Federal Court  Cour fédérale

Date: 20220518

Docket: IMM-4792-21

Citation: 2022 FC 739

Toronto, Ontario, May 18, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

PRABHJIT SINGH BHAIRON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review, pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision (the Decision) of an Immigration Officer to refuse his application for a temporary residence permit (TRP). For the reasons below, I find the Decision reasonable and will dismiss the application.

II. Background

[2] The Applicant, a citizen of India, first came to Canada in 2011 as a student. He was subsequently issued a 3-year Post Graduate Work Permit (PGWP), valid until February 2019, and found work as an Operations Supervisor at Rutherford Collision Centre in Brampton, Ontario (Rutherford). Prior to the expiry of his PGWP, Rutherford applied for a labour market impact assessment (LMIA) so that they could continue to employ him in the position.

[3] The LMIA was not processed prior to the expiry of the Applicant's PGWP. The Applicant retained an immigration consultant, who applied for an extension of his work permit. The pending LMIA was not mentioned in the work permit application to Immigration, Refugees and Citizenship Canada (IRCC), and the work permit was refused in May 2019, being the first of four successive work permit refusals.

[4] The Applicant then applied for a restoration of status with his second work permit application in August 2019. Once again, the LMIA, which had at that point been approved, was not included in the work permit application. That second work permit application was refused in November 2019. In December 2019, the Applicant applied for a TRP, in addition to his third successive work permit application. This Application was refused in June 2020.

[5] In November 2020, the Applicant again applied for a TRP and an open work permit on the basis of subsection 208(b) of the *Immigration and Refugee Protection Regulations* (SOR /2002-227), based on humanitarian reasons for "a foreign national in Canada who cannot

support themselves without working if the foreign national (b) holds a temporary resident permit".

[6] In this fourth work permit application, the Applicant claimed that any breaches of the Act up to that point were inadvertent or accidental on his part. Rather, he claimed that previous failures to mention his LMIA were the fault of the immigration consultant he had retained. The Applicant then wrote to the Respondent in the months of February, April and June of 2021, requesting a status update to his application.

[7] Over seven months later, in late June 2021, his fourth work permit application, along with the accompanying TRP request, was refused. This refusal forms the basis of the present judicial review application. The reasons for the refusal, contained in an entry to the Global Case Management System, reads as follows in its entirety:

> Client entered Canada on a Study Permit on 03 Sep 2011. They applied for and received extensions vu 30 Mar 2016. They applied for a PGWP which was granted for 3 years vu 17 Feb 2019. The client applied for an extension rec'd on 16 Feb 2019 and refused for no LMIA on 22 May 2019. Client had 90 days to restore their status ending on 24 Aug 2019. Client applied for restoration on 20 Aug 2019 and it was again refused for no LMIA on 26 Nov 2019. Client submitted an initial TRP application 23 Dec 2019 which was refused on 12 Jun 2020. Client states that it was their rep's fault (the one they had at the time) that their application was refused. However it is the responsibility of the client to ensure that the applications submitted contain all the correct information. The LMIA #8496423 is now expired and cannot be used. I have reviewed the information provided by the client in this application as well as the information in GCMS. The new rep has indicated that the client's employer is applying for a new LMIA however a review of ESDC does not show any LMIA in process. This application was received 23 Nov 2020. It would be logical to assume if an LMIA was submitted it would show up in ESDC by now. I also note that the client indicates that they intend to stay in Canada however there was no

> APR submitted during the 3 years they worked on their PGWP. This is sufficient work experience to apply on CEC or a skilled worker application. As for COVID, there is now a vaccine and as the borders are opening again and flights are available, the client has a mechanism in place to leave and once the LMIA has been approved, apply for a new work permit and the client will be able to return to Canada with valid status. AS there is a mechanism in place to overcome this inadmissibility, I am not satisfied that the issuance of a TRP is justified in this case. Application refused. Refusal letter sent and client advised to leave Canada. I note that this is the 2nd TRP application the client has submitted and they were advised to leave on the last one. Should another application be submitted, I recommend it be sent for removal procedures to be started.

III. Analysis

[8] As the parties agree, the only issue is whether the Decision of the Officer to refuse the Applicant's TRP application was unreasonable (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]).

[9] The Applicant's written submissions to this Court are similar to those placed before the Officer, reiterating the applicable factors that should have been considered for a TRP under the IRCC's policy, and advocating that a different determination should have been reached.

A. *Prior representation*

[10] Specifically, the Applicant submits that instead of being concerned with the Applicant's responsibility to ensure his application included all the correct information, the Officer should have focused on whether the Applicant's situation was inadvertent and accidental due to the actions of the immigration consultant who assisted with the first three failed work permit

attempts, and whether those missteps were a result of a careless or flagrant disregard of the law by the Applicant, as opposed to the consultant who the Applicant hired for assistance but failed to provide the LMIA to IRCC as he should have.

[11] Having said that, the Applicant argued at the hearing that since LMIA's are uploaded to IRCC's computer system, even without the omission and missteps of the consultant in failing to comply with the 'best practice' of submitting the LMIA with the Applicant's work permit application, the Officer should have been able to check whether an LMIA had been issued. Thus technically, the consultant was not required to submit an LMIA for the officer to have issued a work permit. Indeed, it was for this reason why Applicant's counsel explained that she did not pursue the formal requirements of the Federal Court's March 7 2014 Protocol in making allegations against authorized representatives. Further *obiter* is provided on this point at the conclusion of these Reasons.

B. *The Officer's comments on a permanent resident application*

[12] The Applicant submits that the Officer acted outside his scope of expertise and speculated in noting that the Applicant had not applied for permanent residence (PR) despite having accumulated several years of work experience while holding a PGWP, which could support a skilled worker application. The Applicant expanded on this second argument in oral submissions, explaining that the Officer's comment did not provide any nuance or analysis regarding the shifting requirements of Express Entry, and furthermore, given the Applicant's education and experience, he would not have qualified under the federal skilled worker program

stream, with a similar outcome likely for the Canadian Experience class stream, given that he did not yet have a year of experience at the skill levels required by that program.

C. *COVID-19 and applying from abroad*

[13] Third, the Applicant takes issue with the Officer's comments on the COVID-19 pandemic, specifically regarding the observation about the availability of vaccines and with opening borders, the Applicant could apply from abroad pending the results of the LMIA. To the contrary, the Applicant submits it would be unreasonable for the Applicant to return to India instead of waiting in Canada given that he would have a difficult time having a work permit approved in India.

[14] Despite Applicant's counsel's best efforts to convince me otherwise, the arguments do not bear out that the Officer's Decision was unreasonable given all the circumstances. Beginning with the latter two arguments regarding the alleged errors made and the pandemic, neither of these comments were determinative or central to the decision; borrowing a term from the judicial domain, I find them more akin to *obiter*. Even if the Officer was mistaken in one or both, which is debatable, this in my view would not constitute a sufficiently serious shortcoming to set aside the decision as unreasonable. Indeed, it appears as though the Officer was simply suggesting that there may have been other mechanisms for the Applicant to be able to reside and work in Canada – or viewed from the flip side, to apply from India.

[15] As for the then-evolving pandemic situation, I see nothing unreasonable in the comment made by the Officer, which simply noted the improving availability of travel and a vaccine and

the implications this would have for the Applicant's ability to apply from abroad while awaiting an LMIA. This comment also appears to have been in direct response to the contents of the TRP application, which had invoked the hardship of the COVID-19 situation. The Applicant has not articulated how the Officer's comment is unreasonable, let alone how it can be considered sufficiently serious to justify sending the matter back for redetermination. Counsel for the Respondent pointed to various stay of deportation cases that proceeded despite concerns raised with respect to COVID (see, for instance, *Kyere v. Canadas (MPSEP)* (November 17, 2020), Docket No IMM-1656-20; *Vushaj v Canada (MPSEP)* (February 17, 2021) Docket No IMM-875-2021, as per J Fothergill).

[16] I further note that this Court has not interfered in recent matters considering refusals despite COVID concerns being raised (see *Springer v. Canada (Citizenship and Immigration),* 2022 FC 180 at paras 28-30; *Bagatnan v. Canada (Citizenship and Immigration)* 2021 FC 1188, at para 23, both in the humanitarian and compassionate application context). Here, the Applicant did not provide the Court with any other authorities, nor did he submit any particular evidence to the Officer, that would render the Officer's conclusions unreasonable on account of COVID.

D. *The missing LMIA, and reasonability of the Decision*

[17] The Applicant argued at the hearing that the Officer unreasonably erred in finding that despite waiting several months, a new (second) LMIA application had not been received. The Applicant submits that he made it clear in the application package, both in counsel's submission letter, and in the accompanying letter from the prospective employer, that the employer was

prepared to apply for a second LMIA, and stood behind their former employee, but that neither had committed to submitting to the LMIA application prior to receiving a decision on the TRP.

[18] The Applicant contends that, under these circumstances, it was unreasonable for the officer to have expected to receive a new LMIA, and to have based a refusal on the failure to receive one. Indeed, the Applicant explains that is precisely the reason why the Applicant requested an open work permit under R208 based on humanitarian reasons (as set out above in paragraph 5 of these Reasons).

[19] The Respondent objected to this argument, noting that it had not been raised in the Applicant's factum, and should thus be disregarded on judicial review. Even if considered, the Respondent submitted, the Officer was completely justified in considering the fact that a second LMIA had not been issued, based on the materials submitted in his TRP and work permit application and his application history to that point.

[20] This Court's jurisprudence consistently holds that barring exceptional circumstances, new arguments not presented in a party's written submissions should not be entertained by the Court, to ensure fairness and that the Respondent can properly and in a considered fashion respond to all arguments made (*Rouleau-Halpin v. Bell Solutions Techniques Inc.*, 2021 FC 177, at para 33).

[21] I make two brief observations regarding the new argument. First, it is somewhat related to the Applicant's other arguments raised in his factum contending that the Decision is unreasonable. Second, to his credit, Respondent's counsel was nonetheless able to pivot during

the hearing and respond to the new argument. Considering these two factors, I will exercise my discretion, on an exceptional basis, to consider the new argument raised at the hearing (see *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754 at paras 12–14).

[22] I do not agree that it was unreasonable for the Officer to read the application as indicating that an LMIA would be forthcoming, and to have decided to refuse the application and close the file some seven months later without having received it. Submissions that accompanied the application request a TRP "so that he gets his status back and can be eligible to apply for a work permit for his previous employer based on a new LMIA", and later, that "[h]is employer will be submitting a second LMIA application, but the process of getting another LMIA application approved will take a couple of months and this work permit can help our client gain experience and earn a living while the application will be processed".

[23] While I agree that if parsing through the application package, and reading the submission letter alongside the Employer's support letter, an officer could have interpreted the Application to state that the LMIA would not be applied for until after the TRP had been issued. However, the Officer's alternate interpretation, that a new LMIA application would be initiated within a couple months, was also reasonable in the circumstances.

[24] Finally, in terms of the other arguments raised by the Applicant stating the Officer unreasonably found that his circumstances did not merit the issuance of a TRP, it is worthwhile referring to subsection 24(1) of the Act:

Temporary resident permit **Permis de séjour temporaire**

24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.	**24 (1)** Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

[Emphasis added]

[25] The Applicant argues that the Officer unreasonably erred by using the "compelling reasons" test to reject the issuance of TRP. He states that this test is not mentioned anywhere in the provision above, such that the officer fettered their discretion in doing so. He mentions that the provision only mentions the issuance of a TRP being "justified in the circumstances", and not requiring "compelling reasons" as certain case law has stated (see, for instance, *Farhat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at paras 22-24, and *Ju v. Canada (Citizenship and Immigration)*, 2021 FC 669 [*Ju*] at paras 18-19).

[26] I note that an officer's decision to grant a TRP is exceptional and highly discretionary (*Bhamra v. Canada (Citizenship and Immigration)*, 2020 FC 482 at paras 27, 31; *Ju* at para 18). By highlighting certain excerpts of the contents of his TRP application to this Court, and arguing that the Officer unreasonably decided them, the Applicant has, at best, made a case that the applicable factors should have convinced an officer that granting his application was warranted.

[27] However, the Applicant's burden on judicial review is not to re-argue the case, because the judicial review judge is not to decide the merits of the TRP submissions. Rather, it is to

convince the Court that the Officer's decision was unreasonable, or more specifically, 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" (*Vavilov* at para 100). I am not satisfied that the Applicant has met this burden. Ultimately, the Applicant was unable to provide, as Justice MacDonald wrote in *Bhamra* at para 22, evidence of "something more than inconvenience to an applicant to justify the issuance of a TRP".

[28] Thus, absent having found any serious shortcomings in the Officer's reasoning, I decline to accept the Applicant invitation to reweigh the evidence or endorse the Applicant's proposal of what would have been a more appropriate decision under the circumstances.

E. *Obiter comments*

[29] As noted in paragraphs 10-11 of these Reasons, some time at the hearing was spent discussing the errors made by the immigration consultant that the Applicant retained, who represented him in the preceding three work permit applications, all of which failed. I am not able to provide any precise comment on what exactly was contained in those prior applications, because they were not included in the record. However, given what can be gleaned from the circumstances and comments of the officer, there may well have been errors made.

[30] Unfortunately, this Court all too often sees problems caused by careless errors – or worse – caused by substandard representation. As here, counsel is then brought in late in the day to attempt to salvage cases that have already gone awry due to this prior representation (see, for instance, *Lin v. Canada (Citizenship and Immigration)*, 2022 FC 341 at paras 23-24, *Li v Canada*

(Public Safety and Emergency Preparedness), at paras 20-22, *Gao v Canada (Public Safety and Emergency Preparedness)*, at paras 7, 10-11).

[31] In fact, in the previous judicial review I heard earlier the same day as this one, counsel had also alleged missteps by the immigration consultant who had previously acted for his client (see *Afshari*, above). While these are invariably very unfortunate circumstances, the case law is clear that applicants in immigration matters are responsible for the representatives that they hire (*Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96, at para 66; *Figueroa v. Canada (Citizenship and Immigration)*, 2016 FC 521, at para 35; *Al-Abayechi v. Canada (Citizenship and Immigration)*, 2018 FC 360 at para 23).

[32] Here, counsel for the Applicant, Ms. Lee, worked diligently with what she could to rechannel water that had already flowed under the bridge – both in the fourth work permit application she submitted to the Department after the three submitted by the original immigration consultant, and then at the judicial review before this Court. While Ms. Lee is to be commended for her valiant efforts before the Court, there are simply no grounds upon which to sustain a finding that the Decision was unreasonable under the constraints set out in *Vavilov*. The Application is accordingly dismissed.

JUDGMENT in file IMM-4792-21

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.

2. No question for certification was submitted and I agree that none arise.

3. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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