Federal Court  Cour fédérale

Date: 20220401

Docket: IMM-7301-19

Citation: 2022 FC 443

Ottawa, Ontario, April 1, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

GURPREET KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant Ms. Gurpreet Kaur seeks judicial review of the decision issued by a visa officer [the Officer] of the Visa Section of the High Commission of Canada in India, dated October 7, 2019, refusing the work permit application she had filed under the Home Caregiver Program for the National Occupation Classification [NOC] number 4411 [the Decision].

[2] The Officer was not satisfied that Ms. Kaur met the requirements of the position offered and that she was a bona fide temporary worker who will depart Canada by the end of her temporary stay should it be authorized.

[3] For the reasons exposed below, I find that the Applicant has not met her burden to convince the Court that the Officer's decision is unreasonable per the teachings of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. For the reasons exposed below, I will dismiss the application for judicial review.

II. Context

[4] The context, as it often does, informs the analysis and decision, and I will thus expose it. Ms. Kaur is an Indian citizen. In March 2019, she signed an employment contract with a Canadian employer as a caregiver to their two young children. In the letter he signed on June 18, 2019 to support Ms. Kaur's work permit application, the prospective Canadian employer stated, *inter alia*, that "[s]he has also taken IELTS test and she is proficient in English language to communicate to our children".

[5] On May 14, 2019, Employment and Social Development Canada/Service Canada issued a positive Labour Market Impact Assessment [LMIA] to the prospective employers for the position of NOC 4411-In Home Child Caregiver (Nanny) for a two-year employment period. This LMIA specifically required the prospective employee to meet the language requirements in verbal and in written English.

[6] In June 2019, Ms. Kaur applied for a work permit under the Home Caregiver Program. To support her application, Ms. Kaur provided English knowledge International English Language Test System [IELTS] test results dated September 9, 2017 and showing an Overall Band Score of 5.5.

[7] On September 6, 2019, the Immigration Section of the High Commission of Canada wrote to Ms. Kaur to confirm her interview with the Officer would take place on October 1, 2019. The letter indicates that the Immigration Section does not provide interpretation services and that applicants who so wish must engage the services of qualified professionals. On October 1st, 2019, Ms. Kaur attended an interview at the High Commission of Canada without interpretation services. In the Global Case Management System [GCMS] notes, the Officer who conducted the interview asked questions related to the care of children or other subjects. The Officer noted that Ms. Kaur was not able to answer in English, that certain questions were put to her in Punjabi, and that she provided no response even to a certain number of those questions. Per the GCMS notes, the Officer explained to Ms. Kaur concerns about her ability to perform her duties in Canada and about her proficiency in English in the following manner:

> The LMIA indicates that the position of caregiver in Canada requires the incumbent to demonstrate ability to work in the position. Information provided by you at the interview indicates that you have completed a nanny program. At the interview, you were unable to satisfactorily describe the steps you would take in case of an emergency. You were unable to respond how you would handle specific urgent situation as a caregiver. I am not satisfied that you have adequately demonstrated that you are able to perform the duties of a caregiver in Canada – The LMIA also indicates that the position of a caregiver in Canada requires the incumbent to have proficiency in Oral and Written English. You also submitted your IELTS test scores. At the interview today, however, you could not understand and answer questions posed

> to you in English. I am not satisfied that you have the required proficiency in English to be able to perform the duties of the position in an unsupervised setting. I am not satisfied that you meet the language requirements of the position.

[8] Important to these proceedings, per the GCMS notes, the Officer provided Ms. Kaur an opportunity to respond, and Ms. Kaur asked that a chance be given to her to improve the English and that she will slowly improve her language skills in Canada.

[9] The Officer concluded that they were not satisfied that Ms. Kaur met the requirements of the position offered or that she was a bona fide temporary worker who will depart Canada by the end of her temporary stay should it be authorized. The Officer thus refused Ms. Kaur's work permit application.

[10] Before the Court, Ms. Kaur filed an affidavit sworn on February 3, 2020 wherein she affirmed *inter alia* that (1) she did not believe she was interviewed fairly; (2) the Officer asked questions aggressively that made her nervous and confused, they spoke very fast and refused to repeat the question, stating that they had no time to do so; (3) the Officer casted doubt on her English language test results in IELTS of 5.5 band score, but did not put a concern of any discrepancy to her at the interview; (4) the Officer did not refer to the employer who are is Punjabi speaking household or to the NOC requirements; (5) the interview notes are missing chunks of the interview; and (6) the notes do not reflect the interview.

III. Issues before the Court

[11] Before the Court, Ms. Kaur argues that (1) the Officer's decision is unreasonable because the Officer's findings that she could not perform the duties of childcare and that she was not a bone fide temporary worker are flawed; and (2) the Officer breached procedural fairness in the manner in which they convened and recorded the interview.

[12] The applicable standard of review is well settled, and not disputed by the parties. When reviewing the merits of an administrative decision, there is a presumption that the legislature intended the standard of review to be reasonableness (*Vavilov* at para 101).

[13] To be reasonable, a decision must be internally coherent and justified in light of the applicable legal and factual constraints. A decision must also be responsive to the arguments raised by the parties. The Supreme Court of Canada further provided some guidance on the reasonableness inquiry as entailing a "robust review" and it is not a "rubber stamping" process or a means of sheltering administrative decision makers from accountability.

[14] Issues of procedural fairness are reviewed without deference. As the Federal Court of Appeal stated in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56, "[…] the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an a priori decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice – was the party given a

right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference".

[15] The Court must thus determine if Ms. Kaur has established, as it is her burden, that the Decision is unreasonable, or that the Officer breached procedural fairness.

A. *The Decision is reasonable*

(1) Parties' positions

[16] Ms. Kaur submits that the Officer erred in reaching their conclusion that she did not demonstrate that she is able to perform work as an in-home childcare nanny in Canada. She submits that the Officer is not an expert on childcare and was not able to conclude that her responses were insufficient to allow her to fulfill her job duties as a nanny in Canada. She argues that there were barely any questions asked about childcare to base a conclusion that she could not perform work as a nanny in Canada. Ms. Kaur adds that while the Officer has discretion to weigh the answers given at the interview, the Officer does not have unlimited authority to probe the requirements of her potential employment without any objective basis, and to rely instead on subjective standards.

[17] Ms. Kaur submits that the absence of objective standards against which the Officer assessed her capacity to perform the work of a caregiver led the Officer to an unreasonable conclusion, citing *Randhawa v Canada (Citizenship and Immigration),* 2006 FC 1294; *Russom v Canada (Citizenship and Immigration),* 2012 FC 1311; *Chen v Canada (Minister of Citizenship*

and Immigration), [2000] FCJ No 594; *Portillo v Canada (Citizenship and Immigration)*, 2014 FC 866; *Gao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 350 at paragraph 21.

[18] Ms. Kaur argues that there are three reviewable errors in this finding. First, the Officer doubts her IELTS results in favour of his own subjective standards and fails to consider the conditions of her proposed employment in Canada. Second, some of the Officer's questioning was irrelevant to the NOC 4411 and simply inadequate to conclude that she did not have the ability to work as a nanny. Third, the Officer ignores the evidence and based their conclusion on only three child related questions.

[19] In regards to the knowledge of English in particular, Ms. Kaur submits that the "Program Delivery Instructions for Foreign Workers – language requirements" provides that an applicant's language ability can be assessed through an interview or official testing such as IELTS. Further that "in deciding to require proof of language ability, the officer's notes should refer to the LMIA requirements, working conditions as described in the job offer and NOC requirements for the specific occupation, in determining what precise level of language requirement is necessary to perform the work sought." She stresses that she holds an IELTS score of 5.5. This meets the requirements of the NOC 4411 position as a nanny or child caregiver and the Officer appears to impugn the veracity of the test scores by citing concerns in her language skills, which were based upon the Officer's own subjective notes cited at the interview. Ms. Kaur further alleges that the Officer also failed to refer to the LMIA requirements and working conditions as described in the job offer and the relevant NOC requirements. The Officer's notes disclose language barriers at

the interview, but the Officer did not cite these and nor did he refer to the applicable working conditions or NOC requirements to determine the precise level of language necessary to work as a nanny in Canada with children and their parents who, like the Applicant, are Indian and Punjabi-speaking. In summary, Ms. Kaur asserts that the Officer did not provide a sufficiently detailed analysis of why the Applicant did not satisfy the language requirements for a nanny in light of the proposed employment.

[20] Ms. Kaur also submits that the Officer further erred in finding that she was not a bona fide temporary worker. She argues that other than a blanket statement as part of their notes from the interview, the Officer provided no further reasons to justify this finding.

[21] Ms. Kaur submits that the lack of analysis to allow the Court, and her, to understand why the Officer found that she was not a bona fide temporary worker when put in context of the evidence provided is a reviewable error. The Officer appears to have completely overlooked her ties to India motivating a return. Ms. Kaur argues that this Court has held that when evidence exists – including an applicant's own evidence – that contradicts an officer's findings, it is incumbent upon an officer to address that evidence directly.

[22] The Minister of Citizenship and Immigration [the Minister] responds that the Decision is reasonable in regards to the English proficiency or lack off and that the emergency communication was indeed relevant to childcare.

(2) Decision

[23] Paragraph 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] states that an officer shall not issue a work permit to a foreign national if there are reasonable grounds to believe that the foreign national is unable to perform the work sought. As such, visa officers must undertake their own review of the applicant's abilities (*Liu v Canada (Citizenship and Immigration)*, 2018 FC 527 at paras 52-54; *Bautista v Canada (Citizenship and Immigration)*, 2018 FC 669 at para 15).

[24] As the Minister outlines, the case law confirmed that a visa officer must not delegate their statutory responsibilities to either an employer in Canada or Employment and Social Development Canada. In this case, both the LMIA and the prospective Canadian employer confirmed that knowledge of English was indeed required. The prospective employer made no mention of the knowledge of Punjabi being required. Ms. Kaur herself confirmed to the Officer that she would improve her knowledge once in Canada.

[25] The Court has confirmed that an officer's findings of language proficiency under paragraph 200(3)(a)of the Regulations are both factual and discretionary and entitled to deference. Where a basic lack of comprehension emerges, the legislation posits the discretion to make a final determination in the hands of the officer (*Brar v Canada (Citizenship and Immigration)*, 2020 FC 70 at paras 13-14; see also *Singh v Canada (Citizenship and Immigration)*, 2015 FC 115 at paras 19-21).

[26] While Ms. Kaur's IELTS results suggested that she knew some English, the Officer's notes indicated that she knew in fact very little. In the affidavit she swore on February 3, 2020, Ms. Kaur does not address her actual proficiency in English, but relies, again, on her IELTS score. The situation is distinguishable from the decision cited by Ms. Kaur in *Azam v Canada (Citizenship and Immigration)*, 2020 FC 115 where Justice Russell noted that the officer had not explained what questions were asked or provided actual responses. In the present case, the Officer provided information in regards to the questions they asked and the responds they received from Ms. Kaur.

[27] Aside from being hesitant and needing questions repeated, paraphrased, or translated, the Officer's notes indicate that Ms. Kaur failed to provide any response at all to certain questions, among which were questions related to the safety or well-being of a child in her care. The Officer's notes outline a number of questions presented to Ms. Kaur, in English and in Punjabi, and their answers or lack of.

[28] As the Minister outlines, the questions related to the children's safety and well-being were derived from the requirements of the NOC 4411 identified by Ms. Kaur in her application. I have not been convinced that the Officer assessed Ms. Kaur's qualifications based only on their own subjective standards and requirements, and in a manner unrelated to the duties she is expected to perform.

[29] Ms. Kaur has not established that the Decision is unreasonable. On the contrary, the Decision is internally coherent and justified in light of the applicable legal and factual constraints.

B. *There was no breach of procedural fairness*

(1) Parties' positions

[30] Ms. Kaur submits that the Officer breached procedural fairness in the manner in which they convened and recorded the interview. There is case law holding that an officer's version of the interview as recorded in those notes should be preferred to the extent of any contradiction with an applicant's affidavit several months after the interview, but an officer's notes are not infallible. There is also case law directing that the evidence of an applicant was preferred when faced with a contradictory version of what transpired at an interview (*Parveen v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 660 (TD).

[31] Ms. Kaur refers to her affidavit and stresses that the manner in which the Officer convened the interview deprived her of the ability to respond and is not a true reflection of what transpired. She adds that due to such breaches in procedural fairness, which affected her ability to answer questions, it is not possible to know if the outcome would have been different, had she had a full and fair opportunity to respond to the Officer's concerns, and therefore, this application should be returned for reassessment.

(2) Decision

[32] In the work permit context, and keeping in mind that visa applications do not raise substantive rights since visa applicants do not have an unqualified right to enter Canada, the level of procedural fairness is low. This is particularly the case where, as here, there is no evidence of serious consequences to the Applicant (*Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 10; see also *Kaur v Canada (Citizenship and Immigration)*, 2022 FC 30 at paras 11-16 [*Kaur*]).

[33] In her affidavit, which was sworn four months after the interview, Ms. Kaur expressed the feeling that the Officer was asking questions "aggressively", and that she herself was "nervous and confused". She argues that this amounts to a lack of procedural fairness.

[34] Accepting Ms. Kaur's affidavit at its highest, hence that she felt nervous and confused, and accepting that she perceived the officer to be speaking quickly and aggressively, this does not establish any breach of procedural fairness. To echo Justice Pamel's words in *Kaur*, although addressing apprehension of bias, the visa officer's social skills may need some work, but the situation at bar does not meet the criteria of the test for breach of procedural fairness. I agree with the Minister that it rather supports the Officer's findings regarding her lack of language ability, and the related concerns about her ability to carry out the required duties. I do not believe that the Officer breached procedural fairness in this case.

IV. Conclusion

[35] For these reasons, I will dismiss the application for judicial review.

JUDGMENT in IMM-7301-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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