Federal Court  Cour fédérale

Date: 20211018

Docket: IMM-5941-19

Citation: 2021 FC 1092

Ottawa, Ontario, October 18, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

STEVEN MALCOLM MUSIKER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Steven Musiker, a citizen of South Africa, was denied a work permit on September 27, 2019, because a visa officer was not satisfied he would be able to perform the work he sought. Mr. Musiker had secured an offer for a position as a Security and Compliance Co-Ordinator with Combined Metal Industries Inc (CMI), a position that entailed conducting safety audits, health and safety investigations, workplace health and safety hazard inspections,

and delivering health, environmental protection and workplace safety training programs. The Officer reviewing Mr. Musiker's work permit application was not satisfied his past employment in specialized security positions provided him with sufficient experience to perform these tasks, despite his experience with first aid, medical training, and medical evacuations.

[2] Mr. Musiker alleges the Officer erred by relying too strictly on the applicable National Occupational Classification (NOC), providing inadequate reasons, ignoring material facts, and breaching his right to procedural fairness.

[3] I conclude the Officer's decision was reasonable and fair. The Officer appropriately applied the relevant assessment to Mr. Musiker's work permit application and assessed his experience with reference to the requirements for the position identified in his offer letter. The relevant NOC was largely repeated in CMI's job description, so the Officer reasonably took its terms into account. While Mr. Musiker contends that his prior role as a medic showed experience in health and safety and that his involvement with vehicle maintenance and weapons gave him experience in government regulation, it was reasonably open to the Officer to conclude that this experience was not sufficiently relevant to the requirements of the position, which related to occupational health and safety hazards and governmental regulation in that area. Nor was the Officer required to raise his concerns, which stem from the applicable regulations and the evidence filed, and give Mr. Musiker an opportunity to address them through further submissions.

[4] Mr. Musiker's application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[5] Mr. Musiker raises the following issues on this application, in the order they were presented in oral argument:

A. Did the Officer err in his analysis of the applicable National Occupation Classification and the NOC system more broadly?

B. Did the Officer err in failing to provide adequate reasons and ignoring material facts and documents included in the application?

C. Did the Officer breach the duty of procedural fairness?

[6] The first two of these questions, which go to the merits of the Officer's decision, are subject to review on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Patel v Canada (Citizenship and Immigration)*, 2021 FC 483 [*Patel (2021)*] at para 23.

[7] Reasonableness relates to both the outcome of a decision and the reasons given for it, and is assessed in light of the "legal and factual constraints" that bear on the decision, which include the governing statutory scheme, the evidence, and the submissions of the parties: *Vavilov* at paras 82–83, 105–107. A reasonable decision is one that, when read holistically and contextually, meets the requirements of justification, transparency, and intelligibility: *Vavilov* at paras 84–86, 94–99. It is internally coherent, applies the relevant law, and demonstrates that the decision maker has considered the central arguments and evidence raised by the parties: *Vavilov*

at paras 102–107, 125–128. Conversely, an unreasonable decision is one that is irrational, fails to address central arguments and evidence, materially misapprehends the facts or the law, or otherwise shows sufficiently serious shortcomings that it can no longer be said to be justified, transparent, or intelligible: *Vavilov* at paras 99–101, 126, 128.

[8] The third issue goes to the process of decision making rather than the decision itself. On such issues, the Court asks "whether the procedure was fair having regard to all of the circumstances": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. This "fairness" standard can be considered to be either akin to a correctness standard or as having no standard of review: *Canadian Pacific* at paras 54–56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35.

III. Analysis

A. *The Officer did not err in their analysis of NOC 2263 or the NOC system*

(1) Temporary foreign worker work permits and the NOC system

[9] To obtain a work permit, a temporary foreign worker must meet the requirements of section 200 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. For the work permit category Mr. Musiker applied under, the temporary foreign worker must show they have been offered employment and that Employment and Social Development Canada (ESDC) has provided a labour market impact assessment (LMIA) stating that the impact on the

Canadian labour market of hiring them will be neutral or positive: *IRPR*, ss 200(1)(*c*)(iii), 203(1)(*b*).

[10] In preparing an LMIA, ESDC uses the job classifications set out in the NOC system. The NOC system is a categorization of employment positions developed by ESDC and Statistics Canada that is used, among other purposes, to assess eligibility for immigration to, and work in, Canada: *IRPR*, s 2 ("National Occupational Classification"). ESDC issues an LMIA for a specified occupation and location, and identifies which NOC group that position best fits. The LMIA pertains to a particular job offer, which is the offer that is needed to qualify for a work permit: *IRPR*, ss 200(1)(*c*)(iii), 203(1). Thus while there is no express reference to the NOC in sections 200 or 203, the NOC system is implicitly involved in an application for a work permit given its role in the LMIA.

[11] As set out in an ESDC "Tutorial" document filed by Mr. Musiker, each of the 500 NOC groups has a four-digit code that classifies the occupation within various fields, subfields and skill levels. Each NOC group has an occupational description that includes a "lead statement" with a general description and boundaries of the occupation; example job titles; a "main duties" section that describes the most significant duties of occupations in the group; and employment requirements generally needed to enter the occupation.

[12] Mr. Musiker does not challenge ESDC's use of the NOC system in preparing an LMIA. Mr. Musiker's prospective employer, CMI, applied for an LMIA with specific reference to

NOC group 2263, “Inspectors in public and environmental health and occupational health and safety” [NOC 2263].

[13] In addition to the requirements of subsection 200(1), subsection 200(3) sets out a number of exceptions to the availability of a work permit. At issue in this case is the exception in paragraph 200(3)(*a*):

Exceptions	**Exceptions**
200 (3) An officer shall not issue a work permit to a foreign national if	**200 (3)** Le permis de travail ne peut être délivré à l’étranger dans les cas suivants :
(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	**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;
[…]	[…]

[14] This Court has confirmed on a number of occasions that a visa officer is required to make an independent assessment of whether there are reasonable grounds to believe an applicant for a work permit is unable to perform the work: *Patel (2021)* at para 31, quoting *Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1378 at para 12.

(2) Mr. Musiker’s work permit application and the Officer’s refusal

[15] Mr. Musiker applied for a work permit as a temporary foreign worker, submitting his offer letter from CMI for the position of Security and Compliance Co-Ordinator and a positive

LMIA issued by ESDC to CMI in respect of the offer. The job offer included a statement of duties and responsibilities associated with the position. About half of these are identical in text to the "main duties" section of NOC 2263. The positive LMIA issued to CMI identified the position as falling within NOC 2263, as CMI had proposed.

[16] Mr. Musiker's work permit application attached information regarding his prior work experience and education. This included letters from his three most recent employers, (i) Sallyport Global, where Mr. Musiker worked for four and a half years as an Assistant Team Leader and Medic for a Personal Security Detail Team in Iraq; (ii) Specialist Security Operational Services CC, Mr. Musiker's own specialist security services company which he ran for eight years; and (iii) Patriot Force, a security company for which Mr. Musiker worked for almost two years as an Operations Manager.

[17] Mr. Musiker's work permit application was refused. The reasons for the refusal are set out in the Officer's notes in the Global Case Management System (GCMS). They begin with reference to the LMIA obtained by CMI, the applicable NOC category (NOC 2263), and the position offered by CMI. They then refer to and reproduce the "lead statement" and "main duties" that are listed in NOC 2263 and in CMI's offer letter. The reasons then assess Mr. Musiker's employment experience as follows:

> I note letters of employment from Patriot Forces, Specialist Security Services and Sallyport. The duties outlined in these letters are related to protective security functions, first aid and first responder duties, responding in disaster, medical training, medical evacuations, advance security preparation, ensure vehicles and equipment are maintained, daily maintenance of weapons, providing security services, VIP protection, risk analysis, management of security officers, liaison with clientele, reporting

> on incidents etc. This NOC comprises health and safety hazards and the main duties are revolving about inspections and governmental regulations. Limited evidence that the PA has work experience or relevant education specific to this NOC. I am not satisfied that the PA has the work experience performing the lead statement and some of the main duties outlined in the NOC description. Based on the information provided on this WP application. I am not satisfied that the PA is unable to perform the work sought as per R200(3)(a). Application refused.
>
> [Emphasis added.]

[18] While the Officer mistakenly included a double negative in his conclusion ("I am not satisfied that the PA is unable to perform"), the reasons are readily understood to mean that the Officer was not satisfied Mr. Musiker was able to perform the work sought and that the work permit was therefore refused pursuant to paragraph 200(3)(*a*) of the *IRPR*. This conclusion is confirmed in the refusal letter sent to Mr. Musiker by the Officer, which states that the application was refused because "[y]ou were not able to demonstrate that you will be able to adequately perform the work you seek."

(3) The Officer's decision is reasonable

[19] Mr. Musiker argues that the Officer's assessment of whether he was "able to perform the work sought" unreasonably focused on the description in NOC 2263 and not his job offer, and thereby inappropriately incorporated principles from section 75 of the *IRPR* into the analysis under paragraph 200(3)(*a*). For the following reasons, I am not persuaded the Officer's decision was unreasonable.

[20] Section 75 of the *IRPR* defines the "federal skilled worker class" as a class of skilled workers who may become permanent residents, and sets out requirements for the class. In

particular, subsection 75(2) provides that a foreign national is a "skilled worker" if they have accumulated at least one year of full-time work experience in the occupation identified in their application; performed the actions described in the lead statement for the occupation as set out in the NOC; performed a substantial number of the main duties of the occupation as set out in the NOC; meet the language proficiency thresholds; and have submitted educational credentials: *IRPR*, ss 75(2)(*a*)–(*e*); *Gulati v Canada (Citizenship and Immigration)*, 2010 FC 451 at para 2; see also subsection 87.2(3) in respect of the federal skilled trades class. A foreign national that meets these minimum requirements will then be assessed on various criteria, including education and experience: *IRPR*, ss 75(3), 76(1).

[21] Mr. Musiker argues that by referring to the lead statement and main duties sections of the NOC, the Officer improperly merged the skilled worker requirements of section 75 into the examination of a work permit application under section 200 and in particular the assessment of whether "there are reasonable grounds to believe that the foreign national is unable to perform the work sought" under paragraph 200(3)(*a*).

[22] I disagree. Section 75 contains specific reference to the NOC and requires a skilled worker to have performed actions in the lead statement and to have performed duties outlined in the main duties section. However, the fact that section 75 requires a specific assessment with respect to the NOC does not make the NOC irrelevant to the assessment in paragraph 200(3)(*a*). Nor does it make reference to the NOC group or its lead statement or main duties an inappropriate assessment.

[23] The assessment under paragraph 200(3)(*a*) requires an assessment of the ability to perform "the work sought." I agree with Mr. Musiker that this assessment pertains primarily to the position that has been offered and therefore to the work that the applicant is seeking to perform. However, the requirement that the position in question be subject to a positive LMIA, and the role of the NOC in the LMIA means that the NOC remains a relevant point of reference in assessing the nature of the position and its duties.

[24] The Officer's analysis involved a review of Mr. Musiker's work history and the NOC group. They concluded that there was "limited evidence" Mr. Musiker had work experience or relevant education specific to the NOC, and in particular they were not satisfied he had work experience performing the lead statement and some of the main duties outlined in the NOC. The Officer's reasons do not show that they mistakenly performed the analysis under subsection 75(2) in place of that required under paragraph 200(3)(*a*). In particular, while there is reference to the lead statement and main duties, the Officer did not assess whether Mr. Musiker accumulated at least one year of full-time work experience in which he had performed actions in the lead statement and a substantial number of the main duties of the occupation as set out in the NOC.

[25] Mr. Musiker's argument that the Officer focused too much on the NOC and not enough on the job offer is unpersuasive since his job offer materially overlaps with the duties set out in the NOC. The duties described in Mr. Musiker's job offer are set out in 13 bullet points. Six of these are identical to six of the eight duties in the "main duties" section of NOC 2263:

- Conduct surveys and monitoring programs of the natural environment to identity sources of pollution;

- Collect biological and chemical samples and specimens for analysis; measure physical, biological and chemical workplace hazards; and conduct safety and environmental audits;
- Investigate health and safety related complaints, spills of hazardous chemicals, outbreaks of diseases or poisonings and workplace accidents;
- Inspect workplaces to ensure that equipment, materials and production processes do not present a safety or health hazard to employees or to the general public;
- Develop, implement and evaluate health and safety programs and strategies;
- Provide consultation and deliver training programs to employers, employees and the general public on issues of public health, environmental protection or workplace safety;

[26] The lead statement of NOC 2263 refers to the group as pertaining to inspectors who "evaluate and monitor health and safety hazards and develop strategies to control risks," which appears to fairly describe the role of someone conducting the foregoing duties.

[27] Of the other seven bullet points in Mr. Musiker's job offer, some are administrative ("Establish work schedules and procedures and co-ordinate activities with other work units or departments"; "Requisition supplies and materials") and some are connected to the health and safety issues ("Hire and train staff in job duties, safety procedures and company policies"; "Monitor activity for health and safety"), while only the final one is related to security ("Provide security support for yard"). It is clear given the identical text in the six bullet points that the job offer was prepared with reference to the NOC, presumably with an eye to obtaining a positive LMIA. While this is not itself objectionable provided the offer fairly and accurately describes the

duties of the position, it undermines Mr. Musiker's attempt to distinguish his ability to perform the job offered from his ability to perform the duties in the NOC.

[28] The Officer assessed Mr. Musiker's experience and education against the duties of the work he sought. This is in my view a reasonable approach to assessing whether he was "unable to perform the work sought" under paragraph 200(3)(*a*). Although the Officer phrased the list of duties he was assessing as deriving from NOC 2263 rather than the job offer, which might have been preferable, I cannot see that this affects the reasonableness of the assessment given the significant overlap in duties between the job offer and the NOC group. In a context where CMI incorporated the majority of the duties of NOC 2263 into the job offer, and sought a positive LMIA with reference to this NOC, it is not unreasonable for the Officer to have referred to and considered the NOC in assessing whether Mr. Musiker would be able to perform the work listed in the job offer.

[29] For the same reasons, I cannot accept Mr. Musiker's argument, citing *Kapasi*, that the Officer placed undue reliance on the language of the non-binding NOC: *Kapasi v Canada (Citizenship and Immigration)*, 2017 FC 1070 at paras 21–24. As the language of the NOC was reproduced verbatim in the job offer, an assessment of whether Mr. Musiker was able to perform the work reasonably entailed an assessment of whether his skills and experience matched the duties that were described in that language.

[30] Both parties make reference to the "pith and substance" analysis described in a number of cases as being part of the assessment of whether work performed by an applicant falls within the

scope of an NOC: *Rodrigues v Canada (Citizenship and Immigration)*, 2009 FC 111 at para 10; *Moradi v Canada (Citizenship and Immigration)*, 2013 FC 1186 at paras 37–38; *Millik v Canada (Citizenship and Immigration)*, 2015 FC 82 at paras 8, 21; *Saatchi v Canada (Citizenship and Immigration)*, 2018 FC 1037 at para 26. These cases each pertain to applications for permanent residence under sections 75 or 87.1 of the *IRPR*. Since those sections involve a different assessment, I question whether a "pith and substance" analysis of the NOC is a necessary part of an assessment under paragraph 200(3)(*a*). In any event, however, I agree with the Minister that the Officer's statement that "[t]his NOC comprises health and safety hazards and the main duties are revolving about inspections and governmental regulations" amounts to an assessment of the pith and substance of the NOC and, by extension, the job offer given that the "main duties" of the NOC are largely repeated in the offer.

B. *The Officer did not fail to provide adequate reasons or ignore material facts*

[31] In addition to arguing that the Officer took the wrong approach to the NOC, Mr. Musiker argues that the Officer's decision failed to adequately explain the reasons for their decision and ignored evidence regarding his experience. Again, I cannot agree.

[32] Reasons for an administrative decision must be sufficient to explain the decision maker's reasoning in deciding as they did. Mr. Musiker cites the description of adequacy of reasons in the decision of Justice de Montigny, then of this Court, in *Canada (Citizenship and Immigration) v Jeizan*, 2010 FC 323 at para 17. Although decided prior to *Vavilov*, that description fairly and clearly describes adequate reasons:

> Reasons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was reached. Adequate reasons show a grasp of the issues raised by the evidence, allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision.

[33] Nonetheless, the adequacy of reasons must be assessed in their administrative context: *Vavilov* at paras 84–86, 91, 94, 102–104. This Court has reiterated that given the volume of decisions that must be undertaken and the interests at stake, visa officers do not need to provide extensive reasons, although they must respond to the factual matrix before them: *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 at paras 15–17; *Singh v Canada (Citizenship and Immigration)*, 2015 FC 115 at para 24.

[34] As Mr. Musiker recognizes, the Officer's reasons are fairly read as concluding that there was limited evidence he had experience or relevant education pertaining to "health and safety hazards" and "inspections and governmental regulations." Mr. Musiker argues the Officer's decision is unreasonable because the reasons fail to address his work experience in these categories. In particular, Mr. Musiker cites his first aid certification and his medical training, and his experience as a first responder and in medical evacuations as being related to health and safety; and his experience with vehicle maintenance, weapons maintenance, and incident reporting as being related to government and company regulatory compliance.

[35] It is clear that the Officer was aware of Mr. Musiker's experience in first aid and as a first responder, as well as his medical training and medical evacuation experience, having referred to them in his summary of the prior employment letters. The Officer juxtaposed this experience

against CMI's offer for a Security and Compliance Co-Ordinator who would be responsible for inspecting, evaluating, and monitoring "health and safety hazards." It is clear from the context of the NOC, the job description, and the Officer's reasons that the Officer did not consider the experience of providing personal first aid and medical support established an ability to conduct inspections, assessments and evaluations of workplace health and safety hazards.

[36] Contrary to Mr. Musiker's submissions, we are not left to wonder how the Officer concluded that his first aid certification is unrelated to "health and safety." Notably, in this formulation, Mr. Musiker's submissions excise the word "hazards" from the Officer's description of "health and safety hazards", and seek to remove the term from the context of the job description. The NOC group under which Mr. Musiker applied, and for which CMI received an LMIA, was "Inspectors in public and environmental health and occupational health and safety." While work as a medic and certification in first aid is undeniably valuable work, the mere fact that it is in the area of "health and safety" broadly defined raises no questions about the nature of the Officer's analysis in the context of their decision.

[37] Similarly, the Officer's reference to "inspections and governmental regulations" was made in the context of the NOC and the job offer, each of which pertain to environmental workplace hazards and occupational health and safety. As noted by the Officer, the NOC refers to ensuring "compliance with government regulations regarding sanitation, pollution control, the handling and storage of hazardous substances and workplace safety," while both the NOC and the job offer refer to "safety and environmental audits" and the development of "health and safety programs and strategies." It is only by pulling the term "inspections and governmental

regulations" out of this context that Mr. Musiker can purport to rely on his experience in weapons and vehicle maintenance and incident reporting. I am satisfied that the Officer reasonably concluded that Mr. Musiker's experience did not demonstrate an ability to perform this aspect of the work sought, and that the evidence of regulatory experience he points to does not undermine either the substance or the adequacy of the Officer's reasons.

C. *There was no procedural unfairness*

[38] Mr. Musiker argues he was not made aware of the Officer's concerns prior to receiving the decision and was not given an opportunity to respond to those concerns. Mr. Musiker accepts the principle that there is generally no obligation to raise concerns that arise from the sufficiency of evidence and the requirements of the *IRPR* or the *Immigration and Refugee Protection Act*, SC 2001, c 27: *Patel (2021)* at para 42; *Sun v Canada (Citizenship and Immigration)*, 2019 FC 1548 at paras 23–25. However, he contends that the Officer's concerns arose not from the requirements of paragraph 200(3)(*a*) but from the Officer's overly rigid interpretation of the non-binding NOC group classification and he should therefore have been given the opportunity to respond to them: *Li v Canada (Citizenship and Immigration)*, 2012 FC 484 at paras 32–37.

[39] I agree with the Minister that there was no obligation on the part of the Officer to raise their concerns and give Mr. Musiker an opportunity to respond. For the reasons set out above, I consider the Officer's concerns to have flowed directly from the list of duties found in both the NOC and the job offer, together with the information Mr. Musiker provided. The Officer found that the evidence provided by Mr. Musiker regarding his work experience did not satisfy them that he would be able to perform the work sought, which is the analysis required by

paragraph 200(3)(*a*). The fact that the Officer made reference to the listing of duties in the NOC rather than the listing in the job offer does not take the analysis out of the scope of the paragraph, given the relationship between the NOC, the LMIA, and the position offered.

[40] It is worth noting in this regard that in a letter covering Mr. Musiker's work permit application, his counsel set out his duties (as listed in the job offer) and highlighted the aspects of his experience that were asserted to show his ability to fulfill this role. This included his asserted experience in health and safety, medical emergency response, and first aid. Mr. Musiker was clearly aware of the need to address his ability to perform the work sought prior to any concerns being raised by the Officer, and did so. That the Officer reached the contrary conclusion on the evidence does not raise an issue of fairness. The procedure followed by the Officer was fair in the circumstances.

IV. Conclusion

[41] The application for judicial review is therefore dismissed. Neither party proposed a question for certification and I agree that none arises.

JUDGMENT IN IMM-5941-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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