Federal Court  Cour fédérale

Date: 20210621

Docket: IMM-2505-20

Citation: 2021 FC 635

Toronto, Ontario, June 21, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

JASWINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application judicially reviews a decision dated April 29, 2020, (the "Decision") of an Officer (the "Officer") of the High Commission of Canada in New Delhi to refuse the Applicant's work permit ("WP") application. The Officer refused to grant the WP based on the finding that the Applicant had failed to demonstrate that he would be able to adequately perform the work sought. For the following reasons, I find that the Officer's Decision was reasonable.

II. Background

[2] The Applicant is a citizen of India, with over 16 years of work experience as an electrician. On November 14, 2019, he received an offer of employment ("Offer of Employment") to work as an electrician in Abbotsford, British Columbia, from an employer with a positive Labour Market Impact Assessment ("LMIA"). The LMIA was valid until February 1, 2020. The Offer of Employment and the LMIA both required the Applicant to read and interpret drawings, blueprints, and sketches in English.

[3] The Applicant submitted his WP application on January 31, 2020. In support of his application, the Applicant provided, in addition to extensive evidence of work experience, certificates establishing that he had passed grades 10 and 12 in India, which included a passing grade in English. He also provided a receipt confirming that he had booked testing dates to write the International English Language Testing System ("IELTS") exam in February 2020. The speaking portion of the IELTS exam was booked for February 11, 2020, with the reading and writing component set for two days later. In the application, the Applicant's immigration consultant also advised the visa office, by letter:

> Applicant has completed his education in English medium and is well versed with Oral and Written English. He has already booked his IELTS to be held on 13th February, 2020 and will submit the test results if required.

[4] After booking the testing dates, the Applicant was advised that the reading and writing component of his test was rescheduled to March 7, 2020, on which date the Applicant completed the balance of his IELTS testing.

[5] After the Indian government imposed a countrywide lockdown from March 25, 2020, to May 31, 2020, to reduce the transmission of COVID-19, the Applicant deposes that he was unable to receive any e-mail notifications from the IELTS administrators because he had no Internet at his house. He further deposes that on or about June 1, 2020, after India eased its lockdown restrictions, he was finally able to access his e-mail, when he says that he opened an IELTS e-mail dated April 11, 2020, informing him of a delay in releasing his test results. He states that he received his results on or about June 3, 2020, by mail. The Officer's Decision had thus preceded this notification by over a month.

III. Decision under Review

[6] In refusing the WP, the Officer found that the Applicant had not demonstrated with adequate evidence the English proficiency required for a prospective electrician job in Canada. The Officer wrote in the Global Case Management System ("GCMS") notes, which form part of the Decision:

> I have concerns regarding the applicant's English language skills which are also listed as a requirement for the position on the LMIA. No IELTS result provided. No satisfactory evidence of language proficiency provided. Noted rep's submissions. However, based on info [b]efore me, I am not satisfied that the applicant has sufficient ability to perform the duties of the position offered in Canada. Application is refused on R200(3)(a).

IV. Issues and Standard of Review

[7] First, the Applicant argues that the Officer's Decision regarding the language issue was unreasonable, and second, that the Officer breached procedural fairness in not providing him an opportunity to provide his IELTS results.

[8] The Supreme Court of Canada in *Canada* (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] set out a framework to determine the standard of review in which reasonableness is the presumptive standard. The parties agree that the standard of review that applies to the first question in this case is reasonableness.

[9] The requirements of procedural fairness are flexible and context-specific (*Vavilov* at para 77; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at 837–841), and a review for procedural fairness involves an assessment of whether the process was fair in all of the circumstances on a standard of correctness: *Canada Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

V. Analysis

A. *Was the Officer's Decision reasonable?*

[10] The Applicant argues that the Officer was unreasonable in concluding that he had not demonstrated his ability to do the work sought, given the extensive employment history submitted, as well as school certificates showing he took grade 10 and 12 English.

[11] I am not persuaded that the Officer made any unreasonable findings. The evidence submitted did not adequately establish the Applicant's English proficiency. The school results, in and of themselves, did not demonstrate proficiency (with a mark of 47/100 in English, for instance). Furthermore, the school mark was from 1997, going back more than two decades, and

English is not the Applicant's first language. Thus, wanting to see external, objective testing verification was entirely reasonable.

[12] Certainly, the Applicant or his immigration consultant perceived a need to provide such external verification, because they unilaterally decided that the Applicant should undertake language testing. However, they left this process too late. The Applicant had approximately 10 weeks to prepare his application from when he received his Offer of Employment on November 14, 2019, to the time that he submitted his WP application on January 31, 2020, a day before his LMIA expired. Thereafter, neither the Applicant nor his consultant updated the visa office regarding the rescheduling of his test, or its completion.

[13] In other words, the Applicant had, at a minimum, over two and a half months to book his IELTS test before he did so. The Applicant provided no explanation for the delay and did not follow up with the Officer after he learned that there would be a further delay in his testing.

[14] The *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] state, at paragraph 200(3)(a), that an officer shall not issue a work permit to a foreign national if there are reasonable grounds to believe that the foreign national is unable to perform the work sought. Many of the job duties of an electrician require proficiency in English, including the ability to read and interpret drawings, blueprints, and sketches, as stated above.

[15] It is well settled that the onus is on applicants to put their best case forward, with sufficient documentation to support the work permit application: *Singh v Canada (Citizenship*

and Immigration), 2015 FC 115 at para 25 [*Singh*]; *Grusas v Canada (Citizenship and Immigration)*, 2012 FC 733 at para 63 [*Grusas*]. WP applicants must therefore support their applications with adequate evidence and must themselves satisfy visa officers that they meet all of the job requirements: *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 10 [*Sulce*].

[16] In this case, although both the Offer of Employment and the LMIA required the Applicant's ability to undertake his job tasks in English, the Applicant submitted only his poor and dated high school English marks with his application. He did not provide any other objective indicia of his language ability, whether that be in the form of job, educational, or other references. And while he stated that he would be providing IELTS test results, he did not include these with his application and did not explain why he could not have registered for the IELTS earlier, during the approximately two and a half months that he had to complete his application.

[17] The GCMS notes are clear that the Officer considered the evidence of language proficiency provided in the application, including the submissions of the Applicant's immigration consultant regarding his forthcoming IELTS test. Given the gaps in the evidence, it was reasonable for the Officer to refuse the Applicant's WP, under paragraph 200(3)(a) of the *Regulations*, based on the insufficiency of the documentation provided to support the language requirements of the position.

B. *Did the Officer provide the Applicant with adequate procedural fairness?*

[18] The Applicant also devoted a significant potion of his arguments contending that the Officer was required to provide an opportunity for him to respond to concerns about his English proficiency before refusing the application. I am similarly not persuaded by the procedural arguments submitted by the Applicant, or by the applicability of the jurisprudence he relies on in this regard, as explained below.

[19] It is generally not a requirement that work permit applicants be granted an opportunity to respond to officers' concerns, where such concerns arise from a requirement set out in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and its *Regulations*: *Singh* at para 25.

[20] As explained above, the Officer's concerns arose directly from the Applicant's failure to satisfy the requirements of his prospective position in Canada with evidence of language proficiency. He also submitted no evidence regarding why reapplying would cause him undue hardship (see *Sulce* above).

[21] Furthermore, the level of procedural fairness in work permit applications is low: *Brar v Canada (Citizenship and Immigration)*, 2020 FC 70 at para 22; *Grusas* at para 63. This is particularly so when there is no evidence of serious consequences to the applicant, such as, for example, where the applicant is able to reapply for a work permit without undue hardship: *Sulce* at para 10.

[22] In addition, the Applicant advised the Court of a Delhi visa office COVID-19 pandemic directive (the "Directive"), stating that "officers may continue to request any necessary additional documents" but, where additional documentation is required, the officer "should send a request letter and allow 90 days for the applicant to respond". The Applicant argued that this added to the unfairness of his situation.

[23] However, this Directive does not change my opinion about the fairness of the process in this case. Because the Directive's language is permissive rather than mandatory, and because the Officer did not require additional documentation in order to make a decision, having concluded that the Applicant had failed to meet his onus of providing sufficient evidence, the Directive simply does not apply to these circumstances.

[24] Finally, the Applicant points to *Li v Canada (Citizenship and Immigration)*, 2012 FC 484 at para 49 [*Li*], to support his unfairness arguments. In *Li*, this Court found that there was nothing in either the statutory provisions or the relevant immigration policies to suggest that school records would be inadequate to establish the applicant's proficiency in English, and granted the application for judicial review. Given the lack of specificity about the English requirement in the LMIA, and given the school records with passing grades in English that the applicant had submitted, this Court concluded that the officer had breached the duty of fairness in not giving the applicant an opportunity to respond to concerns before refusing his application. Specifically, in terms of procedural fairness, the Court found that while there is generally no obligation on an officer to make further inquiries when an application is ambiguous, the facts of the case supported an exception to this rule.

[25] The major difference between *Li* and the present case is that the job requirements are materially different for an electrician. In *Li*, the position in question was a cook specializing in Indian-Cantonese Hakka Cuisine. There, it was not clear why the evidence presented, in light of the position, did not respond to the statutory requirements, and the Officer did not provide an opportunity to respond to the concerns. Here, on the other hand, the Officer was not satisfied that the language evidence presented was sufficient to demonstrate that the electrician's job duties could be performed, based on the scant evidence of language that was presented. This conclusion was reasonable in the circumstances, and distinguishable from that of a Hakka cook, given the highly specialized tasks required of an electrician, not to mention the risks involved.

[26] Visa officers are entitled to determine whether applicants have provided sufficient evidence to document language ability required for the performance of the different job duties they will be responsible to undertake in Canada. The English levels may not be explicit in either the LMIA or the job offer. As I have observed previously in *Singh*, the LMIA speaks to the needs of the labour market, and the position sought, rather than the attributes of the individual applicant. Evaluating whether that applicant can adequately perform that job ultimately resides with the visa officer who, as stipulated by the legislation, must determine whether all statutory requirements have been fulfilled, including whether the foreign national is able to perform the work sought (*Regulations* at paragraph 200(3)(a); *Singh* at para 20). This properly includes the ability to work in the language of the job.

[27] The Applicant also cites *Singh Grewal v Canada (Citizenship and Immigration)*, 2013 FC 627 at para 18 [*Grewal*] to support his procedural fairness arguments. However, *Grewal* is also

distinguishable because it involved an application for permanent residence, which carries different considerations and a greater degree of scrutiny given the permanent nature of the outcome (see, for instance, *Li* at para 25).

[28] However, even in cases involving applications for permanent residence, procedural fairness does not entitle an applicant to address an officer's concerns where these concerns relate to the sufficiency of evidence (as opposed to credibility, which was not in issue here): see, for example *Patil v Canada (Citizenship and Immigration)*, 2020 FC 495 at para 37. The procedural fairness rights for non-citizens are at the low end of the spectrum (*Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321 at para 63). Finally, this Court found no procedural unfairness in *Grewal*.

[29] Overall, the duty of procedural fairness is flexible and context-specific. Underlying the *Baker* factors for determining the content of the duty of procedural fairness is the necessity of ensuring that (i) "administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context", and (ii) that those affected by the decision have an opportunity to "put forward their views and evidence fully and have them considered by the decision-maker" (*Baker* at 837). Here, the Applicant benefitted from both guarantees, but simply failed to meet his onus under the legislation.

[30] To shift the onus to the visa officer would simply not be practicable. Requiring visa officers to follow-up on every incomplete element would compromise a system predicated on prompt processing and efficient procedures for all three parties involved in WP applications (*i.e.*,

the Applicant, the employer, and the decision-maker), particularly given the large volume of these applications filed each year. To impose such a requirement would not be in keeping with the legislative scheme of *IRPA* and its *Regulations*, and the jurisprudence. It would undermine the objective of achieving an efficient temporary residency system (*IRPA* paragraphs 3(1)(f), (f.1) and (g)).

VI. Conclusion

[31] The Applicant in this case failed to provide sufficient evidence to support his ability to do the work sought and the Officer therefore reasonably refused his WP application. The Officer breached no fairness requirements in doing so. Consequently, I will dismiss this application for judicial review. The parties confirmed that no question merited certification, and I agree with that observation.

JUDGMENT in IMM-2505-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question of general importance to be certified.

3. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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