Federal Court  Cour fédérale

Date: 20200123

Docket: IMM-2321-19

Citation: 2020 FC 108

Ottawa, Ontario, January 23, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

PRITPAL SINGH BADIAL

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 an Immigration Officer [Officer], dated April 5, 2019 [Decision], denying the Applicant's application for a spousal open work permit.

II. BACKGROUND

[2] The Applicant is a citizen of India. On December 29, 2018, he married Ms. Simarjit Kaur, a citizen of India who has been in Canada since 2017 on a study permit. Ms. Kaur was issued a Canadian study permit in order to complete a Business Administration Diploma at Bow Valley College.

[3] On March 22, 2019, the Applicant applied for an open work permit, pursuant to s 205(c)(ii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], in order to allow him to join Ms. Kaur in Canada while she completed her studies.

[4] Along with his application, the Applicant included two documents related to Ms. Kaur's studies. The first was a letter addressed to Ms. Kaur from Bow Valley College dated January 26, 2017, which notes that the Business Administration Diploma program, to which Ms. Kaur was accepted, was to commence on August 24, 2017, and end on August 21, 2019. The second document was Ms. Kaur's transcripts dated February 5, 2019, which indicated that Ms. Kaur was enrolled in five courses for the Fall 2017 term as well as the Winter 2018 term, three courses for the Spring 2018 term, and four courses for the Fall 2018 term as well as the 2019 Winter term.

[5] On April 5, 2019, the Officer refused the Applicant's open work permit application.

III. DECISION UNDER REVIEW

[6] The Officer rejected the open work permit application because the Applicant had not adequately demonstrated that he met the requirements for a spousal open work permit pursuant to s 205(c)(ii) of the *Regulations*.

[7] The notes in the Global Case Management System [GCMS] first indicate that an immigration officer remarked on April 2, 2019, that no recent documents were provided as proof of Ms. Kaur's duration of status except for her transcripts from Bow Valley College.

[8] It is subsequently noted in the GCMS by the Officer on April 5, 2019, that no letter of current "full-time" enrollment from Bow Valley College was provided concerning Ms. Kaur. As such, the Officer noted that the Applicant was unable to adequately demonstrate that he met the requirements of a spousal open work permit pursuant to s 205(c)(ii) of the *Regulations*.

IV. ISSUES

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

1. Did the Officer breach the Applicant's right to procedural fairness?

2. Did the Officer err in determining that the Applicant failed to demonstrate he met the requirements for a spousal open work permit?

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 agreed that the standard of review applicable to the question of procedural fairness was that of correctness. Both parties also agreed that the standard of review applicable to this Court's review of the Officer's assessment of whether the Applicant met the relevant requirements 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 Officer's assessment of whether the evidence submitted demonstrated that the Applicant met the requirements of the *Regulations*, 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*. See *Toor v Canada (Citizenship and Immigration)*, 2019 FC 1143 at para 6.

[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 provision of the *Regulations* is relevant to this application for judicial review:

Canadian interests	**Intérêts canadiens**
205 A work permit may be issued under section 200 to a foreign national who intends to perform work that	205 Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes :
(c) is designated by the	c) il est désigné par le ministre

Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely,	comme travail pouvant être exercé par des étrangers, sur la base des critères suivants :
(ii) limited access to the Canadian labour market is necessary for reasons of public policy relating to the competitiveness of Canada's academic institutions or economy; or	(ii) un accès limité au marché du travail au Canada est justifiable pour des raisons d'intérêt public en rapport avec la compétitivité des établissements universitaires ou de l'économie du Canada;

[17] The following excerpt of the relevant Program Delivery Initiative for s 205(c)(ii) ("Spouses or common-law partners of full-time students [C42]") is pertinent to this application for judicial review:

Spouses or common-law partners of full-time students [C42]	**Époux ou conjoints de fait d'étudiants à temps plein [C42]**
Spouses or common-law partners of certain foreign students are allowed to accept employment in the general labour market without the need for an LMIA. This exemption is intended for spouses who are not, themselves, full-time students.	Les époux ou conjoints de fait de certains étudiants étrangers sont autorisés à accepter un emploi sur le marché général du travail sans qu'il soit nécessaire d'avoir une EIMT. Cette dispense vise les époux qui ne sont pas eux-mêmes des étudiants à temps plein.
Eligibility	**Recevabilité**
Applicants must provide evidence that they are the spouse or common-law partner of a study permit holder who is a full-time student at either	Le demandeur doit fournir la preuve qu'il est l'époux ou le conjoint de fait d'un titulaire de permis d'études qui étudie à temps plein dans un des types d'établissements suivants :
• a public post-secondary institution, such as:	• un établissement d'enseignement postsecondaire public, tel que

	:
○ a college	○ un collège,
○ trade/technical school	○ une école technique ou de métiers,
○ university	○ une université,
○ CEGEP in Quebec	○ un cégep au Québec;
…	…
Spouses or common-law partners of full-time students are eligible for open or open/restricted work permits, depending on whether a medical examination has been passed. There is no need for an offer of employment before issuing a work permit.	Les époux ou conjoints de fait d'étudiants à temps plein sont admissibles à un permis de travail ouvert ou ouvert avec des restrictions, selon qu'ils ont ou non passé un examen médical. Ils ne sont pas tenus d'avoir une offre d'emploi pour qu'un permis de travail leur soit délivré.
Validity	**Validité**
Work permits may be issued with a validity date to coincide with the spouse's study permit.	Un permis de travail peut être délivré de façon à être valide jusqu'à la fin de la période de validité du permis d'études de l'époux.

VII. ARGUMENTS

A. *Applicant*

[18] The Applicant argues that the Officer erred by: (1) breaching his right to procedural fairness by failing to provide him with an opportunity to respond to the Officer's concerns that did not arise from the requirements of the legislation; and (2) ignoring the significant evidence demonstrating that Ms. Kaur continued to be enrolled in "full-time" studies at Bow Valley

College. In light of these errors, the Applicant asks this Court to allow this application for judicial review, overturn the Decision, and remit the matter back to another immigration officer for redetermination.

(1) Breach of Procedural Fairness

[19] The Applicant submits that, despite providing all the necessary information required by the *IRPA* and the *Regulations*, the Officer clearly questioned Ms. Kaur's enrollment at Bow Valley College and, therefore, the Applicant should have been provided with an opportunity to respond to this concern. The Applicant states that a failure to provide such an opportunity constitutes a breach of procedural fairness.

[20] The Applicant relies primarily on this Court's decisions in *Hernandez Bonilla v Canada (Minister of Citizenship and Immigration)*, 2007 FC 20 [*Bonilla*] and *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 [*Hassani*]. The Applicant notes that this Court confirmed in *Bonilla*, at para 27 that procedural fairness requires an applicant to be given an opportunity to respond to an officer's concerns when such concerns relate to inferences with respect to the applicant's intent. The Applicant also highlights the fact that this Court found in *Hassani*, at para 24 that an applicant must be given an opportunity to respond to concerns which cannot be said to have come directly from the requirements of the legislation.

(2) Reasonableness of the Officer's Decision

[21] The Applicant submits that the Officer's doubts concerning Ms. Kaur's enrollment in "full-time" studies are unfounded as the evidence points to the contrary. Ms. Kaur's acceptance letter, combined with her recent transcripts showing her enrollment in four classes during the Winter 2019 term, clearly demonstrate that she has continuously been enrolled in "full-time" studies at Bow Valley College.

[22] The Applicant states that it is trite law that an officer must consider critical evidence that contradicts their findings (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35 at para 17). The Applicant therefore argues that the Decision was unreasonable as it failed to consider significant evidence that contradicted the Officer's findings concerning Ms. Kaur's "full-time" enrollment at Bow Valley College.

B. *Respondent*

[23] The Respondent submits that the Decision: (1) did not breach the Applicant's right to procedural fairness as the Officer was under no obligation to provide him with the opportunity to address the insufficient evidence submitted; and (2) was reasonable as it simply applied the Program Delivery Initiative for s 205(c)(ii). Consequently, the Respondent asks this Court to dismiss this application for judicial review.

(1) Breach of Procedural Fairness

[24] The Respondent submits that the Officer was not required to provide the Applicant with an opportunity to respond to their concerns as it is well established that the onus is on an applicant to provide sufficient evidence to demonstrate that they meet the requirements to obtain a work permit (*Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at paras 10-11).

[25] In this case, the Officer reviewed the documents provided and concluded that they did not sufficiently demonstrate that Ms. Kaur remained enrolled as a "full-time" student at Bow Valley College. The Officer did not ground this Decision in a credibility finding or any finding concerning the Applicant's intent. Instead, the Decision was grounded in the requirements stated in the relevant Program Delivery Initiative.

(2) Reasonableness of the Officer's Decision

[26] The Respondent argues that the Decision was reasonable as it clearly applied the relevant Program Delivery Initiative for s 205(c)(ii) which states that a foreign national may be eligible for a work permit if they establish that they are the spouse or the common-law partner of a "full-time" student at, notably, a public post-secondary institution. The Respondent notes that the Program Delivery Initiative is binding on the reviewing officer who cannot issue a work permit unless they are satisfied that the requirements have been met.

[27] In this case, the Respondent argues that the Officer's determination was entirely reasonable as Ms. Kaur's transcripts are silent regarding her current enrollment status and clearly

indicate that she decreased her course load following the Winter 2018 term. As such, the Officer could not determine whether the Applicant fulfilled the requirements of the Program Delivery Initiative for s 205(c)(ii).

VIII. ANALYSIS

[28] There are no procedural fairness issues in this case. As the Decision shows, the work permit was refused for one reason:

> No letter of FT enrollment provided by Bow Valley College for [the Applicant]'s spouse. [The Applicant] has been unable to adequately demonstrate that he meets the requirements of a spousal open work permit under section 205(c)(ii) of the Regulations. Refused.

[29] The Officer's reasons and concerns arise directly and obviously from the requirements of the *IRPA* and the *Regulations*. The jurisprudence of this Court is clear that an officer is under no obligation to put these concerns to an applicant. See *Hassani*, at para 24.

[30] The Applicant says that he provided the Officer with all the necessary information to satisfy the *IRPA* and the *Regulations*. The Officer clearly did not question the enrollment of Ms. Kaur at Bow Valley College, as the Applicant alleges. The sole issue was whether she continued to be enrolled as a "full-time" student at, in this case, a public post-secondary institution, as required by s 205(c)(ii) of the *Regulations*.

[31] The Applicant does not say that he provided a current letter of "full-time" enrollment from Bow Valley College. There is a reference to "full-time" status on Ms. Kaur's

January 26, 2017 letter of acceptance, but it is possible to see from the record what the Officer's concern was: that Ms. Kaur's current transcript did not indicate that her current enrollment was "full-time" but instead indicated that she had decreased her course load following the 2018 Winter term. Quite reasonably then, without some kind of a current confirmation of "full-time" enrollment, the Officer would not know if Ms. Kaur continued to be enrolled "full-time." There was no evidence as to what Bow Valley College regarded as "full-time" and Ms. Kaur's transcripts do suggest at least some change in course load. Consequently, the Officer's concerns are not without some basis.

[32] Counsel's submissions to the Officer do not make it clear that Ms. Kaur remained a "full-time" student, and I do not think it can be said that the Officer made the provision of a current enrollment letter into a visa requirement. It was the initial letter that established "full-time" enrollment for Ms. Kaur, so the Officer is simply suggesting that more recent evidence of "full-time" enrollment would be available and there is nothing to suggest a further letter could not have placed the matter beyond doubt.

[33] Ms. Kaur's visa cannot be evidence that she continues to be "full-time." If it did, then the Applicant would have needed no other evidence.

[34] There is also nothing to suggest that the Officer should be assumed to know the requirements for "full-time" enrollment at Bow Valley College.

[35] I agree with the Applicant that it would not have been unreasonable for the Officer to accept the evidence submitted, but the Officer's doubts are not without substance and I cannot say the Decision was unreasonable. This is essentially a matter of what weight to give to the evidence.

[36] The Applicant's obligation is to provide all the evidence required to satisfy the governing *Regulations*, and the Applicant failed to do so in this case. See *Belen v Canada (Citizenship and Immigration)*, 2019 FC 1175 at para 11 and *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at paras 22-23. The governing Program Delivery Initiative for s 205(c)(ii) makes it clear that applicants must be the "spouse or common-law partner of a study permit holder who is a full-time student […]."

[37] The fact that Ms. Kaur may have been a "full-time" student in the past does not mean that she was at the time of the Applicant's application for an open work permit, and that is the operative date when the application was assessed.

[38] The Officer weighed the evidence submitted and concluded that there was some doubt as to the "full-time" status of the Applicant's spouse. There was a reasonable basis for this doubt, and the Court is not in the business of re-weighing evidence. See *Vavilov* at para 125 and *Oladihinde v Canada (Citizenship and Immigration)*, 2019 FC 1246 at para 16.

[39] Overall, I cannot say that the Decision was procedurally unfair or unreasonable.

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

JUDGMENT IN IMM-2321-19

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

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