Federal Court Cour fédérale

Date: 20200416

Docket: IMM-2495-19

Citation: 2020 FC 517

Ottawa, Ontario, April 16, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

VRAJ VIJAYBHAI PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a twenty-four-year-old citizen of India. In February 2019, he applied for a study permit to allow him to take up studies in the field of hospitality and tourism at the University of Prince Edward Island. At the time, he had already completed a diploma in hotel management at the National Institute of Management and Engineering Studies in Surat, India.

[2] An officer with Immigration, Refugees and Citizenship Canada [IRCC] refused the application on March 1, 2019, because the applicant had not established that he would leave Canada at the end of his stay, as required under section 216(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. More particularly, the officer concluded on the basis of a low test score for spoken English that "the applicant would have difficulty effectively communicating and transitioning into successful studies within Canada" and, as a result, was not satisfied that the applicant is a *bona fide* student "who will be able to successfully complete the study program in Canada." The officer also noted the applicant's lack of travel history "which could be used to gauge past compliance to immigration laws of countries with strong migration pull factors."

[3] The applicant has applied for judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. He contends that the decision does not comply with the requirements of procedural fairness and that it is unreasonable.

[4] For the reasons set out below, I do not agree that the requirements of procedural fairness were breached but I do agree that the decision is unreasonable. Accordingly, the decision will be set aside and the matter remitted to another decision maker for redetermination.

II. STANDARD OF REVIEW

[5] The parties submit that on judicial review questions of procedural fairness are to be determined on a correctness standard of review. There is some doubt as to whether it makes sense to speak of a standard of review in this context but, in essence, I agree with the parties. As

a practical matter, what the correctness standard of review means is that no deference is owed to the decision maker on this issue. I must determine for myself whether the process the decision maker followed satisfied the level of fairness required in all of the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at paras 33-56; *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31).

[6] The parties also submit, and I agree, that the substance of the decision on a study permit application is reviewed on a reasonableness standard (*Patel v Canada (Minister of Citizenship and Immigration)*, 2009 FC 602 at para 28; *Penez v Canada (Citizenship and Immigration)*, 2017 FC 1001 at para 11 [*Penez*]). Deference is owed to the officer because of his or her presumed expertise with respect to the applicable criteria and the largely fact-based nature of this kind of discretionary decision (*Ngalamulume v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1268 at para 16 [*Ngalamulume*]; *Akomolafe v Canada (Citizenship and Immigration)*, 2016 FC 472 at para 12; *Omijie v Canada (Citizenship and Immigration)*, 2018 FC 878 at para 10 [*Omijie*]).

[7] Shortly after the hearing of this application, the Supreme Court of Canada established a revised approach for determining the standard of review with respect to the merits of an administrative decision in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness is now the presumptive standard, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at

para 10). In my view, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review here.

[8] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasized were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*]. Although, as already noted, the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of the officer's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the officer's decision is unreasonable; however, the result would have been the same under the *Dunsmuir* framework.

[9] An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). 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).

[10] The burden is on the applicant to demonstrate that the officer's decision is unreasonable. He must establish 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) or that the decision is "untenable in light of the relevant factual and legal constraints that bear on it" (*Vavilov* at para 101).

III. ANALYSIS

1) *Were the requirements of procedural fairness breached?*

[11] The applicant submits that the officer breached the requirements of procedural fairness by determining that he was not a *bona fide* student without giving him an opportunity to address the officer's concerns. I do not agree.

[12] This Court has consistently found that the requirements of procedural fairness in applications for study permits are "relaxed" and fall on the low end of the spectrum (*Li v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 791 at paras 45 to 50; *Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 at para 34; *Hakimi v Canada (Citizenship and Immigration)*, 2015 FC 657 at para 14; *Penez* at para 36). While an applicant must be afforded a fair process by the officer, what is required for the process to be fair is attenuated by the fact that what is at issue is an application for a study permit (*Yuzer v Canada (Citizenship and Immigration)*, 2019 FC 781 at para 16 [*Yuzer*]). An officer is not under any obligation to seek out additional information from an applicant to assuage concerns that arise on the face of the application (*Penez* at para 37).

[13] Foreign nationals wishing to enter Canada must rebut the presumption that they are immigrants (*Danioko v Canada (Citizenship and Immigration)*, 2006 FC 479 at para 15;

Ngalamulume at para 25). Applicants for study permits must therefore establish, among other things, that they will leave Canada at the end of the requested period for the stay: see section 216(1)(b) of the *IRPR*.

[14] The officer concluded that the applicant had failed to establish that he met the legal requirements for obtaining a study permit. The onus was on the applicant to establish his entitlement to a study permit with sufficient evidence. The officer was not obliged to warn him about the deficiencies of his application before making a decision when those deficiencies related to legal preconditions that must be met for the application to succeed as opposed to matters he could not reasonably have anticipated (*Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 at para 38; *Yuzer* at para 16; *Al Aridi v Canada (Citizenship and Immigration)*, 2019 FC 381 at para 20; *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 34). I agree with the respondent that, in the context of this case, the officer's use of the term "*bona fide* student" does not engage issues of credibility (cf. *D'Almeida v Canada (Citizenship and Immigration)*, 2019 FC 308 at para 65). There was no breach of the requirements of procedural fairness.

[15] Whether the officer's determination that the applicant was not a *bona fide* student is reasonable is another question. I turn to it now.

2) *Is the decision unreasonable?*

[16] The applicant submits that the officer's decision is unreasonable in two respects: first, in its treatment of the applicant's lack of travel history; and second, in the inference based on a low language test score that the applicant is not a *bona fide* student.

[17] The applicant contends that the officer's treatment of his lack of a history of travel is unreasonable because a negative inference was drawn from this factor. I do not agree. There is no suggestion that the officer made any factual errors regarding the applicant's travel history. Nor is there any suggestion that the officer erred in stating that a travel history "could be used to gauge past compliance to immigration laws of countries with strong migration pull factors." This is simply a statement of how, as a general matter, someone's travel history can be relevant on an application for a study permit. Depending on what that history is, it could cut either way: a positive travel history can strengthen an application (*Donkor v Canada (Citizenship and Immigration)*, 2011 FC 141 at para 9 [*Donkor*]); an adverse travel history can weaken it.

[18] I do not understand the officer's accurate statement that the applicant lacked a history of travel to amount to anything other than what the officer said: a potentially relevant factor is absent in this application. This is entirely consistent with the well-established principle that the lack of a travel history is at most "neutral" factor (*Dhanoa v Canada (Citizenship and Immigration)*, 2009 FC 729 at para 12; *Donkor* at para 9). It does not amount to treating the absence of a travel history as a negative factor, which would have been an error (*Adom v Canada (Citizenship and Immigration)*, 2019 FC 26 at para 15).

[19] As stated above, the burden was on the applicant to establish that he met the legal requirements for obtaining a study permit. The absence of a positive factor left his application weaker than it would have been had that factor been present. This does not mean that the absence of a positive factor is being treated as a negative factor.

[20] On the other hand, I agree with the applicant that it was unreasonable for the officer to infer that the applicant was not a *bona fide* student from his low test score for spoken English. A visa officer is not required to give extensive reasons but the reasons must be sufficient to explain the result (*Pacheco v Canada (Citizenship and Immigration)*, 2010 FC 347 at para 36; *Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at paras 10-13; *Omijie* at paras 22-28). More generally, as the Supreme Court of Canada emphasized in *Vavilov*, the exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). Consequently, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[21] Section 216(1) of the *IRPR* provides as follows:

216 (1) Subject to subsections (2) and (3), an officer shall issue a study permit to a foreign national if, following an examination, it is established that the foreign national	**216 (1)** Sous réserve des paragraphes (2) et (3), l'agent délivre un permis d'études à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) applied for it in accordance with this Part;	**a)** l'étranger a demandé un permis d'études conformément à la présente partie;

(b) will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;	**b)** il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;
(c) meets the requirements of this Part;	**c)** il remplit les exigences prévues à la présente partie;
(d) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and	**d)** s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);
(e) has been accepted to undertake a program of study at a designated learning institution.	**e)** il a été admis à un programme d'études par un établissement d'enseignement désigné.

[22] Neither subsections (2) nor (3) have any bearing on the present matter.

[23] The applicant was entitled to a study permit if he established that he met the requirements of paragraphs (a) through (e). Nowhere does section 216(1) state that he had to establish that he was likely to succeed in his proposed course of studies.

[24] In theory, an applicant's prospects for success could be relevant to paragraph (b). Wanting to undertake a course of studies in which one was unlikely to succeed could raise questions about whether an applicant is a *bona fide* student who will leave Canada by the end of the period authorized for their stay. This is, however, something immigration officers should approach with care. The connection between the two concepts would appear to be weak at best. There is no reason to presume that immigration officers have expertise in assessing individuals'

prospects for success in a given academic program. One can complete a program successfully without necessarily excelling in it. And many of the factors that can determine academic success are dynamic, not static.

[25] Assuming for the sake of argument that it was open to the officer to consider the applicant's prospects for completing the proposed course of study successfully (in this case, in light of information about the applicant's English language skills), the officer's conclusory statement that he or she was not satisfied that the applicant will be able to complete the program successfully leaves the decision lacking justification, transparency and intelligibility.

[26] The applicant had been admitted into the program. The University of Prince Edward Island must therefore have been satisfied that he had the necessary qualifications. In fact, the applicant was given advanced standing, having been admitted into the third year of a four-year program. The offer of admission was not conditional upon any upgrading of the applicant's English language skills. While the applicant's IELTS Test Report Form gave a score of 5.5 for spoken English, all the other elements (listening, reading, and writing) as well as the overall band score were 6.5. Against this backdrop, if the application for a study permit was to be refused because the applicant lacked sufficient English language skills to complete his program successfully, it was incumbent upon the officer to demonstrate at least some understanding of the level of English language capabilities that were required to succeed in the applicant's program and to offer at least some explanation for why the applicant's score of 5.5 for spoken English, considered in the context of all of the other indications of his language skills, fell short of what was required. The failure to do so has resulted in an unreasonable decision.

IV. CONCLUSION

[27] For these reasons, the application for judicial review is allowed, the decision of the IRCC officer dated March 1, 2019, is set aside, and the matter is remitted for reconsideration by a different decision maker.

[28] The parties did not suggest any serious questions of general importance for certification under section 74(1) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-2495-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the IRCC officer dated March 1, 2019, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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