Federal Court  Cour fédérale

Date: 20210825

Docket: IMM-7314-19

Citation: 2021 FC 876

Ottawa, Ontario, August 25, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

RAYMOND CHUKWUEMEKE UGBOH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Raymond Chukwuemeke Ugboh is a Nigerian citizen who applied for permanent residency as a skilled worker. Immigration, Refugees and Citizenship Canada [IRCC] rejected his application on November 29, 2019. The immigration officer [Officer] was not satisfied that the Applicant had provided sufficient evidence to establish that he had at least one year of continuous full-time paid work experience, or the equivalent in continuous paid part-time

work experience in the primary occupation identified in his application, namely, in the National Occupation Classification [NOC] 1114 (Other Financial Officers): subsection 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. The Officer thus was obligated to refuse the application and no further assessment was required: *IRPR* s 75(3).

[2] The Applicant seeks judicial review of the Officer's decision. In my view, the Applicant's several changes to his stated primary occupation in connection with the application process (that is, in respect of his Express Entry profile discussed in greater detail below), resulted in the Officer's finding of insufficiency regarding the evidence the Applicant submitted with his skilled worker application. I therefore am not persuaded that the Officer's decision was unreasonable, nor that there was a breach of natural justice because the Officer did not provide the Applicant with an opportunity to respond to the Officer's evidentiary concerns. For the more detailed reasons that follow, I dismiss the Applicant's judicial review application.

II. Relevant Provisions

[3] See Annex "A" below for relevant legislative provisions.

III. Standard of Review

[4] Reasonableness is the presumptive standard of review that applies to the merits of the Officer's decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. A reasonable decision must be "based on an internally coherent and rational chain of analysis" and it must be justified in relation to the factual and legal constraints

applicable in the circumstances: *Vavilov*, above at para 85. Courts should intervene only where necessary.

[5] To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, above at para 99. The Court must refrain from reassessing and reweighing the evidence before the decision maker; a decision may be unreasonable, however, if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, above at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, above at para 100.

[6] Breaches of procedural fairness in administrative contexts have been considered subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of procedural fairness is context-specific, flexible and variable: *Vavilov*, above at para 77. In sum, the focus of the reviewing court is whether the process was fair and just.

IV. Analysis

(1) *Preliminary Issue – Parties' Affidavit Evidence*

(a) *Applicant's Affidavits*

[7] In support of his application for leave and judicial review, the Applicant filed his affidavit sworn January 7, 2020. This affidavit appends documents that were not part of the certified tribunal record [CTR], namely letters from Union Bank, the Applicant's most recent employer, dated April 4, 2016 (Exhibit C), September 27, 2019 (Exhibit E), and January 6, 2020 (Exhibits B and D). Instead, the CTR contains a sole letter from Union Bank dated January 28, 2019 confirming the Applicant's full-time employment from April 4, 2016 to the date of the letter. His duties and responsibilities were summarized under the headings "Treasury – Fixed Income Trading 4th April 2016 – 7th July 2017" and "Treasury – Asset & Liability Management (Liquidity Management) 10th July 2017 up till now."

[8] The Respondent has not challenged the inclusion of the documents appended to the Applicant's January 7, 2020 affidavit. That said, this additional evidence was not before the Officer and, in my view, does not fall within any recognized exceptions to the general principle of the inadmissibility of material not before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Access Copyright*] at paras 19-20. Accordingly, the documents are not properly before the Court.

[9] The Applicant also filed his further affidavit sworn July 5, 2021. The affidavit was late-filed with the Respondent's consent. At the hearing of this matter, the Respondent commented that Exhibit E, comprised of the February 1, 2019 Confirmation of Nomination by the province of Nova Scotia under its "NS Demand – Express Entry" Stream in NOC 1114 – Other Financial Officers was not before the Officer but nonetheless referred to the document in oral submissions. I find on the whole the Applicant's further affidavit provides useful general background

regarding his NOC choices in his Express Entry profile, and thus falls within a permitted exception to inadmissibility contemplated in *Access Copyright*, above at para 20.

(b) *Respondent's Affidavits*

[10] The Respondent filed the affidavit of Saudia Samad, sworn June 23, 2021, a paralegal at the Ontario Regional Office of the Department of Justice, Immigration Law Division, and the affidavit of Sophie Giroux, sworn June 24, 2021, IRCC Policy Analyst. Together, these affidavits provide information about the Express Entry and Provincial Nominee programs. The Applicant has not challenged these affidavits and, in my view, they provide general background information that might assist the Court in understanding issues relevant to the judicial review, a permissible exception in *Access Copyright*.

(2) *Reasonableness of Officer's Decision*

[11] Although it may seem unfair to an applicant to be invited to apply for permanent residence and then to have the application denied after it is submitted in response to the invitation, I find the applicable legislative and regulatory scheme regarding the Federal Express Entry program contemplates this scenario. For this reason, looking holistically at the Officer's decision, including the Global Case Management System [GCMS] Notes, and the GCMS Information Request: Application report contained in the certified tribunal record and which is extensive in this case, I am unable to conclude that the Officer's decision was unreasonable.

[12] Section 11.2 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] stipulates two points at which an officer must consider whether a foreign national applicant for permanent residence meets the minimum eligibility criteria [MEC] for being invited to make an application and the applicant's ranking (based on qualifications) pursuant to paragraphs 10.3(1)(e) and (h). This assessment must be done not only at the time the invitation was issued but also at the time the application for permanent residence is received. If an applicant's circumstances (including self-declared information on which the assessments are based) change in the interim period, as occurred in this case, then failure to meet the MEC at the second point of assessment, leaves the officer with no choice but to refuse the application, pursuant to the *IRPR* s 75(3) and the *IRPA* s 11.2.

[13] The MEC at issue in this case is at least one year of continuous full-time paid work experience, or the equivalent in continuous part-time work experience in the **primary occupation**, pursuant to the *IRPR* s 75(2).

[14] Under the Express Entry [EE] system, when a foreign national is interested in coming to Canada as part of at least one of three possible economic immigration classes (Federal Skilled Worker [FSW], Federal Skilled Trades Class [FSTC], and Canadian Experience Class [CEC]), the individual must create, as a first step, an online EE profile. It is the responsibility of the individual to ensure the information in their profile is accurate and up-to-date at all times.

[15] Candidates who meet the program requirements of at least one of the economic immigration classes are accepted into the EE pool for up to one year and may be eligible to

receive an invitation to apply for permanent residence, depending on their competitive rankings, and based on the candidates' self-declared information. A candidate's ranking in the EE pool may be enhanced by receiving a nomination pursuant to a Provincial Nominee Program [PNP] in the provincial express entry system. That said, pursuant to section 11.2 of the *IRPA*, the candidate must continue to meet the requirements of one of the three economic immigration classes managed through the EE system.

[16] Turning to the circumstances of this case, the Applicant created his EE profile on October 16, 2018 and declared NOC 1112 as his primary occupation at that time, and declared work experience relating to this NOC. The Applicant updated his EE profile on November 6, 2018, changing his primary occupation to NOC 2133 and similarly, declaring work experience relating to this NOC. The Applicant submitted a provincial nominee application on November 17, 2018 directly to Nova Scotia. The Applicant accepted a nomination from Nova Scotia on February 3, 2019. The Confirmation of Nomination from Nova Scotia lists the Name of Occupation and NOC as "Other Financial Officers, 1114."

[17] On February 20, 2019, IRCC invited the Applicant to apply for permanent residence. His primary occupation still was listed as NOC 2133 in his EE profile at that time (and appeared to meet the one year full-time work experience requirement), while other work experience was listed in NOCs 1112, 1113 and 2110. In other words, notwithstanding the Nova Scotia Confirmation of Nomination in connection with NOC 1114, the Applicant's eligibility to receive an invitation to apply was assessed based on the information in his EE profile, which was his responsibility to update.

[18] The Applicant submitted his permanent residence application on March 24, 2019 and at that time, changed the primary occupation from NOC 2133 to NOC 1114. His declared work experience, however, listed NOCs 1112, 1113, 2110 but there was no declared work experience in relation to NOC 1114. Further, the online information concerning NOC 1114 regarding applicable job titles, main duties, etc., as reproduced in the Applicant's Record, indicates that NOCs 1112 (Financial and investment analysts) and 1113 (Securities agents, investment dealers and brokers) are excluded from NOC 1114. Even though the January 28, 2019 Letter of Reference from the Applicant's employer, Union Bank well may have supported the claimed NOC 1114, the Applicant failed to update his related work experience in his EE profile.

[19] I find that the GCMS Information Request: Application report contained in the CTR captures the above information, concerning the NOCs claimed at various times, and is referred to in the GCMS Notes. In connection with the *IRPA* s 11.2 review conducted following the submission of the Applicant's permanent residence application [eAPR], the GCMS notes state: "PA has not declared employment history under primary NOC at eAPR." I find this statement consistent with the above-described state of the Applicant's EE profile at the time when he submitted his permanent residence application on March 24, 2019.

[20] Because the GCMS notes form part of the reasons for the decision, I thus cannot find that the Officer's decision was unreasonable. As the Supreme Court of Canada instructs, "[t]he reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered": *Vavilov*, above at para 94. This can include considering the evidence before the decision maker, as well as publicly available policies or

guidelines that informed the decision maker's work. Having done so, in my view this "explain[s] an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent [or alleged] shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency": *Vavilov*, above at para 94.

(3) *Breach of Natural Justice*

[21] I find, on the whole, that the Applicant has not established the Officer in this case had a duty to provide the Applicant with an opportunity to address the Officer's evidentiary concerns and thus, has not established that there was any breach of procedural fairness.

[22] There may arise a duty to provide an applicant with the opportunity to respond to concerns in some circumstances, such as where credibility is in question or where the decision maker relies on extrinsic evidence. This Court has held, however, 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": *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24.

[23] Further, there was no duty on the Officer to inform the Applicant that his application was incomplete, nor to give him an opportunity to file all required documents or provide all required information that was missing when he filed his application; the onus was on the Applicant to establish that he met the legal requirements: *Kaur v Canada (Minister of Citizenship and Immigration)*, 2017 FC 180 at para 25.

[24] Here, the Officer found that the documents and information submitted by the Applicant were insufficient to satisfy the applicable legislative requirements. I am not persuaded, therefore, that the Applicant has established the Officer in this case had a duty to provide the Applicant with an opportunity to address their concerns and, therefore, has not established that there was any breach of procedural fairness.

V. Conclusion

[25] For the above reasons, I conclude that the Officer's decision was not unreasonable, and that there was no breach of procedural fairness, in the circumstances.

[26] Neither party proposed a serious question of general importance for certification and I find that none arises in this case.

JUDGMENT in IMM-7314-19

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is dismissed.

2. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A" - Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

Invitation to Make an Application Instructions	**Invitation à présenter une demande Instructions**
10.3 (1) The Minister may give instructions governing any matter relating to the application of this Division, including instructions respecting	**10.3 (1)** Le ministre peut donner des instructions régissant l'application de la présente section, notamment des instructions portant sur :
(e) the criteria that a foreign national must meet to be eligible to be invited to make an application;	**e)** les critères que l'étranger est tenu de remplir pour pouvoir être invité à présenter une demande;
(h) the basis on which an eligible foreign national may be ranked relative to other eligible foreign nationals;	**h)** la base sur laquelle peuvent être classés les uns par rapport aux autres les étrangers qui peuvent être invités à présenter une demande;
Requirements	**Formalités**
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.
Visa or other document not to be issued	**Visa ou autre document ne pouvant être délivré**
11.2 (1) An officer may not issue a visa or other document in respect of an application for permanent residence to a foreign national who was issued an invitation under Division 0.1 to make that application if — at the time the invitation was issued or at the time the officer received their application — the foreign national did not meet the criteria set out in an instruction given under paragraph 10.3(1)(e) or did not have the qualifications on the basis of which they were ranked under	**11.2 (1)** Ne peut être délivré à l'étranger à qui une invitation à présenter une demande de résidence permanente a été formulée en vertu de la section 0.1 un visa ou autre document à l'égard de la demande si, lorsque l'invitation a été formulée ou que la demande a été reçue par l'agent, il ne répondait pas aux critères prévus dans une instruction donnée en vertu de l'alinéa 10.3(1)e) ou il n'avait pas les attributs sur la base desquels il a été classé au titre d'une instruction donnée

an instruction given under paragraph 10.3(1)(h) and were issued the invitation.	en vertu de l'alinéa 10.3(1)h) et sur la base desquels cette invitation a été formulée.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

Form and content of application **10 (1)** Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall **(a)** be made in writing using the form, if any, provided by the Department or, in the case of an application for a declaration of relief under subsection 42.1(1) of the Act, by the Canada Border Services Agency; **(b)** be signed by the applicant; **(c)** include all information and documents required by these Regulations, as well as any other evidence required by the Act; **(d)** be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and **(e)** if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.	**Forme et contenu de la demande** **10 (1)** Sous réserve des alinéas 28b) à d) et 139(1)b), toute demande au titre du présent règlement : **a)** est faite par écrit sur le formulaire fourni, le cas échéant, par le ministère ou, dans le cas d'une demande de déclaration de dispense visée au paragraphe Immigration and Refugee Protection Regulations Règlement sur l'immigration et la protection des réfugiés 42.1(1) de la Loi, par l'Agence des services frontaliers du Canada; **b)** est signée par le demandeur; **c)** comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi; **d)** est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement; **e)** dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.
Class **75 (1)** For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	**Catégorie** **75 (1)** Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à

Skilled workers

(2) A foreign national is a skilled worker if

(a) within the 10 years before the date on which their application for a permanent resident visa is made, they have accumulated, over a continuous period, at least one year of full-time work experience, or the equivalent in part-time work, in the occupation identified by the foreign national in their application as their primary occupation, other than a restricted occupation, that is listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification;

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties;

(d) they have submitted the results of a language test that is approved under subsection 74(3), which results must be provided by an organization or institution that is designated under that subsection, must be less than two years old on the date on which their application for a permanent resident visa is made and must indicate that they have met or exceeded the applicable language proficiency threshold in either English or French that is fixed by the Minister under subsection 74(1) for each of the four language skill areas; and

s'établir dans une province autre que le Québec.

Qualité

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

a) il a accumulé, de façon continue, au moins une année d'expérience de travail à temps plein ou l'équivalent temps plein pour un travail à temps partiel, au cours des dix années qui ont précédé la date de présentation de sa demande de visa de résident permanent, dans la profession principale visée par sa demande appartenant au genre de compétence 0 Gestion ou aux niveaux de compétence A ou B de la matrice de la Classification nationale des professions, exception faite des professions d'accès limité;

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles;

d) il a fourni les résultats — datant de moins de deux ans au moment où la demande est faite — d'un test d'évaluation linguistique approuvé en vertu du paragraphe 74(3) provenant d'une institution ou d'une organisation désignée en vertu de ce paragraphe qui indiquent qu'il a obtenu, en français ou en anglais et pour chacune des quatre habiletés langagières, au moins le niveau de compétence établi par le ministre en application du paragraphe 74(1);

(e) they have submitted one of the following: **(i)** their Canadian educational credential, or **(ii)** their foreign diploma, certificate or credential and the equivalency assessment, which assessment must be less than five years old on the date on which their application is made.	**e)** il a soumis l'un des documents suivants : **(i)** son diplôme canadien, **(ii)** son diplôme, certificat ou attestation étranger ainsi que l'attestation d'équivalence, datant de moins de cinq ans au moment où la demande est faite.
Minimal requirements **(3)** If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.	**Exigences** **(3)** Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7314-19
STYLE OF CAUSE:	RAYMOND CHUKWUEMEKE UGBOH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 17, 2021
JUDGMENT AND REASONS:	FUHRER J.
DATED:	AUGUST 25, 2021

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