Federal Court  Cour fédérale

Date: 20200122

Docket: IMM-1241-19

Citation: 2020 FC 96

Ottawa, Ontario, January 22, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

LIUBOMYR CHAYKOVSKYY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of a Visa Officer, dated January 24, 2019 [Decision], denying the Applicant's work permit and permanent residency application.

II. BACKGROUND

[2] The Applicant is a citizen of Ukraine seeking a Canadian work permit (and permanent residency) to work as an Office Manager in Fort McMurray, Alberta for Thomas Group Inc. [Thomas Group], an insulation contractor largely serving the Oil and Gas Industry in Alberta and Saskatchewan.

[3] The Applicant holds degrees in law from the Lviv Cooperative College of Economics and the Interregional Academy of Personnel. Since 2000, he has held numerous positions working as a tax inspector, a lawyer, a control manager for delivery departments and warehouses, a manager of logistics, and a labourer. Despite holding various positions over the past two decades, the Applicant has almost exclusively worked on short contracts as a "General Labourer" for Brukpol-2 in Poland since late 2012.

[4] On March 22, 2018, the Applicant signed a two-year employment contract with Thomas Group. The contract, which is conditional on the Applicant obtaining a valid work permit, stipulates that the Applicant agrees to carry out the following tasks:

- […] *[S]upervise 3 to 4 workers*
- *Establish work priorities, delegate work to office support staff, and ensure deadlines are met and procedures are followed*
- *Co-ordinate and plan for office and site services, such as accommodation, relocations, equipment, supplies, forms, disposal of assets, parking, maintenance and security services*
- *Carry out administrative activities*
- *Supervision of clerks and related staff*

[5] On July 25, 2018, Thomas Group received a Labour Market Impact Assessment [LMIA] from Employment and Social Development Canada/Service Canada, which concluded that the hiring of one foreign national to work as an Office Manager in Fort McMurray, Alberta would have a "positive or neutral impact on the Canadian labour market." The LMIA therefore invited the foreign national in question to submit their work permit application to Immigration, Refugees, and Citizenship Canada [IRCC]. The LMIA noted that the job requirements included a college-level diploma/certificate as well as verbal and written English language skills.

[6] The Applicant submitted his work permit and permanent residency application on January 22, 2019. In his application, the Applicant noted that he is able to communicate in English, holds a post-secondary diploma in law, and lists his work experience.

[7] The Applicant included in his application a letter of support from Mr. Erhardt Tutto, President of Thomas Group, who stated that they hired the Applicant on the basis of his managerial and logistics experience, his experience and knowledge of the insulation industry, his training as a lawyer, and his experience in construction. The letter also noted that the Applicant's language skills were satisfactory for the position, and even stated that they have noticed "vast improvements" in his English language abilities.

[8] The Applicant also submitted International English Language Testing System [IELTS] test results dated December 15, 2018, which gave the Applicant an overall score of 4.5/9, and more specifically, 4.5/9 for listening, 4.0/9 for reading, 5.0/9 for writing, and 3.5/9 for speaking.

III. DECISION UNDER REVIEW

[9] On January 24, 2019, the Applicant received a letter from the Visa Officer denying his application for a work permit and permanent residency. The Visa Officer indicated that his application did not meet the requirements of the *IRPA*. More specifically, the Visa Officer concluded that the Applicant was "not able to demonstrate that [he would] adequately meet the job requirements of [his] prospective employment."

[10] The Visa Officer's notes provide more in-depth reasons for denying the work permit application. The notes indicate that the Visa Officer believed that the Applicant did not have the required senior clerical, executive secretarial, or office administration experience for the position, nor the required English language skills given his low IELTS test results. Though the Visa Officer acknowledged the Applicant's experience as a warehouse dispatcher and logistics manager, the Visa Officer indicated that the Applicant lacked recent relevant experience. For these reasons, the application was denied.

IV. ISSUES

[11] The issues to be determined in the present matter are the following:

1. Did the Visa Officer erroneously assess the Applicant's language abilities?
2. Did the Visa Officer err in heightening the employment requirements when analyzing the Applicant's ability to perform the proposed work?
3. Did the Visa Officer erroneously ignore relevant evidence?

V. STANDARD OF REVIEW

[12] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[13] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[14] Both the Applicant and the Respondent submitted that the standard of review applicable to the Visa Officer's assessment of the Applicant's work permit and permanent residency application was that of reasonableness.

[15] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Toor v Canada (Citizenship and Immigration)*, 2019 FC 1143 at para 6, *Baran v Canada (Citizenship and Immigration)*, 2019 FC 463 at paras 15-16, and *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at paras 22-23.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "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). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's

reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[17] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	…
Regulations	**Règlements**
32 The regulations may provide for any matter relating to the application of sections 27 to 31, may define, for the purposes of this Act, the terms used in those sections, and may include provisions respecting	32 Les règlements régissent l'application des articles 27 à 31, définissent, pour l'application de la présente loi, les termes qui y sont employés et portent notamment sur :
(a) classes of temporary residents, such as students and workers;	a) les catégories de résidents temporaires, notamment les étudiants et les travailleurs ;

[18] The following provision of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] is relevant to this application for judicial review:

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 ;
…	…

VII. ARGUMENT

A. *Applicant*

[19] The Applicant submits that the Decision to deny his work permit was unreasonable due to: (1) the failure to assess his language ability according to the work in question; (2) the heightened employment requirements; and (3) the failure to assess key relevant evidence such as Mr. Tutto's letter and the Applicant's years of high-skill work experience. Consequently, he asks that this Court allow this application for judicial review, overturn the Decision and remit the application back to a different visa officer to be re-determined.

(1) Assessment of the Applicant's Language Abilities

[20] The Applicant submits that the Visa Officer unreasonably assessed his language abilities by failing to analyze how they would affect his capacity to perform the proposed work.

[21] The Applicant cites IRCC's operational manual which states that when:

> deciding to require proof of language ability, the officer's notes should refer to the LMIA requirements, working conditions as described in the job offer and NOC requirements for the specific occupation, in determining what precise level of language requirement is necessary to perform the work sought. System 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.

[22] Accordingly, the Applicant argues that the Visa Officer failed to refer to the working conditions or the National Occupation Classification [NOC] when analyzing whether the Applicant satisfied the language requirements for the position. Moreover, the Applicant argues that the Visa Officer did not consider that the employer is satisfied with the Applicant's language abilities, nor his rapid improvement. The Applicant therefore argues that the Visa Officer's assessment of his language abilities was unreasonable.

(2) Heightening of the Employment Requirements

[23] The Applicant also submits that it was unreasonable for the Visa Officer to require "[e]xperience in a senior clerical or executive secretarial position related to office administration" when the NOC notes that this is only "usually required" and the LMIA only indicated that three to five years of relevant work experience is required.

[24] As such, the Applicant submits that the Visa Officer clearly heightened the employment requirements above those contained in the LMIA and the NOC without justification as to why this was necessary for the Applicant to adequately perform the proposed work in Canada, thus

making the Decision unreasonable. Instead, the Applicant suggests his cumulative work experience and his formal legal education are sufficient in this case.

(3) Failure to Explicitly Assess Relevant Evidence

[25] Finally, the Applicant argues that the Visa Officer unreasonably ignored relevant evidence that directly contradicts the finding that the Applicant did not have the necessary experience or English language skills required to adequately perform the work in question.

[26] The Applicant states that this Court has held that a failure to mention important evidence that contradicts a decision-maker's findings is unreasonable. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35 (FC) at paras 14-17. Therefore, the Applicant argues that the Visa Officer's Decision is unreasonable due to the Visa Officer's:

1. failure to acknowledge the letter from Mr. Tutto, which explicitly states that the Applicant has the required experience, education, and language skills to perform the work in question; and

2. failure to take notice of the Applicant's ten years of high skill work experience.

[27] For these reasons, the Applicant argues that his application for judicial review should be allowed.

B. *Respondent*

[28] The Respondent submits that the Visa Officer conducted a thorough and reasonable analysis of the work permit and permanent residency application in question. The Respondent argues that the Applicant is simply asking this Court to re-weigh the evidence that was before the Visa Officer. The Respondent therefore holds that the Decision should be upheld.

(1) Assessment of the Applicant's Language Abilities

[29] The Respondent argues that the burden is on the Applicant to satisfy the Visa Officer that he has met all the legislative requirements to obtain the work permit in question (*Virk v Canada (Citizenship and Immigration)*, 2014 FC 150 at paras 5-6). In this case, the Visa Officer was of the opinion that the Applicant did not provide sufficient evidence that he had the written and oral English abilities required to adequately perform the work in question.

[30] The Respondent argues that the Visa Officer did not err in preferring the objective IELTS results rather than the assessment of the Applicant's language abilities contained within Mr. Tutto's letter, "who had a vested interest in ensuring that the [A]pplicant obtained a positive decision on his work permit application." As such, the Visa Officer's assessment of the Applicant's language abilities was reasonable.

(2) Heightening of the Employment Requirements

[31] The Respondent also argues that the Applicant has not established that he provided the Visa Officer with sufficient evidence to demonstrate that he had the work experience necessary for the proposed work in question. The Respondent notes that the workbook and employment list provided by the Applicant do not provide details of the responsibilities and duties associated with the experience listed. As such, the Decision concerning the Applicant's lack of relevant work experience was reasonable given the insufficient evidence demonstrating that the Applicant met all the legislative requirements to obtain the work permit.

(3) Failure to Explicitly Assess Relevant Evidence

[32] Finally, the Respondent submits that it is well established that this Court's role in judicial reviews is not to substitute its decision for that of the Visa Officer (*Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 606 at para 9). Consequently, the Respondent argues that the Court should not interfere with the Decision if it is overall tenable on the evidence before the Visa Officer.

[33] More specifically, the Respondent argues that the Visa Officer's failure to explicitly refer to certain evidence in his notes does not mean that the Visa Officer ignored that evidence. In fact, the Respondent points to this Court's decision in *Rahman v Canada (Citizenship and Immigration)*, 2016 FC 793 at para 17 which recognized that an "Officer is assumed to have weighed and considered all the evidence presented unless the contrary is shown."

[34] The Respondent argues that this Court should not require a visa officer to exhaustively note all the evidence they considered when making a decision as this would "encumber efficient administration given the volume of applications that visa officers are required to process." The Respondent cites the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v Khan*, 2001 FCA 345 at para 32 which notes that "the Court must guard against imposing a level of procedural formality that, given the volume of applications that visa officers are required to process, would unduly encumber efficient administration."

VIII. ANALYSIS

[35] The Applicant says that the Visa Officer failed to properly assess the evidence that he could perform the work sought and heightened the employment requirements.

A. *Ignoring Relevant Work Experience*

[36] The Applicant says that, in assessing his relevant work experience, the Visa Officer only noted his work as a labourer, a warehouse manager, and his work experience in logistics. He says the Visa Officer failed to note several higher-skilled white-collar jobs that he has held.

[37] On this issue, the Visa Officer reasons as follows:

> Based on the info available on [the Applicant]'s file he has been working in Poland as a labourer since 2012. Prior to that he was working as a dispatcher of the warehouse and Manager of logistics. Therefore [the Applicant] does not have recent experience if any at all in the required occupation.

[38] The record before me shows that the Applicant provided the Visa Officer with a workbook that listed employment positions he had held between March 14, 2000, and May 11, 2013, as well as a list of employment positions for the period from November 2010 to December 2017.

[39] The workbook does not provide any account of the responsibilities and experience associated with any of the listed positions. The employment list only notes the location and the period of employment and there are no details of responsibilities or job duties associated with each position.

[40] Given the materials that were placed before the Visa Officer, his conclusion that the Applicant had not established he had the experience required for the position sought is entirely reasonable.

B. *Importing a Requirement*

[41] The Applicant also submits that the Visa Officer:

> […] appears to import a work experience requirement not contained in the LMIA when they (*sic*) indicate "Experience in a senior clerical or executive secretarial position related to office administration."

[42] The Applicant says that the LMIA only requires three to five years of relevant work experience while the NOC document for the position indicates more specific experience is only "usually required."

[43] This remains nothing more than an assertion. The real problem is that the Applicant simply failed to provide the Visa Officer with sufficient persuasive evidence that he could meet the requirements of the job he was seeking.

C. *Failure to Note the Letter From Mr. Tutto*

[44] The Applicant complains that the Visa Officer failed to note the detailed letter from his prospective employer indicating that he had been interviewed and found to be qualified for the job based upon his education and his cumulative work experience. He argues that this is not a "weighing" issue, but rather a "failure to consider" issue.

[45] Mr. Tutto's letter does not provide the missing details of the Applicant's work experience. It just says "[a]fter reviewing [the Applicant's] experience and knowledge in the insulation industry as well as his experience as an office manager we have decided to offer him the position." This unsubstantiated statement does not need to be mentioned by the Visa Officer because it is nothing more than a bald assertion that he was not obliged to accept. See *Bailey v Canada (Citizenship and Immigration)*, 2014 FC 315 at para 45. It does not provide evidence to refute the Visa Officer's conclusions that the Applicant had not provided the objective evidence that the Visa Officer needed to reach his own conclusions on whether or not the Applicant met the job requirements. Mr. Tutto's bald opinion that he is satisfied that the Applicant can do the job does not need to be mentioned because it does not fill the evidentiary gap. The Visa Officer cannot abdicate his basic responsibility to assess this issue himself. The onus is upon the Applicant to put his best case forward and provide the objective evidence required for the

Decision he wishes to obtain while the Visa Officer is obliged to assess that evidence and reach his own conclusions (*Chamma v Canada (Citizenship and Immigration)*, 2018 FC 29 at para 35).

[46] The Visa Officer's reasoning is that, based on the information on file, the Applicant "does not have recent experience if any at all in the required occupation."

[47] We do not know from Mr. Tutto's letter what the Applicant provided as part of the interview process to establish and confirm his experience. There is nothing in Mr. Tutto's letter that would allow the Visa Officer to check and confirm the Applicant's experience with past employers. Mr. Tutto's interview conclusions do not provide an objective or sufficiently detailed account of the Applicant's experience that can substitute for direct evidence on point. The fact that Mr. Tutto is satisfied that the Applicant is qualified for the job does not mean that he is so qualified. Instead, the Applicant was obliged to provide the Visa Officer with the objective means to assess and check his experience and qualifications.

D. *Proof of Language Ability*

[48] This is not a stand-alone ground for a reviewable error. As the Visa Officer makes clear, the issue of the Applicant's language ability is "in addition" to the principal ground of refusal, which is the Applicant's failure to demonstrate relevant experience for the job. If the Applicant was unable to establish that he had the necessary qualifications and experience to meet the requirements of the job applied for, then his competencies in English will not remedy this defect and render him fit for the job.

[49] The Applicant takes issue that the Visa Officer noted his IELTS test results but did not refer to the applicable working conditions or NOC requirements to determine the precise level of language necessary to perform the work sought. In other words, the Applicant says that the Visa Officer did not provide a sufficiently detailed analysis of why the Applicant did not satisfy the language requirements for the position.

[50] On this issue, the Applicant once again places significant emphasis on Mr. Tutto's letter confirming that the Applicant has the English language abilities required for the job. Once again, this letter was not mentioned by the Visa Officer.

[51] On the language issue, the Decision indicates as follows:

> In addition, [the Applicant] submitted IELTS with overall Band 4.5. His speaking is 3.5 (Extremely Limited User) and reading is 4 (Limited User). Not satisfied [the Applicant] can perform duties of an office manager with such level of English.

[52] I agree with the Applicant that the Visa Officer's analysis of his language skills, as they relate to the requirements of the job, is superficial. There is nothing wrong with the Visa Officer preferring the objective IELTS score to the opinion of his prospective employer. However, this would not be sufficient to remedy the Visa Officer's failure to refer to the LMIA requirements and working conditions as described in the job offer and the relevant NOC requirements. In my view, such detailed analysis does not occur here, and was not necessary, because the Applicant had failed to provide the information and evidence necessary to establish he could fulfil the job requirements. The rejection of his application is supportable on that ground alone. As such, the Applicant has not established a reviewable error with regard to that ground. The Visa Officer did

not need to provide a more detailed appraisal of the language requirements because the Applicant had not provided sufficient evidence to establish that he had the experience required for the job.

[53] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-1241-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1241-19
STYLE OF CAUSE:	LIUBOMYR CHAYKOVSKYY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	OCTOBER 10, 2019
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JANUARY 22, 2020

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