Federal Court  Cour fédérale

Date: 20200129

Docket: IMM-2345-19

Citation: 2020 FC 162

Ottawa, Ontario, January 29, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

IRSHAD BEGUM
ABDUL KHALID, FAHAD KHALIQ,
SAIRA KHALIQ, ZUNAIRA KHALIQ

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of the decision by a visa officer [Officer] in London, UK [High Commission] refusing the Applicants' permanent resident visa application under Saskatchewan's Family Support Stream Provincial Nominee Class [PNC] pursuant to section 87 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

II. Facts

[2] The Applicants are citizens of Pakistan. They are the Principal Applicant, her husband, her son and daughters. The children are all over the age of eighteen.

[3] The Applicants submitted their application for permanent residency under Saskatchewan's Family Support Stream PNC. The Principal Applicant was nominated by Saskatchewan under the Saskatchewan Immigrant Nominee Program [SINP]. She was nominated under the national occupation code for elementary school and kindergarten teachers. She later changed this to the code for cashiers, without objection by Saskatchewan.

[4] As part of her application, the Principal Applicant included her English language scores which are equivalent to Canadian Language Benchmark [CLB] scales: 4 in listening, 5 in reading, 5 in writing, and 6 in speaking.

[5] The minimum CLB requirement for cashiers as determined by the Governments of Canada and Saskatchewan, is CLB 4.

[6] Note that the Principal Applicant met or exceeded CLB 4 in all categories.

[7] In July, 2015, the Principal Applicant received a procedural fairness letter, in which the Officer said he or she was not satisfied the Principal Applicant had the necessary language skills to work as a teacher. The Principal Applicant retained counsel who submitted she could become

economically established as a cashier instead of a teacher, noting that there were a large number of available cashier positions, her English language scores were sufficient for employment as a cashier – she met or exceeded the minimums, she was and had been a mathematics teacher (possibly since 1985), and her experience as a teacher meant she would be familiar with the social and administrative demands of a cashier. She noted that on the job training was usually provided to cashiers. She also submitted she had financial and family support in Canada.

[8] Saskatchewan knew of the procedural fairness letter but did not withdraw its nomination. From this I conclude she is nominated as a cashier by Saskatchewan under its SINP.

III. Decision under review

[9] On March 15, 2019, the Officer rejected the application principally because the Officer was not satisfied the Principal Applicant had the necessary language skills to become economically established in Canada [Decision]. The Global Case Management System [GCMS] notes indicate the Officer's central concern:

> Rep states that "Many cashier positions require no experience in the field, and Ms. Begum's English score will allow her to perform the duties of a cashier." Rep indicates a search on saskjobs website on 090ct15 revealed 70 cashier positions available in the Saskatoon area & "a large number of these jobs explicitly state that no experience is required." Rep has provided printouts of three specific job postings which state no experience required. Rep concludes that due to "the abundance of entry-level cashier positions available, it is submitted that Ms. Begum will be able to find a job as a cashier in the Saskatoon area." *Note that search on saskjobs website for cashier positions in the Saskatoon area as of l9May16 reveals only 11 job listings, none of which specify no exp required. The ESDC job bank essential skills profile for cashiers (NOC 6611) indicates the complexity levels of oral communication, reading, writing, & document use tasks described

> by ESDC as being generally performed by the majority of workers as cashiers range from the complexity levels 1 to 3. It therefore appears reasonable to expect that at least moderate English lang proficiency wld be required to be able to accomplish the full range of tasks it wld appear reasonable to expect of work as a cashier in Cda. PA's demonstrated English lang proficiency is moderate only in speaking, & is only basic in reading, writing, & listening.
>
> …
>
> [Emphasis added]

[10] In accordance with subsection 87(4) of the *IRPR*, the matter was referred to a second officer for concurrence. In February, 2019, GCMS notes indicate the second officer concluded that "based on all available information on file to date and based on the evaluation of the reviewing officer, it appears reasonable to have concerns that the principal applicant would become economically established within a reasonable period of time." I attach little importance to this alone because no further reasons are provided from the second officer. I note the second did not actually concur with the Decision but merely states it appears reasonable.

IV. Issue

[11] The only issue is whether the Officer's finding that the Principal Applicant cannot become economically established in Canada is reasonable.

V. Standard of review and statutory framework

A. *Standard of review*

[12] As to the standard of review, this application for judicial review was heard shortly after the Supreme Court of Canada decisions in *Canada (Minister of Citizenship and Immigration) v*

Vavilov, 2019 SCC 65, majority reasons by Chief Justice Wagner [*Vavilov*], and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*], majority reasons by Justice Rowe. The parties made their original submissions under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. In this decision I will apply the standard of review framework set out in *Vavilov* and *Canada Post*. No unfairness arises because prior to the hearing I invited parties to make submissions regarding the application of the standard of review analysis in *Vavilov*.

[13] In *Canada Post*, Justice Rowe said that *Vavilov* set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. The parties agree this is the standard, and it was not rebutted. Therefore, I conclude the Decision is therefore reviewable on a standard of reasonableness.

[14] Reasonableness review is both robust and responsive to context: *Vavilov* at para 67. Applying the *Vavilov* framework in *Canada Post*, Justice Rowe explains what is required for a reasonable decision and what is required of a court reviewing on the reasonableness standard of review:

> [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). In this case, that burden lies with the Union.

[15] In the words of the Supreme Court in *Vavilov*, the reviewing court must be satisfied the decision maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

B. *Legislation*

[16] The Principal Applicant's application for permanent residence as a member of a provincial nominee class is governed by subsection 12(2) of *Immigration and Refugee Protection Act*, SC 2001, c 27 and section 87 of the *IRPR*. Subsection 12(2) provides:

Economic immigration	**Immigration économique**
12 (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada**.**	**12 (2)** La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[17] Subsections 87(1) to (4) of IRPR's regulations provide:

Class	**Catégorie**
87 (1) For the purposes of subsection 12(2) of the Act, the provincial nominee class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada.	**87 (1)** Pour l'application du paragraphe 12(2) de la Loi, la catégorie des candidats des provinces est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada.
Member of the class	**Qualité**
(2) A foreign national is a member of the provincial nominee class if	**(2)** Fait partie de la catégorie des candidats des provinces l'étranger qui satisfait aux critères suivants :
(a) subject to subsection (5), they are named in a nomination certificate	**a)** sous réserve du paragraphe (5), il est visé par un certificat de

issued by the government of a province under a provincial nomination agreement between that province and the Minister; and

(b) they intend to reside in the province that has nominated them.

désignation délivré par le gouvernement provincial concerné conformément à l'accord concernant les candidats des provinces que la province en cause a conclu avec le ministre;

b) il cherche à s'établir dans la province qui a délivré le certificat de désignation.

Substitution of evaluation

(3) If the fact that the foreign national is named in a certificate referred to in paragraph (2)(a) is not a sufficient indicator of whether they may become economically established in Canada and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.

Substitution d'appréciation

(3) Si le fait que l'étranger est visé par le certificat de désignation mentionné à l'alinéa (2)a) n'est pas un indicateur suffisant de l'aptitude à réussir son établissement économique au Canada, l'agent peut, après consultation auprès du gouvernement qui a délivré le certificat, substituer son appréciation aux critères prévus au paragraphe (2).

Concurrence

(4) An evaluation made under subsection (3) requires the concurrence of a second officer.

[Emphasis added]

Confirmation

(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.

[Nos soulignés]

C. *Regulatory Impact Analysis Statement [RIAS]*

[18] The regulations just referred to were implements in relation to a RIAS issued by the Respondent explaining their intent among other things. The Applicants rely on *Sarfraz v Canada (Citizenship and Immigration)*, 2019 FC 1578 [*Sarfraz*], in which Justice Fuhrer reviewed the RIAS for provincial nominee program, whose conclusions I respectfully adopt in this case:

> [22] In essence, the PNP provides provinces and territories increased flexibility to attract individuals who may not be eligible for federal immigration programs. The RIAS does not indicate, however, that an officer's assessment of economic establishment must be conducted in the same manner as the province's or territory's approach. Rather, it leaves open that officers at the federal level are entitled to their own interpretations on a file, and may consider additional or altogether different factors when determining whether to substitute an evaluation pursuant to IRPR 87(3), as was done here: *Debnath*, above at para 15. While a provincial or territorial nomination decision is owed deference on the government's assessment of applicable criteria, it is not binding on federal officers: *Chaudhry v Canada (Citizenship and Immigration)*, 2015 FC 1072 [*Chaudhry*] at para 28; *Sran v Canada (Citizenship and Immigration)*, 2012 FC 791 [*Sran*] at para 13. Officers must conduct their own analysis objectively, however, to achieve a consistent process [i.e. fair], taking into account their decision should not displace the underlying intent of the applicable program: *Roohi v Canada (Citizenship and Immigration)*, 2008 FC 1408 at para 31. Accordingly, any direct challenge to a provincial or territorial conclusion in the nomination process must be justified, transparent and intelligible: *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47.
>
> [Emphasis added]

[19] Both parties relied on the RIAS for section 87 of the *IRPR*. The Respondent relies on the following extract from the RIAS:

> IX . PROVINCIAL NOMINEE CLASS. PART 6. DIVISION 1
>
> Description
>
> The *Immigration and Refugee Protection Act* subsection 12(2), provides that a foreign national may be selected as a member of the economic class on the basis of his or her ability to become economically established in Canada. The selection of foreign nationals and the acquisition of status under the Act must also be consistent with federal-provincial agreements. Provinces have the authority and responsibility of establishing their own criteria for nomination, while the federal government maintains its responsibility for applying statutory admissibility criteria and exercising ultimate selection authority. These Regulations allow a person nominated by a provincial government under a Provincial Nomination Agreement between that Province and the Minister of Citizenship and Immigration to be issued an immigrant visa without having to meet the pass mark that is required for Skilled Worker Immigrants.

[20] The Applicants say the RIAS for section 87 of the *IRPR* sheds light on the purpose of the provincial nominee program, indicating section 87 allows for the nomination of individuals who do not meet federal immigration criteria for Skilled Workers to benefit the provincial economy:

> These Regulations allow a person nominated by a provincial government under a Provincial Nomination Agreement between that Province and the Minister of Citizenship and Immigration to be issued an immigrant visa <u>without having to meet the pass mark that is required for Skilled Worker Immigrants</u>.
>
> …
>
> The intent of these Regulations is to enable provinces to support the immigration of persons who have expressed an interest in settling in their province and <u>who the province believes will be able to contribute to the economic development and prosperity of that province and Canada</u>.
>
> …

> The provincial economy will benefit when a province is able to bring about the immigration of a candidate who might not meet federal immigration criteria but who has attributes of particular value to the nominating province and its specific economic development objectives. An additional benefit is the ability of the provinces to support a better dispersion of immigrants, and related benefits, into numerous communities across the country.
>
> [Emphasis added]

VI. Analysis

[21] The Applicants submit the Officer's finding that the Principal Applicant lacks sufficient language skills is unreasonable because the Officer effectively substituted a very much higher and unreasonable language proficiency standard, moving it from CLB 4 to at least CLB 6. Secondly, the Applicants say the Officer unreasonably assessed the ability of the Principal Applicant to become established as a cashier in terms of familiar tasks, submitting the Officer in effect moved the language standard even higher, in effect to CLB 9. In this connection, the Federal Provincial agreement governing language proficiency required only CLB 4 – which the Applicant met or exceeded in all four categories.

[22] By way of background, in 2011, the Respondent Minister added CLB 4 as the minimum language threshold for provincial nominee programs. In a 2011 report from the Minister's Evaluation Division [Minister's 2011 Report], it was stated this minimum language threshold would improve provincial nominees' "ability to obtain jobs for which they are qualified, reduce the burden of employers to assess language ability, and have the added benefit of contributing to workplace health and safety." CLB 4 was agreed to by Saskatchewan under its SINP.

[23] The Applicants note that CLB 4 in English across all four categories (listening, speaking, reading and writing) is the minimum standard set by the Government of Canada on its website for provincial nominee applicants for semi and low skilled occupations that fall under National Occupation Classification [NOC] skill levels C and D. Cashier falls under NOC skill level D, which is the lowest level of occupations in the NOC classification scheme.

[24] Yet CLB 4 was not the standard used to measure the language proficiency of the Principal Applicant. With respect, and notwithstanding counsel's submissions to the contrary, the Officer required that she have CLB 6 language proficiency, not CLB 4. This is made clear in the following passage from the GCMS notes of the Decision. The Officer uses the word "moderate" in relation to required proficiency and then used the same adjective "moderate" to describe the Principal Applicant's language proficiency in speaking English - where she scored CLB 6:

> It therefore appears reasonably to expect that at least moderate English lang proficiency wld be required to be able to accomplish the full range of tasks it wld appear reasonable to expect of work as a cashier in Cda. PA's demonstranted (sic) English lang proficiency is moderate only in speaking, & is only basis in reading, writing & listening….
>
> [Emphasis added]

[25] The Respondent disagrees, in effect asking the Court to infer different meanings for the word "moderate" used in the two sequential sentences just quoted. There is however no justification for adopting this interpretation.

[26] As noted, the two levels of government agreed to a CLB minimum of 4. The Court appreciates the Respondent is not technically bound by a provincial nomination. However, the

law is settled that the Minister's Officers must give a degree of deference to provincial nominations. As stated by Justice Southcott in *Chaudhry v Canada (Citizenship and Immigration)*, 2015 FC 1072 at para 28 [*Chaudhry*], citing *Sran v Canada (Citizenship and Immigration)*, 2012 FC 791 per Mosley J at para 13 [*Sran*]:

> [28] Concerning the degree of deference the visa officer owed the Province, I agree with the respondent that there is no error in the Decision in this regard. It is certainly true that deference is owed to the Province's assessment as to whether an applicant has the ability to become economically established in that province. In *Sran*, at para 13, Justice Mosley observed that the provincial nomination must be accorded deference, but is not binding, and the visa officer is not obliged to consider the same criteria as the province.

[27] In my respectful view, particularly given the sophistication of modern governments at both the provincial and federal levels, Minister's officers who decide to substitute their opinions for those of Canada and the nominating province must act reasonably – which means they must provide reasons that are intelligible, transparent and most importantly, justified: *Zahid v Canada (Citizenship and Immigration)*, 2015 FC 1263, per Harrington J at para 36 and *Ullah v Canada (Citizenship and Immigration)*, 2016 FC 607, per Heneghan J at paras 5-6.

[28] Thus, the ability of the Minister's officers to make a substitute decision is not a *carte blanche*. Substitute decisions under subsection 87(3) must demonstrate deference to the nominating province, and where they disagree, reasons are required. In addition, their decision must not displace the underlying intent of the applicable program: *Roohi v Canada (Citizenship and Immigration)*, 2008 FC 1408 at para 31 [*Roohi*]; *Sarfraz* at para 22.

[29] In my respectful view, these constraints on substitute decisions were not applied reasonably in the case at bar. The Decision moving the minimum from CLB 4 to CLB 6 was not justified in the reasons. Even the language used is problematic: the Officer used the word "moderate", but did not define "moderate", which allowed Minister's counsel to argue the word moderate meant something different in one sentence from its meaning in the next.

[30] This problematic reasoning lies at the heart of and was the central reason for the Officer's rejection of the application. In my view this critical part of the Officer's reasoning entails the sort of 'fatal flaw' identified in *Vavilov* in para 102:

> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56…

[31] In my view the Officer lost sight of the factors that persuaded the Saskatchewan government to nominate the Applicants under its SINP, lost sight of the deference owed to a provincial nomination, and also lost sight of the requirement that substitute decisions must not displace the underlying intent of the applicable program. As noted by Justice Mosley in *Sran*:

> [24] In my view, the officer erred in relying primarily on the skilled worker classification tool to evaluate the likelihood that the applicant would become economically established in Canada. In comparing the applicant's skills to the NOC criteria, the officer lost sight of the factors that had persuaded the Alberta government

> that the family could be settled including the wife's education and the parents' willingness to support the family.
>
> [Emphasis added]

[32] I reach this conclusion principally because the Principal Applicant met and, in the case of reading, writing, and speaking (three of the four categories), *actually exceeded* the minimum language requirements established both by Canada and Saskatchewan.

[33] In this connection, the Decision is also unreasonable in holding the Principal Applicant unable to carry out the tasks required by a cashier. I say this because a cashier position is categorized as an NOC skill level D, the lowest level of occupation evaluated by the Minister's department, noting also that the Minister's 2011 Report indicated "on-the-job training is usually provided" for NOC skill level D positions.

[34] The Applicants also submit that the Officer failed to reasonably assess relevant and adjacent factors including the fact – unacknowledged by the Officer – that the Principal Applicant has been teaching mathematics seemingly since 1985 and had a wealth of expertise. In addition, the record is clear that on-the-job training is usually provided for cashiers; this point was raised by the Applicant in response to the procedural fairness letter, but not addressed by the Officer.

[35] In these important and central respects the Decision does not respond to the Applicant's important submissions in relation to relevant and adjacent facts. *Vavilov* says that while a decision-maker is not required to deal with every argument, he or she *is* required to meaningfully

account for central issues and concerns raised by the parties. If not, it may call into question whether the decision maker was actually alert and sensitive to the matter before it:

> (e) Submissions of the Parties
>
> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> [Emphasis added]

[36] In my respectful view, the fact the Principal Applicant was a math teacher should have been factored into the assessment of her ability to establish herself economically as a cashier but it was not. The Court takes judicial notice of the fact that the ability to count and make change and other mathematical calculations forms an important job skill for someone in a cashier

position. It is also reasonably possible that on-the-job training might assist the Principal Applicant in economically establishing herself as a cashier, which was not considered at all.

VII. Conclusion

[37] In summary, the Court concludes the Officer's reasons do not display an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker. Considering the Decision holistically and not as a treasure hunt for errors, the Decision contains fatal flaws and is unreasonable. Therefore, this application for judicial review will be granted.

VIII. Certified Question

[38] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-2345-19

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a different decision-maker, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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