Federal Court Cour fédérale

Date: 20200605

Docket: IMM-6441-19

Citation: 2020 FC 672

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 5, 2020

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

PATEL, HEMANTBHAI KISHORBHAI
PATEL, ASHABAHEN HEMANTBHAI
PATEL, DIYAN HEMANTBHAI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Hemantbhai Kishorbhai Patel, is seeking judicial review of a decision dated August 28, 2018, by a visa officer at the Canadian High Commission in New Delhi,

rejecting his application for a temporary work permit for a position as a human resources officer. As a result of this rejection, the visitor visa applications of his wife and minor son were likewise rejected.

[2] The applicant is a citizen of India. He has a university education in art but has been working in the field of human resources since 2011. In 2018, the applicant applied and was selected by an employer in Quebec for a position as a human resources officer. His application for a temporary work permit was rejected because he did not meet the requirements to be able to do the job he was applying for. It was only after receiving the visa officer's notes that the applicant and his future employer realized that the position code appearing on the Labour Market Impact Assessment [LMIA] did not correspond to the position offered.

[3] A second LMIA application was submitted to Employment and Social Development Canada [ESDC]. On July 16, 2019, the applicant's employer obtained a favourable LMIA for the position of Human Resources Officer classified under code 1223 in the 2016 National Occupational Classification [NOC] system. According to the LMIA, the position required a bachelor's degree as well as oral and written English language skills.

[4] Following the issuance of a positive LMIA, the applicant applied to Immigration, Refugees and Citizenship Canada [IRCC] for a temporary work permit for the intended position. The application was accompanied by a letter from the applicant's counsel explaining, among other things, that the employer had never required the applicant to have a bachelor's degree in a field related to personnel management, but rather a bachelor's degree in any field and experience

in human resources. The applicant's wife and son applied for a visitor's visa to accompany the applicant.

[5] On August 29, 2019, the visa officer rejected the application for a temporary work permit on the basis that the applicant had not demonstrated that he was capable of performing the job for which the permit was requested. The officer also rejected the minor applicant's and the female applicant's visitor visa applications, as they no longer had valid reason to come to Canada.

[6] The Global Case Management System notes, which form part of the reasons for decision, show that the application for a temporary work permit was refused on the grounds that the applicant had not demonstrated that he met the academic requirements for personnel management and the language requirements of spoken and written English for the position.

[7] The applicant argues that the visa officer's decision was unreasonable because it is not in compliance with the NOC requirements for the position of Human Resources Officer (NOC 1223) and because the visa officer could not require the applicant to submit the results of the International English Language Testing System [IELTS test] in order to demonstrate his ability to communicate in English. Furthermore, he submits that the visa officer breached procedural fairness by failing to consider the explanation provided by the applicant's counsel for the level of education required for the position and by failing to provide the applicant with an opportunity to address concerns about his ability to communicate in English.

II. Analysis

[8] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada held that there is a presumption that the reasonableness standard applies to decisions of administrative tribunals. This presumption can be rebutted in two types of situations. Neither of these situations applies in the present case (*Vavilov* at paras 10, 16–17).

[9] Where the reasonableness standard applies, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). The Court's "focus . . . must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83) to determine whether decision is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Close attention must be paid to the decision maker's written reasons, and these must be read in a holistic and contextual manner (*Vavilov* at para 97). Nor is such a review to be a "line-by-line treasure hunt for error" (*Vavilov* at para 102). If "the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision", this Court must not substitute the outcome that would be preferable to it (*Vavilov* at para 99).

[10] In the context of decisions made by visa officers, it is not necessary to have exhaustive reasons for the decision to be reasonable given the enormous pressures they face to produce a large volume of decisions every day (*Vavilov* at paras 91, 128; *Hajiyeva v Canada (Citizenship*

and Immigration), 2020 FC 71 at para 6 [*Hajiyeva*]). In addition, it is well established that visa officers enjoy considerable deference given the level of expertise they bring to these matters (*Vavilov* at para 93; *Hajiyeva* at para 4).

[11] With respect to the alleged breach of procedural fairness, the Federal Court of Appeal has clarified that issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the role of this Court is to determine whether the proceedings are fair in all the circumstances (*Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 79). This approach does not appear to have been modified by the Supreme Court of Canada in *Vavilov*.

A. *Academic requirements*

[12] The applicant submits that the visa officer's decision is unreasonable because it is not in compliance with the NOC requirements for the position of Human Resources Officer (NOC 1223), which give the employer the authority to decide whether or not to require a degree in a field related to personnel management. According to the LMIA application and the letter accompanying the work permit application, the academic requirements in personnel management were not mandatory if the applicant had recruitment experience. The applicant argues that the diplomas he provided to the visa officer attest that he had the minimum level of education required by the employer and specified in the LMIA, namely a bachelor's degree and the required recruitment experience.

[13] The applicant's argument is primarily based on the LMIA application form completed by the employer. This document was not before the visa officer when the decision was made. It is therefore inadmissible before this Court (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19).

[14] The LMIA submitted in support of the permit application clearly states that the position is a human resources officer position classified under NOC code 1223 and that a bachelor's degree is required. When reviewing the NOC for this code, it is expected that a university degree or college diploma in a field related to personnel management such as business administration, industrial relations, commerce or psychology or a professional development program in personnel management is usually required. The applicant acknowledges in his memorandum that this training is often required by the majority of employers.

[15] After taking note of the requirements on the LMIA and those specified in the NOC, the visa officer observed that the applicant has a university degree in the arts, but has not been shown to have studied in a field related to personnel management or to have completed a professional development program in personnel management. On this basis, the visa officer concluded that the applicant does not meet the academic requirements for the job. In light of the file before the visa officer, the Court finds this conclusion to be reasonable.

[16] The applicant submits that the visa officer breached procedural fairness by not taking into account the letter from his counsel which stated, among other things, that the employer did not

require a university degree in a field related to personnel management if the applicant had recruitment experience.

[17] The Court cannot agree with this argument.

[18] There is nothing on the record to show that the visa officer did not consider the information provided by the applicant's counsel. However, the visa officer had nothing to corroborate this information. Furthermore, it was not for the visa officer to question the requirements set out in the LMIA and the NOC. To the extent that the exception was proposed by the employer at the time of applying for the LMIA and did not appear on the LMIA, it was reasonable to conclude that it had not been accepted by ESDC. If the applicant believed that there was an error in the LMIA, he should have taken this up with ESDC. The claimant did not demonstrate that there was a breach of procedural fairness on this point.

B. Language requirements

[19] The applicant submits that it was unreasonable for the visa officer to require the applicant to submit IELTS test results to demonstrate his ability to communicate in English since the IELTS test results were not on the document list maintained by the IRCC site when he created his online application, or in the New Delhi Visa Office Instructions – IMM5905.

[20] Pursuant to paragraph 200(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, a visa officer shall not issue the work permit requested if the visa officer has

reasonable grounds to believe that the applicant is unable to perform the employment for which the work permit is requested. The onus is on the applicant for a work permit to provide sufficient evidence to demonstrate his or her competence, and the visa officer has broad discretion to decide the case (*Sangha v Canada (Citizenship and Immigration)*, 2020 FC 95 at para 42; *Liu v Canada (Citizenship and Immigration)*, 2018 FC 527 at para 52).

[21] It is true that the New Delhi Visa Office Instructions – IMM5905 do not mention the requirement to produce the language certification as is the case for persons applying under the Live-in Caregiver Program. However, it does mention that any application for a work permit must be accompanied by evidence that the person meets the conditions of employment.

[22] In this case, the LMIA clearly refers to the requirement to be proficient in both spoken and written English. In this context, the visa officer could reasonably expect the applicant to demonstrate language proficiency (*Sun v Canada (Citizenship and Immigration)*, 2019 FC 1548 at para 34 [*Sun*]). However, the applicant did not provide any objective evidence of his ability to express himself orally and in writing in English. Contrary to the applicant's contention, the indication in the work permit application form that the applicant is able to communicate in English is not objective evidence that demonstrates the extent of the applicant's language proficiency. Even letters from the applicant's employers in India do not attest to the applicant's proficiency in English. In the Court's view, by referring to the lack of IELTS test results, the visa officer was instead pointing to the lack of objective evidence demonstrating the applicant's language skills. These results would have allowed the visa officer to assess the applicant's language skills.

[23] The applicant complains that the visa officer did not give the expected credibility to his statement regarding his English language proficiency and that, as a result, the visa officer was obliged to give him an opportunity to respond to his doubts. This failure constitutes, in the applicant’s view, a breach of procedural fairness.

[24] This argument is without merit.

[25] In the context of visa applications, the case law distinguishes between adverse findings of credibility and findings of insufficient evidence. Where the visa officer raises doubts as to the credibility, truthfulness or authenticity of the information presented in support of an application, it is incumbent on the visa officer to give the applicant an opportunity to dispel those doubts. However, if the decision is based on the sufficiency of the evidence presented by the applicant, or failure to meet the legislative requirements, the visa officer is not required to inform the applicant (*Sun* at paras 23–24).

[26] In reviewing the record, I find there is no indication that the visa officer doubted the applicant’s credibility with respect to language proficiency. Rather, as noted above, the officer’s decision was based on the insufficiency of the evidence presented by the applicant, and the visa officer was not required to provide the applicant with an opportunity to present additional evidence.

[27] For all these reasons, the application for judicial review is dismissed. No question of general importance has been submitted for certification, and the Court is of the view that this case does not raise any.

JUDGMENT in IMM-6441-19

THIS COURT'S JUDGMENT is the following:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
This 11th day of June 2020.
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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