Federal Court Cour fédérale

Date: 20240911

Docket: IMM-8904-23

Citation: 2024 FC 1427

Toronto, Ontario, September 11, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SARABHDEEP KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of a decision of an Immigration Officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC] dated June 30, 2023 [Decision]. The Officer refused the Applicant's application for permanent residence in Canada as a member of the Canadian Experience Class, established under s 87(1) of the *Immigration and Refugee*

Protection Regulations, SOR/ 2002-227 [*Regulations*], because the Applicant did not meet the work experience requirement. This finding was made because her Canadian work experience was accumulated under the work permit issued to her as a self-employed person or entrepreneur. Self employed work does not qualify under the Canadian Experience Class. For that reason, this application must be dismissed.

II. Facts

[2] The Applicant is a 28-year-old citizen of India. She was invited to and applied for permanent residence in Canada as a member of the Canadian Experience Class in November 2022.

[3] She claimed Canadian Work Experience for working with a numbered company since April 20, 2021 to the date of application and provided a verification letter of employment in support of her application for permanent resident visa. It is not disputed that her work experience was self-employed. Self-employed work is expressly excluded from the Canadian Work Experience *Regulations*.

III. Issues

[4] The Applicant raises the following issues:

1. Whether the immigration officer committed a reviewable error in their decision to refuse the Applicant's permanent resident visa application?
2. Did the Officer commit a reviewable error by deciding that the work experience gained as a self-employed person or as

an entrepreneur does not qualify for experience under the Canadian Experience Class?

3. Did the Officers reviewable errors render the decision unreasonable?

[5] The Respondent submits the Applicant has failed to demonstrate any reviewable error.

[6] Respectfully, the issue is whether the decision is reasonable.

IV. Decision under Review

A. *Procedural Fairness Letter*

[7] The Applicant was provided with a Procedural Fairness Letter [PF Letter] on April 4, 2023, outlining the Officer's "serious concerns" with the Applicant's application. The Officer stated:

> I note that you have declared NOC 0013 for your Canadian work experience. I also note that the duties included on LOE do not appear to indicate you meet the lead statement of NOC 0013 i.e. that you are planning, organizing, directing, controlling and evaluating, through middle managers, the operations of your organization in relation to established objectives.
>
> I also note that the address provided for your employment location is a residential apartment building.
>
> I also note that you are making a gross salary of around CAD$18,000/year; your salary appears comparatively low for your designated job title. Open source search shows the average salary for an executive director in Ontario is between $48,000 and $132,000 annually- usually at the higher end of the scale. It appears you are making less than minimum wage as an executive director.
>
> Based on the documentation before me, I am not currently satisfied you currently have one year of Canadian work experience under NOC 0013 as an executive director.

[8] The Applicant issued a reply on May 26, submitting that 1) the Applicant performed substantial duties in her position, 2) that employment location does not prelude the applicant from having qualifying work experience under the Canadian Experience Class, 3) there is no minimum wage requirement for qualifying work experience, per the IRCC website, and 4) the Applicant also meets the requirements of the Federal Skilled Worker Class pursuant to s 75(1) and s 75(2) of the *Regulations*.

B. *IRCC Decision*

[9] The Decision states:

> Your application was assessed based on the occupation(s) which you identified as part of your skilled work experience in Canada:
>
> > I am not satisfied that you meet the skilled work experience requirement as your Canadian work experience was accumulated under your previous work permit, issued under exemption code C11; C11 being the administrative LMIA exemption code that covers the work of certain foreign nationals entering Canada to run their own business.
> >
> > Work experience gained as a self-employed person or as an entrepreneur does not qualify for experience under the Canadian Experience Clas [*sic*].

[10] Accordingly, per subsection 10.3(1)(e) and 11.2 of the *IRPA*, the Officer refused the Applicant's permanent residence application.

V. Relevant Provisions

[11] The *Regulations* outline membership requirements in the Canadian Experience Class at s 87.1(2), the relevant provision being:

Member of the class	**Qualité**
(2) A foreign national is a member of the Canadian experience class if	**(2)** Fait partie de la catégorie de l'expérience canadienne l'étranger qui satisfait aux exigences suivantes:
(a) they have acquired in Canada, within the three years before the date on which their application for permanent residence is made, at least one year of full-time work experience, or the equivalent in part-time work experience, in one or more occupations, other than a restricted occupation, that are listed in TEER Category 0, 1, 2 or 3 of the National Occupational Classification;	**a)** l'étranger a accumulé au Canada au moins une année d'expérience de travail à temps plein, ou l'équivalent temps plein pour un travail à temps partiel, dans au moins une des professions, autre qu'une profession d'accès limité, appartenant aux catégories FÉER 0, 1, 2 ou 3 de la Classification nationale des professions au cours des trois ans précédant la date de présentation de sa demande de résidence permanente;
(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification;	**b)** pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de la *Classification nationale des professions*;
(c) during that period of employment they performed a substantial	**c)** pendant cette période d'emploi, il a exercé une partie appréciable des

number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties…	fonctions principales de la profession figurant dans les descriptions des professions de la *Classification nationale des professions*, notamment toutes les fonctions essentielles…
[Emphasis added]	[Je souligne]

[12] Importantly however, the *Regulations* state at s 87.1(3) that self-employment shall not be included:

(3) For the purposes of subsection (2),	**(3)** Pour l'application du paragraphe (2) :
…	…
(b) any period of self-employment or unauthorized work shall not be included in calculating a period of work experience…	**b)** les périodes de travail non autorisées ou celles accumulées à titre de travailleur autonome ne peuvent être comptabilisées pour le calcul de l'expérience de travail…
[Emphasis added]	[Je souligne]

[13] Further, section 11.2 of the *IRPA* states:

Visa or other document not to be issued	**Visa ou autre document ne pouvant être délivré**
11.2 (1) An officer may not issue a visa or other document in respect of an application for permanent residence to a foreign national who was issued an invitation under Division 0.1 to make that application if — at the time the invitation was issued or at	**11.2 (1)** Ne peut être délivré à l'étranger à qui une invitation à présenter une demande de résidence permanente a été formulée en vertu de la section 0.1 un visa ou autre document à l'égard de la demande si, lorsque l'invitation a été formulée ou

the time the officer received their application — the foreign national	que la demande a été reçue par l'agent :
(a) did not meet the criteria set out in an instruction given under paragraph 10.3(1)(e);	**a)** il ne répondait pas aux critères prévus dans une instruction donnée en vertu de l'alinéa 10.3(1)e);
(b) did not have the qualifications on the basis of which they were ranked under an instruction given under paragraph 10.3(1)(h) and were issued the invitation; or	**b)** il n'avait pas les attributs sur la base desquels il a été classé au titre d'une instruction donnée en vertu de l'alinéa 10.3(1)h) et sur la base desquels cette invitation a été formulée;
(c) did not meet the criteria for membership in a category that was established in an instruction given under paragraph 10.3(1)(h.2), if they were issued an invitation on the basis that they were eligible to be a member of that category.	**c)** dans le cas où l'invitation lui a été formulée sur la base du fait qu'il pouvait être membre d'un ensemble établi dans une instruction donnée en vertu de l'alinéa 10.3(1)h.2), il ne répondait pas aux critères requis pour être membre de l'ensemble en question.
[Emphasis added]	[Je souligne]

VI. Standard of Review

[14] The parties submit the standard of review is reasonableness, and I agree. However, the Applicant also suggests the Decision is unfair—procedural unfairness is evaluated on a standard of correctness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*] at para 23).

[15] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

VII. Submissions and Analysis

[16] The Applicant submits the Decision is unreasonable and unfair for not considering the work experience the Applicant gained on a work permit under exception code C11. The Applicant submits she performed “substantially similar duties” as those outlined under the National Occupation Classification [NOC] 0013 in this role and the Officer overlooked the material evidence and information submitted by the Applicant in their Decision.

[17] The Applicant further submits the concerns raised in the PF Letter are not dealt with in the Decision, and largely replicates the arguments made in the Applicant’s response to the PF Letter.

[18] With respect, these arguments are not persuasive. The core fact in this case is that the work experience relied upon by the Applicant was self-employment. This is nowhere denied and is a critical constraining fact. It is clear on the record that the class in respect of which the Applicant was invited to apply specifically and expressly excluded periods of self-employment: by virtue of s 87.1(3)(b) of the *Regulations*. Therefore the Decision is not only reasonable, but is the only reasonable conclusion an officer could make in this case. On this basis this application must be dismissed.

[19] The Officer was under no duty to inform the Applicant that s 87.1(3)(b) of the *Regulations* required them to dismiss her application because self-employed work was excluded. The legislation, in this case the *Regulations*, is public legislation where this specific exclusion is expressly laid out. That was or should have been known to the Applicant at the outset. In my view there was no need for the Officer to send a PF letter on such a plain and obvious flaw in her application, and with respect, judicial intervention is not warranted in that respect.

[20] I note among other things the Applicant also argues the Officer fettered their decision. While an officer's fettering of their discretion may result in judicial review of a decision made under a Ministerial policy or program, the doctrine of fettering does not seem available in respect of legislated criteria whether established by Act of Parliament, or as in this case, by Order in Council legislating the *Regulations* to be applied by the Officer. I note no attack was made on the *Regulations*.

[21] The Applicant also submits she should have been considered and approved under the Federal Skilled Worker Class. However there is no merit in this assertion for two reasons. First, she was not invited to apply under that Class, she was only invited to apply under the Canadian Experience Class. Secondly she did not apply under Federal Skilled Worker Class. I am unable to see any unreasonableness in the Officer not considering her under a Class in respect of which no application was made, and for which she did not receive an invitation to apply.

VIII. Conclusions

[22] Therefore this application must be dismissed.

IX. Certified question

[23] Neither party proposed a question of general importance for certification and none arises.

JUDGMENT in IMM-8904-23

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question is certified and there in no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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