Federal Court Cour fédérale

Date: 20220111

Docket: IMM-821-20

Citation: 2022 FC 30

Ottawa, Ontario, January 11, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

KIRANDEEP KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Kirandeep Kaur, a 25-year-old citizen of India from the Punjab region, seeks judicial review of a redetermination decision of the Visa Section of the High Commission of Canada in New Delhi dated December 9, 2019 [Decision], refusing her the issuance of a temporary work permit under the International Experience Canada Program so that she may work as an in-home caregiver for two seniors in their 90s with serious medical issues, including advanced dementia, osteoarthritis, high blood pressure and severe cognitive decline.

[2] Following an interview with Ms. Kaur during which she chose to be interviewed in English, the visa officer found that Ms. Kaur was unable to demonstrate that she would be able to adequately perform the work as required pursuant to paragraph 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. In particular, the visa officer was not satisfied that Ms. Kaur adequately demonstrated that she was able to perform the duties of a caregiver for two elderly individuals with significant medical conditions in an unsupervised setting or that she had the language skills necessary to allow her to properly perform such duties in an emergency situation.

[3] This is Ms. Kaur's third refusal for a temporary work permit as a caregiver; the refusal of her second application was the subject of an application for judicial review before this Court, which was settled and the matter sent back for redetermination by a new visa officer. It is the redetermination refusal that is the subject matter of the present application.

[4] Ms. Kaur's prospective employer in Canada, Mr. Baldev Kharey, indicated in the course of Ms. Kaur's first application for a temporary work visa that he has been unable to find a suitable live-in caregiver for his parents and that he worries that if he had to transfer them to a care facility, it would be particularly difficult for his mother to adjust to new surroundings. Unfortunately, Mr. Kharey's mother has since passed away, and this has had a tremendous emotional impact on his father, who continues to suffer from the onset of dementia and limited mobility. Consequently, Mr. Kharey continues to seek a live-in caregiver to provide round-the-clock care for his father, who is now 93 years old.

[5] Ms. Kaur's position is that the Decision was unreasonable because the visa officer ignored or misapprehended the information she provided, was based on an unreasonable assessment of her English language skills, and contained inadequate reasons justifying the visa officer's decision. Ms. Kaur further submits that the visa officer's conduct during the interview was indicative of, and consistent with, a predisposed opinion and prejudgment of the application, amounting to a reasonable apprehension of bias.

[6] Subsection 200(3) of the Regulations sets out circumstances in which a visa officer may not issue a work permit:

Exceptions	**Exceptions**
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;
. . .	[…]

[7] During the interview, the visa officer presented three hypothetical situations to Ms. Kaur: (1) what she would do if she found that the person she cared for had fallen down the stairs, was semi-conscious with shallow breathing and possible internal injuries, but no external bleeding; (2) what she would say during a 911 call in that situation; and (3) what she would do if she lost the elderly person she was caring for during a walk in a park. The visa officer explained to

Ms. Kaur that he had the following concerns with her answers to the hypothetical situations that were presented to her:

> The position of caregiver in Canada requires the candidate to have language abilities to perform the duties especially during emergency handling and interacting with people other than the clients. You were not able to understand or answer many of the questions and your English language abilities are very limited. This would hinder you from performing your duties – You provided a Nanny care course certificate – however at the interview, you were unable to appropriately describe the steps you would take in case of an emergency and in giving vital information and pro [*sic*]. You were unable to satisfactorily respond how you would handle specific urgent situations as a caregiver. I am not satisfied that you have adequately demonstrated that you are able to perform the duties of a nanny for 2 senior citizens with advanced medical conditions in an unsupervised setting in Canada. I provided the applicant an opportunity to respond. She stated that – She knows that her English language abilities are very limited but she would definitely improve. If given a chance to go to Canada. She has done IELTS – In emergency there is no time to check the vitals so just a call to 911 was suggested by her – Her family situation was bad and wanted to help her grand mother I informed the applicant that I could empathise with her for her family situation but her application could not be approved. Her IELTS score was 5.0 overall with 4.0 in reading which was almost consistent with language abilities at the interview and indicated modest abilities. Also her contention that in emergency there was no time to check the vitals does not appear to be correct. Checking the vitals and prognosis are immediate steps to handling an emergency and just calling 911 was not a solution to handling all emergencies.

[8] Before me, Ms. Kaur raises two issues:

(a) Did the visa officer breach the obligation of procedural fairness in reaching his decision?

(b) Is the visa officer's decision reasonable?

[9] The parties submit that the applicable standard of review for the merits of the Decision is reasonableness. I agree (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]). When reviewing under the reasonableness standard of review, this Court must determine 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; *Bains v Canada (Citizenship and Immigration)*, 2020 FC 57 at paras 50 to 52). In addition, a visa officer's assessment for a work permit should be given a high degree of deference as it requires a balancing of many factors involving questions of fact relating to the visa officer's recognized expertise (*Ekpenyong v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1245 at para 12).

[10] On the issue of procedural fairness, the parties also agree that in order to determine whether procedural fairness principles were breached, the Court has to determine whether the decision-making process was fair in regard to all the circumstances (*Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 20; *Sharma v Canada (Citizenship and Immigration)*, 2020 FC 381 at paras 12-14 [*Sharma*]).

A. *The visa officer did not breach the principles of procedural fairness*

[11] Ms. Kaur argues that the visa officer's conduct during the interview was indicative of and consistent with a predisposed opinion and prejudgment of the application, amounting to a reasonable apprehension of bias. In her affidavit filed in support of the present application, Ms. Kaur recounted her experience with the interviewer as follows:

> I sensed as though this officer was annoyed with the fact that I had challenged the last refusal and was being interviewed for a second time. He was somewhat rude to me at times making me feel as though I had done something wrong;
>
> . . .
>
> As mentioned above, the interview was not a pleasant experience and I called Mr. Kharey and he advised that I write down what occurred at the interview while it was still fresh in my mind. I was very nervous and was treated like I had done something wrong;

[12] The test for the determination of a reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the officer consciously or unconsciously decided fairly (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394-95 (Justice de Grandpré dissenting); *R v S (RD)*, [1997] 3 SCR 484 at para 31). The apprehension of bias "cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel [and must] be supported by material evidence demonstrating conduct that derogates from the standard" (*Sharma* at para 27, citing *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8).

[13] As Justice Gascon stated in *Sharma*, the threshold for finding a reasonable apprehension of bias is high as it calls into question the personal integrity of the decision-maker and the integrity of the entire administration of justice (*Sharma* at para 30). Here, all I have in order to assess the allegation against the visa officer are the Global Case Management System [GCMS] notes and Ms. Kaur's perception as set out in her affidavit, in particular that the visa officer seemed annoyed at the fact that she was back on redetermination. I agree with Ms. Kaur, in reading the visa officer's notes, that he seems to have displayed a tone that could easily be

described as being curt; in fact, the visa officer seems to have ended the interview by saying that he could not give Ms. Kaur another chance as he had 40 more candidates to attend to. The visa officer's social skills may need some work, but I cannot say that I see anything in the GCMS notes, or the notes taken by Ms. Kaur following the interview, to suggest that the visa officer's demeanour rose to the level of a reasonable apprehension of bias on his part. The visa officer clearly had a full day with other visa applicants and he possibly could have given Ms. Kaur more time to answer more questions, but he did not and under the circumstances, I cannot say that he crossed the line and signalled any signs of a reasonable apprehension of bias.

[14] It may also be the case, as argued by Ms. Kaur, that the nature of the interview itself, being conducted through a Plexiglas partition in a rather intimidating environment, may have had an impact on the manner in which she provided her answers to the visa officer's questions and that in this day and age, respect – owed by the visa officer to Ms. Kaur – is the hallmark of fairness and open-mindedness.

[15] That may be the case, but I cannot say that there is any evidence that the visa officer was disrespectful to Ms. Kaur. Visa officers are provided with a certain mandate, with guidelines and training in hopes that they will be able to assess the ability of an applicant to perform the work to which the visa relates – in this case the care of two elderly people with severe mental and physical challenges – and exercise their discretion in a fair and reasonable way while doing so. One thing visa officers often do not have is the luxury of time, and that may easily translate into the perception by an applicant that the visa officer had ulterior motives.

[16] Although I understand the sentiments of an applicant in such a situation, this is the system we have, and under the circumstances of this matter, I have not been persuaded that the visa officer exhibited a reasonable apprehension of bias towards Ms. Kaur. As stated by Justice Diner in *Cruz v Canada (Citizenship and Immigration)*, 2018 FC 1283 [*Cruz*] at paragraph 13, "the role of an officer is not only to assist in facilitating the movement of foreign nationals and workers as set out in paragraph 3(1)(g) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], but also to ensure that they can satisfy the requirements of their prospective employment, which ensures the protection of the health and safety of Canadians." The visa officer was entitled to ask Ms. Kaur probing questions in order to verify whether she was able to perform the duties of a caregiver for two senior citizens under paragraph 200(3)(a) of the Regulations (*Sharma* at para 28); probing questions, an unfriendly demeanour and not providing more time for an interview at the request of an applicant, without anything else, are not signs of a reasonable apprehension of bias.

B. *The visa officer's decision was reasonable*

(1) The visa officer did not ignore or misapprehend the information Ms. Kaur provided in her work permit application

[17] As stated, Ms. Kaur provided a rather lengthy affidavit setting out her version of events, the notes she prepared soon after the interview with the visa officer was concluded, and a comparison as between her version of the questions and answers given contrasted against those set out in the visa officer's GCMS notes. Ms. Kaur argues that the visa officer disregarded her answers during the interview as she responded in detail to each of his questions, that the visa

officer did not include some of her statements in the GCMS notes, and that there is no nexus between the justification for the refusal and her answers.

[18] I accept that the version of the interview found in Ms. Kaur's notes includes additional answers that she purportedly provided in response to the visa officer' questions. However, even if that is the case, it does not establish that the visa officer failed to consider those answers in coming to his decision. The GCMS notes are not meant to be a transcript of the interview and the visa officer is deemed to have taken into consideration all of what was said during the interview process. What is important is that a reviewing court can assess, from the visa officer's notes, the reasoning process followed by the officer to come to his decision.

[19] In my view, Ms. Kaur did not demonstrate that the visa officer misapprehended the information she gave during the interview; the issue is not whether she responded to the visa officer's questions, but rather whether the visa officer was satisfied with her answers. The GCMS notes suggest that the visa officer considered her answers to the three hypothetical emergency scenarios he presented to her and concluded that she did not satisfactorily respond. I see nothing unreasonable with such a determination.

(2) The visa officer did not undertake an unreasonable assessment of Ms. Kaur's language abilities

[20] Ms. Kaur further argues that the visa officer unreasonably assessed her English language skills during the interview by adopting a much higher standard than is required to effectively perform the duties of a caregiver. She claims that although her grammar, syntax, and accent were not perfect, the visa officer seemed to understand her answers, and she was able to provide

detailed answers. Ms. Kaur adds that the previous visa officer assigned to her first application did not have any concerns with her English language skills, however, even if such was the case, it is not relevant in the context of this judicial review (*Singh Bhullar v Canada (Citizenship and Immigration)*, 2008 FC 304 at para 16 [*Singh Bhullar*]).

[21] The Labour Market Impact Assessment does not provide a set standard for the position of a live-in caregiver to seniors, but states simply that what is required are verbal and written English skills. Ms. Kaur asserts that although she had obtained a score of 5.5 for both her writing and speaking skills under the International English Language Testing System [IELTS] – which is the minimum regulatory general language proficiency threshold for the position – the visa officer nonetheless determined her language abilities to be inadequate. Such a determination, says Ms. Kaur, was completely arbitrary and thus unreasonable.

[22] The relevant guidelines are set out in Immigration, Refugees and Citizenship Canada manual OP 14: Processing Applicants for the Live-in Caregiver Program [OP 14 manual], which refers to the language ability requirement for the Live-In Caregiver Program. Although the relevant regulation to which the OP 14 manual refers has been repealed and does not have the force of law, the guidelines are recognized as establishing appropriate criteria against which a visa officer can measure the suitability of an applicant (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 20, cited in *Singh Bhullar* at para 15). Ms. Kaur did not dispute the applicability of the OP 14 manual.

[23] The language requirements included by reference within the OP 14 manual provides:

> . . . applicants under the Live-in Caregiver Program (LCP) must have a level of fluency in English or French that enables them to communicate effectively and independently in an unsupervised setting. For example, they should be able to:
>
> • respond to emergency situations by contacting a doctor, ambulance, police or fire department;
>
> • read the labels on medication;
>
> • answer the telephone and the door; and
>
> • communicate with others outside the home, such as schools, stores or other institutions.
>
> Live-in caregivers must be able to perform their job in an unsupervised setting. A proficiency in speaking, understanding and reading one of Canada's official languages will also ensure that caregivers understand their rights and obligations and are not dependent on their employers to interpret provincial/territorial labour legislation and employment standards. They will also be better equipped to seek outside assistance in the event of personal difficulties or if they find themselves in an unsatisfactory employment situation.
>
> The language assessment for live-in caregivers is part of the overseas processing of work permit applications under the LCP.

[24] The officer found that Ms. Kaur exhibited difficulty in English during the interview despite her IELTS test results; he determined as follows:

> The position of caregiver in Canada requires the candidate to have language abilities to perform the duties especially during emergency handling and interacting with people other than the clients. You were not able to understand or answer many of the questions and your English language abilities are very limited. This would hinder you from performing your duties.

[25] Although Ms. Kaur produced acceptable IELTS scores, the officer discounted Ms. Kaur's IELTS scores because of her performance during the interview. Ms. Kaur relies on the decision *Azam v Canada (Citizenship and Immigration)*, 2020 FC 115 [*Azam*], in which Justice Russell

found an officer unreasonably discounted the applicant's IELTS scores in favour of the officer's own assessment "based upon having to repeat questions at the interview." However, in *Azam*, Justice Russell added that the officer did not "explain precisely what questions were asked or provide actual responses, so [there was] no way of knowing if this amounted to any kind of meaningful test of the Applicant's abilities in English that could reasonably supplant formal IELTS scores" (*Azam* at para 61).

[26] In this case, however, the visa officer provided lengthy details of the interview describing each question that was asked of Ms. Kaur and the answers she provided. Furthermore, the visa officer considered Ms. Kaur's English language skills in the context of emergencies and stated that this position "requires the candidate to have language abilities to perform the duties especially during emergency handling and interacting with people other than the clients." I find that the officer reasonably assessed Ms. Kaur's English language skills in the context of her position, that is, a live-in caregiver being hired to care for two senior citizens with medical conditions, which is a difficult job; simply put, Ms. Kaur did not satisfy the visa officer that she could perform the duties of this position because of her limited English abilities, and I see nothing unreasonable with that assessment.

(3) The officer provided adequate reasons

[27] According to Ms. Kaur, the officer's reasons do not fall within the range of acceptable outcomes as the reasons for the refusal to issue the work permit rested solely on the officer's perception of Ms. Kaur's English language skills (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14; *Khatun v Canada*

(Citizenship and Immigration), 2012 FC 159 at para 46; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[28] I must agree with the Minister – there is simply no mystery as to the refusal. The GCMS notes clearly connect the dots for the grounds of the visa officer's refusal (*Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 at para 32). Section 200 of the Regulations provides a visa officer with the duty to examine whether an applicant meets the requirements to obtain a work permit, including whether the applicant is able to perform the work sought. The visa officer was under an obligation to assess whether Ms. Kaur is able to fulfill the terms of the job offer (*Cruz* at paras 8-13). The onus is on Ms. Kaur to demonstrate to the visa officer that she is able to perform the work of the live-in caregiver. The officer presented Ms. Kaur with three hypothetical situations to determine whether she would be capable of properly responding to each emergency, and the officer was not satisfied with Ms. Kaur's answers (*Sharma* at para 18; *Cruz* at para 8).

[29] Here, the visa officer did not only base his decision on Ms. Kaur's English language skills, but also on her ability to respond to emergencies in the context of her position as a caregiver. Although another officer may have come to a different conclusion than that of the visa officer, that is not the point. Here, the visa officer reasonably assessed Ms. Kaur's ability to perform the duties of a live-in caregiver for two senior citizens, explained in detail the reasons her application was refused, and provided sufficient details and explanations in the GCMS notes to satisfy the hallmarks of reasonableness, i.e. justification, transparency and intelligibility. I see nothing unreasonable with his findings.

[30] I would dismiss the application for judicial review.

JUDGMENT in IMM-821-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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