Federal Court  Cour fédérale

Date: 20210608

Docket: IMM-5873-20

Citation: 2021 FC 573

Ottawa, Ontario, June 8, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SHARADKUMAR RASIKBHAI PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is a judicial review of a decision dated September 16, 2020, by a Visa Officer [Officer] who refused to grant the Applicant a long-haul truck driver work permit and a temporary resident visa under the Temporary Foreign Worker Program [Decision].

II. Facts

[2] The Applicant is a citizen of India and has a Bachelor of Commerce. He has a number of years work experience as a truck driver for another company, and has owned a transport business since 2012.

[3] The Applicant entered into an employment contract in July 2020, with a company in Surrey, BC, for the position of a long-haul truck driver. This position was obtained after the employer received a positive Labour Market Impact Assessment [LMIA] to hire four foreign national long-haul truck drivers.

III. Decision under review

[4] The Applicant applied for a work permit in August 2020, which was assessed by the Officer. The Officer found the Applicant was not able to demonstrate he would adequately perform the work and denied his application. In this connection, the Officer addressed the Applicant's language ability and safety concerns among other things.

IV. Issues

[5] The issues are as follows:

1. Did the Officer breach principles of natural justice and/or procedural fairness?
2. Is the Decision reasonable?

V. Standard of Review

A. *Principles of natural justice and/or procedural fairness*

[6] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I wish to note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, [*Bergeron*] per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re*: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [Rennie JA]. In this connection I note the Federal Court of Appeal's recent decision which held judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[7] I also note from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[8] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonableness*

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

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry

> into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [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).
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> [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).
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> [Emphasis added]

[10] In the words of the Supreme Court of Canada in *Vavilov*, a 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".
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> [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.
>
> [Emphasis added]

[11] The Supreme Court of Canada in *Vavilov* at para 86 states, "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," and provides guidance that the reviewing court review decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[12] Importantly, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances":

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55;

> see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

VI. Analysis

A. *Natural justice and procedural fairness*

[13] The Applicant submits the Officer breached the principles of procedural fairness by not providing the Applicant an opportunity to respond to the Officer's concerns in several respects.

[14] The appropriate level of procedural fairness required is low for visa applicants. In addition, the onus is on the Applicant to establish eligibility for a visa (*Asanova v Canada (Citizenship and Immigration)*, 2020 FC 1173 [Norris J] at para 28; *Patil v Canada (Citizenship and Immigration)*, 2020 FC 495 [Ahmed J] at para 37; *Ekpenyong v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1245 [Pamel J] at para 26; *Vavilov* at para 133).

[15] The Applicant says he was not given procedural fairness in respect of the Officer's consideration of his safe driving record, a point not addressed in his oral submissions but in his memorandum. The Officer said:

> Applicant has provided an Extract of Driving License in which the QR code cannot be validated at this time. The extract does not indicate anything beyond whether the applicant has had his license cancelled or suspended and therefore I have no indication as to

> whether the applicant of the equipment he claims to drive has had any infraction or safety violations. I consider that being able to assess the applicant's level of adherence to the traffic rules and regulations of India is an important factor in determining the likelihood of the applicant adhering to the traffic rules and regulations of Canada, and therefore whether he can perform the work sought and in a way which put the safety of Canadians at risk.

[16] I am not persuaded on this point; it is reasonable for the Officer to consider the issue of the candidate's ability to drive safely on Canadian roads when assessing the overall suitability of the Applicant to become a Canadian long-haul truck driver. I do not agree the Applicant was entitled to special notice on this point; he should have expected this basic qualification to be considered by the Officer.

[17] The Applicant also submits the Officer breached procedural fairness by not providing the Applicant an opportunity to respond to the Officer's concerns about the size of the company, particularly questioning if the company to employ the Applicant had any drivers at all at the moment. The Applicant says this raises a question of the credibility, accuracy and genuine nature of the job offer submitted by the Applicant. The Applicant says he should have had a special opportunity to respond to the Officer's concerns about the actual size and financials of the employer. The Officer said:

> I note that the perspective company in CDA (SSB Trucking Ltd.) is a company registered to a residence in Surrey, B.C. No company website found. Minimal evidence of online presence. There is no proof of the company size, however I note that some evidence points to 4 trucks. At the same time, I note that the LMIA for the applicant includes 4 individuals which would imply that the company potentially has no drives at the moment. No evidence provided as part of this application to indicate the current company assets financial and equipment.

[18] In my view, the Officer's determination involved a review of very basic issues concerning the prospective employer. Such basic review was not unexpected and the Applicant had the opportunity to address this in his initial application. Visa Officers are not merely rubber stamps. In this connection I also agree that Visa Officers are not bound by statements by a prospective employer or in the LMIA, see *Patel v Canada (Citizenship and Immigration)*, 2021 FC 483 [Little J]:

> [29] The decision of the officer must be considered together with the officer's reasons, which are set out in the GCMS notes. The decision and reasons may be considered having regard to the record before the officer: *Vavilov*, at paras 91-95.
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> [30] The onus was on the applicant to submit all relevant supporting documentation to obtain a temporary work permit. The applicant was required to put his best case forward: *Sangha v Canada (Citizenship and Immigration)*, 2020 FC 95 (Russell J.), at paras 42 and 47; *Chamma v Canada (Citizenship and Immigration)*, 2018 FC 29 (Shore J.), at para 35; *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 (LeBlanc J.), at paras 10 and 14.
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> [31] The visa officer was required to make an independent assessment of whether the application for a temporary work permit complied with the requirements of the *IRPA* and *IRPR* and specifically, whether there were reasonable grounds to believe the applicant was unable to perform the work. Justice Snider set out the requirement in the following passage in *Chen v Canada (Minister of Citizenship and Immigration)* 2005 FC 1378*:*
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> > [12] In all applications, the visa officer is under a duty to examine all of the relevant evidence before him in order to come to an independent assessment of whether there are reasonable grounds to believe that the Applicant is unable to perform the work (*Regulations*, s. 200(3)(a)). The officer cannot be bound by a statement by HRDC that English is or is not required; he cannot delegate his decision making function to a third party such as HRDC. Conversely, a statement by an applicant or employer that English is not required cannot be binding on the visa officer. The officer must carry

> out his own evaluation based on a weighing of all of the evidence before him.
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> See also *Kumar v Canada (Citizenship and Immigration)*, 2020 FC 935 (Pallotta J.), at para 27; *Sulce*, at paras 9 and 28-29.
>
> [32] An LMIA is not determinative of a temporary work visa application and the officer is not bound by its contents: *Ul Zaman v Canada (Citizenship and Immigration)*, 2020 FC 268 (Pamel J.) at para 37; *Sulce*, at para 29; *Singh v Canada (Citizenship and Immigration)*, 2015 FC 115 (Diner J.), at para 20.

[19] In addition, as is well known, the onus was on the Applicant to put his best foot forward. He should certainly have anticipated some basis level of inquiry into his application, and in 2020 that would likely mean a basic internet check into the employer in a case like this. There was no need to provide a procedural fairness letter in relation to what I consider a legitimate and reasonably expected inquiry.

[20] I therefore agree with the Respondent that if an applicant fails to discharge his or her burden of proof and or files an incomplete visa application, Visa Officers are under no duty to give such applicants a "running score" of the weaknesses in their application (*Kong v Canada (Citizenship and Immigration)*, 2017 FC 1183 [*Kong*] [Kane J] at para 29). The duty is on the Applicant to file a reasonably complete application in the first place. In addition, it is reasonably clear, and I did not hear the Applicant disagree generally, that the duty to notify only arises when there are concerns about the credibility, accuracy or genuineness of the information submitted (*Kong* at para 29). In my respectful view, the Officer was not concerned with the credibility, accuracy or genuineness of the information, but was assessing the sufficiency of the application, which was found lacking.

[21] In sum, I do not find the Decision tainted with procedural unfairness.

B. *Reasonableness*

[22] The Applicant submits the Officer's assessment of his language abilities is not based on the facts of the case because she did not provide a detailed analysis on how the Applicant failed to satisfy the Officer that he could perform the work. The Officer found:

> I note that the applicant has provided IELTS with 4.5 noted for reading with an overall score of 5.5. I consider this element as an important indicator of the applicant's ability to properly read and understand manuals, course material and even traffic signs while operating a truck in CDA. A deficiency in this area could pose a risk to the safety of the applicant and to other in CDA in the course of his duties as a truck driver.

[23] The Applicant also received 4.5 for reading, 5.5 for listening, 6.0 for writing and 5.0 for speaking. Thus, he is in the category of "Modest User" based on the International English Language Testing System [IELTS] website which means he can handle basic communication in his field:

> Modest User: You have a partial command of the language, and cope with overall meaning in most situations, <u>although you are likely to make many mistakes</u>. You should be able to handle basic communication in your own field.
>
> (Emphasis added)

[24] Regarding reading specifically on which the Applicant scored only 4.5, the Applicant is in the "Limited User" category described on the IELTS website as:

> Your basic competence is limited to familiar situations. <u>You frequently show problems in understanding and expression</u>. You are not able to use complex language.

[Emphasis added]

[25] The Applicant submits the Officer imposed an unreasonably high standard. The Applicant also submits the Officer unreasonably failed to take into account the Applicant achieved the standard of Level B2 in a different framework from IELTS, namely the Common European Framework of Reference for Languages [CEFR]. A score of B2 means among other things that he "can understand the main ideas of complex text on both concrete and abstract topics, including technical discussions in his/her field of specialization". The Applicant submits he has the language abilities to carry out the job.

[26] To begin with, in this respect, the Applicant fails to appreciate the considerable discretion and deference Officers are given in matters such as this, as noted above. In addition, he invites the Court to engage in the reweighing and reassessing of evidence, a matter that is expressly withheld from judicial review in many cases of the Supreme Court of Canada including *Vavilov*. It was up to the Officer to determine what standard testing method to use, and to interpret the score against the job requirements and other evidence.

[27] In any event, in my respectful view, as it was reasonable to conclude the Applicant's English skills would impact his ability to read and understand manuals, course material, required documentation to be provided by a long-haul truck driver, not to mention traffic signs. It was for the Officer to determine the importance of reading in a case like this. In this connection and in my respectful view, the Officer reasonably assessed the Applicant's language ability in light of the job requirements in the National Occupational Classification for truck drivers particularly to "obtain special permits and other documents required to transport cargo on international routes"

and “communicate with dispatcher and other drivers using two-way radio, cellular telephone and on-board computer”.

[28] I also note the Officer’s Decision is consistent with this Court’s recent decision in *Sangha v Canada (Citizenship and Immigration)*, 2020 FC 95 [*Sangha*] [Russell J], where it is confirmed that “safety must surely be a paramount requirement for competence” in the case of long-haul truck drivers; the case also notes again the onus is on an applicant to provide sufficient evidence of competence, which was not done to the Officer’s satisfaction in the case at bar.

[29] The Applicant submits the Officer’s findings regarding the Applicant’s prospective employer are perverse and not supported by any evidence. He submits the conclusion that the LMIA having four people implies the company has no drivers at the moment is irrational, unreasonable and speculative. The Officer states:

> I note that the perspective company in CDA (SSB Trucking Ltd.) is a company registered to a residence in Surrey, B.C. No company website found. Minimal evidence of online presence. There is no proof of the company size, however I note that some evidence points to 4 trucks. At the same time, I note that the LMIA for the applicant includes 4 individuals which would imply that the company potentially has no drives at the moment. No evidence provided as part of this application to indicate the current company assets financial and equipment.

[30] With respect, I find this line of reasoning legitimate because the Officer was assessing basic information about the prospective employer, as Visa Officers are entitled to do. As noted already, the Officer is not bound by statements by the employer, and was entitled to seek answers to basic questions unaddressed by the Applicant.

[31] This is not an unreasonable finding. The jurisprudence is clear the onus is on an applicant for a work permit to provide sufficient evidence to establish competence, that a visa officer has a wide discretion to decide this issue, and that their decision is entitled to a high degree of deference (*Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 [de Montigny J] at paras 19-20; *Sangha* at para 42; *Liu v Canada (Citizenship and Immigration)*, 2018 FC 527 [Kane J] at para 52; and *Nwachukwu v Canada (Citizenship and Immigration)*, 2020 FC 122 [Heneghan J] at para 15).

VII. Conclusion

[32] In my respectful view, the Decision is procedurally fair for the reasons stated above. Considered together and holistically, and not as a treasure hunt for error, in my respectful view the Decision is also reasonable in that it is intelligible, transparent and justified. Specifically, it is justified on the record and on the applicable jurisprudence. Therefore, judicial review will be dismissed.

VIII. Certified Question

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

JUDGMENT in IMM-5873-20

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

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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