Federal Court Cour fédérale

Date: 20200612

Docket: IMM-5111-18

Citation: 2020 FC 687

Ottawa, Ontario, June 12, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

SUKHMANDEEP SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Sukhmandeep Singh, seeks to overturn a decision of a border services officer (the Officer) that denied his application for a Post Graduate Work Permit (PGWP). The Officer refused the application because he found that the Applicant had worked without authorization. The Applicant says that this was unreasonable, because under the terms of the Respondent's policies, he was allowed to work. The Applicant argues that the Officer failed to account for all of the evidence, and misinterpreted the relevant policies.

[2] There is a debate about the admissibility and weight of certain evidence filed by both parties in this matter concerning the key events that lead to the decision. The parties also disagree about whether the decision is unreasonable.

[3] For the following reasons, I find that some of the Applicant's evidence is inadmissible, and that a smaller portion of the Respondent's evidence should be given limited weight. I find that the decision is reasonable, given the evidence before the Officer and the relevant legislative and policy framework that applied to this case.

I. Background

[4] The Applicant is a citizen of India. He has studied in Canada since 2016, first at Cambrian College of Applied Arts and Technology in Sudbury, Ontario, in a program he completed in April 2017, and then at the University of Manitoba in a program that ran from September 2017 to September 2018. He had obtained study permits to authorize him to pursue his education in Canada, and the last of these was valid until December 31, 2018.

[5] On September 4, 2018, the Applicant received two letters dated August 31, 2018 (hereafter referred to as the August 31 Letters), from the University of Manitoba, indicating that he had successfully completed all of the requirements for his two certificates and that his official graduation date would be October 16, 2018.

[6] On October 9, 2018, the Applicant went to the Port of Entry at Emerson, Manitoba, to apply for a PGWP. He was interviewed by a border services officer with the Canada Border Services Agency, who refused his application. The Officer's notes indicate that the Applicant

stated that he had worked after being advised that he had completed his studies, and that he had not enrolled in any other program or continued to study at any other institution. The notes also state that the Applicant had been working up to the date of the interview, October 9, 2018. Because he had been working without authorization, the PGWP was refused. The Applicant was given 10 days to depart Canada.

[7] The Applicant seeks judicial review of this decision.

II. Issues and Standard of Review

[8] There are two issues in this case:

A. What evidence is inadmissible in this application?

B. Was the Officer's decision reasonable?

[9] The standard of review that applies to the Officer's determination of eligibility for a PGWP is reasonableness. This was determined by previous case law (*Komljenovic v Canada (Citizenship and Immigration)*, 2018 FC 460 at para 17, citing *Osahor v Canada (Citizenship and Immigration)*, 2017 FC 666 at para 11), and is consistent with the guidance in the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[10] In view of paragraph 144 of *Vavilov*, there is no reason to request additional submissions from the parties on either the appropriate standard or the application of that standard. This case is similar to the situation in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, where the Supreme Court stated at paragraph 24 that it was not unfair to decide a case

applying the *Vavilov* framework when it had been argued under the *Dunsmuir* approach (*Dunsmuir v New Brunswick*, 2008 SCC 9), because the results would be the same under both frameworks.

[11] When reviewing for reasonableness, the Court asks "whether the decision 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). It must be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85).

[12] Based on this framework, a decision will likely be found to be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision-maker's reasoning on a critical point (*Vavilov* at para 103). The burden is on the applicant to show that the decision is unreasonable (*Vavilov* at para 100):

> Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[13] The *Vavilov* framework "affirm[s] the need to develop and strengthen a culture of justification in administrative decision-making" by endorsing an approach to judicial review that is both respectful and robust (*Vavilov* at paras 2, 12-13).

III. Analysis

A. *What evidence is inadmissible in this application?*

[14] Both parties argue that the other's affidavits are inadmissible, in whole or in part. I will consider each claim in turn before analyzing whether the Officer's decision was reasonable.

(1) Applicant's evidence

[15] The Respondent argues that some of the material filed by the Applicant was not before the Officer, and it is therefore not admissible on an application for judicial review. In particular, the Respondent points to exhibits to the Applicant's affidavits, as well as the affidavit he submitted from the friend for whom he worked. Essentially, the material in question relates to when the Applicant says he worked for his friend, as well as information from the University of Manitoba that the Applicant obtained after the Officer made his decision.

[16] The Applicant argues that this information should be admitted because the Respondent's affidavits call into question his credibility, and that he should be permitted to file further evidence to address this issue. The Applicant argues that this is similar to the recognized exception that allows further evidence to be provided to deal with allegations of procedural unfairness. The Applicant does not point to any case law which supports this argument, but submits that it should be accepted as a matter of first principles.

[17] I am not persuaded. The jurisprudence is clear that subject to certain limited exceptions, none of which apply here, an application for judicial review of the merits of an administrative decision is to be determined on the basis of information that was before the decision-maker, and

neither party is permitted to file supplementary information to bolster their case (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*]). The Applicant cannot bring forward new information that he should perhaps have provided to the original decision-maker. Equally, the Respondent is not permitted to provide information from the decision-maker that should perhaps have been included in the original decision.

[18] In this case, the Applicant submits that the new evidence should be admitted to enable him to answer a challenge to his credibility that flows from the Respondent's evidence. There are several answers to this. First, some of the evidence was submitted prior to the Respondent's affidavit, and thus is not an answer to a credibility challenge. Second, to the extent credibility is in issue in this matter, which is discussed below in the context of the specific evidence insofar as it relates to the reasonableness of the decision, the new information is not particularly persuasive or useful. It does not assist the Court in carrying out its role on judicial review.

[19] In *Access Copyright*, the Federal Court of Appeal grounded its analysis in "the different roles played by judicial review courts and the administrative decision-makers they review" (at para 14). This is consistent with the approach of the Supreme Court of Canada in *Vavilov* (see paras 13-28). One of the main differences is that the reviewing court is not to become a fact-finder standing in the place of the original decision-maker. To the extent that credibility is relevant to a case, that determination is generally within the sole and exclusive purview of the administrative decision-maker (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319). To the extent that the credibility of an affiant in a judicial review is in issue, it can be assessed by

considering the evidence in its totality, in particular the transcript of any cross-examination on the affidavit.

[20] It is not necessary to rule on the argument raised by the Applicant that where credibility is in issue a further exception should be recognized, because I find that the new evidence is not particularly useful in considering the credibility of the Applicant. As noted previously, it does not otherwise fit into one of the existing exceptions set out in *Access Copyright*.

[21] In this case, therefore, I find the following evidence put forward by the Applicant to be inadmissible: Exhibits “G,” “J,” and “K” to the Applicant’s Affidavit of January 3, 2019; Exhibit “A” to the Applicant’s Affidavit of May 2, 2019; and the entire affidavit of Sahil Sharma of May 2, 2019, including Exhibits.

[22] There are other arguments relating to certain aspects of the Applicant’s evidence, which are more convenient to deal with in consideration of the reasonableness of the Officer’s decision.

(2) Respondent’s Evidence

[23] The Applicant submits that certain statements in the Officer’s affidavits go beyond what is reflected in his notes, and amount to an attempt to “bootstrap” his reasons by adding to them through these affidavits. In particular, the Applicant points to the Officer’s statement that during the interview, the Applicant “verbally confirmed to me several times that he continued to work up to and including October 9th, 2018.” In addition, the Applicant notes the Officer’s statement that once he was advised that his application for a PGWP was being denied because he had worked in contravention of the rules, the Applicant became upset and changed his story, stating that “he didn’t work.”

[24] The Applicant points out that these statements are not reflected in the Officer's notes, and they amount to an attempt to bolster the Officer's reasons. This is not permitted: *Seemungal v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 524 at para 21 [*Seemungal*], and *Abdullah v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185 at paras 12-15 [*Abdullah*]).

[25] The Respondent accepts that it is not permissible for an Officer to seek to bolster or correct a decision on judicial review, but argues that in this case the Officer's affidavits simply provide context and explain the reasoning, which is permitted (*Pompey v Canada (Citizenship and Immigration)*, 2016 FC 862 at paras 25 and 32; *Kalra v Canada (Minister of Citizenship and Immigration)*, 2003 FC 941 at para 15 [*Kalra*]. The Respondent notes that the Officer's affidavits simply seek to explain what transpired during the interview and do not seek to add to the reasons for denying the PGWP as set out in the Officer's notes.

[26] I find that while some statements in the Officer's affidavits do go beyond what is reflected in the notes, this does not render all of the Officer's evidence inadmissible. Unlike the situation in the decisions cited by the Applicant, in this case the Officer's affidavits do not seek to correct or supplement the decision under review. Rather, they seek to provide further elaboration on what happened during the interview without altering or adding to the analysis or conclusion.

[27] I agree with the Applicant that the Officer's affidavits do contain some new and additional information beyond that reflected in the notes, and in particular the Officer's reference to the Applicant's repeated statements that he worked up to October 9, 2018, and that the

Applicant changed his story during the interview. Both of these statements amount to new facts and are not permissible. For that reason, I will give these aspects of the affidavits no weight.

[28] However, I find that the affidavits are otherwise admissible. The Officer explains his note-taking process, including the fact that he types his handwritten notes into his computer, and then transfers them to the Respondent's Global Case Management System (GCMS). He also explains that since he cannot print records from that system, he copied them back into a document on his computer, in order to produce the notes that were submitted as part of the record for the judicial review. These explanations do not attempt to bolster or otherwise improve the decision that is under review. This case can be distinguished on its facts from *Seemungal* and *Abdullah*, cited by the Applicant. The situation in this case is similar to that in *Kalra*, where it was found that an Officer's affidavit may be used to "elaborate on the information found in [the] notes" (at para 15).

[29] Based on this analysis, I will ignore the specific additional information contained in the Officer's affidavits, but will otherwise not exclude these affidavits. As noted previously, there is a stark contradiction in the evidence about what transpired during the interview, which will be addressed in the next section during the analysis of the merits of the decision.

B. *Was the Officer's decision reasonable?*

[30] The Applicant argues that the decision is unreasonable on two main grounds: (i) he denies telling the Officer that he worked up to October 9, 2018, and argues that his evidence should be preferred to that of the Officer; (ii) the Officer misinterpreted the law about whether

the Applicant was allowed to work during the relevant period, and therefore his conclusion that the Applicant was not authorized to work is unreasonable.

(1) Should the Applicant's evidence be preferred to that of the Officer?

[31] On the first question, there is a contradiction in the evidence before the Court. The Applicant states that he has confirmed that he only worked on September 8 and 9, 2018. He indicates that during the interview he told the Officer that he could not recall the exact dates in September when he worked, but that it was approximately one month before the interview (which occurred on October 9, 2018). This aspect of the Applicant's narrative is reflected in the following statement from his affidavit of January 3, 2019:

> 14. The Border Services Officer interviewed me and asked me if I worked during the duration of my studies, to which I replied that I did not have a part time job and I worked a few delivery shifts for my friend Sahil who was employed by Skip the Dishes. The BSO then questioned me on my current situation, if I had worked. I answered that I recently completed my class one licence training to work as a truck operator in order to line up a trucking job… I further responded to the officer that I had worked a couple of shifts for Sahil as a Skip the Dishes delivery driver in September. I told the officer that I could not recall the exact dates from memory. The reason for this was because the shift information was on Sahil's account. The officer responded: "Maybe you worked for them yesterday?" I responded no and that I could not remember the exact dates but it was from a month ago. The officer did not believe me and advised me that I was not permitted to work after the completion of my studies…

[32] In cross-examination, the Applicant confirmed that he told the Officer he could not recall the exact dates when he worked, and that he was not sure whether it was before or after he received his official transcripts on September 20, 2018. He continued to deny telling the Officer that he had worked up to the time of the interview.

[33] In contrast, the Officer's notes indicate that the Applicant stated he had worked up to the date of the interview, October 9, 2018, and this is confirmed in the Officer's affidavit. In cross-examination, the Officer was asked whether he would have specifically recorded in his notes that the Applicant had stated that he worked on October 9, but before he answered the question the Applicant's counsel asked for a short break and then ended the cross-examination.

[34] The Applicant contends that his evidence should be preferred over that of the Officer, and he points to a number of difficulties with the way in which the Officer prepared the notes that appear in the record. The Applicant argues that the notes do not purport to be a verbatim account of what was said during the interview, nor a summary of the questions and answers asked; rather, they simply summarize the Officer's analysis and conclusions. Therefore, the notes should be discounted as evidence of what actually transpired during the interview. Much of the cross-examination of the Officer was taken up with this question, and it was pursued in oral argument. It forms the basis of the Applicant's argument that his evidence should be given more weight than that of the Officer.

[35] I am not persuaded.

[36] First, the Officer's description of how he normally takes his notes and puts them into the GCMS system provides no basis to question their overall accuracy. The Officer indicated that he makes handwritten notes during an interview, which he then transfers into a Word document. Because the GCMS system is programmed to "time out" after a period of time, he does not enter his notes directly into it. Once he has completed the Word document, he simply copies it into the GCMS system. When he was required to produce the notes as part of the record for the application for judicial review, the Officer copied the GCMS notes back into a Word document,

because he cannot print the notes directly from the GCMS system. None of this casts doubt on the accuracy of the notes.

[37] Second, the Officer did not purport to prepare verbatim notes, but rather sought to capture the essential points from the interview with the Applicant. This is not the form in which other similar notes are sometimes prepared, but that in itself is not an indication of unreliability. While it may be more advisable for interview notes to track more closely the questions asked and answers provided, the fact that these particular notes are not structured in this way is not a basis to prefer the Applicant's narrative over the Officer's.

[38] Third, the Officer's evidence is consistent that the notes were prepared contemporaneously with the interview and that they accurately reflect what the Applicant told him during the interview. As will be described in more detail below, the notes reflect the Officer's analysis of the facts having regard to the applicable law and policies, and they capture the key points.

[39] The jurisprudence of this Court is that an Officer's notes are generally to be given significant weight, because they reflect the contemporaneous record of the interaction by a trained officer with no vested interest in the outcome (see the summary of the case law in *Waked v Canada (Citizenship and Immigration)*, 2019 FC 885 at para 22).

[40] Furthermore, I agree with the Respondent that the Applicant's efforts to cast doubt on the Officer's evidence has been done in a manner which is unfair because it did not respect the rule in *Browne v Dunn* (1893), 6 R 67 (UK HL). In brief, this rule provides that if a party wishes to undermine the credibility of a witness by introducing contradictory or inconsistent evidence, that

party should bring that other evidence to the witness' attention during cross-examination (see *Bokhari v Canada (Citizenship and Immigration)*, 2011 FC 354 at para 27). The Applicant did not do this during the cross-examination of the Officer, and this undermines his efforts to call into question the Officer's evidence.

[41] Turning back to the evidence in this case, the Officer's notes and cross-examination confirm that the Applicant stated he had worked up to the time of the interview on October 9, 2018. There is no dispute about the other findings of the Officer, namely that the Applicant had received two letters dated August 31, 2018, from the University of Manitoba stating that he had completed his studies, and he had not enrolled in other classes or another program of study.

[42] I prefer the Officer's evidence to that of the Applicant, and am not persuaded by the Applicant's attempts to cast doubt on the reliability of this evidence.

[43] This is sufficient to dispose of the case, because the Applicant agreed that if he had worked after he received his transcripts, the Officer's conclusion would be unassailable. However, in light of the arguments that were advanced on the second issue, I will address it in the following section.

(2) Is the Officer's interpretation of the relevant law and policy unreasonable?

[44] The crux of the Applicant's argument on this point is that he was still technically "enrolled" in his program of study when he worked, and that the Officer misinterpreted the law that governed the situation. This makes the decision unreasonable.

[45] The Applicant argues that he was still entitled to work after he received the August 31 Letters. The Respondent's "Off-campus work and completion of a program of studies" policy (the Off-Campus Work Policy) provides that a student may work part-time off campus during the period after the end of classes and exams, and prior to receiving written confirmation of program completion from their institution. There are other requirements, but none is relevant here. The Applicant submits that the Officer erred in concluding that he had worked without authorization. The core of the argument is set out in the following passage from the Applicant's Further Memorandum of Fact and Law:

> With respect to the officer's reasons that the Applicant worked without authorization, the Applicant provided to the officer a copy [of] his official transcripts dated September 20, 2018. It is submitted that the official University of Manitoba transcript is the written confirmation of program completion that made the Applicant eligible to receive a post-graduate work permit and it is that same document that disentitled the Applicant to work part time by notifying him that he had completed his program. The August 31 letters by themselves on its [*sic*] face does not entitle the Applicant to a post-graduation work permit and cannot be construed as program completion letters.

[46] The Applicant argues that he was still enrolled in his program after he received the August 31 Letters. He points to the letter from the University of Manitoba dated March 15, 2018, which indicates that he is registered in a full-time program of Applied Human Resource Management "beginning on September 18, 2017, through to September 14, 2018." He argues that this is proof that he was still "enrolled" in a program of full-time study when he worked and therefore the Officer's finding that he worked without authorization is not reasonable.

[47] The Applicant contends that the Officer erred by failing to consider paragraph 186(v) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*], which

sets the rules governing work by holders of student visas. There is no reference to this provision in the Officer's notes, and no indication that the Officer applied it. The *Regulations* must govern, and any policy that is inconsistent with them must not be given effect.

[48] In addition, the Applicant contrasts the detailed and specific program completion letter he received from Cambrian College with the short and general wording of the August 31 Letters from the University of Manitoba. He argues that it was unreasonable for the Officer to find that the August 31 Letters were the type of program completion notification referred to in the Off-Campus Work Policy.

[49] The Respondent submits that the question before the Court is not whether the Officer's interpretation of the rules was correct, but rather whether it was reasonable, since this involves the Officer's interpretation of his home statute (in this case, the *Regulations*) and the policy guidance that has been provided to assist officers in administering the law. The Respondent argues that the Officer in this case applied the right policy and rules and that his interpretation of them, as well as his consideration of the facts, was reasonable.

[50] I am not persuaded by the Applicant's arguments on this point. The Officer's interpretation of the relevant policy is reasonable, and his reasoning process is clear from the decision.

[51] The Officer's conclusion is based on two main findings: (i) the Applicant had worked without authorization after receiving confirmation from the University of Manitoba that he had completed his program of studies; and (ii) pursuant to subsection 200(3) of the *Regulations*, a PGWP could not be issued because the Applicant had engaged in unauthorized work.

[52] On the question of whether the Applicant had worked without authorization, the Officer was required to consider paragraph 186(v) of the *Regulations*. However, the Officer was also entitled to consider the Off-Campus Work Policy, which provides:

> Students may work off campus on a part-time basis if the following applies:
>
> - they meet the eligibility criteria to work off campus [R186(v)]
> - they have completed the final academic requirements for their program of study but have not yet received written confirmation of program completion from their institution (for instance, a transcript, an official letter or an email)
> - they have not applied for a work permit (for instance, a post-graduate work permit…) or a study permit extension or enrolled in a subsequent program of study
>
> **They may work until the first day they receive written confirmation of program completion from their educational institution** (for instance, an email, a letter, a transcript **or** a diploma), provided their study permit remains valid during this period…
>
> **Once a student receives written confirmation of program completion from their institution, they are no longer authorized to continue to work in Canada, as they no longer meet the eligibility criteria in paragraph R186(v).** They should apply to change their status (for instance, to visitor status) or leave Canada before their study permit becomes invalid as per section R222
>
> [Emphasis in original.]

[53] The Officer's notes reflect the analysis required by the Off-Campus Work Policy. The Officer found that the August 31 Letters received by the Applicant constituted written confirmation of program completion, and the Applicant admitted that he had worked subsequent to receiving these letters. Therefore, he had worked without authorization.

[54] The Applicant disputes this finding, and points to the fact that he did not think that the August 31 Letters were sufficient to meet the requirements to obtain a PGWP. Therefore, he waited until he had received his transcripts to go to the border to apply. His argument conflates the two programs, and draws a connection between them that does not exist. Whether the August 31 Letters were sufficient to permit the Applicant to qualify for the PGWP is a question I do not need to decide, and it is not relevant to the determination of whether he had worked without authorization as a student visa holder. The Officer did not err in focusing his analysis on the specific policy that did govern that question, given the particular circumstances of the Applicant. The Off-Campus Work Policy addresses the requirements and limitations on student work during the period after the end of classes and exams and prior to receiving confirmation of program completion. That is precisely the situation the Applicant was in during the relevant period.

[55] I find that the Officer's factual determination that the August 31 Letters constituted notice to the Applicant that he had completed his program of study is reasonable. The relevant part of the first letter states: "I am pleased to inform you that Continuing and Professional Studies, Extended Education at the University of Manitoba has determined that you have completed all of the requirements for the following; **Certificate: Human Resource Management**" (emphasis in original). The second letter indicates that the Applicant had "completed all of the requirements" for "**Letter of Accomplishment: Career Success in Canada**" (emphasis in original).

[56] The August 31 Letters provide other information about when the certificate parchment will be available and that the transcript "will reflect that you have graduated only after your

official graduation date." This does not, however, cast any doubt on the earlier confirmation that the Applicant had successfully completed his programs.

[57] The Officer's notes make clear that he considered these letters in the context of the Off-Campus Work Program requirements, and concluded that the Applicant had "received written confirmation of program completion from their institution (for instance, a transcript, an official letter or an email)." This is a reasonable conclusion.

[58] The fact that Cambrian College has provided a differently worded letter to signal program completion to the Applicant does not make the Officer's finding unreasonable. Indeed, the Off-Campus Work Policy indicates that confirmation of program completion may take the form of a letter, an e-mail, or an official transcript. The key is what is conveyed by the document, and in this case there can be no doubt that the August 31 Letters confirmed to the Applicant that he had successfully completed his program. Under the terms of the Off-Campus Work Policy, this disentitled him to work until he obtained another status in Canada.

[59] The Officer's conclusion that the Applicant had worked subsequent to receiving confirmation of program completion is reasonable. It is supported in the law and the evidence, and the Officer's reasoning is adequately explained, even if the reasons are not lengthy or detailed. The reasons must be examined in the context of the administrative setting in which they were given (*Vavilov* at paras 91-98). In the circumstances of an application for a work permit made at a border crossing, the reasons are adequate.

[60] There was no challenge to the Officer's conclusion that the PGWP could not be issued because the Applicant had contravened paragraph 200(3)(e) of the *Regulations* and, in any event, the Officer's findings are unassailable in view of the wording of that provision.

IV. Conclusion

[61] For these reasons, this application for judicial review is dismissed.

[62] There is no question of general importance for certification.

JUDGMENT in IMM-5111-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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