Federal Court  Cour fédérale

Date: 20200430

Docket: IMM-929-19

Citation: 2020 FC 568

Ottawa, Ontario, April 30, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SAIMA BANO
MUHAMMAD IRFAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of a visa officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC") to refuse the Applicants' permanent residence application under the provincial nominee program ("PNP"), pursuant to subsection 87(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"). The Officer determined that the

Principal Applicant failed to meet the language requirements to become economically established in Canada.

[2] For the reasons that follow, the Officer's decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *The Applicants*

[3] Ms. Saima Bano (the "Principal Applicant") and Mr. Muhammad Irfan (the "Associate Applicant") (collectively, the "Applicants") are citizens of Pakistan and are married. The Principal Applicant holds two undergraduate degrees and a Master's degree in Education. She currently works as an office administrator in Faisalabad, Pakistan.

[4] The Principal Applicant received a provincial nomination under the Saskatchewan Immigrant Nominee Program ("SINP") through the family member stream. By letter dated May 25, 2016, the Principal Applicant received a SINP work permit support letter for a position at Dollar Stretcher to work as a retail salesperson (NOC 6421 – Retail Salespersons and Sales Clerks). In January 2017, the Principal Applicant applied for permanent residence on the basis of her provincial nomination. The Associate Applicant was included as an accompanying dependant, although he was selected to work as a cook at a restaurant in Regina.

[5] The permanent residence application specified the Principal Applicant's intended occupation in Canada as a "Retail Salesperson and Sales Clerk," and stated that the Principal Applicant spoke Urdu and English. It also included the Principal Applicant's International English Language Testing System ("IELTS") test scores: 5.5 in listening, 3.5 in reading, 5.5 in writing, 5.5 in speaking, and an overall band score of 5.0 on a 10-point scale. According to the Government of Canada's language test equivalency chart, the corresponding Canadian Language Benchmarks ("CLB") levels were: CLB 6 for listening, CLB 4 for reading, CLB 6 for writing, and CLB 6 for speaking.

[6] On August 15, 2017, the Principal Applicant received a procedural fairness letter ("PF Letter"). The letter stated that the Principal Applicant's "language scores were at or above Saskatchewan's minimum recommended level, equating to CLB 6 in speaking, listening, and writing, and CLB 4 in reading. [Her] language scores indicate that [her] English language proficiency may be described as moderate in speaking, listening, and writing, and basic in reading." However, the letter then went on to express the Officer's concern that the Principal Applicant did not have the necessary language skills to work as a retail salesperson. The letter stated (emphasis added):

> Although the ESDC essential skills profiles also acknowledges that complexity levels may vary based on the requirements of the workplace, and ESDC essential skills profiles complexity levels do not correlate precisely to specific IELTS scores, it nevertheless appears reasonable to expect that to be able to perform the tasks typical of work as a retail salesperson and sales clerk, an occupation requiring interaction with the general public in Canada, where English is the language used daily by the majority of people, would require at least moderate (CLB 6-7) to high (CLB 8 and above) English language proficiency. Although your demonstrated level of English language proficiency may be described as

> moderate in speaking, listening, and writing, your scores were at CLB 6 rather than CLB 7 and that appears to be a significant difference in the capacity to function effectively in a service occupation in Canada. Your demonstrated ability to read English at only a basic level does not appear sufficient for becoming economically established in Canada.

[7] Notably, the Officer suggested that the Principal Applicant's CLB score of 6 would be insufficient due to a "significant difference" between CLB 6 and CLB 7. The Officer also noted that someone in a retail salesperson position would be required to interact with the public, and to complete "complexity level 3" tasks under the Employment and Social Development Canada's ("ESDC") 5-level scheme.

[8] On November 13, 2017, the Principal Applicant submitted her updated IELTS test results from April 2017, a letter from Dollar Stretcher offering the position of a head cashier, and a comparison table of the language thresholds used by other Canadian immigration classes. The Principal Applicant also requested an explanation as to why the Officer required a CLB of 7 or higher, and how the Officer determined which language levels were "moderate" or "high".

[9] The Principal Applicant's new IELTS results showed slightly improved writing scores: 5.5 in listening, 3.5 in reading, 6.0 in writing, 5.0 in speaking, and an overall band score of 5.0 on a 10-point scale. The equivalent CLB levels were: CLB 6 for listening, CLB 4 for reading, CLB 7 for writing, and CLB 5 for speaking.

[10] The offer letter from Dollar Stretcher stated that the Principal Applicant would work as a head cashier on a permanent basis. The main duties indicated that the position would mostly be

administrative and involve limited interactions with the Canadian public. The duties included: managing the store's accounts, managing a cashier schedule, preparing spreadsheets, supervising the checkout stations, and managing the store's inventory. According to the national occupational classification ("NOC") matrix, this position is considered a "low skill" occupation. According to the Government of Canada's Job Bank, the NOC 6421 position requires basic (1) to intermediate (3) levels of reading, writing, and oral communication skills.

B. *Decision Under Review*

[11] By decision dated January 16, 2019, the Principal Applicant's permanent residence application was refused on the basis that the Officer was not satisfied that the Principal Applicant had the language skills to become economically established. The decision included the following findings:

A. The description of CLB 4-5 as "basic", CLB 6-7 as "moderate", and CLB 8 and above as "high" comes from a "common understanding" and a "habit grown out of previous practice";

B. The PF Letter expressed that a minimum range of English language proficiency—from a lower CLB 6 to a higher CLB 8+—was reasonable for the successful accomplishment of the occupation of retail salesperson and sales clerk;

C. The PF Letter offered an explanation for why the Principal Applicant's highest demonstrated language level at CLB 6 may not be sufficient: a) the Principal

Applicant only possessed a basic level of reading proficiency; and b) the upper range indicated in the PF Letter's assessment indicated that the Principal Applicant did not possess sufficient language abilities to become economically established;

D. The Canadian Experience Class and Federal Skilled Trades Program language requirements are not relevant to the consideration of a provincial nominee application; and

E. The minimum language requirements represent a standard to become eligible for the class, not whether an applicant will become economically established.

III. **Issue and Standard of Review**

[12] The sole issue is whether the Officer's decision is reasonable.

[13] It is well-established that the reasonableness standard applies for a visa officer's decision on a permanent residence application under the PNP: *Zahid v Canada (Citizenship and Immigration)*, 2015 FC 1263 (CanLII) at para 12; *Yasmin v Canada (Citizenship and Immigration)*, 2018 FC 383 (CanLII) at para 13 [*Yasmin*]; Chaudhry v Canada (Citizenship and Immigration), 2015 FC 1072 (CanLII) at para 14 [*Chaudhry*].

[14] The recent decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*] sets out a revised framework for standard of review. However, I see no need to depart from the standard of review followed in

previous case law, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[15] As noted by the majority in *Vavilov*, "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). Furthermore, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies," (*Vavilov* at para 86). Overall, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

IV. **Analysis**

[16] The Applicants submit that the Officer's findings on language sufficiency are unreasonable due to the Officer's lack of justification for setting a higher language threshold. The Applicants submit that provincial nominations must be given deference by reviewing officers. In support of their arguments, the Applicants rely on the statutory text, the Regulatory Impact Analysis Statement, IRCC's practice, and case law (*Sran v Canada (Citizenship and Immigration)*, 2012 FC 791 (CanLII) [*Sran*]; *Chaudhry*). The Applicants also submit that the Officer should have considered the language requirements of other immigration classes.

[17] The Respondent submits that the Officer accorded proper weight to the provincial nomination process because while a provincial nomination is an important indicator of an

applicant's eligibility, it is not binding on the Officer. The Respondent also submits that it was reasonable to conclude that the Principal Applicant failed to demonstrate adequate English language skills and that the Officer did not impose a higher language threshold. The Respondent argues that a fair reading of the Officer's reasons shows that the Principal Applicant lacked the requisite English language skills and fell short of other requirements to establish her economic establishment in Canada.

A. *The PNP Statutory Scheme: Section 87 of the IRPR*

[18] The PNP grants a certain degree of autonomy to provinces and territories to select immigrants that meet their jurisdiction's particular needs, provided that the chosen candidates can "become economically established in Canada" (subsection 87(1) of the *IRPR*). In general, the term "economically established" means that an applicant is able "to join and participate in the labour market in Canada" (*Sran* at para 22). The purpose of the PNP is evinced in the Regulatory Impact Analysis Statement for section 87 of the *IRPR* (*Canadian Gazette*, Part II, Registration SOR/2002-227, 11 June 2002 at p 234-235) (emphasis added):

> 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 who the province believes will be able to contribute to the economic development and prosperity of that province and Canada.
>
> […]
>
> 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.

[…]

> 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 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.

[19] In other words, the PNP relaxes the thresholds set for federal economic immigration classes, and gives provinces and territories the ability to invite applicants who may be ineligible under other economic immigration classes. In light of the purposes of the PNP, this Court has recognized that provincial nomination decisions should be accorded deference, and that a provincial nomination creates the presumption that the applicant possess the ability to become economically established (*Kikeshian v Canada (Citizenship and Immigration)*, 2011 FC 658 (CanLII) at para 14; *Sran* at paras 20-21; *Chaudhry* at para 28). It is then incumbent on the visa officer to justify a departure from the presumption.

[20] While the Minister has the final authority to grant applications, section 87 of the *IRPR* sets out two procedural safeguards that encourage deliberation when a visa officer makes a decision that diverges from the provincial nomination (*Shaukat v Canada (Citizenship and Immigration)*, 2015 FC 1120 (CanLII) at para 19; *Ransanz v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1109 (CanLII) at para 25). Subsection 87(4) requires the concurrence of a second officer if a visa officer seeks to substitute a provincial determination of economic establishment under subsection 87(3). Subsection 87(3) requires a visa officer to consult with the issuing provincial government if the officer seeks to substitute a provincial determination (*Sran* at para 14). It is clear that section 87 of the *IRPR* is designed to ensure that

visa officers do not impose their own arbitrary or unjustified requirements, and defer to provincial determinations unless there are "strong" reasons not to do so (*Sran* at para 18).

B. *Reasonableness of the Officer's Decision*

[21] In my view, the Officer's findings on the Principal Applicant's language sufficiency are unreasonable. While visa officers generally have discretion when making determinations on language sufficiency (*Singh Grewal v Canada (Citizenship and Immigration)*, 2013 FC 627 (CanLII) at para 17), this Court has repeatedly found that it is unreasonable for a visa officer to substitute a language requirement without justification.

[22] In *Ullah v Canada (Citizenship and Immigration)*, 2016 FC 607 (CanLII) [*Ullah*], this Court allowed an application for judicial review because there was no evidence to suggest that the applicant lacked the necessary English language skills. In *Ullah*, the applicant was trained in information technology (IT), although he received a job offer to work as a dishwasher in Regina, Saskatchewan. In *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 782 (CanLII) at paragraph 25, this Court found that "contrary to the Visa Officer's conclusion that the Applicant has almost no proficiency in English, his GCMS notes demonstrate[d] the opposite, particularly when one reasonably and objectively looks at the level 5 proficiency of the IELTS certificate". Thus, a visa officer must explain, in light of the available evidence, how an applicant fails to meet the language standard (See *Bokhari v Canada (Citizenship and Immigration)*, 2019 FC 1419 (CanLII) at para 21; *Yasmin* at paras 40-44).

[23] I find this Court's recent decision in *Begum v Canada (Citizenship and Immigration)*, 2020 FC 162 (CanLII) [*Begum*] to be particularly helpful as it is placed in a similar factual context. In *Begum*, the principal applicant was nominated by the Province of Saskatchewan under the SINP for a cashier position. The minimum CLB requirement for cashiers as determined by Saskatchewan and the federal government was CLB 4, and the principal applicant met or exceeded CLB 4 in all categories. However, the Officer rejected the application for permanent residence primarily on the basis that the Officer was not satisfied that the principal applicant had the necessary language skills to become economically established in Canada (*Begum* at paras 2-9). In finding that the Officer did not justify raising the minimum language requirements, the Court found the Officer's reasons to be unreasonable (*Begum* at paras 29-30). As the Court notes in *Begum* at paragraph 18, citing *Sarfraz v Canada (Citizenship and Immigration)*, 2019 FC 1578 (CanLII) at paragraph 22, an Officer's decision to deviate from a provincial nomination must be justified in its reasons:

> [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.

[24] Similarly to *Begum*, in the case at bar, the Officer failed to provide a justification for imposing a higher language threshold. In fact, the actual language requirements of the Principal Applicant's position are unclear from the Officer's reasons. Initially, the Officer accepted that the Principal Applicant met or exceeded Saskatchewan's language requirements, and noted that under the ESDC's scheme, the complexity level of tasks performed by retail salespersons and sales clerks ranged from levels 1 to 3 (on a scale from 1 to 5, with 5 being the most complex and thus requiring the highest level of language proficiency). However, the Officer subsequently stated that the Principal Applicant's language skills must be "at least moderate (CLB 6-7) to high (CLB 8 and above)," and arbitrarily asserted that it would be reasonable to expect such language skills in a position that "[requires] interaction with the general public in Canada" where "English is the language used daily by the majority of people".

[25] Given that the NOC pertaining to the case at bar requires basic (CLB 4-5) to intermediate (CLB 6-7) language skills, and that the Principal Applicant's listed key duties were mainly administrative with a limited interaction with the Canadian public, it is unclear why the Officer chose to impose a higher language standard. In my view, the Officer failed to provide a basis for the assertion that higher language skills were "reasonable" to successfully carry out the duties of a retail salesperson or sales clerk.

[26] Furthermore, the Officer's reasons exhibit arbitrariness by asserting that there is a "significant difference" between CLB 6 and CLB 7, and ultimately concluding that the Principal Applicant's CLB 6 scores may be insufficient on this basis. The Officer failed to indicate the source for these specific thresholds, and it is entirely unclear why the Officer imposed the higher end of the "moderate" language proficiency, i.e. CLB 7, to be necessary for the Principal Applicant's position.

V. **Certified Question**

[27] The parties agreed that there is no question for certification, and the Court concurs.

VI. **Conclusion**

[28] The Officer erred by failing to provide a justification for imposing a higher language threshold. As a result, the Officer's findings on the Principal Applicant's language sufficiency are unreasonable. This application for judicial review is granted.

JUDGMENT in IMM-929-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different officer.
2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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