Federal Court  Cour fédérale

Date: 20200219

Docket: IMM-2107-19

Citation: 2020 FC 268

Ottawa, Ontario, February 19, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

QAMAR UL ZAMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant is an experienced sweet maker (confectioner) with 13-years experience from Pakistan who applied for a temporary work permit to make more money doing the same profession in Canada. The visa officer refused the work permit application because the Applicant has a strong economic incentive to remain in Canada and the Applicant does not meet the English language requirement as specified in the Labour Market Impact Assessment [LMIA].

[2] The Applicant submits that the visa officer erred in failing to address evidence that militates in favour of granting the work permit and misconstrued the nature of the employment position. The Respondent believes that the present application for judicial review is merely an invitation for this Court to reweigh evidence in an effort to arrive at a conclusion that is more favourable to the Applicant.

[3] I disagree with the Respondent and, for the reasons that follow, I grant the present application for judicial review. In short, the visa officer did not conduct a complete and proper assessment of the evidence.

II. Facts

[4] The Applicant is a citizen of Pakistan. He lives in Pakistan with his wife and two minor children. Although his father has passed away, the Applicant's mother and seven siblings live in Pakistan.

[5] The Applicant only speaks Urdu; he does not speak English or French other than to say "yes" and "no."

[6] The Applicant has been employed for over eight years on a full-time basis as a senior sweet maker at Rafiq Sweet House in Lahore, Pakistan. Prior to his employment at Rafiq Sweet House, the Applicant was employed for five years as a sweet maker at Gourmet Bakers & Sweets in Lahore.

[7] Shirin Mahal Bakery & Sweets, a specialty Pakistani sweets bakery with several locations in the Greater Toronto Area, posted a job offer for a senior sweet maker. The job is a full-time position (37.5 hours per week) with an hourly wage of $22.50.

[8] The job offer was particularly attractive to the Applicant because of the nature of the position. The position called for expertise in making Asian and Pakistani sweets, and the Bakery could accommodate an Urdu speaker. According to an advertisement for the position, the job requirements were as follows:

> […] [m]ust have minimum 5 years of experience in the preparation of a large variety of Asian/Pakistani sweets, including Barfi, Gulab Jamun, Amrati, Jalebi, Patissa, Kala Kand, Balooshai, Ladu, Rasgulla, Halwa, Petta, etc. Duties include preparation of the above sweets, as well as supervising sweetmaking personnel and kitchen staff, training staff and ensuring quality standards are met. Language of work: English. However, employer can accommodate an Urdu speaking applicant.
>
> [Emphasis added.]

This advertisement appeared twice in Jang Canada (a weekly Urdu newspaper) and a few times on a couple of Canadian job board websites during the months of September and October 2018.

[9] The Applicant applied for the position and then signed a contract of employment on October 29, 2018. The position involved work on the production side and did not involve dealing with customers. The contract specified that the Applicant was to work as a sweet maker of Pakistani sweets for a period of two years. The job offer was conditional upon a valid LMIA-based work permit and successful entry into Canada. The contract did not specify a language requirement.

[10] On January 15, 2019, the Applicant received a positive LMIA for the "Specialty Baker" position at Shirin Mahal Bakery & Sweets. The LMIA included the following "Language Requirements" under the "Job Information" heading:

> Verbal: English
>
> Written: English

[11] According to Shirin Mahal Bakery & Sweets, the English requirement was included in the LMIA because the company could not opt out of the requirement that one of Canada's two official languages be spoken for the job.

[12] On the basis of a positive LMIA, the Applicant filed a work permit application on February 1, 2019. The permit application was submitted online and assessed by a visa officer in Abu Dhabi. In the application, the Applicant indicated that he had 13 years of experience as a sweet maker in Pakistan and only spoke Urdu. The Applicant also indicated that his family would not accompany him to Canada.

[13] On February 11, 2019, Rafiq Sweet House (his current employer) sent a letter confirming the Applicant's employment as a senior sweet maker at the company since January 2011. The letter specified that the Applicant's current monthly salary is 45,000 Pakistani rupees (roughly $833 in Canadian dollars at current exchange rates). The letter from Rafiq Sweet House also stated the following: "Upon [the Applicant's] return to Pakistan, we would be pleased to have him continue as a Senior Sweet Maker with our company."

[14] Shirin Mahal Bakery & Sweets provided a letter confirming that knowledge of English was not a requirement for the position:

> Urdu is the everyday language spoken at our workplace and there is absolutely no need for a prospective worker to have fluency in English in order to adequately function at the job.

[15] The same letter specifies that knowledge of English was not required for the position for three reasons. First, Shirin Mahal Bakery & Sweets noted that the job applicant would be working on the production side of the business and would not be dealing with customers. Second, Urdu is effectively the *lingua franca* at Shirin Mahal Bakery & Sweets. Of the 14 employees involved in the production side of the business, 12 are bilingual in English and Urdu. The head sweet maker is fluent only in Urdu. As a result, workplace instructions are usually given in Urdu and then translated into English for the few employees who do not speak the language. Third, Shirin Mahal Bakery & Sweets noted that it has the ability to translate English instructions into Urdu, as the vast majority of its production staff are bilingual.

[16] On February 15, 2019, counsel for the Applicant sent a letter to the High Commission of Canada. In the letter, counsel for the Applicant argued that the Applicant had little incentive to overstay the visa because he wishes to eventually apply for permanent residence and has strong family and employment ties to Pakistan.

III. Decision Under Review

[17] On March 21, 2019, the Applicant appeared for an interview with an immigration officer in Islamabad, Pakistan. At the interview, the Applicant explained that he wished to work in

Canada in order to send money to satisfy the needs of his family in Pakistan. The Applicant also indicated that he would only seek to extend his work permit for another two years if he is allowed to bring his children to Canada, otherwise he would return to Pakistan upon the expiry of his visa.

[18] According to the Global Case Management System [GCMS] notes, the visa officer questioned the Applicant about his English and French language abilities in order to satisfy the language requirement specified in the LMIA. On the basis of the Applicant's answers, the visa officer concluded that the Applicant does not meet the "requirements of the LMIA for this job." According to the GCMS notes, the visa officer also harboured doubts that the Applicant was not a genuine visitor to Canada given the Applicant's "financial situation in Pakistan" and intention to apply for permanent resident status to bring his children to Canada after his two-year temporary resident term.

[19] The Applicant's work permit application was refused on March 28, 2019. The letter indicates that the visa officer was not satisfied that the Applicant will leave Canada at the end of his stay as a temporary resident, as stipulated in paragraph 179(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, and that the visa officer was not convinced that the Applicant is "able to adequately perform the work."

IV. Issues

[20] The case at bar involves two issues:

(1) Did the visa officer err either in ignoring evidence or in rendering an unintelligible decision when the visa officer limited his or her assessment of the language requirements solely to those set out in the LMIA?

(2) Did the visa officer err in ignoring evidence as to the Applicant's strong ties to his country of residence (Pakistan) and in focusing almost exclusively on the Applicant's financial situation?

V. Standard of Review

[21] These issues are reviewable on the reasonableness standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]). Under the reasonableness standard of review, "the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable" (*Vavilov* at para 83).

[22] It is clear that decisions of visa officers are entitled to considerable deference in their assessment of the evidence and the weight to be accorded to evidence relevant to temporary work visas (*Chhetri v Canada (Citizenship and Immigration)*, 2011 FC 872 at para 9 [*Chhetri*]). Mr. Justice Rennie determined the following, at paragraph 10:

> Foreign nationals are entitled to the minimum degree of procedural fairness. There is no obligation on the visa officer to advise the applicant of concerns about, or deficiencies in, their application or to offer an interview. Nor, as Rothstein J.A. (*ex officio*) said in *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815, does the onus shift to the visa officer to take any additional steps to address or satisfy outstanding concerns. The foreign national has no right or interest at play. It is for these reasons that it is often difficult to set aside, on judicial review, a visa officer's decision.

[23] However, as I explained in *Ekpenyong v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1245 at paragraphs 12 and 13 [*Ekpenyong*], while the visa officer's assessment for a temporary work permit requires a balancing of many factors, the visa officer must nonetheless provide adequate reasons that justify his or her decision, and must address evidence that may contradict important findings of fact.

VI. Analysis

(1) Did the visa officer err either in ignoring evidence or in rendering an unintelligible decision when the visa officer limited his or her assessment of the language requirements solely to those set out in the LMIA?

[24] The Applicant submits that the visa officer's determination indicates a failure to properly consider the evidence as to the prospective employer's language accommodations, in particular, the evidence that knowledge of English was not a requirement for the job. This latter determination is contrary to the visa officer's Operational Guidelines relating to "Foreign workers: Assessing language requirements" [Operational Guidelines], which specify that visa officers should not limit their assessment of language to the requirements described in the LMIA. The Applicant points out that English was only set out as a required language on the LMIA because Shirin Mahal Bakery & Sweets was unable to opt out of the English requirement. The Applicant submits that the visa officer should have instead conducted an analysis of the impact of the Applicant's inability to speak English in connection with the nature of the job.

[25] The Respondent submits that the visa officer's assessment of the Applicant's lack of English was reasonable because the visa officer considered all of the evidence, including the Applicant's testimony, the prospective employer's letter, and the LMIA language requirement.

The Respondent argues that the Applicant merely disagrees with the manner in which the officer assessed the evidence.

[26] The Applicant cites *Chhetri* for the proposition that visa officers must undertake an analysis as to whether an applicant possesses the requisite English language ability for the job if the job duties do not involve any meaningful interaction with the public.

[27] I do not agree that the Court in *Chhetri* went as far as the Applicant is suggesting; however, that case should provide guidance on how the visa officer in this case should have undertaken the review of the language requirement issue.

[28] In *Chhetri*, the visa officer denied the applicants' temporary work permits for "domestic servant" positions because the applicants did not speak English. Mr. Justice Rennie found that the visa officer's decision was unreasonable in part because the officer failed to consider a letter from the employer that confirmed the ability of the applicants in that case to fulfill all the requirements of the position.

[29] The LMIA at issue in *Chhetri* confirmed that the position did not require applicants to have a fluent understanding of English as a work requirement. Here, the level of ability in English is not set out by the LMIA.

[30] What is clear from *Chhetri* is that, in the exercise of his or her discretion, the visa officer is not limited to the LMIA and can consider any factor relating to the *bona fides* of both the

employment offer and the employee in relation to language requirements. I would add that in doing so, the visa officer must also address evidence that may contradict his or her important findings of fact.

[31] In the case at bar, the visa officer failed to do just that.

[32] As the Applicant points out, the visa officer fixated on the Applicant's inability to speak English and the language requirement indicated in the LMIA. According to the GCMS notes, the visa officer questioned the Applicant about his language abilities (verbatim):

> Do you speak English of French? No. You have no abilities in English? No. Your offer of employment requires abilities in English, are you aware? This is not a problem, everyone speaks Urdu at my employer's. However, LMIA requires abilities in English? I can say yes or no. I will take training.

[33] The visa officer concluded that the Applicant does not satisfy the language requirements of the employment position (verbatim):

> I have concerns regarding pa's application, as follows: Pa does not have abilities in English which are required according to LMIA. I have considered information provided in Rep's submission, however, the requirement on the LMIA remains and the LMIA was approved with the language requirement listed. Therefore, I am not satisfied that Pa meets the requirements of the LMIA for this job.
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> [Emphasis added.]

[34] In effect, the visa officer took the LMIA's language requirement—as opposed to a balancing between the LMIA's language requirement, the prospective employer's own words, and the nature of the job—as determinative of the issue.

[35] This line of reasoning is contrary to the Court's jurisprudence that has maintained that LMIA language requirements should not be determinative as to the *actual* requirements of the job position (*Chhetri* at para 17; *Singh Grewal v Canada (Citizenship and Immigration*), 2013 FC 627 at para 9).

[36] As is made clear by the visa officer's Operational Guidelines, the LMIA process is not meant to bind the visa officer in his or her assessment of whether the applicant has established that he or she is able to perform the work sought.

[37] In *Chen v Canada (Minister of Citizenship and Immigration*, 2005 FC 1378, [2005] FCJ No 1674 (QL) [*Chen*], it was determined that visa officers may find that the language requirements for a particular job are independent or different from those set forth in the LMIA if they are relevant to the performance of the job duties.

[38] Here, the visa officer should not have relied on the LMIA process to determine the actual language requirements (*Chen* at para 12). Demarcation of each inquiry involves an appreciation for the different functions of each administrative process.

[39] The Court's maintenance of a distinction between these two language requirements is justified because of the distinct nature of each determination. As Mr. Justice Diner remarked in *Singh v Canada (Citizenship and Immigration)*, 2015 FC 115 at paragraph 20, the labour market assessment process is meant "to test a labour market need, and not the attributes of the individual: that is what the visa application is for."

[40] Although the language requirements on the LMIA should be part of the assessment process, the visa officer should have conducted an analysis of all of the evidence pertaining to the language requirements of the position and made an independent determination on the *actual* language requirements of the position. Simply stating that the visa officer considered the representations of the applicant is insufficient where there is evidence that contradicts important findings of fact. Where that is the case, such evidence must at least be addressed, and if it is not accepted, reasons should be provided (*Ekpenyong*).

[41] This approach is consistent with the Operational Guidelines, which have been judicially accepted as guidelines for the exercise of a visa officer's discretion in this area (*Kaur v Canada (Citizenship and Immigration)*, 2017 FC 782 at paras 22-24).

[42] We must also keep in mind that in this case, knowledge of English was not an actual requirement for the job. The only reason why it appeared on the LMIA was because there was no mechanism, according to the prospective employer, to opt out of choosing one of the two official languages of Canada or to indicate the level of English or French that would be actually required.

[43] Consequently, if a visa officer over-emphasizes the stated language requirement in the LMIA when a better reflection of the actual language requirement for the job was provided as evidence, the visa officer is required to specifically address why he or she did not prefer that evidence to what is mentioned in the LMIA.

(2) Did the visa officer err in ignoring evidence as to the Applicant's strong ties to his country of residence (Pakistan) and in focusing almost exclusively on the Applicant's financial situation?

[44] The Applicant submits that the visa officer concentrated on the economic incentives to remain in Canada to the exclusion of other clues showing that the Applicant has an interest in returning to Pakistan. These clues include the residence of the Applicant's children and family in Pakistan and the Applicant's 13-year employment record in Pakistan. To the Applicant, the failure to consider these clues shows that the visa officer did not test the strength of the Applicant's establishment in Pakistan.

[45] The Respondent submits that the visa officer's treatment of the Applicant's financial situation and incentives to leave Canada was reasonable. The Respondent argues that the visa officer considered all of the evidence on file, including the Applicant's spouse's lack of employment, the needs of the Applicant's family in Pakistan, the fact that the Applicant did not own a house in Pakistan, and the Applicant's stated intention to bring his children to Canada. Further, the Respondent argues that the Applicant has failed to rebut the presumption that any person seeking to enter Canada is presumed to be an immigrant (citing *Danioko v Canada (Minister of Citizenship and Immigration)*, 2006 FC 479 at para 15).

[46] It is clear that the visa officer harboured doubts about the Applicant's incentives to leave Canada upon the completion of his work permit:

> […] I am not satisfied that Pa would be a genuine visitor to Cda who would leave upon expiry of his WP or any status granted to him. Notwithstanding Pa's statements, I am not satisfied that Pa would leave Cda upon expiry of his status there given Pa's financial situation in Pakistan which I will not come back to

> Pakistan if only my children can join me there. I will work there and create a bright future for my children. I am renting a house here. There are so many expenses here related to children's schooling. I work so hard and I am not getting enough for my work, I don't even own a house. After 2 years I will try to bring my children to Canada. Explained to Pa that while I understand his concerns about life in Pakistan, [t]his is the reason why I'm not satisfied that Pa would leave Cda. Additional information provided by Pa did not disabuse me of my concerns.

[47] The decision to deny the Applicant a visa stated that the visa officer was not satisfied that the Applicant would leave Canada at the end of his stay as a temporary resident based upon (i) the "purpose" of the Applicant's "visit", (ii) the "limited employment prospects" in the Applicant's "country of residence", (iii) the Applicant's "current employment situation", and (iv) the Applicant's personal assets and financial status.

[48] It seems to me from a reading of the GCMS notes that the visa officer's doubts are based on the Applicant's financial situation in Pakistan as well as the Applicant's stated intent to possibly extend his visa for an additional two years on condition that he would be able to bring his children to Canada. It is apparent from the other factors and a reading of the Applicant's testimony that his testimony cannot be reasonably taken as evidence of an intention to overstay. The Applicant's testimony is clear: if he cannot bring his children to Canada and if he cannot extend his visa upon its expiry, he will return to Pakistan. In other words, there may have been dual intent on the part of the Applicant, that is, the Applicant may have intended to eventually apply for permanent residency while maintaining an intention to leave the country when the temporary work status expires (subsection 22(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]; *Sibomana v Canada (Citizenship and Immigration)*, 2012 FC 853 at para 28).

[49] The visa officer does not mention the Applicant's family ties in Pakistan (i.e., his children, spouse, mother, and siblings) or the Applicant's open job offer in Pakistan. In fact, the visa officer failed to give any weight to evidence showing that the Applicant has strong incentives to return to Pakistan. The GCMS notes make no mention of the following facts: (i) the Applicant's spouse, children and seven siblings all live in Pakistan, (ii) the Applicant has no relatives in Canada, (iii) the Applicant has held long-term employment in Pakistan, (iv) the Applicant's employer in Pakistan confirmed that it would be willing to employ the Applicant on his return to Pakistan, or (v) his wages in Pakistan. Nor do the GCMS notes attempt to weigh these factors against factors that militate in favour of refusing the work permit application.

[50] These five facts are all relevant factors that may well displace the finding that the Applicant has little incentive to return to Pakistan (*Calma v Canada (Citizenship and Immigration)*, 2009 FC 742 at paras 33-34).

[51] Rather than weigh the evidence of "the strength of" the Applicant's "ties to the home country" against the other evidence, the visa officer put overwhelming weight on the Applicant's strong economic incentives to remain in Canada and his stated plans to eventually apply for permanent residency (*Chhetri* at para 14).

[52] Although the prospect of better economic opportunities in Canada is a factor to consider on the issue of the Applicant's return to Pakistan after his employment, I would say that such is the case for most applicants in similar circumstances coming from countries with a significantly lower standard of living than Canada.

[53] Indeed, it is now well settled that relying on an economic incentive to come to Canada cannot be the determinative factor to refuse a work permit application (*Cao v Canada (Citizenship and Immigration)*, 2010 FC 941 at paras 7-11; *Dhanoa v Canada (Citizenship and Immigration)*, 2009 FC 729 at para 18). The reason for this is simple: "[o]bviously, persons who apply for temporary work permits in Canada are doing so because they can earn more money here than at home" (*Rengasamy v Canada (Citizenship and Immigration)*, 2009 FC 1229 at para 14; see also *Kindie v Canada (Citizenship and Immigration)*, 2011 FC 850 at para 13).

[54] Nor, I should add, should reliance on an applicant's stated intention to pursue permanent residency be the determinative factor to refuse a work permit application (subsection 22(2) of the IRPA; *Rebmann v Canada (Solicitor General)*, 2005 FC 310 at para 19; *Mata v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 200 at para 10).

[55] By simply relying on the Applicant's financial incentive to work in Canada without addressing the evidence of the Applicant's stable employment history, family ties in Pakistan, and job offer in Pakistan, I cannot see how the decision of the visa officer can be reasonable.

[56] The Respondent points to the fact that the Applicant was afforded an interview in this case as a distinguishing factor from the cases cited by the Applicant. There is nothing to suggest why the Applicant was afforded an interview in this case, admittedly a rare occurrence in these types of applications, or that credibility was an issue. However, in the end, I am not certain how this makes any difference. What is important is the manner in which the visa officer conducted his or her analysis of the evidence.

VII. Conclusion

[57] Accordingly, I grant the application for judicial review.

JUDGMENT in IMM-2107-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is returned to a different visa officer for redetermination.

2. No question has been submitted for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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