Federal Court  Cour fédérale

Date: 20230920

Docket: IMM-1184-22

Citation: 2023 FC 1261

Ottawa, Ontario, September 20, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

SUKHPREET KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Sukhpreet Kaur seeks judicial review of the refusal of her application for permanent residence and a work permit under Canada's Home Child Care Provider Pilot Program. An officer with Immigration, Refugees and Citizenship Canada [IRCC] found that her offer of employment to work as a live-in caregiver to two children, aged 9 and 13 at the time of the decision, was not genuine. Ms. Kaur argues the officer gave inadequate reasons for their

decision, failed to consider the family's circumstances and Ms. Kaur's planned role, and unfairly did not give her an opportunity to respond to their concerns.

[2] For the following reasons, I conclude the officer's reasons, while brief, were reasonable and were reached in a fair manner. In particular, it was reasonable for the officer to assess the children's ages and past need for a caregiver in the context of the limited information that was put before them. Further, the officer's conclusion that, on a balance of probabilities, the "job offer [was] not genuine and [was] being made primarily to facilitate [the applicant's] entry to [Canada]," is simply a statement that program requirements were not met, and not a finding of credibility requiring that Ms. Kaur be given an additional opportunity to demonstrate her eligibility.

[3] The application for judicial review is therefore dismissed.

II. Issues and Standards of Review

[4] Ms. Kaur challenges both the merits of the officer's decision and the fairness of the process by which it was reached. As the parties agree, the former is reviewable on the reasonableness standard, in which the Court asks whether the decision bears the hallmarks of justification, transparency, and intelligibility and whether it is justified in relation to the relevant factual and legal constraints that bear on it: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25, 99. The latter is reviewable on a standard akin to correctness but that effectively engages no standard of review, in which the Court asks whether

the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

[5] In raising her challenges, Ms. Kaur relies on an affidavit she filed in this Court. The Minister argues that Ms. Kaur's affidavit contains significant new evidence that was not before the officer, and is therefore inadmissible. The primary issues for determination on this application are therefore the following:

A. Is the affidavit Ms. Kaur filed on this application for judicial review inadmissible, in whole or in part?

B. Was the officer's decision unreasonable because they gave inadequate reasons or failed to consider the circumstances relevant to Ms. Kaur's job offer?

C. Did the officer unfairly fail to give Ms. Kaur an opportunity to address concerns about the genuineness of the job offer?

III. Analysis

A. *Ms. Kaur's affidavit is largely inadmissible*

[6] The Court on judicial review performs a supervisory role, assessing the legality and reasonableness of an administrative decision, but not re-deciding the merits of the decision: *Vavilov* at paras 23–24, 75, 82–83; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 18. As a result, the evidentiary record before the Court on an application for judicial review is generally

restricted to the evidentiary record that was before the administrative tribunal: *Access Copyright* at para 19; *Vavilov* at paras 125–126. Subject to certain recognized exceptions, evidence that was not before the decision maker and that goes to the merits of the matter is not admissible on an application for judicial review: *Access Copyright* at paras 19–20.

[7] In the present case, Ms. Kaur filed an affidavit in support of her application for leave and judicial review that sets out her personal background; the process leading to the employment offer underlying her application; her employer's circumstances and family; and her expected duties as caregiver.

[8] At the time she swore her affidavit, Ms. Kaur did not have a complete copy of her application filed with IRCC, since her immigration consultant had not kept a copy and a request made under the *Access to Information Act*, RSC 1985, c A-1, had not been completed. She asked the Minister to provide a copy of the certified tribunal record before perfecting her application, and brought a motion to that effect. The Minister opposed that motion. The request was dismissed by order dated May 31, 2022, the Court nonetheless noting that it saw "no hardship or prejudice to the Respondent in informally providing [Ms. Kaur] with a copy of her own application." Unfortunately, and surprisingly, despite this indication from the Court, the Minister continued to refuse to provide Ms. Kaur with a copy of her application.

[9] Ms. Kaur's affidavit described this factual background, and attached the parts of her application that she had. However, it also provided additional information about her background and the circumstances and needs of the family she proposed to work for. As is clear from the

certified tribunal record that was produced after leave to commence this application was granted, much of this information was not before the officer at the time the decision was made. Such information is inadmissible: *Access Copyright* at paras 19–20. In addition, as the Minister points out, much of the information is hearsay evidence, relaying information that the mother of the family told Ms. Kaur about their family situation.

[10] At the hearing of this application, Ms. Kaur did not press her reliance on the additional information contained in the affidavit. Instead, she appropriately relied on the information contained in the certified tribunal record, recognizing that this was the extent of the factual record before the officer and therefore the extent of the record the Court could consider on judicial review.

[11] I will therefore disregard those aspects of Ms. Kaur's affidavit that go to the substance of the matter and go beyond the information contained in the certified tribunal record.

B. *The officer's decision was reasonable*

(1) Program framework

[12] Ms. Kaur filed her application under the Home Child Care Provider Pilot Program in March 2020. The program was created in 2019 by way of Ministerial Instructions under section 14.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Subsection 14.1(7) of the *IRPA* states that an officer "must comply with the instructions" when processing an application.

[13] At the time, the Ministerial Instructions for the program provided for two categories of applicants: those with at least 24 months of full-time work experience in an eligible occupation in Canada during the prior three years; and those without such Canadian work experience. Ms. Kaur was in the latter category. In this category, applicants had to demonstrate, among other things, that they had received an offer of employment meeting specified conditions, including being "genuine."

[14] In assessing whether an application meets the requirements set out in the Ministerial Instructions, officers are guided by a manual entitled "Home Child Care Provider Pilot and Home Support Worker Pilot: Assessing the application against selection criteria." As Ms. Kaur sets out, this manual includes guidance on assessing whether an offer of employment is genuine. The manual states that considerations in the genuineness assessment may include whether there is a "genuine need for a caregiver (for example, proof of a school-age child, expected delivery date of newborn child, or a person with medical needs in the home)." It also states that officers can request further information and use information in the job offer to assess its validity.

(2) Ms. Kaur's application for permanent residence and work permit

[15] As required by the program, Ms. Kaur's application included an offer of employment. The offer was in the standard form published by IRCC for use in the Home Child Care Provider Pilot Program, and was signed by the father of the family and Ms. Kaur in December 2019. The completed offer form provided information about the family for whom Ms. Kaur proposed to work, the live-in arrangements in the home, and identified the two children, who were aged 11 and 7 at the time of the offer.

[16] The IRCC job offer form includes a section entitled “Job Description,” which includes the question “What will the employee be doing on a daily basis? Provide detail [*sic*] descriptions of the duties (example: meal preparation, shopping, driving, housekeeping, pet care, etc.).” In response, Ms. Kaur’s offer of employment says “Explained in employment contract (extra sheet attached).” The extra sheet in question states as follows, in its entirety:

> EMPLOYEE MAIN DUTIES:
>
> Bathe, dress and feed infants and children, Discipline children according to the methods requested by the parents, Keep records of daily activities and health information regarding children, Tend to emotional well-being of children, Instruct children in personal hygiene and social development, Organize, activities such as games and outings for children, Prepare and serve nutritious meals, Supervise and care for children, Help children with homework.

[17] Ms. Kaur’s application provided no other information about the circumstances of the family or the children, or the work she would be required to do. As both parties point out, the above list of main duties appears to be drawn, largely verbatim, from the list of main duties identified in the National Occupational Classification (NOC) description for “Home child care providers.”

(3) The officer’s decision

[18] An IRCC officer assessed Ms. Kaur’s application in January 2022. They rejected Ms. Kaur’s application, concluding the offer was not genuine. The officer’s notes in the Global Case Management System, which form part of their reasons for decision, read as follows, in their entirety:

> File reviewed.
>
> The applicant is applied for PR and work permit as a caregiver for a 10 years old and 14 years old child.
>
> The employer did not hire caregivers in the past, no indication of disability or special needs child.
>
> I have carefully considered reasons for hiring a caregiver, however, I am not satisfied that a 10 and 14 years old children, with no disabilities or special needs, are requiring the assistance of a full-time live-in caregiver. I am of the opinion that children are old enough and fully capable of doing self-care tasks that would otherwise be performed by a caregiver on their behalf. I am therefore not satisfied that there is reasonable need for a live-in caregiver. I am not satisfied that subj meets definition of a caregiver since duties and responsibilities will not be primarily caregiving in nature.
>
> I have concluded, on balance of probabilities, that job offer is not genuine and is being made primarily to facilitate subj's entry to Cda.
>
> Application is refused, work permit is cancelled as not required, refund initiated.

(4) The decision was reasonable

[19] Ms. Kaur argues the officer breached the duty of fairness in failing to provide adequate reasons for the refusal. However, the Supreme Court of Canada in *Vavilov* made clear that while principles of fairness dictate when an administrative tribunal will have an obligation to give reasons, where reasons are required and given, the merits, sufficiency, or adequacy of those reasons is to be addressed within the framework of reasonableness review: *Vavilov* at paras 76–81, 95–98, 127–128, 136. I will therefore apply the principles of reasonableness review in assessing Ms. Kaur's arguments regarding the adequacy of the officer's decision. Such review assesses whether the reasons, read as a whole in light of the record and in their administrative

context, are transparent, intelligible, and justified: *Vavilov* at paras 15, 91–96, 99–101. As Ms. Kaur notes, reasons must be comprehensible, explaining to a party why their application failed: *Rudan v Canada (Citizenship and Immigration)*, 2022 FC 429 at para 10.

[20] Ms. Kaur argues the officer's reasons failed to meet this standard. She contends that they do not give sufficient detail about how or why the officer decided the children could perform their own "self-care tasks," and did not turn their mind to other caregiving tasks the children were not able to perform. I cannot agree. The officer was assessing the genuineness of an offer of employment for a caregiver position for young, but not infant, children. The offer stated that the caregiver's tasks would include bathing, dressing, and feeding the children, and instructing them in personal hygiene. It was reasonable for the officer to question the "genuine need for a caregiver" in light of the information that was put before them. Contrary to Ms. Kaur's argument, I cannot see that greater explanation is necessary of the officer's conclusion that children of the ages given, and not presented as having any special needs, would not be in need of the type of care described.

[21] As Ms. Kaur points out, the offer of employment also refers to other tasks, such as organizing activities and helping with homework. However, in my view, the genuineness assessment need not include an itemized assessment of each task identified to determine whether it may be needed by the children. It can be an assessment of whether the description of the employee's main duties reasonably accords with what would be required in the circumstances known. In this regard, the absence of any other information about the family's needs and circumstances significantly reduced the officer's ability to assess whether the description of

duties was consistent with a genuine offer of employment. The very limited information in Ms. Kaur's application about the proposed employment meant that the incongruity in suggesting she would be bathing and dressing an 8-year-old and an 11-year-old was accentuated.

[22] Ms. Kaur also argues that the program manual refers to "proof of a school-age child," with no requirement that children be of a specific age for an application to be successful. She notes that the two children were school-aged, and argues the officer's reasons effectively suggest that only children under 10 years old or children with disabilities or special needs require a caregiver. Again, I disagree. The officer did not reject the application simply based on the age of the children or a conclusion that older children do not require a caregiver. Rather, the officer considered the description of duties in front of them, the information about the children's ages, the fact that the children had not previously had a caregiver, and the absence of any other explanatory information to conclude that this particular offer of employment was not genuine. This was a conclusion open to the officer on the record and one that was adequately and intelligibly justified in their reasons.

[23] Ms. Kaur's other arguments, such as her argument that the officer failed to appreciate the reality of the family's situation, rely on explanations and additional information about the family that were put forward in her affidavit and were not before the officer. These arguments cannot be entertained, as the evidence on which they are based is inadmissible.

[24] I am therefore not satisfied that Ms. Kaur has met her onus to show that the officer's decision was unreasonable.

C. *The officer's decision was fair*

[25] Ms. Kaur argues the officer breached the duty of procedural fairness by failing to inform her of their concerns, and allow her an opportunity to respond to those concerns. In particular, she contends that the officer unfairly made an adverse finding of credibility without first giving her an opportunity to respond to the asserted credibility concerns.

[26] The duty of procedural fairness owed to visa applicants is generally recognized to be on the lower end of the spectrum: *Grewal v Canada (Citizenship and Immigration)*, 2022 FC 1184 at para 17, citing *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 23 and *Gur v Canada (Citizenship and Immigration)*, 2019 FC 1275 at para 16. Nonetheless, this Court has held that the duty of fairness may require a visa officer to give an applicant the opportunity to respond to concerns about credibility or the authenticity of documents: *Tollerene v Canada (Citizenship and Immigration)*, 2015 FC 538 at para 16; *Hamza* at paras 25–29; *Madadi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 716 at para 6; *Rezvani v Canada (Citizenship and Immigration)*, 2015 FC 951 at para 20.

[27] Ms. Kaur contends that in finding that the offer of employment was "not genuine," and by further concluding that it was made primarily to facilitate her entry to Canada, the officer was going beyond an assessment of the sufficiency of the evidence in her application to make an adverse credibility finding. She argues it was unfair to do so without first raising the concern and allowing her to respond.

[28] The jurisprudence of this Court indicates that a finding that an offer is not genuine is not necessarily a credibility finding for which the duty of fairness requires an opportunity to respond: see, *e.g.*, *Grewal* at paras 1, 7, 19–23; *Singh v Canada (Citizenship and Immigration)*, 2016 FC 509 at paras 26–28; *Hakobyan v Canada (Citizenship and Immigration)*, 2015 FC 499 at paras 1, 5–7. Indeed, the Court has held that such a duty is not necessarily triggered even where the credibility, accuracy, or genuine nature of information submitted by the applicant is at issue, particularly where the concern "arises directly from the requirements of the legislation or related regulations": *Obeta v Canada (Citizenship and Immigration)*, 2012 FC 1542 at paras 17–26, citing *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24; *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 30; *Rezvani* at para 25; *Sharma v Canada (Citizenship and Immigration)*, 2020 FC 381 at para 32.

[29] The requirement that an employment offer for a caregiver position be "genuine" derives from the Ministerial Instructions establishing the program. The assessment of "genuineness" can be based on a number of factors, such as the genuine need for a caregiver, the employer's ability to pay the wages specified, and whether reasonable accommodations are provided: *Grewal* at para 19. These factors do not always raise an issue with respect to the credibility of the applicant that requires an officer to raise the concern and provide an opportunity to address it. In the present case, having reviewed the limited information in the application, the officer stated that they were "not satisfied that there is reasonable need for a live-in caregiver." This then formed the basis of their assessment that the employment offer did not meet the "genuineness" requirement of the Ministerial Instructions. In these circumstances, I conclude that the duty of

procedural fairness did not require the officer to provide Ms. Kaur with notice of their concerns and an opportunity to respond to them.

[30] I conclude by noting Ms. Kaur's argument that the finding that the job offer was not genuine, but rather was primarily to facilitate her entry into Canada, is a serious adverse finding that could interfere with her ability to obtain a future visa or to be approved under this program. A similar argument was made in *Hakobyan*, and was rejected by Justice Locke, then of this Court, as unsubstantiated: *Hakobyan* at paras 5, 7. In any event, as set out above, the officer's assessment that the employment offer was not genuine was based on the limited evidence before them. There is nothing to indicate that Ms. Kaur should not be able to apply again to enter Canada, under this program or otherwise, with sufficient documentation to establish that she meets the requirements of the visa she is seeking to obtain.

IV. Conclusion

[31] As Ms. Kaur has not demonstrated that the decision was unreasonable or procedurally unfair, the application for judicial review will be dismissed.

[32] Neither party proposed a question for certification. I agree that none arises in the matter.

JUDGMENT IN IMM-1184-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1184-22
STYLE OF CAUSE:	SUKHPREET KAUR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	APRIL 4, 2023
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	SEPTEMBER 20, 2023

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