

Federal Court



Cour fédérale

**Date: 20200928**

**Docket: IMM-5875-19**

**Citation: 2020 FC 935**

**Ottawa, Ontario, September 28, 2020**

**PRESENT: The Honourable Madam Justice Pallotta**

**BETWEEN:**

**ANKUSH KUMAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] Mr. Ankush Kumar applies for judicial review of a visa officer's (the "Officer") decision to refuse his application for a work permit. Mr. Kumar seeks an order quashing the decision and remitting the matter for redetermination. For the reasons below, the application is dismissed.

## II. Facts and Decision Under Review

[2] Dhanju Group Inc. (“DGI”) offered to hire Mr. Kumar as a cook at an Indian restaurant in Edmonton. Mr. Kumar is a foreign national as a citizen of India. Before Mr. Kumar could work in Canada, he and DGI were required to meet the conditions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. DGI met one of the conditions by obtaining a Labour Market Impact Assessment (the “LMIA”) indicating that hiring a temporary foreign worker would have a positive or neutral impact on the Canadian labour market. As another condition, Mr. Kumar was required to obtain a work permit, but his application was refused.

[3] The Officer refused Mr. Kumar’s work permit application on the ground that Mr. Kumar failed to demonstrate he would be able to adequately perform the work, and invited Mr. Kumar to reapply. The Officer’s reasons in the Global Case Management System (“GCMS”) Notes were as follows:

Applicant is applying under R203 for a work permit. LMIA is confirmed, valid and lists applicant’s name. Applicant has submitted an employment offer issued by Dhanju Group Inc. to work as Cook for one year. [LMIA] Requirements: Completion of secondary school is usually required. / Completion of a three-year apprenticeship program for cooks or Completion of college or other program in cooking or Several years of General commercial cooking experience are required. Applicant has submitted few employment reference letters. I note these letters contain grammatical and formatting errors. Applicant has not submitted educational documents. No evidence of English language proficiency submitted. File reviewed. Based on the documents submitted by the applicant, I am not satisfied that the applicant meets the requirements of [LMIA]. Application is refused pursuant to R200(3)(a).

[4] Mr. Kumar challenges the underlying decision on the basis that the Officer (1) breached the duty of procedural fairness, and (2) unreasonably concluded that Mr. Kumar failed to demonstrate he would be able to adequately perform the work. First, Mr. Kumar submits he was denied procedural fairness because he was not able to fully present his case. He argues that the Officer should have provided an opportunity for Mr. Kumar to address concerns that his supporting documents were insufficient because the job requirements were ambiguous and the online application process led him to believe he had submitted a complete application with all of the required documents. Second, Mr. Kumar submits the Officer did not have reasonable grounds to believe he would be unable to perform the work sought. The supporting documents included a *curriculum vitae* (“CV”) indicating that Mr. Kumar met the language and education requirements, and employment reference letters related to his position as a cook in commercial kitchens since 2013. According to Mr. Kumar, the Officer did not provide reasons to impugn the authenticity of the supporting documents and failed to justify why they were insufficient to demonstrate an ability to perform the work.

### III. **Issues and Standard of Review**

[5] The issues in this application for judicial review are:

- A. Did the Officer breach the duty of procedural fairness?
- B. Was the Officer’s decision to refuse the work permit reasonable?

[6] The standard of review for the second issue is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25 [Vavilov]; *Sun v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1548 at para 15 [Sun]. A court undertaking a reasonableness review should ask whether 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: *Vavilov* at para 99. Mr. Kumar bears the onus of demonstrating that the Officer’s decision is unreasonable.

[7] The presumptive standard of reasonableness does not apply to questions of procedural fairness: *Vavilov* at paras 23 and 77. The parties’ submissions on the appropriate standard of review for procedural fairness can be summarized as follows. Mr. Kumar submits that the duty of fairness required the Officer to provide him a meaningful opportunity to present his case and to provide full and fair consideration of the application: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 30 [*Baker*]. Mr. Kumar submits that *Vavilov* did not change the standard of review for a breach of procedural fairness, which remains reviewable on a standard of correctness.

[8] The respondent submits that the duty of procedural fairness is flexible and context-specific: *Vavilov* at para 11. The respondent relies on *Wardak v Canada (Minister of Citizenship and Immigration)*, 2020 FC 582 at para 25 (citing *Canada Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*]), which states that the standard of review analysis is not required to determine whether an applicant was afforded procedural fairness—the ultimate question is whether the applicant knew the case to be met and had a full and fair chance to respond.

[9] In my view, the parties’ positions regarding the applicable standard for the issue of procedural fairness are not materially different. While the requirements of procedural fairness

are flexible and context-specific, once they are defined a reviewing court must determine whether the underlying decision was consistent with the requirements. A number of recent decisions from this Court have described the standard as one that reflects a correctness review: *Mannings v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 823 at para 43; *Pardo Quitian v Canada (Citizenship and Immigration)*, 2020 FC 846 at para 18; *Vyshnevskyy v Canada (Citizenship and Immigration)*, 2020 FC 881 at para 18. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific* at para 54; *Baker* at 837–841.

[10] It is not disputed that the Officer did not provide Mr. Kumar an opportunity to address concerns with the sufficiency of the supporting documents. The question is whether the Officer was required to give Mr. Kumar an opportunity to do so, having regard to all of the circumstances of this case.

#### IV. **Preliminary Issue: Objection to Evidence in Mr. Kumar’s Further Affidavit**

[11] In this proceeding, Mr. Kumar filed an affidavit intended to address some of the Officer’s negative findings. First, the Officer’s reasons noted grammatical and formatting errors in the reference letters from Mr. Kumar’s former employers, and the affidavit explained that English is not the employers’ native language. Second, Mr. Kumar argues that the Officer discounted his work experience based on a failure to understand industry-standard job descriptions for cooks who work in commercial kitchens. As such, the affidavit defines the terms used in the supporting documents within Mr. Kumar’s work permit application (such as Commis 1 and

Commis 3), and attaches an exhibit describing the roles and responsibilities associated with those positions.

[12] The respondent objects to the admissibility of certain aspects of Mr. Kumar's affidavit based on the general rule that the evidentiary record before the reviewing court is restricted to the evidentiary record that was before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]. The respondent takes the view that the evidence in Mr. Kumar's affidavit that was not before the Officer is inadmissible and does not fall within an exception to the general rule.

[13] Mr. Kumar argues that such evidence is admissible because it falls within the recognized exception that a court reviewing a decision for procedural fairness may admit evidence relating to procedural defects that cannot be found in the evidentiary record: *Access Copyright* at para 20. He argues that he was denied procedural fairness because the Officer should have sought clarification if they did not understand industry terms related to the job in question.

[14] A reviewing court must be mindful that its role is not to make findings of fact or re-decide the merits of the matter before the tribunal. The general rule that evidence on judicial review is restricted to the evidentiary record before the tribunal recognizes the distinct roles of the tribunal and the reviewing court, and exceptions to the general rule must be consistent with these roles: *Access Copyright* at para 20. I find that Mr. Kumar's affidavit falls within a recognized exception to the general rule and is admissible to the extent that it supports his

procedural fairness argument. However, it is not the Court's role to decide if Mr. Kumar meets the requirements of the job in question. As such, I have not considered evidence that was not before the Officer when determining whether the Officer's decision on the merits was reasonable.

V. **Analysis**

A. *The Officer did not breach the duty of procedural fairness*

[15] Mr. Kumar submits that he was required to apply for a work permit using an online application process. He argues that he submitted "each and every document" requested as part of the online application checklist and believed his application was complete. Specifically, Mr. Kumar uploaded a CV and employment reference letters as outlined in the checklist. However, Mr. Kumar submits that the online process never requested proof of his education (such as a copy of his secondary school diploma or a transcript of his grades) or proof of his English language writing and speaking abilities. Mr. Kumar argues that the Officer breached procedural fairness by denying his application based on a failure to provide documents not specified in the online checklist (proof of education and English language proficiency), without first giving him an opportunity to provide these additional documents. He submits the online process only permits an applicant to upload requested documents.

[16] Moreover, Mr. Kumar submits that since the job requirements were ambiguous, the duty of procedural fairness required the Officer to give him an opportunity to respond to concerns: *Li v Canada (Minister of Citizenship and Immigration)*, 2012 FC 484 at para 49 [*Li*]. As part of the application, Mr. Kumar had submitted a CV that listed his education, a score of 6 on the

International English Language Testing System (“IELTS”) proficiency test, and his ability to speak English. Mr. Kumar argues that the LMIA did not require specific academic grades or a specific level of English language proficiency. Similar to the applicant in *Li*, Mr. Kumar submits that the evidence before the Officer coupled with the limited guidance regarding the specific educational, language, and work requirements of the potential job required the Officer to give Mr. Kumar an opportunity to respond to the concerns.

[17] The respondent argues that there was no breach of procedural fairness and that the Officer was not required to apprise Mr. Kumar of concerns arising from or related directly to the requirements of the *IRPA* or the *IRPR: Anenih v Canada (Citizenship and Immigration)*, 2018 FC 718 at para 16 [*Anenih*]. As per paragraph 200(3)(a) of the *IRPR*, an officer shall not issue a work permit where “there are reasonable grounds to believe that the foreign national is unable to perform the work sought.” The respondent submits Mr. Kumar was required to provide sufficient supporting evidence to prove that he met the job requirements.

[18] For the reasons below, I find that the Officer did not breach the duty of procedural fairness. Specifically, I am not persuaded that the Officer was required to provide Mr. Kumar an opportunity to address concerns with his supporting documentation, having regard to all the circumstances of this case.

[19] While an applicant who applies for a work permit can expect procedural fairness, the degree of procedural fairness falls at the low end of the spectrum: *Anenih* at para 15; *Kindie v Canada (Citizenship and Immigration)*, 2011 FC 850 at para 5. As the respondent correctly



states, an officer does not have a duty to inform applicants of concerns arising from requirements set out in the *IRPA* or the *IRPR: Anenih* at para 16; see also *Ayyalasomayajula v Canada (Citizenship and Immigration)*, 2007 FC 248 at para 18. Proof that an applicant is able to perform the work sought is a requirement that arises from subsection 200(3)(a) of the *IRPR*.

[20] In this case, the Officer found, “Applicant has not submitted educational documents. No evidence of English language proficiency submitted...I am not satisfied that the applicant meets the requirements of [LMIA].” The LMIA indicated that verbal and written English was required and that secondary school education was required. Mr. Kumar had the onus of establishing these requirements according to the LMIA.

[21] Moreover, while the online checklist did not specifically require documents such as diplomas, academic transcripts, or certificates of English proficiency, it expressly included a field for uploading supporting documents as proof that Mr. Kumar met the requirements of the job being offered. However, Mr. Kumar did not upload any corresponding documents on the mistaken belief that the requirement applied only to regulated occupations, due to an explanatory note that read as follows:

If your intended occupation in Canada is regulated, provide evidence that the responsible provincial, territorial or professional body has granted you the required licence or certification.

[22] Instead of documents supporting his ability to perform the work (including by meeting educational and language requirements), Mr. Kumar uploaded a letter from his counsel, which stated that Mr. Kumar was “not required to provide proof of meeting the requirements of the job

offered to him” since the job offer of cook did not fall into a regulated profession. The letter invited the reader to contact counsel if there were any questions or concerns.

[23] While a cook is not a regulated occupation requiring proof of licence or certification, Mr. Kumar was nevertheless required to demonstrate that he met the job requirements, as noted above. In my view, Mr. Kumar’s failure to provide required documentation did not stem from misleading information in the online checklist or a technical limitation that only permits an applicant to upload requested documents. Rather, the online application form flagged Mr. Kumar’s application as incomplete until he uploaded a document, his counsel’s letter, to the field for “Proof that you Meet the Requirements of the Job Being Offered (required)”.

[24] Also, I am not persuaded that the Officer was required to give Mr. Kumar an opportunity to address concerns with the sufficiency of his supporting documents because his case was similar to the case of *Li*. In my view, *Li* is distinguishable because Mr. Li had submitted school records showing passing grades in English to satisfy the written and spoken English requirements. Justice O’Keefe held that the officer failed to provide a basis for the finding that Mr. Li failed to satisfy the language requirements, as there was nothing to suggest that his grades and school records could not be used to establish his proficiency in English. In contrast, Mr. Kumar did not provide documents to support his statements about education and English language proficiency in his CV. As the adequacy of the submitted evidence also arises in relation the second issue, I will address this point in more detail below.

[25] Therefore, the Officer did not breach procedural fairness by failing to apprise Mr. Kumar of concerns with the evidence regarding the employment requirements, or by failing to give him an opportunity to respond to those concerns.

B. *The Officer's decision to refuse the work permit was reasonable*

[26] Mr. Kumar submits that the Officer's decision is unreasonable as there was no reasonable basis to conclude that he would be unable to perform the work as a cook. Mr. Kumar submits that he satisfies the requirements for the position and points to his reference letters and CV, which outline his work experience from 2013 to 2019. Mr. Kumar argues that the statements in his CV must be presumed to be true unless contradicted. He asserts that the Officer failed to consider the evidence or erred in assessing it, since there was no evidence to contradict his CV. Moreover, Mr. Kumar submits that the Officer unreasonably fixated on "grammatical and formatting errors" in his reference letters, and erroneously concluded that Mr. Kumar provided "few employment reference letters", despite the fact that the three letters covered the entire relevant period in his employment history.

[27] Officers are under a duty to conduct an independent assessment of a work permit applicant's ability to perform the work sought: *Cruz v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1283 at para 7. In my view, it is clear from the Officer's reasons that the key issue in Mr. Kumar's work permit application was the lack of evidence to establish that he met the LMIA requirements. Mr. Kumar applied for his work permit under a LMIA that included an educational requirement (i.e. secondary school) and language requirement (i.e.

spoken and written English). However, as specifically noted by the Officer, Mr. Kumar did not provide evidence of his English language proficiency or completion of secondary education.

[28] I acknowledge that Mr. Kumar's CV indicates:

- he completed secondary school (12<sup>th</sup> passed from H.P.O.B.S.E., Dharamshala), a one-year diploma in computer science from Optech Computer Education and a one-year diploma in food production from CIHM Chandigarh;
- he speaks English and that he obtained a 6.0 overall score in IELTS; and
- he was employed as a cook at various levels from 2013 to 2019.

[29] Mr. Kumar also submitted reference letters from each of his employers, and a letter from the Country Inn & Suites hotel stating that he was a student of the Chandigarh Institute of Hotel Management & Catering Technology and completed "Industrial Training in F&B Production" [food & beverage] at the hotel from June to November 2013. Mr. Kumar argues that this was evidence of his education and English abilities and the Officer's statements that "Applicant has not submitted educational documents" and "No evidence of English language proficiency submitted" are untrue. However, these documents do not establish Mr. Kumar's English proficiency or the completion of his secondary school education. It appears to me that the Officer's concerns could have been alleviated with the submission of a secondary school diploma and official IELTS certificate—however, such documents were not before the Officer. It was reasonable for the Officer to require supporting documentation to verify whether Mr. Kumar had the necessary competencies, particularly since the duties of the position as a cook included supervising kitchen helpers and overseeing kitchen operations.

[30] In the context of work permit applications, this Court has held that it is reasonable for an officer to expect more than an English language application and cover letter to verify the applicant's ability to speak and write in English, where there are reasonable grounds to believe that such language skills are necessary to perform the work sought in accordance with subsection 200(3)(a) of the *IRPR*: *Sun* at para 34; *Virk v Canada (Citizenship and Immigration)*, 2014 FC 150. Similarly, in this case it was reasonable for the Officer to require verification of Mr. Kumar's secondary school education and English language skills referred to in his CV. Mr. Kumar's failure to provide evidence to meet these specific requirements of the LMIA provided sufficient justification to refuse his work permit application.

[31] While I acknowledge that the Officer does not explain how the grammatical and formatting errors in letters from Mr. Kumar's previous employers are relevant to Mr. Kumar's application for a work permit, I find that this point was not sufficiently central or significant so as to render the decision unreasonable: *Vavilov* at para 100.

[32] As noted above, Mr. Kumar's CV also indicated that he had completed a "[o]ne year diploma in food production from CIHM Chandigarh", and Mr. Kumar submitted a number of reference letters from former employers where he worked as a cook since 2013. He argues that the CV and reference letters should have been sufficient to prove qualifications of "completion of a three-year apprenticeship program for cooks or completion of college or other program in cooking or several years of general commercial cooking experience" as stated in the Officer's reasons, particularly since the National Occupation Classification (NOC) description for a cook only indicated that those qualifications may be required. However, it is not clear from the

reasons that the Officer found Mr. Kumar's qualifications as a cook to be deficient, and the lack of evidence establishing Mr. Kumar's secondary education and English language ability were sufficient to support the Officer's conclusion that Mr. Kumar did not meet the requirements of the LMIA.

[33] The Officer's decision is justified in light of the facts of the case, and the Officer's reasons are coherent: *Vavilov* at para 105. I find that the Officer's decision is reasonable.

## VI. **Conclusion**

[34] In the result, I am dismissing this application for judicial review. The Officer did not breach procedural fairness, and the Officer reasonably found that Mr. Kumar did not meet the requirements of the LMIA.

[35] No question for certification arises from the parties' submissions.

**JUDGMENT in IMM-5875-19**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is dismissed.
2. There is no question to certify.

**"Christine Pallotta"**

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5875-19

**STYLE OF CAUSE:** ANKUSH KUMAR v THE MINISTER OF  
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