Federal Court  Cour fédérale

Date: 20210525

Docket: IMM-6108-19

Citation: 2021 FC 483

Toronto, Ontario, May 25, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

BINDUL DEVENDRABHAI PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a visa officer at the High Commission in New Delhi, India. The officer denied the applicant's request for a temporary work visa because the evidence did not demonstrate that the applicant was able to adequately perform the work that he intended to undertake in Canada.

[2] The applicant claims the officer's decision was unreasonable, and that procedural fairness required the officer to tell him about the deficiencies in his application so he could address them before the officer rendered a decision.

[3] In my view, the officer did not make a reviewable error and provided procedural fairness to the applicant. The application is therefore dismissed.

I. Facts and Events Leading to this Application

[4] The applicant is a citizen of India. Since 2010, the applicant has owned and managed a business in Anand, India, known as Charotar Cement Works.

[5] In February 2019, the applicant received a job offer from a cleaning services company in Winnipeg, Manitoba to work as a Cleaning Supervisor for a period of two years. He accepted that offer on February 25, 2019. The employer applied for and received a positive Labour Market Impact Assessment ("LMIA") for the position.

[6] On June 19, 2019, the applicant applied to Immigration, Refugees and Citizenship Canada in New Delhi for a work permit in Canada under the Temporary Foreign Worker Program. A cover letter from an immigration consultancy noted, among other things, that the applicant had been working as owner-manager of his own business for several years and had performed the duties of manager of his business, managing more than 10 employees and external parties such as suppliers. The letter submitted that he was eminently qualified to perform the duties of the Canadian job.

[7] In a decision dated October 2, 2019, a visa officer determined that his application did not meet the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*"IRPA"*) and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*"IRPR"*) because he was "not able to demonstrate [he] will be able to adequately perform the work".

[8] The record before the officer consisted of financial statements related to the applicant's business: an Indian Income Tax Return Verification Form, a Profit & Loss Statement, a Balance Sheet and a Statement of Account from its bank. The application also included the offer letter from the employer dated February 20, 2019 and the positive LMIA dated June 3, 2019.

[9] The officer's Global Case Management System ("GCMS") notes referred to National Occupation Classification ("NOC") 3615 (Cleaning Supervisor) and to the employer's letter dated February 20, 2019. Referring to the LMIA, the officer's notes listed the requirements for the job, including that "job experience in a particular area of cleaning is usually required" and that "previous supervisory experience may be required". The GCMS notes recognized that the applicant advised he had been the manager/owner of his business since 2010.

[10] The GCMS notes then indicated that the applicant had not demonstrated that he had work experience in the following areas:

- supervising and co-ordinating light duty, industrial or specialized cleaners and janitors;
- inspecting sites or facilities to ensure safety and cleanliness protocols are met;
- hiring and training cleaning staff;
- recommending or arranging for additional services such as repair work;
- preparing work schedules and collaborating with other departments; and/or

- preparing budgets, estimating costs and keeping financial records.

[11] The officer refused the work permit, with express reference to paragraph 200(3)(*a*) of the *IRPR*. That provision provides that an officer shall not issue a work permit to a foreign national if there are "reasonable grounds to believe that the foreign national is unable to perform the work sought".

[12] In this Court, the applicant submitted that the visa officer denied him procedural fairness by failing to inform him of the officer's concern that he was not qualified for the job in Canada. The applicant argued that the officer unreasonably went beyond the requirements of job readiness set out in the LMIA and based the decision on the requirements of NOC 6315. This is important because, in contrast to NOC 6315, the LMIA does not require any related job experience. Under the LMIA, related job experience is "usually," but not always, needed.

[13] The applicant also submitted that the officer's decision was unreasonable in substance, because it failed to conclude that the applicant had the necessary work experience for the duties in his proposed employment. The applicant claimed he had run his own successful business in India since 2010 and had the necessary managerial, supervisory and other skills to perform the work. The applicant contended that the managerial aspects of the job were critical and the cleaning aspects could be learned. The applicant noted that the employer found the applicant's qualifications were satisfactory. The LMIA made no reference to a requirement for cleaning experience and expressly included the applicant's name. The applicant noted that the language in NOC 6315 is permissive, not mandatory, concerning the need for prior supervisory experience.

[14] The respondent submitted that the officer was under a duty, under *IRPR* paragraph 200(3)(*a*), to ensure that the applicant was able to do the work he proposed to undertake in Canada. In essence, the respondent's position was that the evidence before the officer was insufficient to demonstrate that the applicant could do the work because it only included financial documents from the applicant's company. The respondent emphasized that the onus was on the applicant to put his best foot forward in the application. The respondent also noted that the employer's offer letter reflected the requirements of NOC 6315, not merely the LMIA.

[15] The respondent submitted that procedural fairness obligations owed to an applicant for a temporary work permit are at the lower end of the spectrum. To the respondent, the key issue when the officer applied paragraph 200(3)(*a*) was the insufficiency of the record, which only included financial statements from the applicant's business in India. The applicant was not entitled to disclosure of the officer's concerns or a further opportunity to make submissions or adduce additional evidence.

[16] The respondent also noted that the applicant was free to apply for a temporary work permit again with a more robust record.

II. Admissibility of New Evidence on this Application

[17] There is a preliminary issue. In this Court, the applicant filed new evidence in an affidavit from Gurpal Singh sworn on December 6, 2019. Mr Singh owns and is President of the cleaning company in Winnipeg that was to employ the applicant. Mr Singh's affidavit attached as an exhibit a "Job Posting for Cleaning Supervisor" that advertised the position. The affidavit also

described the duties the applicant was expected to perform, the terms of the LMIA and the process through which the applicant was selected for the position. Mr. Singh testified that the applicant's supervisory skills from running his business in India were "highly adaptable to his new position in Canada", that the employer had been hiring supervisors with his profile for several years and that "past experience in cleaning is not a criteria and accordingly it was not included in the advertisement" (i.e., the attached Job Posting). Mr Singh concluded that in his opinion, the applicant is a "suitable person for performing the supervisory role".

[18] The respondent objected to the admission of this evidence, referring to the Federal Court of Appeal's decision in *Perez v Hull*, 2019 FCA 238. The respondent submitted that the general rule is that new evidence is not admissible on judicial review, subject to certain exceptions that do not apply to this case. According to the respondent, Mr Singh's evidence goes directly to the merits of the officer's decision and could have been submitted in the work permit application.

[19] I agree with the respondent that in general, the evidentiary record before a reviewing court is restricted to the record before the decision maker. New evidence going to the merits of the impugned decision may not be offered for the first time before a reviewing court: *Perez*, at para 16, citing *Sharma v Canada (Attorney General)*, 2018 FCA 48, at para 8; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 19.

[20] The Federal Court of Appeal in *Perez* and in *Association of Universities* described three exceptions to the general rule: (i) an affidavit that provides general background in circumstances

where that information might assist the court in understanding the issues relevant to the judicial review; (ii) an affidavit that is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, to enable the court to fulfil its role of reviewing the decision for procedural unfairness; and (iii) an affidavit that highlights the complete absence of evidence before the decision-maker when it made a particular finding. There may be additional exceptions, as the list is not closed. See the discussions in *Perez*, at para 16, and in *Association of Universities*, at para 20.

[21] Does one of these exceptions apply? Not in this case. Like the proposed new evidence about the merits in *Perez* (at para 17), Mr Singh's affidavit in substance goes to the merits of the applicant's arguments on this application, specifically about whether the applicant met the criteria for the position and whether experience was a requirement.

[22] Accordingly, Mr Singh's affidavit is not admissible on this application.

III. Standard of Review

[23] The standard of review of the officer's substantive decision is reasonableness, as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[24] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a

whole is transparent, intelligible and justified: *Vavilov*, at para 15. The focus of reasonableness review is on the decision actually made by the decision maker, including both the reasoning process (i.e. the rationale for the decision) and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, at para 85.

[25] With respect to factual constraints, the Supreme Court in *Vavilov* held that absent "exceptional circumstances", a reviewing court will not interfere with the decision maker's factual findings and will not reweigh or reassess the evidence (at para 125). A reviewing court's ability to intervene arises only if the reviewing court loses confidence in the decision because it was "untenable in light of the relevant factual … constraints" or if the decision maker "fundamentally misapprehended or failed to account for the evidence before it" [underlining added]; *Vavilov*, at paras 101, 126 and 194. See also *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 (Rowe J), at para 61; *Canada (Attorney General) v Honey Fashions Ltd.*, 2020 FCA 64 (de Montigny JA), at para 30.

[26] The standard of review for procedural fairness is essentially correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 ["CPR"], esp. at paras 49 and 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, at para 35. The Court's review involves no margin of appreciation or deference. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights

involved and the consequences for the individual(s) affected: *CPR*, at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

IV. Analysis

[27] I turn now to the two substantive issues raised by the applicant.

A. *Was the officer's decision unreasonable?*

[28] In my opinion, the officer did not commit a reviewable error as described by the Supreme Court in *Vavilov*. The officer's decision was reasonable on that standard.

[29] The decision of the officer must be considered together with the officer's reasons, which are set out in the GCMS notes. The decision and reasons may be considered having regard to the record before the officer: *Vavilov*, at paras 91-95.

[30] The onus was on the applicant to submit all relevant supporting documentation to obtain a temporary work permit. The applicant was required to put his best case forward: *Sangha v Canada (Citizenship and Immigration)*, 2020 FC 95 (Russell J.), at paras 42 and 47; *Chamma v Canada (Citizenship and Immigration)*, 2018 FC 29 (Shore J.), at para 35; *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 (LeBlanc J.), at paras 10 and 14.

[31] The visa officer was required to make an independent assessment of whether the application for a temporary work permit complied with the requirements of the *IRPA* and *IRPR* and specifically, whether there were reasonable grounds to believe the applicant was unable to

perform the work. Justice Snider set out the requirement in the following passage in *Chen v Canada (Minister of Citizenship and Immigration)* 2005 FC 1378*:*

> [12] In all applications, the visa officer is under a duty to examine all of the relevant evidence before him in order to come to an independent assessment of whether there are reasonable grounds to believe that the Applicant is unable to perform the work (*Regulations*, s. 200(3)(a)). The officer cannot be bound by a statement by HRDC that English is or is not required; he cannot delegate his decision making function to a third party such as HRDC. Conversely, a statement by an applicant or employer that English is not required cannot be binding on the visa officer. The officer must carry out his own evaluation based on a weighing of all of the evidence before him.

See also *Kumar v Canada (Citizenship and Immigration)*, 2020 FC 935 (Pallotta J.), at para 27; *Sulce*, at paras 9 and 28-29.

[32] An LMIA is not determinative of a temporary work visa application and the officer is not bound by its contents: *Ul Zaman v Canada (Citizenship and Immigration)*, 2020 FC 268 (Pamel J.) at para 37; *Sulce*, at para 29; *Singh v Canada (Citizenship and Immigration)*, 2015 FC 115 (Diner J.), at para 20.

[33] I agree with the respondent that the material submitted to support the applicant's work permit was meagre. It essentially included a cover letter and the financial documents from the applicant's cement business, as already described.

[34] The applicant's argument is essentially that the employer offered the applicant a supervisory or managerial position for which he was qualified, having operated his own business for a number of years. Specifically, he had ample supervisory experience from his years

supervising the employees of his company. While experience in the area of cleaning was usually required, the employer was satisfied with the applicant's qualifications and the LMIA was positive; therefore, the officer should have been equally satisfied.

[35] At the hearing, the applicant observed that the LMIA expressly named the applicant for the position he was offered. However, that fact does not require the officer to accept that the applicant is qualified to perform the work. As Diner J. stated in *Singh,* at paragraph 20: "[a]fter all, the [LMIA] portion of the process is to test a labour market need, and not the attributes of the individual: that is what the visa application is for".

[36] The applicant also complained that the officer used requirements of NOC 6315 to assess his ability to perform the work, rather than relying on the LMIA. The respondent observed that the offer letter made by the prospective employer used the list of duties set out in NOC 6315. However, neither party actually put NOC 6315 before the Court and it was not contained in the Certified Tribunal Record.

[37] As the Supreme Court stated in *Vavilov*, the Court's role on a judicial review application is not to reweigh or reassess the evidence before the officer. In this case, that is what the applicant is asking the Court to do. Unfortunately, whether the Court agrees or disagrees with the decision on the merits is not the issue on judicial review: *Sangha*, at para 48. A reviewing court can only determine the legality of the decision and whether it was reached in accordance with the principles of procedural fairness.

[38] Having regard to the onus on the applicant and the record before the officer, I am unable to conclude that the officer fundamentally misapprehended the evidence in the work permit application, or that the officer's conclusion was untenable based on that evidence: *Vavilov*, at paras 101 and 125-126. The officer was both entitled and required to come to his own opinion as to whether the application met the requirements of the *IRPA* and the *IRPR*, including whether the evidence in the record contained reasonable grounds to believe that the applicant could perform the work – or not – under *IRPR* paragraph 200(3)(*a*). The officer decided that the evidence did not do so. The Court is not permitted to reassess the evidence on the merits in order to interfere with the officer's decision.

B. ***Was the applicant denied procedural fairness?***

[39] The applicant submits that he was denied procedural fairness because the officer did not advise him of the officer's concerns that the evidence did not demonstrate that he could perform the work. I am unable to agree.

[40] The procedural fairness obligations required on an application for a temporary work permit are at the low end of the spectrum, particularly when (as here) the applicant may re-apply: *Kumar*, at para 19 (and the cases cited there): *Sulce*, at para 10. Procedural fairness does not generally require applicants for a temporary work permit to be granted an opportunity address a visa officer's concerns that the applicant may not comply with requirements of the *IRPA* or the *IRPR*: *Sulce*, at paras 10 (and the cases cited there) and 18.

[41] There are exceptions. One example arises if the officer has concerns about the credibility, accuracy or genuine nature of the information provided with the application: *Sulce*, at paras 11 and 18. In those cases, the officer may be required to disclose his or her concerns and offer the applicant an opportunity to provide further information.

[42] However, where a visa officer's decision is based on the sufficiency of evidence adduced by the applicant, or on the requirements of the *IRPR* and the statutory scheme at large, including under subsection 200(3)(*a*) of the *IRPR*, there is generally no obligation to apprise a visa applicant of those concerns: *Sun v Canada (Citizenship and Immigration)*, 2019 FC 1548 (Ahmed J.), at paras 23-24 and 27; *Kumar*, at para 19; *Anenih v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 718 (Diner J.) at para 16.

[43] In this case, the applicant did not submit that any of the exceptions to the general rule apply. He argued that the officer failed to inform him that on the evidence in the application, he was not qualified for the job in Canada, and that this failure breached his right to procedural fairness.

[44] Proof that an applicant is able to perform the work he or she seeks to do in Canada is a requirement that arises from the *IRPR*, in paragraph 200(3)(*a*). I note that paragraph 200(3)(*a*) is mandatory – the officer "shall not issue a work permit" if there are reasonable grounds to be believe the foreign national is unable to perform the work sought [underlining added].

[45] The officer found that the applicant had not demonstrated that he had work experience in several specified areas associated with supervising cleaning services. I agree with the respondent that given the contents of the modest record before the officer, the evidence was insufficient to satisfy the officer about a matter in the *IRPR*. In the circumstances, the officer was not required to go back to the applicant to disclose concerns about insufficient or inadequate information and ask for more.

[46] I conclude therefore that the officer provided procedural fairness to the applicant in determining his application for a temporary work permit.

V. Conclusion

[47] The application is therefore dismissed. Neither party proposed a question for certification and I agree that there is none. This is not a case for costs.

JUDGMENT in IMM-6108-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.
3. There is no costs order.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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