first argument is that the Officer's decision relied on his lack of English language skills without analyzing how this lack of skills influenced Mr. Ponican's ability to do the job given the contract for employment and the National Occupational Classification (NOC) requirements. Mr. Ponican indicates his employer verified that he could in fact meet the requirements of the job, and this should be interpreted to include speaking and writing English.

[15] The LMIA provides that oral and written English are requirements of the job. These requirements must be met to comply with the LMIA. The Respondent's authority of *Virk v Canada (MCI)*, 2014 FC 150 at paras 5–6 is an example where the position stated English was a requirement and yet the applicant "provided nothing to the Officer to verify his English language skills." Mr. Ponican's case of *Tan v Canada (MCI)*, 2012 FC 1079 can be distinguished because

in that case no English reading or writing skills had been specified in the employment requirements.

[16] I cannot agree with Mr. Ponican that his employer's general view that he has the skills needed to do the job is enough to confirm he speaks or writes English. He has presented no evidence of his language abilities. It was not unreasonable to find he did not meet this requirement as Mr. Ponican provided no supporting documentation to show he has any knowledge of English.

(2) Educational requirements

[17] Mr. Ponican argued at the judicial review hearing that he met the educational requirements given that he had high school education. However, Mr. Ponican provided no evidence anywhere in the Certified Tribunal Record about having high school education even though the LMIA form said "Education Requirements: Secondary school" and his first work visa application had been refused in part because he did not meet the educational requirements. As the Officer stated, the only educational document Mr. Ponican submitted was the 6-month vocational certificate which fell short of the necessary credentials. Mr. Ponican now arguing he has grade 12 is not helpful as this was not put before the Officer. This was not the case of an officer imposing a non-existent educational requirement.

(3) Painting experience

[18] On the third point, Mr. Ponican argues the Officer incorporated other "non-existing" employment requirements not found in the NOC because formal training is not a "hard" employment requirement for painters in Canada. While the LMIA does not note a certain level of experience, the NOC says completion of a three to four year apprenticeship program *or* over three years of work experience in the trade is an employment requirement for painters. The Officer found there was no reliable evidence that Mr. Ponican met either of these requirements. The reference letter was held to not be "reliable proof" and it was not supported by independent documents. To the contrary, the independent, objective evidence of the bank statements showed no regular deposits despite Mr. Ponican's claim that he was getting a regular salary. The Officer weighed this evidence, and also considered Mr. Ponican's statement on his application that he owned a furniture store. The Officer said the sporadic deposits were "more in line with ownership and operation of furniture business (fewer sales but for bigger amounts of money)." This was an interpretation that flowed from the evidence and it was reasonable.

[19] As suggested by Rennie J in *Komolafe v Canada (MCI)*, 2013 FC 431 at para 11 (endorsed in *Vavilov* at para 97), reviewing courts may "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn." The Officer provided a short, informal summary of the lack of linguistic skills, education, and job experience. In light of these "dots," and in the context of visa applications which do not demand court-like reasons, the Officer's conclusion that Mr. Ponican could not perform the work was reasonable. The onus was on Mr. Ponican when making his visa application yet he did not convince the Officer that he was

able to perform the work he was seeking. The onus was on Mr. Ponican on judicial review to show that the decision was unreasonable, and he did not discharge his onus.

B. *Was the decision procedurally fair?*

[20] In terms of procedural fairness, Mr. Ponican argues the Officer's treatment of his reference letter was "clearly a credibility finding, yet the Officer failed to provide the Applicant an opportunity to respond – violating the Applicant's right to procedural fairness." His counsel says the Officer's findings suggest the Officer thought Mr. Ponican did not actually work as a painter in Kosovo even though Mr. Ponican provided a letter of reference. Mr. Ponican says he submitted the required information including his proof of employment and evidence indicating his salary (the reference letter), but says he had "no way of anticipating that the Officer would not accept the credibility of the document." Mr. Ponican says he should have been given a chance to respond to the concerns, making the decision procedurally unfair.

[21] Mr. Ponican also argued that the letter had his former employer's phone number and address and if the Officer had concerns they should have called the former employer.

[22] The Respondent, on the other hand, says the Officer conducted a "thorough and proper analysis." As the Respondent suggested, the duty of fairness varies according to context. The Respondent cited *Khan v Canada (MCI)*, 2001 FCA 345 which says:

> [31] The factors tending to limit the content of the duty in the case at bar include: the absence of a legal right to a visa; the imposition on the applicant of the burden of establishing eligibility for a visa; the less serious impact on the individual that the refusal of a visa typically has, compared with the removal of a benefit, such as

> continuing residence in Canada; and the fact that the issue in dispute in this case…is not one that the applicant is particularly well placed to address.
>
> [32] Finally, when setting the content of the duty of fairness appropriate for the determination of visa applications, the Court must guard against imposing a level of procedural formality that, given the volume of applications that visa officers are required to process, would unduly encumber efficient administration. The public interest in containing administrative costs and in not hindering expeditious decision making must be weighed against the benefits of participation in the process by the person directly affected.

[23] I agree with this Respondent that this Court should be careful not to impose formal obligations upon visa officers due to their high volume of work. Usually, if an application does not meet the requirements (i.e. if the applicant does not meet the work permit criteria set out in *IRPA* and the *Regulations*), the Officer does not need to give the applicant a chance to clarify the application to address concerns (*Rukmangathan v Canada (MCI)*, 2004 FC 284 at para 23). I find that this application is at the very low end of the spectrum of procedural fairness.

[24] The Respondent argued that the Officer did not find the letter not to be credible but instead found it to be not reliable. Though it is possible that was the case, the fact is the Officer did not set out why he found the document unreliable, therefore I will deal with the above credibility issue.

[25] As Mr. Ponican points out, credibility findings engage a higher duty of fairness even in the visa context. In *Talpur v Canada (MCI)*, 2012 FC 25 at para 21[*Talpur*], Justice de Montigny stated that even though the duty of fairness is "at the low end of the spectrum in the context of visa applications," visa officers must give applicants an opportunity to respond when concerns

about the authenticity or credibility of the evidence arise. Mr. Ponican's counsel relies on *Madadi v Canada (MCI)*, 2013 FC 716 [*Madadi*] where Justice Zinn wrote (at para 6):

> The jurisprudence of this Court on procedural fairness in this area is clear: Where an applicant provides evidence sufficient to establish that they meet the requirements of the Act or regulations, as the case may be, and the officer doubts the "credibility, accuracy or genuine nature of the information provided" and wishes to deny the application based on those concerns, the duty of fairness is invoked.

[26] In *Madadi*, Justice Zinn sent the case back for redetermination because the visa officer had doubts about the veracity of an employment letter and yet "the officer erred in failing to put his or her concerns to the Applicant." Justice Zinn relied on five other decisions of this Court which confirm a duty to provide the applicant with an opportunity to respond if the officer doubts the veracity of a document (*Enriquez v Canada (MCI)*, 2012 FC 1091 at para 26; *Patel v Canada (MCI)*, 2011 FC 571 at para 27 [*Patel*]; *Hamza v Canada (MCI)*, 2013 FC 264 at para 25; *Farooq v Canada (MCI)*, 2013 FC 164 [*Farooq*]; *Ghannadi v Canada (MCI)*, 2013 FC 515). These nuanced procedural fairness rules apply even if the credibility finding is not explicit which was the case here (*Patel* at paras 26–27; *Farooq* at para 12).

[27] These decisions all confirm a slightly higher duty of fairness when credibility is an issue. The exception to the rule is *Obeta v Canada (MCI)*, 2012 FC 1542 [*Obeta*] where Justice Boivin said there is no absolute duty to provide an interview if the document includes "irrelevant, unconvincing or ambiguous" information (para 25). Otherwise, usually the higher duty of fairness is engaged by credibility concerns, and this duty means the applicant is given a chance to make further submissions.

[28] So, it is clear from these cases that there was a duty to inform Mr. Ponican of the credibility issue. The Officer had to give him a reasonable opportunity to make his case even though visa applications usually require limited formal procedures.

[29] In *Talpur*, the visa officer conducted an interview where they expressed concerns about a reference letter. The officer asked questions to allow her to address the concerns (paras 22–25). Justice de Montigny said visa officers must "inform applicants of their concerns so that an applicant may have an opportunity to disabuse an officer of such concerns" (*Talpur* at para 21). However, the applicant was given a "reasonable opportunity to make her case" and to demonstrate her application was genuine (para 22), so Justice de Montigny found the decision to be procedurally fair. In *Farooq*, Justice Roy summarized the issue as: "if credibility of the evidence is the issue, procedural fairness would require that an opportunity be given to the applicant to address the credibility concerns" (para 11). These cases show the procedural fairness concerns in visa cases relate to whether the foreign worker was given a chance to make their case.

[30] Mr. Ponican was not deprived of his procedural fairness rights because he *was* given a reasonable opportunity to make his case. In his May 6, 2019 letter, his counsel argued he had not had the opportunity to address the credibility issues in the first application. The first refusal decision told him that his trustworthiness and lack of education and employment experience were each problems with his first application. As noted above, it seems from the February 20, 2019 date on his reference letter that the letter was presented on his first application and so he

knew that letter did not convince the first officer he was a painter. His counsel was aware credibility was an issue thanks to the first decision, as shown by his May 6 letter to the Officer:

> The Officer appears to believe that Mr. Ponican does not meet the requirements outlined in the LMIA and does not have the ability to perform the duties of the job in Canada. This is unreasonable because Mr. Ponican has over 6 years of work experience as a Painter, which was supported by a detailed employment letter in our previous application. Clearly, Mr. Ponican has previous work experience consistent with the job he was seeking a work permit for. Accordingly, it is completely unreasonable for the Officer to assess that Mr. Ponican does not have the ability to perform the job…

[31] In that May 6 letter, Mr. Ponican's counsel went on to raise the same procedural fairness case law from that he is raising here about needing to give him a chance to make submissions if his credibility is in issue. He and his counsel then submitted a new application on May 14 and used the Kosovo reference letter to support the claim. The Officer referred to this letter but then examined the bank statements and the other shortcomings in Mr. Ponican's application and rejected the application. Mr. Ponican was clearly aware there were credibility issues based on his May 6 letter and he had the opportunity to address these issues and file more supporting documentation in the second application on May 14. It is misleading for Mr. Ponican to say he did not have a reasonable opportunity to make his case. If his argument in his counsel's May 6 letter prior to the second refusal was that he should get to make further submissions, he could have just made those submissions in his May 14 application. He has not been treated unfairly.

[32] His case can be distinguished from Justice Zinn's decision in *Madadi* and the five cases he cited, which seem to all be the first work permit applications by those individuals. In those

cases the applicants did not know authenticity of their documents was going to be an issue. Mr. Ponican was making a second submission in response to a prior refusal.

[33] In the alternative, and as Justice Boivin found in *Obeta*, there is no absolute right to an interview if a visa officer raises credibility concerns. If the application is unconvincing then an interview may not need to be provided even if there are concerns about fabrication of evidence (*Obeta* at para 25; followed in *Rezvani v Canada (MCI)*, 2015 FC 951 at paras 21–27; *Ansari v Canada (MCI)*, 2013 FC 849 at para 36). If "sufficient information" is not provided then the applicant will not have met their burden and they will not be entitled to an interview just because the officer has doubts about the applicant's story (*Ansari* at para 36). Mr. Ponican's bank records show no sign of receiving the monthly salary he claims he received. Aside from the reference letter and a 6-month training certificate there is not much evidence that he was ever a painter, so he has not provided "sufficient information" to engage the higher duty of fairness that would demand further action from the Officer. This goes to the argument that the Officer should have contacted the letter writer and I find that there was no obligation for the Officer to contact the former employer to verify the reliability of the letter.

[34] I find that the Officer's decision was reasonable and procedurally fair. I will dismiss this application for judicial review.

[35] There were no questions for certification and none arose.

JUDGMENT in IMM-4320-19

THIS COURT'S JUDGMENT is that:

1. This application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

Annex A – Relevant legislation

Immigration and Refugee Protection Act, SC 2001 c 27

Application before entering Canada

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.

Right of temporary residents

29(1) A temporary resident is, subject to the other provisions of this Act, authorized to enter and remain in Canada on a temporary basis as a visitor or as a holder of a temporary resident permit.

Obligation — temporary resident

29(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.

Regulations

32 The regulations may provide for any matter relating to the application of sections 27 to 31, may define, for the purposes of this Act, the terms used in those sections, and may include provisions respecting

(a) classes of temporary residents, such as students and workers…

Loi sur l'immigration et la protection des réfugiés, LC 2001 ch 27

Visa et documents

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.

Droit du résident temporaire

29(1) Le résident temporaire a, sous réserve des autres dispositions de la présente loi, l'autorisation d'entrer au Canada et d'y séjourner à titre temporaire comme visiteur ou titulaire d'un permis de séjour temporaire.

Obligation du résident temporaire

29(2) Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

Règlements

32 Les règlements régissent l'application des articles 27 à 31, définissent, pour l'application de la présente loi, les termes qui y sont employés et portent notamment sur :

a) les catégories de résidents temporaires, notamment les étudiants et les travailleurs;

Immigration and Refugee Protection Regulations (SOR/2002-227)

Temporary Resident Visa

Issuance

179 An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national

(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;

(b) will leave Canada by the end of the period authorized for their stay under Division 2;

(c) holds a passport or other document that they may use to enter the country that issued it or another country;

(d) meets the requirements applicable to that class;

(e) is not inadmissible;

(f) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and

(g) is not the subject of a declaration made under subsection 22.1(1) of the Act.

Work permits

Exceptions

200(3) An officer shall not issue a work permit to a foreign national if

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

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

Visa de résident temporaire

Délivrance

179 L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;

b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;

c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;

d) il se conforme aux exigences applicables à cette catégorie;

e) il n'est pas interdit de territoire;

f) s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);

g) il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

Délivrance du permis de travail

Exceptions

200(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :

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…

FEDERAL COURT

SOLICITORS OF RECORD

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