Federal Court  Cour fédérale

Date: 20200407

Docket: IMM-1306-19

Citation: 2020 FC 495

Ottawa, Ontario, April 7, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DAKSHESH KISHOR PATIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of an immigration officer (the "Officer") dated February 13, 2019, wherein the Officer denied the Applicant's permanent residency application.

[2] The Applicant submits that the Officer's decision was improperly speculative and that the Officer breached procedural fairness. The Respondent submits that the Officer reasonably

assessed the evidence, that the Applicant's arguments amount to asking this Court to reweigh the evidence, and that the low level of procedural fairness owed to the Applicant was met.

[3] For the reasons that follow, this application for judicial review is allowed.

II. **Preliminary Issue: Evidence**

[4] As Exhibit B to the Applicant's Affidavit for this application for judicial review, the Applicant attached a "Wage Report" published by the Government of Canada, which lists wages for "Retail Sales Supervisor" positions throughout Canada, corresponding to the National Occupational Classification ("NOC") 6211. I note that this Wage Report was not submitted by the Applicant as part of his permanent residency application.

[5] In response to the Wage Report, the Respondent submitted job postings in the Greater Toronto Area ("GTA"), showing the wages corresponding to gas station manager positions, and noting that the position held by the Applicant was not a "gas station manager" but a "supervisor", also further submitted wages corresponding to gas station supervisors.

[6] It is trite law that on judicial review this Court only examines evidence that was before the underlying decision-maker *(Ayodele George v Canada (Citizenship and Immigration),* 2007 FC 1315 (CanLII) at para 12; *Bodine v Canada (Citizenship and Immigration),* 2008 FC 848 (CanLII) at para 12). Therefore, the evidence submitted by counsel for the Applicant and Respondent is inadmissible. However, given that both counsel relied extensively on the Wage Report, and GTA job postings during the hearing, I will make brief references in my decision.

[7] Furthermore, for purposes of the analysis, I wish to note that even if the GTA job postings evidence had been admitted, it would have been irrelevant to the case at bar, as it is not disputed that some other gas station supervisors earn more than the minimum wage rate. It is only relevant that some gas station supervisors are indeed paid at the minimum wage rate—as the Applicant had been and indicated in the Wage Report.

III. **Facts**

A. *The Applicant*

[8] Mr. Dakshesh Kishor Patel (the "Applicant") is a 33-year-old citizen of India. The Applicant is a father and husband. His wife and one-year-old son reside in India.

[9] The Applicant came to Canada in September 2015 on a study permit. The Applicant studied at Centennial College in Toronto, and completed his studies in December 2016. Subsequently, the Applicant applied for and received a "post-graduate work permit".

[10] While in school, the Applicant began working for Debbie Williams Enterprises Inc., a company that operates Shell gas stations. The Applicant worked part-time as a gas station attendant. After completing his studies at Centennial College, the Applicant continued working for Debbie Williams Enterprises Inc. on a full-time basis beginning on February 15, 2017. On May 1, 2017, the Applicant was promoted to a full-time "Sales Supervisor" position—a gas station supervisor position.

[11] The Applicant consistently earned minimum wage while working for Debbie Williams Enterprises Inc. He began working in October 2015 when the minimum hourly wage was $11.25. The Applicant's hourly wage increased along with the minimum wage rate increases, which reached $14.00 in January 2018.

B. *Procedural History*

[12] The Applicant was invited to apply for permanent residence via the Canadian Experience Class ("CEC") on July 25, 2018. The Applicant accepted the invitation and applied for permanent residence to Canada through the CEC on September 19, 2018.

[13] The requirements for the CEC are set out in section 87.1(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"), which reads as follows:

Member of the class	**Qualité**
(2) A foreign national is a member of the Canadian experience class if	**(2)** Fait partie de la catégorie de l'expérience canadienne l'étranger qui satisfait aux exigences suivantes:
(a) they have acquired in Canada, within the three years before the date on which their application for permanent residence is made, at least one year of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix, exclusive of restricted occupations; and	**a)** l'étranger a accumulé au Canada au moins une année d'expérience de travail à temps plein, ou l'équivalent temps plein pour un travail à temps partiel, dans au moins une des professions, autre qu'une profession d'accès limité, appartenant au genre de compétence 0 Gestion ou aux niveaux de compétence A ou B de la matrice de la *Classification nationale des professions* au cours des trois ans précédant la date de présentation de sa demande de résidence
(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 had their proficiency in the English or French language evaluated by an organization or institution that is designated under subsection 74(3) using a language test that is approved under that subsection, the results of which must indicate that the foreign national has met the applicable threshold that is fixed by the Minister under subsection 74(1) for each of the four language skill areas; and

(e) in the case where they have acquired the work experience referred to in paragraph (a) in more than one occupation, they meet the threshold for proficiency in the English or French language, fixed by the Minister under subsection 74(1), for the occupation in which they have acquired the greater amount of work experience in the three years referred to in paragraph (a).

permanente;

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 la *Classification nationale des professions*;

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 la *Classification nationale des professions*, notamment toutes les fonctions essentielles;

d) il a fait évaluer sa compétence en français ou en anglais par une institution ou une organisation désignée en vertu du paragraphe 74(3) qui utilise un test d'évaluation linguistique approuvé en vertu de ce paragraphe et les résultats de ce test démontrent qu'il a obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence applicable établi par le ministre en vertu du paragraphe 74(1);

e) s'il a acquis l'expérience de travail visée à l'alinéa a) dans le cadre de plus d'une profession, il a obtenu le niveau de compétence en anglais ou en français établi par le ministre en vertu du paragraphe 74(1) à l'égard de la profession pour laquelle il a acquis le plus d'expérience au cours des trois années visées à l'alinéa a).

[14] The Applicant applied to the CEC on the basis that he had at least one year of full-time work experience in a skilled work position as a gas station supervisor, which the Applicant claims corresponds to NOC 6211.

[15] The Global Case Management System ("GCMS") notes stated that the Applicant had previously applied for a spousal work permit, but had been denied because he had then been working as a sales associate, which did not fall within the NOC 0, A or B categories.

[16] The Applicant included his wife, Priyanka Dakshesh Patil, and their recently-born son, Prerit Dakshesh Patil, on his permanent residence application.

[17] By decision dated February 13, 2019, the Applicant's permanent residence application was denied. This is the underlying decision on this application for judicial review.

C. *The Underlying Decision*

[18] The Officer found that the Applicant did not meet the requirements of the CEC. The requirements included "temporary resident status during the qualifying period of work in Canada, meeting the minimum language proficiency threshold in either English or French, and qualifying Canadian skilled work experience". The Officer noted that the Applicant was being assessed on the basis that he held a skilled work position as a gas station supervisor (NOC 6211) at Debbie Williams Enterprises Inc.

[19] However, the Officer concluded that the Applicant did not meet the skilled work experience requirement of the CEC because the Applicant's pay stubs showed that he was continuously making minimum wage. The Officer reasoned that the salary or wage rates would be higher in a supervisor role (the Applicant's current position) than in a sales associate role (the

Applicant's previous position). Therefore, on a balance of probabilities, the Officer found that the Applicant's position at Debbie Williams Enterprises Inc. did not correspond to NOC 6211.

[20] Section 11.2(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") states that:

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

[21] The Officer found that because the Applicant no longer satisfied the requirements of the CEC, the Applicant did not satisfy the requirements of section 11.2(1) of the *IRPA*. Therefore, the Officer refused the Applicant's application for permanent residence.

[22] It is well established that the GCMS notes also form part of the reasons of the decision *(Khowaja v Canada (Citizenship and Immigration)*, 2013 FC 823 (CanLII) at para 3; *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 (CanLII) at para 8). In the GCMS entry dated February 13, 2019, the Officer noted that the Applicant's pay increases were reflective of the increase in minimum wage rates, and that it was unreasonable for the Applicant to earn "the same amount as the Sales Associates he is allegedly supervising".

[23] In the GCMS notes, the Officer noted that "there may be concerns regarding the client's credibility" because the Applicant continued to make minimum wage even after he became a gas station supervisor. The Officer pointed out that the Applicant's pay stubs indicated his occupation as a "Sales Associate" until November 2017. The Officer also noted that the wording found in the letter of employment was very similar to the wording in the Applicant's explanation letter, and therefore noted concerns on the authenticity of the letter of employment.

IV. **Issue and Standard of Review**

[24] In my view, the procedural fairness argument is dispositive of this application, and therefore I find that there is only one issue:

A. Did the Officer breach the duty of procedural fairness by failing to give the Applicant an opportunity to address the Officer's concerns regarding the Applicant's hourly wage?

[25] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], issues of procedural fairness were reviewable on a correctness standard *(Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 72; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 (CanLII) at para 54; *Saatchi v Canada (Citizenship and Immigration)*, 2018 FC 1037 at para 15). In *Vavilov* at paragraph 23, the Supreme Court writes:

> Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[26] A reading of paragraphs 76 and 77 in *Vavilov* reveals the Supreme Court's acknowledgement that the "requirements of the duty of procedural fairness in a given case…will impact how a court conducts reasonableness review." In my view, this is instructive for a reviewing court to first determine whether a duty of procedural fairness exists, and in light of the procedural fairness requirements (if applicable), apply the presumption of the reasonableness standard on the overall decision. In *Vavilov*, the duty of procedural fairness concerned whether reasons for the administrative decision was required and provided (*Vavilov* at para 78). Having found that reasons were both required and provided in this case, the Supreme Court moves onto its discussion on whether the decision is substantively reasonable. The following excerpt is also helpful, where the duty of procedural fairness is distinguished from the reasonableness analysis (*Vavilov* at para 81):

> […] The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

[27] The specific issue raised by the Applicant, whether he was entitled to an opportunity to address the Officer's concerns, is an established issue of procedural fairness reviewed on a correctness standard *(Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 (CanLII) at paras 9, 13 [*Hamza*]). The Officer is not entitled to deference upon review of this issue (*Hamza* at para 13). The correctness standard continues to apply to the issue of procedural fairness in the case at bar.

V. **Analysis**

A. *The Applicant's Submissions*

[28] The Applicant submits that the Officer breached the duty of procedural fairness by failing to bring their concerns regarding the Applicant's permanent residency application to the Applicant's attention. The Applicant submits that the Officer could have contacted the Applicant's employer to verify the veracity of the Applicant's employment letter, but the Officer did not. In failing to let the Applicant address the Officer's concerns, the Officer breached procedural fairness.

[29] The Applicant disputes the Respondent's reliance on *Hamza* and submits that *Hamza* involved an application for permanent residency with deficient evidence. In contrast, the Applicant submits that his evidence before the Officer was not deficient, but that the Officer still rejected the evidence without giving the Applicant an opportunity to address the Officer's concerns, which amounts to a violation of procedural fairness.

[30] The Applicant specifically draws this Court's attention to the fact that his letter of employment stated that his pay was $14/hour plus benefits. The Applicant submits that the Officer should have inquired into the meaning of "benefits" because it may have addressed the Officer's concerns.

B. *The Respondent's Submissions*

[31] The Respondent submits that the duty of fairness owed to visa and permanent resident applicants is at the low end of the spectrum. The Respondent cites several cases in support of its position: *Tahereh v Canada (Citizenship and Immigration)*, 2008 FC 90 (CanLII) at para 12; *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 (CanLII) at paras 31-32 [*Khan*]; *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA) at para 41.

[32] The Respondent submits that where an officer's concerns arise from the requirements of the legislation or regulations, the applicant is not entitled to an opportunity to address the Officer's concerns *(Zeeshan v Canada (Citizenship and Immigration)*, 2013 FC 248 (CanLII) at para 33; *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 (CanLII) at para 23).

[33] The Respondent further cites *Hamza* for the principle that an officer does not have to notify an applicant of inadequacies with an application (*Hamza* at para 24). The Respondent argues that the relevant issue in this case is that the Applicant's submitted materials were

inadequate. The Respondent cites *Chadha v Canada (Citizenship and Immigration)*, 2013 FC 105 (CanLII) at paras 37-39, 47-49 for the same principle [*Chadha*].

[34] The Respondent submits that an officer is entitled to draw from their own experiences and expertise, and that an officer does not need to alert an applicant if they draw from their own experience *(Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 (CanLII) at para 52; *Bahr v Canada (Citizenship and Immigration)*, 2012 FC 527 (CanLII) at para 42). The Respondent argues that there was no breach in procedural fairness as the Officer relied on their own experiences and expertise to draw their conclusions.

C. *Analysis*

[35] In my view, the Officer breached procedural fairness, and I find this Court's decision in *Hamza* to be particularly helpful. In *Hamza*, the applicant submitted an application for permanent residence through the Federal Skilled Worker program. The applicant's permanent residency application was refused because the visa officer found that the applicant had not submitted sufficient documentation supporting his experience as a general practitioner or family physician (*Hamza* at para 1). The officer had concerns with the employment letter submitted by the applicant, which mirrored the job duties found in the applicable NOC code (*Hamza* at para 7).

[36] In *Hamza*, in order to assess whether there had been a breach of procedural fairness, the Court explained at paragraph 10:

> This issue requires the Court to determine, first, if the Officer's concerns were related to the credibility of the employment letter provided by the applicant, or to the sufficiency of the evidence provided. Second, if the Court is satisfied that the Officer's concerns were related to the veracity of the employment letter, it must determine whether, in the circumstances of this case, the Officer should have provided the applicant with an opportunity to address her concerns.

[37] I note that the Respondent is correct that where an officer's concerns relate to the sufficiency of evidence, procedural fairness does not entitle an applicant to address an officer's concerns (*Chadha* at paras 47-49). The Respondent is similarly correct that the procedural fairness owed to the Applicant in the case at bar is on the low-end of the spectrum (*Khan* at paras 31-32; *Hamza* at para 23).

[38] However, as noted in *Hamza* at paragraph 25:

> Nevertheless, a duty to provide an applicant with the opportunity to respond to an officer's concerns may arise when the officer is concerned with the credibility, the veracity, or the authenticity of the documentation provided by an applicant as opposed to the sufficiency of the evidence provided.

[39] Moreover, although an immigration officer need not make explicit credibility findings, where the officer's decision as a whole demonstrates their skepticism of an applicant's claim, the applicant's right to address an officer's concerns is triggered (*Hamza* at para 30 citing *Adeoye v Canada (Citizenship and Immigration)*, 2012 FC 680 (CanLII) at para 8 [*Adeoye*]).

[40] In *Hamza*, the Court also found that the officer questioned the veracity of the applicant's submissions because the officer labelled the letter of employment as "self-serving" and because the officer found the letter to be "insufficient in the absence of other supporting documents" (*Hamza* at paras 38-39). As a result, the Court concluded that the officer breached procedural fairness by failing to provide the applicant with an opportunity to address the concerns with his evidence.

[41] Similarly, in the case at bar, the Officer flagged a possible credibility concern with the Applicant's submissions by noting that "there may be concerns regarding client's credibility". The Officer criticized the Applicant's evidence, in particular, the Applicant's minimum wage rate, and the timing of when the paystubs were updated to reflect the Applicant's promotion to a gas station supervisor. The Officer's reasons ultimately paint the picture that the Applicant's evidence was not credible, not that there was insufficient evidence to support the Applicant's work experience.

[42] Moreover, I find that the Officer's comments was indicative of an overall skepticism of the Applicant's claim. The Officer's credibility concerns rested on the fact that the Applicant worked minimum wage. There was no explicit, final determination that the Applicant was not credible, and the Officer appeared to cast doubt on the veracity of the Applicant's claim on the mere fact that the Applicant worked at the minimum wage rate. However, as noted in *Hamza* and *Adeoye*, an overall skepticism in the decision can warrant a finding that the officer breached procedural fairness.

[43] It is undisputed that the Applicant submitted a letter of employment, which stated that he was a gas station supervisor and listed both the Applicant's wages and his duties. As noted in *Hamza*, "There is no rule that requires an applicant to provide more than one employment letter to establish sufficient work experience. An application can be deemed complete even if the work experience is supported by a single employment letter, as long as the employment letter accurately and completely lists the main duties performed by the applicant," (*Hamza* at para 39). In the case at bar, although there was no suggestion in the Officer's reasons that the Applicant's letter of employment did not accurately or sufficiently list the required duties of his claimed position, the Officer refused the application on the basis that the Applicant earned minimum wage.

[44] By focusing on the Applicant's wage as the determinative issue, the Officer's decision gives the impression that the letter of employment was not a reliable or credible source of information. Despite a letter from the Applicant's employer stating that the Applicant made $14/hour and that he worked as a gas station supervisor with the accompanying duties, the Officer—in effect—impugned the credibility of the employment letter by concluding that a gas station supervisor would not be earning the minimum wage rate at $14/hour.

[45] During the hearing, the Court brought to the attention of the Respondent that a "common sense" approach is not the applicable framework in the case at bar. The Respondent argued that it would have been "common sense" for the Applicant to find a similar position that had higher wages. However, there is no need to consult "common sense". The evidence indicated that the Applicant was a supervisor, but that the Officer did not accept this fact based on his adverse

credibility assessments. The Respondent questioned during the hearing as to why the Applicant did not switch positions to a higher paying company or seek out better opportunities, despite the fact that he did not get a raise at his current position along with the promotion to a sales supervisor.

[46] However, such speculative questioning is inappropriate, and it is certainly not the Respondent's job to speculate on the reasons why the Applicant may have stayed at his current position. Some individuals may lack the luxury of changing jobs with ease or negotiating for a higher wage rate. Furthermore, it is troubling that the Respondent emphasized in a disrespectful manner that the minimum wage rate is a "starting wage" for gas station supervisors.

[47] The issue in the case at a bar is a question of procedural fairness and the Officer is not entitled to deference. The Applicant was entitled to an opportunity to address the Officer's concerns because the Officer's decision as a whole demonstrated skepticism of the Applicant's claim that he was a gas station supervisor. This was not merely an issue of the sufficiency of evidence. The Officer connected the Applicant's wage to a concern that the Applicant was not credible, and the Officer implicitly suggested that the Applicant's letter of employment was similarly not credible.

VI. **Certified Question**

[48] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[49] The Officer questioned the veracity of the Applicant's application without giving him an opportunity to address the Officer's concerns. In doing so, the Officer breached the Applicant's right to procedural fairness. This application for judicial review is allowed.

JUDGMENT IN IMM-1306-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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