

Federal Court



Cour fédérale

Date: 20210503

Docket: IMM-4926-19

Citation: 2021 FC 392

Ottawa, Ontario, May 3, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MUHAMMAD ASGHAR ALI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Migration Officer [Officer] of the High Commission of Canada located in London, UK [Commission] dated July 20, 2019 [Decision]. The Officer refused the Applicant's application for permanent residence as a nominee of the Manitoba Provincial Nominee Program.

I. Facts

[2] The Applicant is a citizen of Pakistan. In February 2016, he submitted an application to the Manitoba Provincial Nominee Program [MPNP] and on January 28, 2017, he received his nomination as “manufacturing manager.”

[3] He then submitted an application for permanent residence under the provincial nominee class to Immigration, Refugees and Citizenship Canada as represented by the Commission. His application included documents attempting to show he would become economically established in Canada.

[4] On February 5, 2018, the Officer sent a procedural fairness letter [Letter] to the Applicant and the Province of Manitoba. The Letter stated that although the Officer was aware the Applicant had been nominated by the MPNP, the Officer was not satisfied he had the ability to become economically established in Canada. The Letter advised “it also appears reasonable to expect that to carry out the tasks of a manager in Canada would require an advanced level of English language proficiency. As already indicated, your demonstrated English language proficiency is at only a basic to intermediate level.” The Letter stated the Applicant could provide further information within 90 days.

[5] A copy of the Letter was also sent to the provincial authorities in Manitoba with an additional paragraph inviting Manitoba to respond to the concerns raised in the Letter within 90 days.

[6] On May 3, 2018, the Applicant replied to the Officer's Letter explaining he had the ability to become established because he had experience in the job type, had relatives in Canada and was trying to take the International English Language Testing System [IELTS] exam again but struggling to get time away from work.

[7] On February 25, 2019, the Applicant submitted a new IELTS score to the Officer, which moved his average score from 4.5 to 5.0.

II. Decision under review

[8] On July 30, 2019, the Officer determined the Applicant did not meet the requirements for an application for a permanent residence visa as a member of the provincial nominee class because the Officer was not satisfied the Applicant would become economically established in Canada.

[9] The Officer concluded the Applicant could not properly perform the intended occupation of a manufacturing manager with an IELTS score of 5.0 and said it would be reasonable to expect a higher level of language ability. The Officer said although the Applicant appeared to have applied for jobs, there was insufficient evidence to show the Applicant had received an offer of employment or any interest as a prospective candidate. The Officer found the updated IELTS results did not show the Applicant's language abilities had improved significantly and they were lower than the advanced level set out in the Letter. He also said, apart from the updated IELTS results, the Applicant could not explain how he might become economically established with the level of English language proficiency he demonstrated.

[10] Subsection 87(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227

[*Regulations*] states an Officer may substitute its decision:

Provincial Nominee Class	Candidats des provinces
Class	Catégorie
<p>87 (1) For the purposes of subsection 12(2) of the Act, the provincial nominee class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada.</p>	<p>87 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des candidats des provinces est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada.</p>
Member of the class	Qualité
<p>(2) A foreign national is a member of the provincial nominee class if</p> <p style="margin-left: 2em;">(a) subject to subsection (5), they are named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister; and</p> <p style="margin-left: 2em;">(b) they intend to reside in the province that has nominated them.</p>	<p>(2) Fait partie de la catégorie des candidats des provinces l'étranger qui satisfait aux critères suivants:</p> <p style="margin-left: 2em;">a) sous réserve du paragraphe (5), il est visé par un certificat de désignation délivré par le gouvernement provincial concerné conformément à l'accord concernant les candidats des provinces que la province en cause a conclu avec le ministre;</p> <p style="margin-left: 2em;">b) il cherche à s'établir dans la province qui a délivré le certificat de désignation.</p>
Substitution of evaluation	Substitution d'appréciation
<p>(3) If the fact that the foreign national is named in a certificate referred to in paragraph (2)(a) is not a</p>	<p>(3) Si le fait que l'étranger est visé par le certificat de désignation mentionné à l'alinéa (2)a n'est pas un</p>

sufficient indicator of whether they may become economically established in Canada and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.	indicateur suffisant de l'aptitude à réussir son établissement économique au Canada, l'agent peut, après consultation auprès du gouvernement qui a délivré le certificat, substituer son appréciation aux critères prévus au paragraphe (2).
---	--

III. Issues

[11] The only issue in this application is whether the Decision is reasonable.

IV. Standard of Review

[12] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] Justice Rowe said that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in certain situations, none of which apply in this case. Therefore, the Decision is reviewable on a standard of reasonableness.

[13] In *Canada Post*, Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

[31] A reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”

(*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov*, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100).

[14] The Supreme Court of Canada in *Vavilov*, at para 86 states “it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies.” The reviewing court must be satisfied the decision maker’s reasoning “adds up”:

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of

academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[15] Furthermore, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances":

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[Emphasis added]

V. Analysis

[16] The Applicant submits the Officer's conclusion was beyond his mandate. The MPNP already concluded the Applicant had been economically established in Canada and that is why it issued a positive nomination to the Applicant. The Applicant submits the Officer's mandate was only to ensure the Applicant had presented authentic documents and to do the necessary background checks.

[17] With respect, this is not an accurate summary of the responsibilities of an Officer acting under the provisions of the *Regulations* outlined above: see *Haider v. Canada (Citizenship and Immigration)*, 2018 FC 686 [Strickland J]:

[29] As a starting point I note that s 12(2) of the IRPA designates a category of permanent residents as, “economic class on the basis of their ability to become economically established in Canada.” Section 87 of the *IRP Regulations* states that a foreign national is a member of the provincial nominee class when they are named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister, and, they intend to reside in the province that has nominated them. However, under s 87(3), if the fact that the foreign national is named in a certificate is not a sufficient indicator of whether they may become economically established in Canada, and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria (certificate of nomination and intent to reside in the subject province) their own evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.

[18] The Applicant submits the Officer did not consult with provincial authorities. There is no merit to this submission. First of all, the Officer states in the Decision they had consulted with Manitoba, and indeed that is the case. The Officer had copied the procedural fairness Letter to the provincial authorities in Manitoba. In addition, it was not simply a “cc” letter, rather the last full paragraph was specifically addressed to the provincial authorities in Manitoba. The Officer drew their attention to what was taking place, and gave the Province 90 days to respond to the Letter. The Province decided not to respond; however, in my view it could have. In my view, the Province was duly consulted in the circumstances.

[19] The Applicant submits the Officer “for some unknown reason, in a perverse and capricious manner” decided to reconsider the Applicant’s eligibility. The Applicant submits

unless the Officer found information showing the Applicant lied or mislead the MPNP, there was no need for a re-assessment. I disagree. At issue, as known to the Applicant from the procedural fairness Letter, were his English language skills in relation to the job requirements for a manufacturing manager. These requirements are set out in a National Occupational Classification [NOC], the relevant portions of which are set out in the Officer's notes:

Nominated occupation is manufacturing manager. Indicated intended occupation is manufacturing manager. PA. indicates experience as production manager with a textile company since 2005. Main duties of manufacturing manager as per NOC: Manufacturing managers perform some or all of the following duties: Plan, organize, direct, control and evaluate the operations of manufacturing establishment or the operations or production department of a manufacturing establishment · Develop and implement plans to efficiently use materials, labour and equipment to meet production targets Plan and manage the establishment of departmental budget · Develop production schedules and maintain an inventory of raw materials and finished products Plan and implement changes to machinery and equipment, production systems and methods of Work Direct quality control inspection system and develop production reporting procedures. · Develop equipment maintenance schedules and recommend the replacement of machines · Hire, supervise and train or oversee training of employees in the use of new equipment or production techniques. Demonstrated English language proficiency does not appear sufficient for PA to become economically established.

[Emphasis added]

[20] This information was conveyed to the Applicant in the procedural fairness Letter which said, in part:

The ability to communicate effectively in one of Canada's official languages is recognized as a vitally important factor in becoming economically established, information on the Immigrate Manitoba website also confirms that Nominees are expected to have the "demonstrated ability to get a job in their occupation and establish in the local labour market, thereby making an immediate economic contribution to the province" and that "job-ready English" is now

required to apply to immigrate through the Manitoba Provincial Nominee Program.

Your language scores equate to a Canadian Language Benchmark (CLB) 5 for reading and for writing, and CLB 4 for listening and for speaking. The CLBs are organized into three stages, Stage I Basic (CLB 1-4), Stage II Intermediate (CLB 5-8), and Stage III Advanced (CLB 9-12). Your language test scores indicate your English language proficiency may be described as basic in reading and writing, and intermediate in listening and speaking. Critical in determining your ability to economically establish is a comparison of your information with the requirements of the occupation indicated in your nomination. The occupation in which you have been nominated by Manitoba is manufacturing manager. The occupation which you indicate you intend to pursue in Canada is manufacturing manager. You indicate experience as a production manager.

The duties of a manufacturing manager may include planning, organizing, directing, controlling, and evaluating the operations of a manufacturing business, as well as hiring, supervising, and training of employees. Managing and training staff and developing and planning, directing, and evaluating operations are duties which it would appear to be reasonable to expect of any management or assistant management level job. It also appears reasonable to expect that to carry out the tasks of a manager (*sic*) in Canada would require an advanced level of English language proficiency. As already indicated, your demonstrated English language proficiency is at only a basic to intermediate level.

[21] The Applicant also submits his responses to the procedural fairness Letter were not considered. There is no merit in this submission. The Applicant's first response to the Letter did not substantially address the language issue, except to suggest he could be tested by the Officer in an interview. He also said he could try a second round of testing which might improve his marks. Indeed, he did and his score showed an improvement from basic to intermediate. However, he had not achieved the advanced level noted in the Letter.

[22] With respect, the Officer did consider the other submissions advanced by the Applicant in his response, namely experience in the job, and relatives in Canada. While the Applicant is not satisfied with the result of the assessment, in my view the record shows the Officer considered the Applicant's submissions.

VI. Conclusion

[23] In my respectful view, the Officer reasonably exercised discretion pursuant to subsection 87(3) of the *Regulations* to substitute its own evaluation and reject the application. I am also of the view the Decision is transparent, intelligible and justified on this record. It adds up, and there is no fatal error. It is therefore reasonable per *Vavilov* and *Canada Post*. There was no breach of procedural unfairness in terms of the procedural fairness Letter sent to both the Applicant and to Manitoba (Manitoba did not respond to it). Therefore, this application will be dismissed.

VII. Certified Question

[24] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-4926-19

THIS COURT'S JUDGMENT is that this application is dismissed, no question is certified and there is no Order as to costs.

“Henry S. Brown”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4926-19

STYLE OF CAUSE: MUHAMMAD ASGHAR ALI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

**HEARING HELD BY VIDEOCONFERENCE ON APRIL 29, 2021 FROM OTTAWA,
ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)**

JUDGMENT AND REASONS: BROWN J.

DATED: MAY 3, 2021

APPEARANCES:

Robert Gertler FOR THE APPLICANT

Margherita Braccio FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gertler Law Office FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario