Federal Court  Cour fédérale

Date: 20220510

Docket: IMM-5434-20

Citation: 2022 FC 692

Toronto, Ontario, May 10, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

BALBIR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of the decision to refuse his work permit application, made by an Immigration Officer (the "Officer") in New Delhi. At the end of the hearing of this Application, which took place on May 9, 2022, I granted the judicial review, provided a brief explanation for why, and indicated that written reasons would follow in short order. For the reasons detailed here, I find the decision to be unreasonable and the application is granted.

I. Background

[2] The Applicant is a 56-year-old citizen of India, currently residing in New Delhi with his spouse of 25 years. He was a temporary resident of Canada from May 2018 to May 2020. He first entered Canada in 2018 as a visitor. When Xpro Transport Ltd. (Xpro), a trucking company based in Delta, British Columbia, obtained a positive labour market impact assessment ("LMIA") for long haul truck drivers, the Applicant 'flagpoled' at and was issued a work permit for a period of two years, from March 2018 to March 2020 (for a description of flagpolling, see *Paranych v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 158 at para 5).

[3] He thereafter worked for Xpro as a long haul trucker from May 2018 until January 2020, when he returned to India to visit family, including his spouse. His work permit expired while he was still in India.

[4] On April 15, 2020, another Delta-based trucking company, S.G.L. Trucking Ltd. ("SGL"), obtained a positive LMIA, which would facilitate the hiring of the Applicant as a long haul trucker for two years. Duties listed in SGL's job offer included operating company trucks across Canada and the U.S., performing vehicle inspections and roadside repairs, ensuring accurate documentation of cargo information and log books, and communicating with the company dispatcher and other drivers.

[5] Mistakenly believing that he could apply for a further work permit at the port of entry with his positive LMIA from SGL and valid temporary resident visa, as he had done previously

at the U.S. border when he flagpolled and received his first Canadian work permit, the Applicant flew to Canada but was denied entry and advised to return to India and apply for the work permit in order to receive his official counterfoil document in his passport.

[6] The Applicant followed these instructions, returning immediately to India, where he applied for a new permit to allow him to work as a long-haul trucker for SGL, based on his LMIA. His application made reference to his previous experience as a long haul truck driver from 2018 to 2020, and as a driver and operator of construction equipment in Qatar between 1996 and 2017. His application also included reference letters from his previous employers, which detailed the nature of his duties, in addition to a photocopy of his Class 1 British Columbia driver's license, which allows the holder to drive any class of vehicle (other than motorcycles), including semi-trailer trucks.

[7] In a letter dated October 14, 2020, the Officer refused the work permit application, citing the Applicant's failure to demonstrate (i) that he could adequately perform the work sought and, or (ii) that he would leave Canada at the end of his stay, based on his family in Canada and his country of residence. The Global Case Management System ("GCMS") notes, which form part of the decision record, include an entry dated July 30, 2020, which explain the rationale behind these two grounds of refusal:

> Application reviewed. Married male applying to work as a long haul truck driver in Canada. App has spouse in India and 2 sons in Canada. Applicant is not employed in India and is not well established there. Applicant has not resided in India since 1996 when he went to Doha to work. Applicant went to Canada as a visitor and remained as a visitor while he took training to work as a long haul truck driver. Subsequently flagpoled at poe and issued a work permit for 2 years. Work permit has expired. Departed

> Canada for India to visit family and Attempted to return to Canada with 2020/07/30 BG00031 a valid TRV while his intention was to work. Applicant was allowed to leave. Applicant has not demonstrated that he meets the criteria of the LMIA: no Ielts results submitted. Language ability not demonstrated. Applicant is not well established in India as he has not worked or lived permanently in India since about 1996. Applicant has strong family ties in Canada including a sister and her family as well as his 2 sons. Given the above I am not satisfied that the applicant is a *bona fide* temporary worker who would depart at the end of a specified period of time. Application refused.

II. Analysis

[8] The only issue is whether the Decision is reasonable per *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]). I do not find that it meets this standard for two reasons.

A. *Ability to perform the work*

[9] First, with respect to the finding that the Applicant had failed to demonstrate that he could adequately perform the work, the Officer ignored relevant evidence, and failed to set out or consider the level of English that was required to perform the duties of his employment.

[10] Paragraph 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*] provides as follows:

(3) An officer shall not issue a work permit to a foreign national if	(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	a) l'agent a des motifs raisonnables de croire que l'étranger est incapable

foreign national is unable to perform the work sought;	d'exercer l'emploi pour lequel le permis de travail est demandé;

[11] The Respondent's policy guideline *Foreign Workers: Assessing language requirements* ("Guideline") indicates that under R200(3)(a), officers should not limit their assessment of language requirements, or the other requirements to perform the work sought, to those described in the LMIA. Instead, language requirements stated in the LMIA should form part of the assessment, which can also consider other factors, like the terms of the actual job offer.

[12] IELTS test results are described by the policy as one means of assessing language ability, but where an officer decides to require proof of language ability, the officer is supposed to determine the precise level of language ability required with reference to the LMIA, in addition to working conditions described in the job offer. The Guideline concludes that GCMS "notes must clearly indicate the officer's language assessment, and in the case of a refusal, clearly show a detailed analysis on how the applicant failed to satisfy the officer that they would be able to perform the work sought".

[13] Here, the Officer's finding appears to have been entirely based on the absence of IELTS language test results. While I acknowledge that the LMIA does make reference to English verbal and written language requirements, albeit without reference to any particular degree of proficiency, the Officer does not appear to take into consideration the fact that the Applicant had already successfully performed the exact same work he was seeking to perform in Canada for almost two years preceding his work permit application. Xpro's letter confirmed the Applicant had already performed exactly the same work for nearly two years, with the same

responsibilities, as a long-haul truck driver based in British Columbia, the same location where he was to be based under his new LMIA.

[14] The Guideline is not binding on officers, but it is instructive to the Court on the assessment the Officer was meant to conduct. The Respondent essentially submits that it is reasonable for an officer to expect evidence of English language skills where such skills are necessary to the performance of the work (*Sun v. Canada (Citizenship and Immigration)*, 2019 FC 1548). Indeed it is, but the *Regulations* are concerned with the performance of the work, and as the Guideline suggests, an officer should look beyond the LMIA to the nature of the work itself and consider the precise level of language required. That did not occur in this case.

[15] It may have been open to the Officer to come to the same conclusion in spite of the evidence on the record, if the Decision to do so were justified, such that the Officer had included rationale as to why the Applicant would not be able to perform the work requirements under his new LMIA. However, without reconciling the finding with clear evidence that runs to the contrary, in terms of the Applicant's prior work experience, the Decision lacks justification and is thus unreasonable (*Gill v. Canada (Citizenship and Immigration)*, 2020 FC 934).

B. *Leaving Canada at the End of the Work Permit*

[16] Second, with respect to the finding that the Officer was unsatisfied that the Applicant would leave Canada at the end of his stay based on his family ties in Canada and in his country of residence (India), the Applicant submits the Officer failed to consider his previous compliance

with immigration requirements, instead referring only to his lack of establishment in India and strong family ties in Canada.

[17] The Respondent counters that the Officer made reference to the Applicant's immigration history, and therefore argues that the Applicant is simply inviting the Court to find that the Officer should have preferred evidence of past compliance with immigration rules over the evidence that there were strong incentives for him to remain in Canada.

[18] I disagree. If the Officer had weighed the Applicant's compliance with Canadian immigration law, the weight afforded to that evidence would have been the Officer's to weigh. However, the Officer did not conduct any such analysis. Rather, the only justification provided, is in the extract from the GCMS notes reproduced in paragraph 7 of these Reasons.

[19] The problem with this second issue, just as with the first, is that there is no indication that the Officer considered the Applicant's compliance with Canada's immigration laws in reaching the determination. Once again, the Officer was free to come to this conclusion, but not without justifying it in light of the evidentiary record, which contains sworn explanations that shed light on these events, and suggest the great lengths to which the Applicant was willing to go to remain in compliance with immigration rules. The omission to consider these facts is a shortcoming in the decision. As the Chief Justice stated in *Singh v. Canada (Citizenship and Immigration)*, 2017 FC 894 at para 24:

> Moreover, in finding that Mr. Singh was unlikely to return to India at the end of his two year stay in Canada, the officer failed to consider the significance of the fact that there was nothing to suggest that he had ever failed to comply with Singapore's

> immigration laws, since he moved to that country in 2009 (*Momi*, above, at paras 20 and 25). I do not mean to suggest that a failure to consider this factor alone should provide grounds for finding a decision to be unreasonable. However, on the particular facts of this case, this omission was another shortcoming which, taken together with others, collectively, rendered the Decision unreasonable.

[20] Here too, this gap is compounded by the first error described above. Moreover, as counsel for the Applicant emphasized, *Singh* and *Momi v Canada* (*(Minister of Citizenship and Immigration)*, 2013 FC 162, both faulted the Officer for failing to evaluate compliance with immigration laws in other countries. Here, unblemished compliance record had taken place in Canada itself.

[21] Finally, the refusal letter stated that the Officer was not satisfied the Applicant would leave Canada at the end of his stay based on family ties in Canada *and* in his country of residence. In the GCMS notes however, reference is made to the Applicant's sister, her family and two sons living in Canada, but the Officer does not weigh this against the countervailing fact that the Applicant's spouse of 25 years resides in India, who the Applicant did return to visit when he ran into the work permit issue for his second LMIA, and which is clearly a relevant and contradictory factor to the Officers' conclusion.

[22] Visa officers are certainly entitled to deference, but only where their findings have at least a modicum of justification. That was entirely absent here. In the age of *Vavilov*, the Court cannot defer to reasoning missing from the Decision, or fill in that reasoning for administrative decision-maker. Lacking justification, the matter will be returned for redetermination.

JUDGMENT in file IMM-5434-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted.
2. The decision of the visa officer is set aside and remitted to a new officer for redetermination after inviting the applicant to file additional submissions.
3. No question for certification was submitted and I agree that none arise.
4. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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