Federal Court  Cour fédérale

Date: 20221219

Docket: IMM-2897-21

Citation: 2022 FC 1757

Ottawa, Ontario, December 19, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Anantkumar Rasikbhai BHATTI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] After receiving a positive Labour Market Impact Assessment [LMIA], the Applicant, Anantkumar Rasikbhai Bhatti, an Indian citizen, applied for a work permit for a position as a hairstylist at "The Relief Hai [*sic*] and Beauty Salon" in Vaughan, Ontario. The LMIA and National Occupation Classification [NOC] code for hair stylist do not require formal training, but do require two to three years of experience.

[2] A visa officer [Officer] at the High Commission of Canada, New Delhi refused the Applicant's work permit application pursuant to paragraph 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. The Officer found that the Applicant was "not able to demonstrate that you will be able to adequately perform the work you seek." See Annex "A" below for applicable legislative provisions.

[3] The Applicant comes to the Court seeking judicial review of the work permit refusal [Decision], questioning its reasonableness and whether it was procedurally fair.

[4] Having reviewed the parties' written material and listened to their oral submissions, I grant the judicial review application. As explained below, I find that the Decision is not justified, thus warranting the Court's intervention.

II. Standard of Review

[5] Questions of procedural fairness attract a correctness-like standard of review: *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 at paras 8-9; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*]. The focus of the reviewing court is whether the process was fair in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

[6] Otherwise, the Court will review the merits of the Decision for reasonableness: *Vavilov*, above at paras 10, 17, 25. A reasonable decision is one that exhibits the hallmarks of

justification, transparency and intelligibility, and is justified in the context of the applicable factual and legal constraints: *Vavilov*, above at para 99. The party challenging an administrative decision has the burden of showing that it is unreasonable: *Vavilov*, above at para 100.

III. Analysis

[7] The procedural unfairness and unreasonableness of the Decision are rooted, in my view, in the Officer's treatment of the Applicant's evidence regarding his experience as a hairstylist.

[8] The Applicant's evidence in support of his experience in this field for at least five years includes, among other items: his resume; a letter from an owner of the salon, "The Relief," where the Applicant has worked in India for more than 10 years, and is a part-owner himself, listing his job duties [Letter]; affidavits from clients [Affidavits]; training certificates; and IELTS language ability scores.

[9] The Global Case Management System [GCMS] notes, which contain the Officer's reasoning and form part of the Decision (see for example *Dheskali v Canada (Citizenship and Immigration)*, 2021 FC 1191 at para 7 and cited cases), clarify that the Officer was not satisfied the Applicant has experience as a hairstylist.

[10] Regarding the Affidavits, the Officer notes that the Affidavits state the Applicant performs hairstylist duties in The Relief salon. The Officer then states that, "I note all the affidavits contain similar language and were made on a single day." The Officer does not say anything else about the Affidavits, including what weight if any the Officer assigned to them. At

best, this is a factual observation that falls short of constituting a rationale for not taking the Affidavits into account or for discounting them. The Affidavits are uncontradicted, sworn statements that are entitled in the circumstances to the presumption of truthfulness, unless there is reason to doubt their truthfulness: *Maldonado v Minister of Employment and Immigration*, 1979 CanLII 4098 (FCA), [1980] 2 FC 302 at 305.

[11] Similarly, although not sworn, the Letter confirms that the Applicant is a partner in The Relief salon who has been working with them for more than 10 years and whose job duties include recommending hair styles, performing haircuts using scissors, clippers and razors, performing hair treatments like shampooing, conditioning and hair spa, performing perms and waves, relaxing hair using flat irons and blow dryers, and coloring, bleaching, highlighting, low lighting hair, among other tasks. While the Officer acknowledges the Applicant's ownership interest in the salon, there is no other mention of the Letter or what weight if any the Officer assigned to it.

[12] The Officer also notes the certificate courses attended by the Applicant, and further acknowledges that several years of experience may replace formal education and training. The Officer then concludes that "based on the documents on file, I am not satisfied that the Applicant has experience as hairstylist."

[13] I recognize the Supreme Court of Canada's guidance that administrative decisions under review are not to be assessed against a standard of perfection: *Vavilov*, above at para 91. That said, I find that the Affidavits and the Letter, in particular, are central to the Applicant's work

permit application. In my view, the Officer simply noted the evidence, or aspects of it, without explaining why it did not satisfy the Officer of the Applicant's experience as a hairstylist.

[14] As noted in longstanding jurisprudence of this Court, "the [administrative decision maker's] burden of explanation increases with the relevance of the evidence in question to the disputed facts": *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 17. The Supreme Court more recently guides that reasons are the way that decision makers communicate they have "listened" to the parties and grappled with key issues and arguments, including, I add, key documents: *Vavilov*, above at paras 127-128.

[15] I find that it behooved the Officer, in the circumstances, to explain why the Applicant's evidence did not satisfy the Officer or was insufficient: *Sallai v Canada (Citizenship and Immigration)*, 2019 FC 446 at paras 57-63; *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 35; *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 16; *Ayeni v Canada (Citizenship and Immigration)*, 2019 FC 1202 at para 28. This requirement protects against "veiled credibility findings," that is credibility determinations disguised as insufficiency arguments, and hence, the procedural unfairness that results from such findings.

[16] I find, for example, that the decision in *Suthakar v Canada (Citizenship and Immigration)*, 2022 FC 262, on which the Respondent relies is distinguishable because, there, the applicant's evidence involved self-serving statements. In the case before me, the Applicant's evidence included uncontradicted, sworn statements of third party clientele. I am sympathetic to

the argument that it is difficult to know what other evidence this Applicant could have adduced that would have satisfied the Officer regarding the Applicant's experience as a hairstylist.

[17] While I recognize that the duty of procedural fairness in the case of work permits falls at the low end of the spectrum or is more relaxed, in part because of the volume of applications that officers assess, this does not equate to no duty. A visa officer should notify an applicant of credibility concerns, such as in the form of a procedural fairness letter, to provide the applicant with an opportunity to respond to the concerns: *Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716 at paras 6-7; *Kharaud v Canada (Citizenship and Immigration)*, 2022 FC 801 at para 18.

[18] In the end, I find that the Officer here breached procedural fairness and rendered an unreasonable decision by failing to weigh, and hence by effectively discounting, key evidence in expressing a lack of satisfaction with the Applicant's experience as a hairstylist: *Ransanz v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1109 at para 10.

[19] Finally, I note that in written submissions, the Applicant argues that the Officer treated the Applicant's IELTS scores unreasonably by failing to account for a second set of improved scores that were submitted. The Applicant conceded at the hearing of this matter, however, that on reflection, it is likely that the Officer did account for the second set of scores.

[20] The Respondent argues that the Officer could have refused the work permit application on the basis of insufficient language skills alone, and therefore, the findings on lack of hairstylist

experience and language skills should be considered separately or severed. While I do not disagree necessarily that a lack of sufficient language skills alone could have grounded the refusal, that is not what transpired here. The Officer addressed both the Applicant's experience as a hairstylist and his language skills, and in doing so, rendered a decision that is procedurally unfair and unreasonable, thus warranting the Court's intervention.

[21] The Respondent points to the dissent in *Vavilov* (at para 304) for the proposition that the adequacy (or lack) of reasons is not a stand-alone basis for quashing a decision. In my view, however, the majority in *Vavilov* guide (at para 15) that a reviewing 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." [Emphasis added.] Further, "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome": *Vavilov*, above at para 83.

[22] The majority also caution the reviewing court applying the reasonableness standard against asking "what decision it would have made in place of that of the administrative decision maker, attempt[ing] to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct[ing] a de novo analysis or seek[ing] to determine the 'correct' solution to the problem": *Vavilov*, above at para 83. In other words, "it is not enough for a decision to be justifiable[;… it] must also be *justified*, by way of …reasons": *Vavilov*, above at para 86 [emphasis in original]. In my view, the majority and minority positions do not line up on this point and my analysis must follow the majority's guidance.

IV. Conclusion

[23] I conclude that the Decision not only is procedurally unfair but also is unjustified, and hence, it is unreasonable. The reasons that the Officer gave regarding the Applicant's experience as a hairstylist, do not permit the Court to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": *Vavilov*, above at para 97 [emphasis added], citing *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para 11.

[24] For the above reasons, I therefore grant the Applicant's judicial review application. The Decision is set aside, with the matter to be redetermined by a different visa officer.

[25] Neither party proposed a serious question of general importance for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-2897-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The March 11, 2021 refusal of the Applicant's work permit application is set aside, with the matter referred to a different visa officer for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

Immigration and Refugee Protection Regulations (SOR/2002-227)
Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)

Issuance of Work Permits **Exceptions**	**Délivrance du permis de travail** **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;
…	…

FEDERAL COURT

SOLICITORS OF RECORD

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