Federal Court  Cour fédérale

Date: 20200122

Docket: IMM-1265-19

Citation: 2020 FC 95

Ottawa, Ontario, January 22, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

GURDEEP SINGH SANGHA

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 application.

II. BACKGROUND

[2] The Applicant, Gurdeep Singh Sangha, is a citizen of India. He is currently on a work permit in Dubai, United Arab Emirates [UAE] where he is working as a truck driver. The Applicant now seeks a work permit to work as a long-haul truck driver for Rig Logistics Inc. [Rig] in Rocky View, Alberta.

[3] On August 20, 2018, Rig received a Labour Market Impact Assessment [LMIA] from Employment and Social Development Canada/Service Canada, which concluded that the hiring of fifteen foreign nationals to work as long-haul truck drivers out of Rocky View, Alberta would have a "positive or neutral impact on the Canadian labour market." The LMIA therefore invited the foreign nationals in question to submit their work permit applications to Immigration, Refugees, and Citizenship Canada [IRCC]. The LMIA noted that the job requirements included secondary school education as well as verbal and written English language skills.

[4] On November 5, 2018, the Applicant signed a 24-month employment contract with Rig. The contract stipulates that the Applicant agrees to carry out the following tasks:

- Load and unload goods;
- Tarping and ensuring safety and security of cargo;
- Perform emergency roadside repairs;
- Operate and drive straight or articulated trucks to transport goods and materials;
- Record cargo information, hours of service, distance travelled and fuel consumption;

- Perform pre-trip, en route and post-trip inspection and oversee all aspects of vehicle;
- Oversee condition of vehicle and inspect tires, lights, brakes, cold storage and other equipment; [and]
- Receive and relay information to central dispatch, drive as part of a two-person team or convoy.

[5] A few days after signing the employment contract, the Applicant submitted his application for a work permit to IRCC. In his application, the Applicant notes that: he is able to communicate in English; holds a secondary school degree; and has held a heavy vehicle licence in Dubai since May 2017. He also lists his relevant work experience. Indeed, his application indicates that he worked as a truck driver in Dubai since March 2016 and worked as a school bus driver in Faridkot, Punjab from February 2010 to November 2015. The Applicant provided letters from both employers confirming his work experience along with his current salary as a truck driver in Dubai.

III. DECISION UNDER REVIEW

[6] On January 24, 2019, the Applicant received a letter from the Visa Officer denying his application for a work permit. 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] be able to adequately perform the work," in question.

[7] The Visa Officer's notes provide more in-depth reasons for denying the work permit application. The Visa Officer first acknowledged in his notes that: (1) the Applicant holds a heavy vehicle licence; (2) has two and a half years of work experience as a truck driver in UAE;

and (3) has secondary school education. However, the Visa Officer also raises several concerns, notably that the Applicant did not provide:

1. International English Language Testing System [IELTS] test results;
2. Bank statements confirming the salary paid to him as a truck driver in the UAE; and
3. Evidence of formal truck driver training.

[8] As such, the Visa Officer concluded that the Applicant did not establish that he "has the necessary skills to adequately perform the proposed work in Canada in a manner that protects the safety of Canadians." The work permit application was therefore refused.

IV. ISSUES

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

1. Did the Visa Officer's Decision violate the Applicant's right to procedural fairness?
2. Did the Visa Officer erroneously assess the Applicant's language abilities?
3. Did the Visa Officer erroneously heighten the employment requirements when analyzing the Applicant's ability to perform the proposed work?

V. STANDARD OF REVIEW

[10] 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.

[11] 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).

[12] Both the Applicant and the Respondent submitted that the standard of review applicable to the issue of procedural fairness was that of correctness while the standard of review applicable to the Visa Officer's assessment of the Applicant's work permit application was that of reasonableness.

[13] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé*, para 74).

[14] As for the standard of review applicable to the Visa Officer's assessment of the work permit application, there is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to this issue is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. Indeed, prior to *Vavilov* it was well established that the standard of reasonableness applies. 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.

[15] 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 *Khosa*, 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

[16] 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 ;
…	…

[17] 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. ARGUMENTS

A. *Applicant*

[18] The Applicant submits that the Visa Officer's Decision to deny his work permit application breaches his right to procedural fairness and, in any case, was unreasonable. Consequently, he asks that this Court overturn the Decision and return the application to a different visa officer to be re-determined.

(1) Breach of Procedural Fairness

[19] The Applicant argues that the Visa Officer violated his right to procedural fairness by not allowing him to respond to the veiled credibility finding concerning the contents of his employment letter. He states that the negative inference drawn by the Visa Officer regarding the Applicant's failure to provide bank statements confirming his salary equates to a credibility finding, as the employment letter provided by the Applicant included a breakdown of his salary.

[20] Since the Visa Officer makes no mention of the Applicant's employment letters or why the bank statements are critical to the assessment of his application, the Applicant argues that the only logical conclusion is that the Visa Officer did not find the information contained in the letters to be credible. The Applicant suggests that the Visa Officer might have believed that the Applicant had never even worked for a trucking company in Dubai.

[21] The Applicant submits that this Court has held on numerous occasions that the duty of procedural fairness requires a visa officer to provide an applicant with the opportunity to address concerns relating to the credibility of the information submitted. The Applicant cites Justice Mosley's decision in *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283:

> [24] Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where, however, the issue is not one that arises in this context, such a duty may arise. **This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern**, as was the case in *Rukmangathan*, and in *John* [*John v. Canada (Minister of Citizenship and Immigration) (2003)*, 2003 FCT 257 26 Imm. L.R. (3d) 221 (F.C.T.D.)] and *Cornea* [*Cornea v. Canada (Minister of Citizenship and Immigration) (2003)*, 2003 FCT 257, 30 Imm. L.R. (3D) 38 (F.C.)] cited by the Court in *Rukmangathan*, above.
>
> [Emphasis added].

[22] The Applicant also notes that this was reiterated by Justice Zinn in *Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716 at para 6.

[23] Since the Visa Officer did not provide the Applicant with an opportunity to address these credibility concerns, the Applicant concludes that there was a breach of procedural fairness.

(2) Assessment of the Applicant's Language Abilities

[24] The Applicant also submits that the Visa Officer unreasonably assessed the issue of the Applicant's language abilities by failing to analyze how they would affect his capacity to perform the proposed work.

[25] 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.

[26] Accordingly, the Applicant argues that the LMIA only required oral and written English capabilities and that none of the tasks set out in the employment contract require a high level of English. Moreover, he notes that the Visa Officer failed to consider that Rig has already verified that the Applicant's language abilities meet those required for the job. Therefore, the Applicant argues that, by requiring IELTS test results, the Visa Officer is unreasonably "importing an English level not necessary for the position," which is analogous to this Court's finding in *Tan v Canada (Citizenship and Immigration)*, 2012 FC 1079 at paras 41-42 [*Tan*] and contrary to IRCC's operational manual.

(3) Heightening of the Employment Requirements

[27] Finally, the Applicant submits that it was unreasonable for the Visa Officer to require formal training in truck driving in order to obtain the work permit when the LMIA and the applicable National Occupation Classification [NOC] only require secondary school education.

[28] Although the relevant NOC states that an "accredited driver training course of up to three months […] may be required," the Applicant argues that the word "may" clearly indicates that this is not a hard requirement.

[29] 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 previous truck driving experience and his secondary school education are sufficient in this case.

B. *Respondent*

[30] The Respondent submits that the Visa Officer in no way violated the Applicant's right to procedural fairness and conducted a thorough and reasonable analysis of the work permit application. As such, the Visa Officer's Decision should be upheld.

(1) Breach of Procedural Fairness

[31] The Respondent argues that there is no breach of procedural fairness in this case as there was no credibility finding made by the Visa Officer. In fact, the Respondent points to the Visa Officer's notes, which show that the Applicant's work experience as a truck driver in the UAE is accepted and believed by the Visa Officer.

[32] Instead, the Respondent argues that this is a case where the Applicant simply failed to demonstrate that he satisfied the requirements of the *IRPA* and the *Regulations*. The Respondent states that it is well established that it is the applicant who has the burden of satisfying the visa officer that they have met all the legislative requirements to obtain the requested work permit.

[33] In fact, the Respondent notes that this Court has held on numerous occasions that, should an applicant fail to provide sufficient proof to satisfy the visa officer that a work permit ought to be granted, the visa officer has no duty to afford the applicant with an opportunity to provide additional information. The Respondent notes that this is stated succinctly in *Pacheco Silva v Canada (Citizenship and Immigration)*, 2007 FC 733 [*Pacheco Silva*]:

> [20] I am of the view that the principles of procedural fairness have not been breached in the circumstances of this case. The onus is on the Applicant to provide all relevant supporting documentation and sufficient credible evidence in support of his application. In her decision letter, the Officer clearly stated that the Applicant had not discharged this onus. It is for the Applicant to put his best case forward. See *Lam v. Canada (M.C.I.)* (1998) 152 F.T.R. 316 (T.D.). The onus does not shift to the Officer and there is no entitlement to a personal interview if the application is ambiguous or supporting material is not included. Here, there was

> no obligation on the Officer to gather or seek additional evidence or make further inquiries.

(2) Assessment of the Applicant's Language Abilities

[34] The Respondent points out 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. In this case, the Applicant did not provide any evidence that he had the written and oral English abilities required to adequately perform the work in question, despite the fact that these language requirements were clearly noted in the LMIA. Furthermore, the Respondent notes that the Visa Officer could not have been expected to undertake a detailed analysis of the Applicant's language skills in relation to the work in question; there was simply no evidence provided for the Visa Officer to analyze.

[35] The Respondent claims that the case at bar is distinguishable from *Tan*, above, because the Visa Officer did not import heightened language requirements in this case but, instead, simply sought to apply the requirements stipulated in the LMIA. The Respondent cites *Singh v Canada (Citizenship and Immigration)*, 2012 FC 360 at paras 12-13 and *Singh Grewal v Canada (Citizenship and Immigration)*, 2013 FC 627 at para 17, as both decisions confirm that an applicant has the burden of establishing that they met the language requirement.

[36] Moreover, the Respondent notes that the Visa Officer is under a duty to examine the evidence at hand to assess whether an applicant is able to adequately perform the work in question. Though the Applicant argues that Rig was of the opinion that he fulfilled the language requirements for the job, this Court has recognized in *Chen v Canada (Minister of Citizenship*

and Immigration), 2005 FC 1378 at para 12 that a visa officer is not bound by the statements of an employer concerning language requirements or the sufficiency of an applicant's language abilities.

(3) Heightening of the Employment Requirements

[37] Finally, the Respondent argues that the work requirements in the LMIA are not determinative of how a visa officer should exercise their discretion when assessing a work permit application. The Respondent cites *Sluice v Canada (Citizenship and Immigration)*, 2015 FC 1132 where this Court confirmed that the visa officer has a duty to conduct an independent assessment of the applicant's ability to perform the work sought.

[38] The Respondent also cites *Singh v Canada (Citizenship and Immigration)*, 2015 FC 115 [*Singh (2015)*] where this Court considered a similar case. In *Singh (2015)*, the applicant had 10 years of truck driving experience in Italy, a letter of employment, and proof of a valid licence. Nevertheless, despite meeting the requirements set out in the Labour Market Opinion, the applicant's work permit was rejected because the visa officer was not satisfied that the applicant could adequately perform the work in question. The Respondent highlights that this Court recognized in that case that the requirements in the Labour Market Opinion were not binding on the visa officer's independent assessment of whether an applicant can adequately perform the work in question (*Singh 2015*, above, at para 20).

VIII. ANALYSIS

[39] As the Decision makes clear, the Applicant's work permit application was refused because he was not able to demonstrate that he would be able to perform the work he was seeking in Canada.

[40] Subsection 200(3) of the *Regulations* stipulates that an officer shall not issue a work permit to a foreign national if there are reasonable grounds to believe that the foreign national is unable to perform the work sought.

[41] The Visa Officer's notes show that he was "not satisfied that [the Applicant] ha[d] the necessary skills to adequately perform the proposed work in Canada in a manner that protects the safety of Canadians."

[42] The Applicant does not argue that the Visa Officer committed a reviewable error by considering the safety of Canadians. Subsection 200(3) of the *Regulations* does not stipulate a level of competence or safety, but in the case of a long-haul truck driver, safety must surely be a paramount requirement for competence. In this regard, the jurisprudence is clear: the onus is upon the applicant for a work permit to provide sufficient evidence to establish competence; that a visa officer has a wide discretion to decide this issue and; that their decision is entitled to a high degree of deference. See, for example, *Taipur v Canada (Citizenship and Immigration)*, 2012 FC 25 at paras 19-20 and *Khosa*, above, at paras 4 and 46.

[43] The Visa Officer specifically notes and references the experience and qualifications the Applicant did submit. However, the clear message is that what was submitted was not sufficient to satisfy the Visa Officer that the Applicant would be able to perform the job in a manner, and to a level, that would protect the safety of Canadians.

[44] In the end, of course, the Visa Officer must be satisfied in this matter and not the Court, provided his assessment is reasonable and is grounded in the evidence submitted. It is quite common in work permit judicial review applications for applicants to disagree with a visa officer and say that, in their opinion, they did satisfy the requirements. Nonetheless, such disagreement is not a ground of judicial review.

[45] In the present case, for instance, the Applicant argues that:

a) The Visa Officer imports into the Decision a higher level of English language ability than the job requires and "has failed to tie the language analysis with the relevant policy guidelines, the NOC duties, and the employment contract";

b) The Visa Officer imports a non-existent employment requirement by requiring evidence of formal training in truck driving; and

c) The Visa Officer breached his right to procedural fairness by requiring copies of bank statements demonstrating his salary instead of relying on the letters from his employer that confirm his employment and his salary (this issue was withdrawn at the hearing).

[46] The Visa Officer notes the contents of the application and makes it clear that the principal concerns are:

1. Whether the Applicant had the necessary skills to be a long-haul truck driver in Canada. In this regard, the Visa Officer noted that the "[Applicant] did not provide evidence that he has received formal training in truck driving. Noted [the Applicant] has work [*sic*] for past 2.5 years as a truck driver in UAE";

2. Whether the Applicant has the necessary linguistic skills for the job. In this regard, the Visa Officer noted that the "[Applicant] did not provide IELTS."

[47] The Visa Officer also noted that the Applicant "did not provide bank statements demonstrating salary paid for truck driving position in UAE." In written submissions, the Applicant argued that this raised a procedural fairness issue because it demonstrated that the Visa Officer was questioning the veracity of what he and others had said about his job in the UAE. However, at the oral hearing of the present application before this Court, the Applicant withdrew this ground of review. In my view, that was appropriate because the Visa Officer was entitled to look for objective confirmation of what the Applicant had said about his job in the UAE, and the reference to bank statements is nothing more than a suggestion as to how this could be done. This issue was one of adequate documentation, not credibility, and did not require the Visa Officer to give the Applicant a further opportunity to address this issue. The onus is upon an applicant to put their best case forward in their application. The Visa Officer is not required to assist in this process by contacting an applicant and advising them on any deficiencies (*Pacheco Silva*, above, at para 20).

[48] I am also of the view that, regarding driving skills, the Visa Officer does not make "formal training" into a requirement for a work permit. Read as a whole, the Visa Officer's approach is to itemize what does appear in the application and some things that are missing. He refers to the Applicant's actual experience of two and a half years but is clearly concerned about the adequacy of this experience in a Canadian context, in light of the fact that the Applicant has had no "formal training." This does not mean the Visa Officer is making formal training a requirement. The Visa Officer's overall concern is that he is "not satisfied that the Applicant has the necessary skills to adequately perform the proposed work in Canada in a manner that protects the safety of Canadians." The Applicant may disagree, and obviously feels that his two and a half years of driving in the UAE is sufficient, but the Visa Officer believes otherwise and I do not think the Court is in a position to substitute its opinion for that of the Visa Officer on this issue, given his broad discretion (*Vavilov*, above, at para 83; *Khosa*, above, at paras 59-61).

[49] Regarding language skills, the Applicant acknowledged through counsel at the hearing of his application that he had not submitted sufficient evidence that he had the necessary language capability in English for the job. However, he maintained that the Visa Officer was, once again, imposing a formal requirement (i.e. an IELTS) that the job did not require.

[50] However, when the Decision is read as a whole and the Visa Officer's general conclusion is taken into account about the skills necessary to perform the work "in a manner that protects the safety of Canadians," I do not think that the Visa Officer is saying any more than the Applicant had not demonstrated sufficient language capability for the job (which the Applicant does not take issue with) and that one of the ways this could be done is through an IELTS.

[51] So, in the end, the work permit was refused because the Applicant failed to convince the Visa Officer that he had the necessary experience or the required language abilities for the job. It is possible to disagree with this conclusion, but I cannot say that it was reached as a result of a reviewable error.

[52] Both parties agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-1265-19

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-1265-19
STYLE OF CAUSE:	GURDEEP SINGH SANGHA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	OCTOBER 8, 2019
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JANUARY 22, 2020

APPEARANCES:

Raj Sharma	FOR THE APPLICANT
Colin J. Stephens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Sharma Harsanyi Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT