Federal Court  Cour fédérale

Date: 20210909

Docket: IMM-2783-20

Citation: 2021 FC 934

Ottawa, Ontario, September 9, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SUKHPREET SINGH GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Sukhpreet Singh Gill, seeks to judicially review the decision of a visa officer (the "Officer") located at the Canadian Embassy in Abu Dhabi, the United Arab Emirates (the "UAE"), refusing his application for a work permit under the Temporary Foreign Worker Program (the "TFWP").

[2] The Applicant submits that the Officer unreasonably determined that the Applicant could not adequately perform the work he sought in Canada, and that the Applicant would not leave Canada at the end of his authorized stay. Additionally, the Applicant alleges that the Officer breached their duty of fairness.

[3] For the reasons that follow, I find the Officer's decision is unreasonable. In assessing the ability of the Applicant to safely perform the work sought, the Officer did not provide sufficient justification for raising the language ability requirement and did not consider evidence of the Applicant's driving experience and clean driving record. The Officer also failed to address the Applicant's sworn statement, which stated that the Applicant would leave Canada at the end of his authorized stay. I therefore grant this application for judicial review.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a citizen of India. Since 2014, he has worked as a professional long-haul heavy vehicle driver in the UAE, where he holds a Class 4 Heavy Vehicle Licence. His wife and daughter live in India.

[5] In 2019, Regal Transport Ltd ("Regal"), a Canadian company located in Abbotsford, British Colombia, obtained a positive Labour Market Impact Assessment ("LMIA") permitting it to hire several long-haul truck drivers, under the National Occupational Classification ("NOC") 7511. Regal thus sought to hire the Applicant.

[6] On June 18, 2019, the Applicant filed an application for a temporary work permit with the Canadian Embassy in Abu Dhabi ("Work Permit Application"). Along with his application, the Applicant submitted his results from the International English Language Testing System ("IELTS"). His IELTS results revealed a level 5 in "listening", 4.5 in "reading", 5.5 in "writing", and 5.5 in "speaking", and an overall score of 5.

B. *Decision Under Review*

[7] On March 3, 2020, the Officer refused the Applicant's work permit application on two grounds: (i) that the Applicant failed to demonstrate he would be able to adequately perform the work sought; and (ii) the Officer was not satisfied the Applicant would leave Canada at the end of his stay, based on familial ties in Canada and in India. The Officer's decision is largely contained in their Global Case Management System ("GCMS") notes, which form part of the reasons for their decision (*Torres v Canada (Citizenship and Immigration)*, 2019 FC 150 at para 19).

[8] With respect to the first ground of refusal, the Officer noted that while the Applicant provided a Police Clearance Certificate with his application, he provided no evidence as to whether he had committed any traffic violations while working in the UAE. The Officer considered being able to assess the Applicant's adherence to the traffic rules and regulations of the UAE important to determining whether the Applicant would adhere to those rules and regulations in Canada, and thus whether the Applicant could perform the work he sought without risking the safety of Canadians.

[9] Additionally, the Officer noted that the Applicant provided no pay slips or bank statements revealing his salaries earned in the UAE. He also noted that while the Applicant had extensive driving experience in the UAE, the weather conditions and driving terrain would be significantly different in Canada.

[10] The Officer also took issue with the Applicant's English language abilities. The Officer found that the Applicant's score of 4.5 in the "reading" competency of the IELTS posed a risk to his ability to study and learn the rules of driving in Canada. According to the evidence submitted by the Applicant, both British Columbia and Canada require an equivalent IELTS score of 3.5 or higher in the reading competency for NOC 7511.

[11] Finally, the Officer was not satisfied the Applicant would depart Canada at the end of the period authorised for his stay. The Officer found that the Applicant held weak ties to both India and the UAE, noting that the Applicant chose to live separate from his family in India in pursuit of economic betterment.

III. **Statutory Framework**

[12] Under section 200 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"), an officer shall not issue a work permit if it is established that the foreign national will not leave Canada by the end of their authorized stay, or there are reasonable grounds to believe the foreign national is unable to perform the work sought:

200 (1) Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act — an officer shall issue a work permit to a foreign national if, following an examination, it is established that:	**200 (1)** Sous réserve des paragraphes (2) et (3), et de l'article 87.3 de la Loi dans le cas de l'étranger qui fait la demande préalablement à son entrée au Canada, l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments ci-après sont établis:
[...]	[...]
(b) the foreign national 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;
[...]	[...]
200 (3) An officer shall not issue a work permit to a foreign national if:	**200 (3)** Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :
(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	**a)** l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé

IV. **Issues & Standard of Review**

[13] This application for judicial review raises the following issues:

A. *Did the Officer err in concluding that the Applicant could not perform the work he seeks?*

(1) Did the Officer err by raising the language requirements for the work sought by the Applicant?

(2) Did the Officer err by raising the experience requirements for the work sought by the Applicant?

B. *Did the Officer err in concluding that the Applicant would not leave Canada at the end of his authorized stay?*

C. *Did the Officer breach their duty of fairness?*

[14] I agree with the Respondent that the first and second issues are reviewed upon the reasonableness standard, as they concern a visa officer's decision of whether to grant a work permit (*Patel v Canada (Citizenship and Immigration)*, 2020 FC 672 ("*Patel*") at para 8, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 10, 16-17). The third issue is reviewed upon what is best reflected in the correctness standard, as it concerns whether the Officer complied with the principles of procedural fairness (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[15] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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).

[16] Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135). In the context of decisions made by visa officers, it is not necessary to have exhaustive reasons for the decision to be reasonable, given the enormous pressures they face to produce a large volume of decisions every day (*Patel* at para 10).

[17] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing the evidence that was before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

[18] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair, having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

V. **Analysis**

A. *Did the Officer err in concluding that the Applicant could not perform the work he seeks?*

[19] The Officer found the Applicant failed to demonstrate that he is able to perform the work sought in a way that does not put the safety of Canadians at risk. Key to the issue of public

safety were the Applicant's English language skills, his driving record, and his driving experience. As stated in their GCMS notes, the Officer was concerned with whether the Applicant would be able to study, understand, and adhere to Canadian driving laws:

> No payslips or bank statement showing salary received. Police Clearance certificate seen. IELTS 5.0 with a 4.5 in reading. Whilst the applicant has provided a Police Clearance certificate he has not provided any evidence to show if he has had any traffic violations in the UAE during the course of his employment. I consider that being able to assess the applicant's level of adherence to the traffic rules and regulations of the UAE 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 in a way which does not put the safety of Canadians at risk. I note that the applicant's work experience as a truck driver is entirely limited to the UAE which has significantly different terrain and weather condition compared to Canada […]
>
> [emphasis added]

[20] The Officer then explained that the Applicant's IELTS score in the "reading" category cast doubt as to whether the Applicant would be able to understand and respect Canadian driving laws:

> I note that [the Applicant's] reading IELTS score of 4.5 shows that is a "limited user" and as per the IELTS website people who score in this bracket "frequently show problems in understanding and expression. They are not able to use complex language". I consider that it would be difficult with this limited level of English to study and learn the rules of driving in Canada, and thereby ensure he is aware of what is expected in order to drive safely by Canadian standards.
>
> [emphasis added]

[21] The Applicant submits that the Officer committed two reviewable errors in finding that the Applicant could not adequately perform the work he seeks: first, the Applicant asserts the Officer erred by raising the language requirements; and second, the Applicant asserts the Officer erred by raising the experience requirements. I shall address each argument respectively.

(1) Did the Officer err by raising the language requirements for the work sought by the Applicant?

[22] The Applicant asserts the Officer's decision is not justified in relation to the fact that the Applicant's score of 4.5 in the "reading" competency of the IELTS exceeds the minimum score of 3.5 required by British Columbia and Canada for a job in NOC 7511.

[23] I am persuaded by the Applicant's argument. Visa officers generally have discretion when making determinations on language sufficiency (*Grewal v Canada (Minister of Citizenship and Immigration)*, 2013 FC 627 at para 17). Nonetheless, I find that the Officer's determination that the Applicant's language skills were insufficient, does not follow a rational chain of analysis and is not justified in relation to the relevant facts and law (*Vavilov* at para 85).

[24] The Officer's logic is that the language ability requirement for reading under NOC 7511 should be set higher than an IELTS score level of 4.5 in reading, rather than the 3.5 level set by both British Columbia and Canada. The Officer's rationale for this conclusion is that individuals with an IELTS score level of 4.5 in reading "frequently show problems in understanding and expression" and are "not able to use complex language." According to the Officer, individuals

with such language skills face difficulty in learning the rules of driving in Canada, thereby putting Canadians at risk.

[25] While the Officer is not bound by the language requirements set by British Columbia and Canada for NOC 7511, the Officer must provide reasons that are intelligible, transparent and justified if they are to depart from that requirement (*Begum v Canada (Citizenship and Immigration)*, 2020 FC 162 ("*Begum*") at paras 26-27). In this case, the Officer provides no evidence for the proposition that an IELTS score level of 4.5 in reading is insufficient for the work sought by the Applicant, instead relying on conjecture that the Applicant's skills are insufficient, when both British Columbia and Canada say otherwise.

[26] The case at hand is analogous to *Bano v Canada (Citizenship and Immigration)*, 2020 FC 568 ("*Bano*"). In that case, the principal applicant exceeded the language scores required by Saskatchewan, the province that nominated her for a retail sales position. Nevertheless, a visa officer informed the applicant in a procedural fairness letter that her IELTS results were likely insufficient, as she would likely require a higher score to perform her job effectively (*Bano* at para 6).

[27] Relying on *Begum*, the Court in *Bano* held that the visa officer failed to justify why they required language abilities exceeding those required by Saskatchewan. The Court found it was unclear "why the Officer chose to impose a higher language standard" given that the NOC for the relevant job only required basic to intermediate language skills, and the duties required minimal interaction with members of the public (*Bano* at paras 24-25).

[28] As in *Bano*, the Officer in this case failed to justify why the Applicant's IELTS score was insufficient in light of the fact that it exceeds the NOC requirement. The Officer did not explain why an individual who frequently shows problems in understanding and expression, a phrase so broad that it could reasonably apply to most advanced language learners, is unable to learn the rules of driving in Canada. The fact that the Applicant is not able to use complex language is also not a sufficient justification for the Officer's conclusion, as the Officer does not identify what elements of the Applicant's position specifically require such abilities. I therefore find the Officer's decision is unreasonable.

(2) Did the Officer err by raising the experience requirements for the work sought by the Applicant?

[29] In their decision, the Officer relied on the absence of pay stubs and traffic violation certificates, in addition to the differences in terrain between Canada and the UAE, to conclude that the Applicant would not be able to perform his work safely in Canada.

[30] I accept that visa officers are entitled to a high degree of deference. However, as shall be discussed next, I am of the view that the Officer in this case failed to reasonably consider key evidence that spoke to the Applicant's driving experience and clean driving record.

[31] The Respondent cites *Sangha v Canada (Citizenship and Immigration)*, 2020 FC 95 ("*Sangha*") at para 42, for the proposition that public safety is a paramount consideration for visa officers assessing the competency of long-haul truckers, and that applicants bear the onus of demonstrating their competence to the officer's satisfaction.

[32] The circumstances of *Sangha* are nearly identical to those of the case at bar, with a notable distinction being that the applicant in *Sangha* failed to submit any IELTS or similar standardized language results with their application. I therefore find *Sangha* is only analogous insofar as it relates to the Officer's assessment of whether the Applicant possessed the necessary experience to perform the proposed work safely, not with respect to the Applicant's language abilities.

[33] When making their decision, a visa officer has a wide discretion and their decision is entitled to a high degree of deference (*Sangha* at para 42). Yet, visa officers are also under a duty to examine all of the relevant evidence before them in order to conduct an independent assessment of whether there are reasonable grounds to believe that the applicant is unable to perform the work sought, and an LMIA is not determinative of a temporary work visa application (*Patel v Canada (Citizenship and Immigration)*, 2021 FC 483 at paras 29-32).

[34] The Applicant argues that the Officer's decision was unreasonable because they failed to consider evidence of the Applicant's driving experience and driving record. He also argues that the employment requirements required for truck drivers under NOC 7511 is an industry standard "on-the-job training," meaning that no heavy vehicle experience is required under the LMIA.

[35] Contrary to the Respondent's argument that the Applicant failed to provide sufficient evidence to demonstrate his competence as a driver, the Applicant brought to the Court's attention that there was in fact evidence in the record before the Officer to establish the

Applicant's competence. In a sworn affidavit submitted as part of the Work Permit Application, the Canadian employer stated:

> **"**We hired Mr. Sukhpreet Gill because of his skills, experience, qualifications and integrity. He has several years of international experience driving heavy vehicles throughout the UAE. He has a clean driving record, no criminal record and he speaks English fluently."
>
> [emphasis added]
>
> "In our experience hiring foreign drivers in the last 10 years, we have found that heavy vehicle drivers with experience from the UAE are exceptional drivers. They transition well into driving in North America for several reasons:
>
> Unlike new Canadian drivers, foreign drivers already have at least two years of heavy driving experience overseas, some significantly more;
>
> We review all of the foreign drivers' records and vet them thoroughly;
>
> All foreign drivers come to Canada are required to go through additional training in preparation for the licencing requirements; […]
>
> [emphasis added]

[36] In their decision, the Officer did not refer to the evidence that asserted the Applicant has a clean driving record that had been thoroughly vetted and several years of driving experience. I therefore find it was unreasonable for the Officer to conclude that the Applicant did not have the experience requirements to perform the work he sought.

B. *Did the Officer err in concluding that the Applicant would not leave Canada at the end of his authorized stay?*

[37] Subsection 200(1)(b) of the *IRPR* is specific and mandatory: an officer shall issue a work permit if, following an examination, it is established that the foreign national will leave Canada by the end of the period authorized for their stay (*Wardak v Canada (Citizenship and Immigration)*, 2020 FC 582 at para 58).

[38] The Officer found that the Applicant would not leave at the end of the period authorized for his stay because the Applicant has weak ties to India and the UAE:

> [The Applicant's] salary is unknown, he has a temporary Immigration status in the UAE which will end upon his departure from the UAE, he has chosen to live separately from family in India for many years in the pursuit of economic betterment. I consider [the Applicant] to have weak ties to UAE and India and I am not satisfied that [the Applicant] would depart Canada at the end of the period authorised for stay.

[39] The Applicant submits that the officer erred in this respect. He claims the Officer ignored a sworn declaration in which the Applicant indicates that he would not remain in Canada unlawfully, and that he would seek to return home to his family in India. The Applicant asserts the Officer also failed to address evidence relating to the Applicant's lack of a criminal record and historical compliance with the immigration laws of other countries.

[40] In my view, the Officer's determination that the Applicant would not leave at the end of his authorized stay is not justified in relation to the relevant evidence (*Vavilov* at para 85). The

Applicant's sworn declaration affirms that he will not remain in Canada unlawfully, yet the Officer makes no mention of this evidence. The Officer instead relies on the fact that the Applicant has weak ties in India and the UAE, yet the Applicant's sworn declaration affirms that the Applicant's "permanent home is India" and that he shares a "very close relationship" with his family there.

[41] A decision-maker is not obliged to mention every piece of evidence or argument bearing on an issue; nonetheless, the more important the unmentioned evidence is, the more willing the Court is to infer that the decision maker unreasonably failed to account for the evidence before it (*Ali v Canada (Citizenship and Immigration)*, 2021 FC 731 at para 33, citing *Cepeda-Guttierez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667, [1999] 1 FC 53 at paras 16-17). In this case, the Officer failed to address the evidence that directly contradicts their conclusion and that the Applicant relied upon in displaying that he would leave Canada at the end of his authorized stay. I find the failure to address this evidence renders their decision unreasonable.

[42] Having found that the Officer's decision is unreasonable, I find it unnecessary to address whether the Officer breached their duty of fairness.

VI. **Conclusion**

[43] I find the Officer's decision is unreasonable. The Officer failed to justify why the Applicant could not safely perform the work he sought in Canada based on his language abilities, which exceeded the requirements in the NOC, and failed to consider evidence that spoke to the

Applicant's driving experience and clean driving record. Further, in determining the Applicant would not leave Canada at the end of his authorized stay, the Officer failed to address the Applicant's sworn statement to the contrary. I therefore grant this application for judicial review.

[44] The parties have not proposed a question for certification, and I agree that none arises.

JUDGMENT in IMM-2783-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter returned for redetermination by a different decision-maker.

2. There is no question for certification.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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