Federal Court

Cour fédérale

Date: 20211004

Docket: IMM-2246-20

Citation: 2021 FC 1027

Ottawa, Ontario, October 4, 2021

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

YUNYING HE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Yunying He ("Ms. He") has twice been refused a work permit and temporary resident visa to come to Canada for work as a child caregiver for a family with two school-aged children. Both times, her application was refused on the same grounds: i) that she

had not satisfied the Officer that she would leave Canada when required; and ii) that she had not demonstrated the required skills for the caregiving job she was seeking.

[2] This is a judicial review of the second refusal decision. Ms. He argues that the Officer unreasonably imported work experience and suitability requirements beyond those inherent to the job offer and provided no explanation for finding Ms. He was an overstay risk or unsuitable to perform the work she was seeking. For the reasons set out below, I agree that the Officer's decision is unreasonable on both grounds.

[3] Ms. He also argued that there was a procedural fairness breach because the Officer refused to consider the documents she attempted to submit in response to a procedural fairness letter. As I agree that the Officer's decision is unreasonable, even without the additional documents that had been attempted to be filed in response to the procedural fairness letter, I need not consider the procedural fairness issue and decline to do so.

II. Background Facts

[4] Ms. He was offered a job to be an in-home childcare provider in Vancouver for a family with two school-aged children, who were 10 and 12 years old at the time of the job offer. The job involved supporting the family's care of the two children during the school week.

[5] In May 2018, Employment and Social Development Canada ("ESDC")/Service Canada ("SC") approved the Labour Market Impact Assessment ("LMIA") application for the family

who had offered Ms. He the caregiver position under the National Occupation Classification (NOC) 4411, a childcare provider in a private home.

[6] Ms. He applied for a work permit and temporary resident visa ("TRV") in August 2018. This application was refused in April 2019 ("First Refusal Decision"). The basis for this refusal was summarized in the officer's notes as follows:

> After a careful review of all information available, I am not satisfied that client has demonstrated sufficient employment experience to support her adequate ability to perform the duty in the position in Canada and am also not satisfied with client's primary purpose to Canada is not seeking admission to Canada to remain for other means. Refused application.

[7] Ms. He applied for leave and judicial review of the First Refusal Decision. Leave was granted by this Court. A judicial review hearing was not held as the parties consented for the First Refusal Decision to be set aside and for it to be considered again by a different officer. The application for judicial review was discontinued on November 21, 2019.

[8] On December 3, 2019, Ms. He received a procedural fairness letter from the Officer considering her application on redetermination. The procedural fairness letter set out the same concerns that had been the basis for first refusal of her application:

> I am concerned that you do not have sufficient experience and ability to perform duties required by the job offer in Canada… given economic incentives to remain in Canada, I am also concerned that you are not a bona fide temporary worker who will depart Canada at the end of your authorized stay.

[9] The procedural fairness letter was sent to Ms. He’s representative on file. The representative on file was no longer representing Ms. He, though the firm where she worked continued to represent her. Ms. He, through her personal email, filed a response and further documents about the nature of the training program she attended. The Officer responded that the documents could not be accepted as they were sent through an unauthorized email address.

[10] The Applicant’s current counsel, who represented her on the previous judicial review that had settled, wrote to the Respondent’s counsel on file for the judicial review of the First Refusal Decision. In her letter, Ms. He’s counsel advised that the officer considering the redetermination of the file, which they had agreed to settle in the previous month, was raising the same issues that were the basis of the first refusal. Respondent’s counsel replied that this letter had been provided to the “client.”

[11] The Officer sent the procedural fairness letter again to the email address of Ms. He’s former counsel and no further submissions were filed.

[12] On March 13, 2020, the Officer refused Ms. He’s application on the grounds that she had neither demonstrated that she could perform the child caregiving role she was seeking or that she would leave Canada at the end of her authorized stay.

III. Issues and Standard of Review

[13] As noted above, I will not be addressing the Applicant’s procedural fairness argument and as such, the only issues on this application for judicial review relate to the Officer’s

determinations that i) Ms. He had not demonstrated she could do the job she was seeking and that ii) Ms. He was an overstay risk.

[14] In reviewing the decision of the Officer, I will apply a reasonableness standard of review. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

[15] Sections 179 and 200(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*Regulations*") are the principal legislative provisions governing the authority of a visa officer to issue a TRV and a work permit requested by a foreign national prior to entering Canada. An Officer can refuse an application because they believe the applicant will not leave Canada by the end of the period authorized for their stay (ss 179(b), 200((1)(b) of the *Regulations*). An Officer is required to refuse an application for a work permit where "there are reasonable grounds to believe that the foreign national is unable to perform the work sought" (s 200(3) of the *Regulations*).

[16] The refusal in this case is based on both these grounds—overstay risk and suitability for the work sought. The Officer's analysis on the suitability for the work sought was limited to the following:

> As of the date of this application was submitted, other than the internship at a kindergarten, the only related work experience applicant has to that of an in-home caregiver was having been a babysitter for 4 months between Dec2017 and Mar2018.
>
> Based on info presented before me, I am not satisfied that applicant demonstrated sufficient ability to perform duties required by the job offer in Cda. Concerns were raised and the applicant was given opportunities to address them. However, she forewent the opportunities by not responding to the PFL.
>
> I am not satisfied that applicant meets the requirements of issuance of a WP as an in-home caregiver.

On the issue of not leaving at the end of her authorized stay, the Officer's reasons are limited to "I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 200(1) of the *IRPR* based on the purpose of your visit."

[17] The Officer set out both these grounds for refusal (overstay risk and suitability for the work sought) but failed to explain the basis on which they reached their conclusion on either ground. On the first issue, the Officer listed Ms. He's experiences and concluded that she did not have "sufficient ability" to perform the job being offered to her in Canada, but failed to explain how Ms. He's experience was insufficient given that it is beyond what is being sought in the LMIA certificate and the description of the role set out in the relevant National Occupation Classification (NOC). On the second issue, being an overstay risk, the Officer offered no explanation for how they reached this conclusion.

[18] Applicants need to understand the basis on which their application has been refused and the decision-maker's reasoning in reaching their conclusion. The Supreme Court of Canada in *Vavilov*, at paragraph 13, described the reasonableness standard as a deferential but nonetheless "robust form of review," where the starting point of the analysis begins with the decision maker's reasons. The Court explained that administrative decision makers, in exercising public power, must ensure that their decisions are "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95). Reasons must be responsive by demonstrating that they are "justified in relation to the constellation of law and facts that are relevant to the decision" (*Vavilov* at para 105).

[19] In evaluating the reasonableness of a decision, the institutional context in which it took place must be considered. The Supreme Court of Canada in *Vavilov* held at paragraph 103 that "formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given…" (see also *Vavilov* at para 91).

[20] Work permit and TRV reasons do not need to be extensive but this does not absolve a decision-maker from the requirement that their reasons are transparent, justified and intelligible. There needs to be a "rational chain of analysis" so that a person impacted by the decision can understand the basis for the determination (*Vavilov* at para 103).

A. *Suitability to perform the work sought*

[21] Ms. He provided the following with her TRV and work permit application:

- Proof of secondary school completion

- Proof of completion of a bachelor degree in marketing
- Proof of employment in a bank for three years
- Proof of employment as a service housekeeper
- English language test scores of 5
- Completion of caregiving training program
- Reference letters from child caregiving position
- Reference letters from the child caregiving training program
- Course grades for six-month child caregiving training program
- Completion of a child food course

[22] The Officer had no issue with the genuineness of Ms. He’s education or experience; nor did the Officer take issue with the genuineness of the job offer made to Ms. He. The only basis to find that there were reasonable grounds to believe that Ms. He could not perform the work sought was the Officer’s own view that Ms. He’s experience and education was insufficient. The Officer did not explain why they believed it to be insufficient in relation to the job duties or the requirements set out by the employer or in the relevant NOC profile.

[23] In fact, the Officer made no reference to the specific duties of the position in deciding to override the employer’s determination that Ms. He was qualified for the role. The duties listed in the employment contract were limited to: preparing breakfast, lunch, after school snacks and dinner for two children, taking children to school and picking up children from school and taking them to afternoon classes, cleaning dishes and children’s bedrooms, and possibly doing laundry. The Officer does not explain how they come to the determination that Ms. He has insufficient

experience to be able to perform this role given her experience in childcare settings, her references for her work in childcare settings, her education in childcare and her experience in housekeeping.

[24] Nor did the Officer make any reference to any requirements for the position set out in the LMIA certificate or in the description of the NOC 4411—a childcare provider in a private home. Completion of secondary school was a requirement of the position, as was the ability to communicate in verbal and written English. There were no other requirements listed in the LMIA certificate or NOC profile for the position or the job offer. Ms. He's education and experience qualifications clearly exceed the requirements for the role.

[25] This Court has held in a number of cases it is unreasonable for officers to import suitability requirements, without explanation, which were not considered necessary by the employer. In *Portillo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 866, Justice Russell explained:

> [56] …the Officer in this case was not in a position to assess their suitability and experience, or unreasonably imported suitability requirements that the employers did not consider necessary for the employment in question. There is no dispute that the Applicants' were offered the positions as part of an organized recruitment process on behalf of McDonald's and that they were offered positions based upon their resumés, interviews and revealed past experience. McDonald's was entirely happy with all aspects of their Applications and offered the Applicants jobs. It is entirely unreasonable for the Officer to say, on these facts, that he is not sure the Applicants meet the requirements when the employer is sure that they do. Without some explanation for the Officer's Decisions to override the employer on the issue of suitability, this aspect of the Decision is unreasonable.

[26] In *Liu v Canada (Minister of Citizenship and Immigration)*, 2018 FC 954, also a child caregiver work permit case, Justice McVeigh held that “it is a reviewable error for the Officer to have not provided an explanation on the question of suitability” (at para 29). In *Sibal v Canada (Minister of Citizenship and Immigration)*, 2019 FC 159, Justice Elliott, also held in another child caregiving work permit case, that it was unreasonable for the officer to require further qualifications that were not in the NOC profile or the LMIA certificate:

> [43] The Officer’s finding that the Applicant is not able to demonstrate that she adequately met the job requirements of her prospective employment is unreasonable since there is no evidentiary basis for it and, other than secondary school education, there are no requirements found in the record.

[27] The Respondent argued that officers have the authority to reject a work permit application even though there is a LMIA approval. This point is not in dispute. The *Regulations* provide that officers should not issue permits where “there are reasonable grounds to believe that the foreign national is unable to perform the work sought” (s 200(3) of the *Regulations*). However, the fact that an officer has the power to reject a work permit on these grounds does not mean that they do not have to explain how they reached their conclusion.

[28] The Respondent also argued that the onus is on the Applicant to provide sufficient evidence that they meet the requirements set out in the statute and regulations. The issue in this case is that Ms. He is arguing that she provided sufficient evidence of her ability to perform the job she was seeking but that the Officer rejected it without explaining why it was considered insufficient and with no reference to the specific duties of the job or the requirements for such a position as set out in the LMIA certificate or in the relevant NOC profile.

[29] In reading the Officer's reasons and the record of this file, there can be no doubt that the Officer failed to provide a justification as to why the Applicant's experience and education that went well beyond the requirements for the position were insufficient to perform the role.

B. *Overstay risk*

[30] Ms. He addressed whether she would leave at the end of her authorized stay in her letter filed with the application. She explained her knowledge that any violation of the terms of her temporary stay in Canada would jeopardize her ability to regularize her status and she had no intention of hurting her own prospects for permanent resettlement in Canada. Ms. He also provided evidence that she had previously complied with immigration requirements as a visitor in Thailand. None of this evidence was addressed by the Officer in their reasons.

[31] The Officer provided no justification for their conclusion. Without any reference to Ms. He's submissions or evidence, the Officer simply concluded that they were not satisfied she would leave at the end of her authorized stay in Canada because of the purpose of her visit.

V. Indirect substitution remedy

[32] Ms. He's counsel requested that the Court use its exceptional powers under paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7 and direct the Officer to accept Ms. He's application. The Court's power of indirect substitution is considered exceptional and generally only used where sending the case back for redetermination would be pointless, or where there is

only one possible outcome (*Canada (Minister of Citizenship and Immigration) v Tennant*, 2019 FCA 206 at paras 79, 80-82, and *Vavilov* at para 142).

[33] Justice Barnes recently held in a similar context of an arranged employment work permit decision that indirect substitution would be inappropriate where the decision "is dependent on a potentially changing factual landscape where … [the applicant's] continuing eligibility is not assured." Justice Barnes noted that "with the passage of time, her arranged employment could lapse or her health status could change" (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2020 FC 53 at para 13). I agree with this reasoning and that it would also apply to Ms. He's situation. I decline to issue this type of direction.

VI. Costs

[34] The Applicant is seeking the costs of this application. I consider this to be a case where there are special reasons within the meaning of Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 to order costs.

[35] This will now be the third time that Ms. He will have her application determined after she filed it over three years ago. Given that the second decision mirrors the first refusal that was settled by the parties by way of consent, the efforts made by Applicant's counsel to alert the Respondent early on in the redetermination process that the same error risked being made again, and that the errors in the Officer's reasons are readily apparent on the record, I find this is a case where it is appropriate to award costs against the Respondent. I fix the costs of this application to $1,500.

VII. Certified question of general importance

[36] In oral submissions, Applicant's counsel raised the possibility of a certified question on the procedural fairness issue. I advised that I would allow further submissions on a certified question if the case was going to be determined on the procedural fairness issue. As noted above, I have concluded that the procedural fairness issue is not determinative of the issues raised in this judicial review and I have declined to address it. As such, there is no basis to ask for further submissions on this point.

[37] The parties did not raise any other issues for certification and I agree that none arise.

JUDGMENT IN IMM-2246-20

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is referred back to a new officer for redetermination;
3. Costs are fixed at $1,500, payable to the Applicant;
4. There is no question for certification.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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