Federal Court  Cour fédérale

Date: 20200313

Docket: IMM-4366-19

Citation: 2020 FC 381

Vancouver, British Columbia, March 13, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

DAVINDER KUMAR SHARMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Davinder Kumar Sharma, is a citizen of India. In February 2019, Mr. Sharma applied for a temporary resident visa [TRV] to work as a plumber in Canada under the Temporary Foreign Worker Program. In a decision issued in June 2019, an immigration visa officer at the High Commission of Canada office in New Delhi, India [Officer] refused Mr.

Sharma's application [Decision]. The Officer was not convinced that Mr. Sharma would be able to adequately perform the work as a plumber.

[2] Mr. Sharma argues that the Decision is unreasonable because it is not supported by the evidence before the Officer. He also contends that the Officer breached the rules of procedural fairness by approaching his file with bias and a closed mind. Mr. Sharma seeks judicial review of the Officer's Decision and asks the Court to quash it and to send it back for redetermination by a different officer.

[3] Having considered the evidence before the Officer and the applicable law, I can find no basis for overturning the Officer's Decision. The Officer did explain, with reference to the evidence, why Mr. Sharma's TRV was denied. In essence, the Officer was not convinced that Mr. Sharma had actually worked as a plumber in India. The Decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the Officer. Furthermore, in all respects, the Officer met the procedural fairness requirements in dealing with Mr. Sharma's application and did not exhibit any reprehensible form of bias. Therefore, I must dismiss Mr. Sharma's application for judicial review.

II. Background

A. *The factual context*

[4] In February 2019, after having received an offer of employment from DMS Hydronic Mechanical Systems Ltd. located in Burnaby, British Columbia, and after a positive Labour Market Impact Assessment [LMIA], Mr. Sharma applied for a TRV to work in Canada as a plumber. In March 2019, the Officer reviewed Mr. Sharma's TRV application. He found that Mr. Sharma had low English scores and that there were inconsistencies between Mr. Sharma's secondary school completion and his vocational training. The Officer also had concerns with respect to the authenticity of Mr. Sharma's alleged employment with his current employer in India, GST Industries [GST], as the employer's letter of reference submitted by Mr. Sharma appeared informal.

[5] In April 2019, the Officer therefore conducted a telephone interview with Mr. Sharma's alleged current employer, in order to verify his employment. When the Officer asked the employer's spokesperson to list all of the employees working for him, he did not include Mr. Sharma. It was only after the Officer reviewed the reference letter with him that the employer's spokesperson listed Mr. Sharma among his employees.

[6] On June 4, 2019, the Officer conducted an interview with Mr. Sharma to allow him to respond to some of the Officer's concerns regarding his employment in India. At the conclusion

of the interview, the Officer was not satisfied that Mr. Sharma could do the work as a plumber in Canada and, on that basis, he refused Mr. Sharma's TRV application.

B. ***The Decision***

[7] As is often the case for work permit applications, the Decision itself is brief and adds up to only a few lines. However, the Global Case Management System [GCMS] notes taken by the Officer, which form part of the Decision, provide further light on the analysis conducted by the Officer and on the grounds for refusing Mr. Sharma's application.

[8] The GCMS notes indicate that, at the June 2019 interview, the Officer raised numerous concerns with Mr. Sharma in relation with his employment at GST, and offered him an opportunity to respond. These concerns included:

- Mr. Sharma had provided a list of names of employees he worked with at GST, but it was inconsistent with the list provided by his employer;
- The Officer questioned the photographs of Mr. Sharma posing for various plumbing work, to which Mr. Sharma responded that his immigration representative had told him to take such photos;
- Mr. Sharma had not submitted evidence of recurring payments from his alleged job in India, and could only provide erratic cheque payments bearing close cheque numbers. The Officer found this problematic as it seemed unlikely for cheque numbers to be that close when Mr. Sharma's employer had an active business with multiple employees;

- Mr. Sharma could not provide an explanation as to why some payments were missing for several months;
- Mr. Sharma could not provide other indications of actual employment, including a Form 16 annual employment form, income tax returns or bank statements showing cash deposits or remittance;
- Mr. Sharma could not shed light on how he obtained his job in Canada nor provide specific information on how plumbing is done in Canada; and
- There was a discrepancy in naming a certain Balwinder Singh as the other plumber at GST, and whether that individual was in fact Mr. Sharma's father.

[9] At the end of the interview, the Officer refused Mr. Sharma's TRV application because he was not satisfied that Mr. Sharma could adequately perform the job required. The Officer explained to Mr. Sharma that the information as provided by his employer in the telephone interview was inconsistent with the answers he provided, that there was a lack of credible information offered by Mr. Sharma during the course of the interview, and that the documentation evidencing his alleged employment as a plumber in India was deficient.

C. *The standard of review*

[10] The parties do not dispute that the decisions of visa officers are reviewable against the standard of reasonableness. That reasonableness is the appropriate standard has recently been reinforced by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In that judgment, the majority of the Court set out a revised framework

for determining the standard of review with respect to the merits of administrative decisions, holding that they should presumptively be reviewed on the reasonableness standard, unless either legislative intent or the rule of law requires otherwise (*Vavilov* at paras 10, 17). I am satisfied that neither of these two exceptions apply in the present case, and that there is no basis for derogating from the presumption that reasonableness is the applicable standard of review for the Officer's Decision.

[11] Regarding the actual content of the reasonableness standard, the *Vavilov* framework does not represent a marked departure from the Supreme Court's previous approach, as set out in *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*] and its progeny, which was based on the "hallmarks of reasonableness", namely justification, transparency and intelligibility (*Vavilov* at para 99). The reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome", to determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 83, 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31).

[12] Turning to the issues of procedural fairness (which includes apprehension of bias), the approach to be taken has not changed following *Vavilov* (*Vavilov* at para 23). It has typically been held that correctness is the applicable standard of review for determining whether a decision maker complies with the duty of procedural fairness and the principles of fundamental justice (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[13] However, the Federal Court of Appeal has recently affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, it is a legal question to be answered by the reviewing court, and the court must be satisfied that the procedure was fair having regard to all of the circumstances (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54). This assessment includes the five, non-exhaustive contextual factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] (*Vavilov* at para 77).

[14] Therefore, the ultimate question raised when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review is whether, taking into account the particular context and circumstances at issue, the process followed by the administrative decision maker was fair and offered the affected parties a right to be heard as well as a full and fair opportunity to know and respond to the case against them (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51-54).

III. Analysis

A. *Reasonableness*

[15] Mr. Sharma complains that no questions were asked by the Officer on Mr. Sharma's knowledge or ability to perform the duties of a plumber, and that the Officer had not asked Mr.

Sharma to submit bank statements prior to the interview, which Mr. Sharma indicated he could provide, and which would have confirmed his regular pay remitted by his employer. Mr. Sharma further argues that he confirmed that Mr. Balwinder working at GST was not the same individual as his father, whose name is also Balwinder. Relying on *Sevilla v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 424 [*Sevilla*], where the Court stated that if a visa officer adopts a benchmark, he should state and explain how that benchmark relates to the legislative requirements, Mr. Sharma argues that the LMIA for a plumber does not require specific work experience. He therefore asserts that the Decision is unreasonable insofar as the Officer attempted to discredit Mr. Sharma's work experience at GST, which is not a benchmark requirement set out in paragraph 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[16] I do not agree.

[17] Further to my review of the Decision and the GCMS notes, I am satisfied that the Officer did not ignore evidence nor otherwise err in determining that Mr. Sharma would not be able to adequately perform the job duties of a plumber in Canada. Foreign nationals must establish that they meet the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and of the Regulations. In this case, paragraph 200(3)(a) of the Regulations mandates visa officers not to issue a TRV where "there are reasonable grounds to believe that the foreign national is unable to perform the work sought".

[18] Since Mr. Sharma did not adequately allay the Officer's concerns during the course of his interview with the Officer, and failed to meet his onus to establish that he satisfied the TRV requirements, it was reasonably open to the Officer to conclude that Mr. Sharma would not be able to undertake the duties of a plumber (*Canada (Minister of Citizenship and Immigration) v Khan*, 2001 FCA 345 [*Khan*] at para 22; *Li v Canada (Citizenship and Immigration)*, 2012 FC 484 [*Li*] at para 31).

[19] Visa officers must conduct their own independent assessment of TRV applications, and statements made by an applicant or a prospective employer are not binding upon them (*Chamma v Canada (Citizenship and Immigration)*, 2018 FC 29 at para 36; *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at paras 9, 28). Furthermore, a positive LMIA is not determinative of how visa officers exercise their discretion; it is simply a procedural pre-condition to the exercise of such discretion (*Chhetri v Canada (Citizenship and Immigration)*, 2011 FC 872 [*Chhetri*] at paras 15-17).

[20] Mr. Sharma is faulting the Officer for not asking questions about his actual work experience as a plumber. However, in this case, the Officer's concerns and questions focused on the veracity of Mr. Sharma's alleged employment as a plumber in India. It was up to Mr. Sharma to prove such employment, and the Officer was not convinced by the evidence that he was indeed working at GST. I do not find it unreasonable for a visa officer to conclude that a lack of sufficient evidence of actual employment in the line of work sought in a TRV application constitutes reasonable grounds to believe that the foreign national will be unable to perform such

work in Canada. The Officer was not discrediting Mr. Sharma's work at GST; he was simply assessing whether it was genuine.

[21] The standard of reasonableness requires the reviewing court to pay "respectful attention to the decision maker's demonstrated expertise" and specialized knowledge, as reflected in their reasons (*Vavilov* at para 93). It is anchored in the principle of judicial restraint. The reviewing court must show deference to the decision maker as it is "grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing" (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para 33; *Dunsmuir* at paras 48-49). Under a reasonableness review, when a question of mixed fact and law falls squarely within the expertise of a decision maker, the reviewing court's role is not to impose an approach of its own choosing (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 57). Of course, a reviewing court should ensure that the decision under review is justified in relation to the relevant facts, but deference to decision makers includes more specifically deferring to their findings of facts and assessment of the evidence. Reviewing courts should refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Canada Post* at para 61; *Vavilov* at para 125). This is the situation here.

[22] In the end, Mr. Sharma's submissions simply express his disagreement with the Officer's Decision and assessment of the evidence. On judicial review, the role of the Court is not to reweigh the evidence on the record or to substitute its own conclusions to those of visa officers. Visa officers have a broad discretion when rendering decisions under the Regulations and their

decisions are entitled to a high degree of deference from the Court given their specialized expertise.

[23] I find that the *Sevilla* case is of little help to Mr. Sharma since the facts in that case differ significantly from his situation. The relevance of a precedent atrophies as the similarity of the factual frameworks involved decreases; this is precisely the situation here. In *Sevilla*, the application for judicial review was granted because the visa officer had specifically imported an additional requirement of one to two years experience for granting the work permit, which was not in the relevant statutory language and was not explained in the decision. Here, the Officer clearly limited his analysis and considerations to the precise language of paragraph 200(3)(a) of the Regulations, and to Mr. Sharma's ability to do his anticipated work as a plumber.

[24] I am therefore satisfied that, in the circumstances, it was reasonable for the Officer to conclude that Mr. Sharma had failed to address the concerns about his employment, and that there were reasons to believe that he could not perform the plumber work contemplated by his TRV application.

B. ***Apprehension of bias***

[25] On the issue of bias, Mr. Sharma takes particular exception with one line of questioning during the June 2019 interview, where the Officer asked three questions regarding his immigration representative and the payments made by Mr. Sharma for his services. Mr. Sharma argues that this line of questioning – in particular, the Officer's comments relating to the

representative being engaged in “underhanded activities” and inquiring as to the money charged by the latter – shows that the Officer could not decide Mr. Sharma’s TRV application fairly. According to Mr. Sharma, the Officer approached his file with a closed mind and was not open to any persuasion.

[26] I am not convinced by Mr. Sharma’s submissions.

[27] Mr. Sharma correctly sets out the test to be applied for apprehensions of bias. He refers to *Baker*, where the Supreme Court reiterated that a reasonable apprehension of bias requires to assess whether an “informed person, viewing the matter realistically and practically – and having thought the matter through – [would] conclude that the decision-maker ‘consciously or unconsciously decided fairly’” (*Baker* at para 46). As the Supreme Court also stated in *Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 [*Committee for Justice*], “the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information” (*Committee for Justice* at p 394). Mr. Sharma also rightly relied on *Arthur v Canada (Attorney General)*, 2001 FCA 223 [*Arthur*], for the proposition that a reasonable apprehension of bias “cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel [and must] be supported by material evidence demonstrating conduct that derogates from the standard” (*Arthur* at para 8).

[28] An allegation of bias cannot be raised lightly, and requires support of concrete evidence. Here, it goes without saying that the Officer had the required expertise and authority allowing

him to question Mr. Sharma on key aspects of his TRV application and testimony. A visa officer interview is not a tea party and visa officers are entitled to ask questions that may appear unpleasant, to consider contentious points regarding the genuineness of documents provided in support of TRV applications, and to question an applicant's credibility. The Officer was entitled to verify Mr. Sharma's employment and to probe the veracity of his statements. Asking probing questions cannot be equated with bias. In the circumstances, I find that the questions singled out by Mr. Sharma were neither improper nor unfair. Once he received the responses, the Officer simply moved on with his other questions on Mr. Sharma's alleged employment at GST, which were at the heart of his concerns. In the end, none of the questions that Mr. Sharma flags as evidencing a close mind and appearance of bias appear in the GCMS notes articulating the Officer's reasons for the Decision.

[29] In short, Mr. Sharma's allegations that the Officer appeared to be biased just do not stand up to analysis. As the Minister rightly points out, such allegations cannot rest on mere suspension, pure conjecture, insinuations, or mere impressions of an applicant or his counsel. Rather, allegations of bias must be supported by material evidence demonstrating conduct that derogates from the standard (*Arthur* at para 8). Mr. Sharma did not submit any evidence of this nature.

[30] An allegation of bias is serious, and this Court's threshold for such a finding is high (*Shahein v Canada (Citizenship and Immigration)*, 2015 FC 987 at para 21). Indeed, "an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice" (*R v S (R.D.)*, [1997] 3 SCR

484 at para 113). In the case of Mr. Sharma, I simply do not see any sign of bias in the Officer's behaviour or comments. Thus, despite the laudable efforts of Mr. Sharma's counsel to identify an issue of procedural fairness in the Officer's Decision, there is no hint of any.

[31] I pause to point out that allegations of bias and unfairness cannot generally be raised on judicial review "if they could reasonably have been the subject of timely objection in the first-instance forum" (*Hennessey v Canada*, 2016 FCA 180 at para 20 [*Hennessey*]). The reason underlying this rule is that a first-instance decision maker, such as the Officer in this case, ought to be afforded "a chance to address the matter before any harm is done, to try to repair any harm, or to explain itself" (*Hennessey* at para 21). A party cannot withhold a disqualifying procedural ground in reserve, stay still in the weeds and later brandish it on judicial review when it happens to be unsatisfied with the first-instance decision (*Hennessey* at para 21).

[32] I make one final observation. In visa applications, the duty of fairness is reduced and "the Court must guard against imposing a level of procedural formality that, given the volume of applications that visa officers are required to process, would unduly encumber efficient administration" (*Khan* at paras 30-32). Procedural fairness is only minimally involved in TRV applications because those applying for work permits have no right or interest at play. In such situations, procedural fairness does not generally entitle an applicant to address concerns that might arise from the material submitted, particularly when the applicant can simply re-apply for a TRV. In particular, visa officers do not have a duty or legal obligation to seek to clarify a deficient application, to reach out and make an applicant's case, to apprise an applicant about concerns arising directly from the legislation or regulations, to provide the applicant with a

running score at every step of the application process, or to offer further opportunities to respond to continuing concerns or deficiencies (*Li* at paras 31-35, 37; *Chhetri* at para 10; *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 23). To impose such an obligation on a visa officer would be akin to giving advance notice of a negative decision, an obligation that the Court has expressly rejected on many occasions.

[33] Here, Mr. Sharma had the opportunity to address the Officer's concerns in an interview, and the TRV application of Mr. Sharma was ultimately assessed fairly and comprehensively.

IV. Conclusion

[34] For the reasons stated above, Mr. Sharma's application for judicial review is dismissed. The refusal of Mr. Sharma's work permit is a reasonable outcome under the IRPA and the Regulations, and is based on the evidence. On a reasonableness standard, it is sufficient that the reasons detailed in the Decision demonstrate that the conclusion is based on an internally coherent and rational chain of analysis and that it is justified in relation to the facts and law that constrain the decision maker. This is the case here. Furthermore, in all respects, the Officer met all procedural fairness requirements in dealing with Mr. Sharma's application and did not exhibit any reprehensible form of bias. Therefore, the Decision is not vitiated by any error that would warrant the Court's intervention.

[35] The parties have not proposed a question of general importance for me to certify. I agree that there is none in this case.

JUDGMENT in IMM-4366-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed without costs;

2. No serious question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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