Federal Court  Cour fédérale

Date: 20210621

Docket: IMM-2849-20

Citation: 2021 FC 633

Ottawa, Ontario, June 21, 2021

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

LUXI SHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Luxi Shang [Ms. Shang], seeks judicial review of a decision of a Visa Officer [the Officer] to refuse her application for a work permit under the Temporary Foreign Worker Program. Ms. Shang applied for a work permit pursuant to the Prince Edward Island Provincial Nomination Program [PEI PNP]. The Officer found that Ms. Shang had not demonstrated that she met the requirements of section 205(a) of the *Immigration and Refugee*

Protection Act Regulations, SOR/2002-227 [*Regulations*] and was not satisfied that Ms. Shang was exempt from a Labour Market Impact Assessment [LMIA].

[2] For the reasons that follow, the Application for Judicial Review is allowed.

I. Background

[3] Provincial nomination programs are for workers from other countries who seek to immigrate to Canada and who will contribute to the economy of the particular province, live in that province and ultimately become permanent residents of Canada. There are various "streams" by which a province identifies the skills or occupations that it supports for nomination. Each province may negotiate its own agreement with Canada to reflect provincial variations and goals. The Canada-PEI Immigration Agreement [the Provincial Agreement] is the immigration agreement between PEI and Canada and the PEI PNP is part of the agreement.

[4] Ms. Shang, a resident of China, proposed to immigrate to Canada to open a home décor business in PEI. Ms. Shang planned to lease retail space in Summerside, hire two staff, and use other local vendors to support her marketing efforts for the business, which would sell imported goods from China.

[5] Ms. Shang was approved as a Provincial Nominee Candidate under PEI PNP's work permit stream. (A candidate is not a provincial nominee, rather a potential nominee.) In accordance with the terms and conditions of the program, she was required to obtain a temporary

work permit from Canada and, upon arrival, reside in PEI and invest at least $150,000 in an approved business.

[6] In her application for a temporary work permit, Ms. Shang submitted her business plan, two letters of support from her representatives and a work permit letter of support from PEI. The support letter from PEI noted, among other information, that PEI was of the opinion that PEI will significantly benefit from the proposed business and that PEI had determined that the business plan is economically viable, consistent with PEI's requirements and that the candidate is likely to establish the business and meet the requirements for nomination within the required period. PEI's support letter also requested that the work permit be issued for two years and that the requirement for a LMIA be exempted.

II. The Decision Under Review

[7] The Officer issued the decision, which refused to issue the work permit, by way of letter dated June 16, 2020. The Officer concluded that Ms. Shang had not demonstrated that she met the requirements for a work permit pursuant to section 205(a) of the *Regulations*, which the Officer noted as "Significant Benefit to Canada" and was not satisfied that she was exempt from a LMIA. The Officer attached the notes from the Global Case Management System [GCMS], which together with the letter constitute the reasons for the decision.

[8] The GCMS notes are brief and state that: the application was reviewed; a previous refusal is noted; the application is "for C11 Entrepreneur in PEI"; and, according to the business plan, the Applicant proposes to offer residential and commercial home décor products and furnishings

imported from China. The GCMS notes also state that "[f]oreign nationals applying to work for themselves or to operate their own business on a temporary basis must demonstrate that their admission to Canada to operate their business would generate significant economic, social or cultural benefits or opportunities for Canadian citizens or permanent residents pursuant to paragraph R205(a). Given that there will be no products manufactured/supplied from Canada and the job creation is minimal, it is difficult to see the significant benefit to Canada. The business plan provided does not indicate how PA's [the Applicant] involvement will [*sic*] provided economic stimulus, job creation for Canadians and/or significant benefit to Canada."

III. The Applicant's Submissions

[9] The Applicant submits that the decision is unreasonable including because: the Officer did not consider that she submitted her application in accordance with the Provincial Agreement; and, the Officer ignored evidence, including that PEI supported her application.

[10] The Applicant argues that the Officer was required to consider the Provincial Agreement – or at least acknowledge awareness of it – because the Provincial Agreement provides the context for her application.

[11] The Applicant submits that it appears that the Officer considered that she was a stand-alone entrepreneur or business applicant and not a candidate for provincial nomination (a potential nominee), which requires the Officer to consider the provincial letter of support. The Applicant submits that the Officer's notation in the GCMS notes "C11 Entrepreneur" does not

convey whether the Officer understood that she was a potential nominee given that this category includes many types of applicants for temporary work permits.

[12] The Applicant acknowledges that the ultimate decision to issue the work permit is that of the Officer, but submits that the Officer's authority to make the decision is constrained by and should be consistent with the Agreement. The Applicant submits that the purpose of the requirements set out in the *Regulations* and the provision of a temporary work permit is to ensure that an applicant can begin their business activity before the nomination is made.

[13] The Applicant points to the Minister's Guidelines (International Mobility Program: Canadian interest - Significant Benefit - Entrepreneurs/self employed candidates seeking to operate a business [R205(a) - C11]) [the Guidelines] regarding the requirements for and processing of applications for temporary work permits of provincially nominated applicants undertaking business activities. The Applicant notes the distinction in the Guidelines between applicants who seek only temporary residence and those who seek eventual permanent residence, such as applicants who intend to start a business.

[14] The Applicant further argues that the decision is unreasonable because the Officer ignored the letters of support, in particular, PEI's letter of support. The Applicant notes that a support letter from PEI was a requirement for the work permit and, as a result, the Officer was required to consider the letter, which set out PEI's opinion, in determining whether to grant the work permit.

[15] The Applicant disputes the Respondent's submission that the Court should not consider the Guidelines because they were not submitted by way of an affidavit. The Applicant notes that the Guidelines are publicly available documents, the Certified Tribunal Record refers to parts of the Guidelines, the Officer used wording from the Guidelines and the Respondent refers to the Guidelines. The Applicant submits that the Respondent's reliance on *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 [*Leahy*] is not applicable as that case dealt with very different issues.

[16] The Applicant also disputes that excerpts of Annex A of the Provincial Agreement should not be considered by the Court. The Applicant submits that Annex A should be considered in its entirety.

IV. The Respondent's Submissions

[17] As a preliminary issue, the Respondent submits that the Court should not consider or take judicial notice of the Guidelines because these are internal policy documents that have not been provided to the Court by way of affidavit. The Respondent points to *Leahy* at para 143 as establishing that reviewing courts should not take judicial notice of internal policy statements and if these are relevant they should be attached to an affidavit.

[18] The Respondent explains that their references to the Guidelines are only in response to the submissions of the Applicant.

[19] The Respondent also argues that the Court should not consider or take judicial notice of the excerpts of Annex A to the Provincial Agreement included in the Applicant's Record for the same reason – it was not provided by way of an affidavit. Alternatively, the Respondent submits that the Court should consider the complete Provincial Agreement.

[20] The Respondent submits that the Officer reasonably concluded that the Applicant's proposed business would not generate economic benefits for Canadian citizens and permanent residents.

[21] The Respondent notes that the duty on visa officers to provide reasons is minimal and although the Officer's reasons are brief, they are sufficient to enable the Court to understand the Officer's chain of analysis, which is consistent with the legal and factual constraints imposed by the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the Provincial Agreement. The Respondent submits that the reasons reflect transparency, justification and intelligibility. The Respondent points to several passages in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (including at paras 83, 85, 99, and 100), which highlight that a decision should only be disturbed where there are serious shortcomings that are more than superficial or peripheral to the merits.

[22] The Respondent points to Annex A to the Provincial Agreement and subsection 87(1) of the *Regulations*, which together establish the PEI-PNP. The Respondent notes that the Provincial Agreement sets out the role and responsibilities of Canada as distinct from those of PEI.

[23] The Respondent submits that it is the Officer's responsibility to determine if an applicant is eligible for a work permit. The Officer must be satisfied that the requirements of the IRPA and its *Regulations* have been met in order to do so.

[24] The Respondent notes that section 205(a) of the *Regulations* sets out the requirements for the issuance of a work permit for applicants that do not have an offer of employment and requires that the proposed work "would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents." [Emphasis added].

[25] The Respondent submits that the reasons demonstrate that the Officer grappled with the issue whether the Applicant's business would generate significant economic benefit to Canada and the reasons focus on this.

[26] The Respondent highlights that the Applicant is not a business nominee; rather she is only a potential nominee, as PEI has not yet nominated her. The Respondent notes that in accordance with sections 5.6 and 5.7 of Annex A, PEI may provide business nominees – as distinct from potential nominees – with a work permit support letter to confirm that their entry would generate the benefits noted in section 205(a) of the *Regulations*.

[27] The Respondent submits that the PEI letter of support did not address whether there will be significant benefits, nor was it required to conduct this assessment. The PEI letter of support was simply an opinion.

[28] The Respondent disputes that the due diligence requirements of the Provincial Agreement require PEI to assess whether the planned business activity will create or maintain significant economic, social or cultural benefits or opportunities for Canadian citizens or permanent residents. The Respondent points to section 5.3 of Annex A, noting that the requirements fall short of requiring PEI to assess whether significant benefits "will" be created. The Respondent also points to sections 5.8 and 5.9 regarding Canada's obligations related to the processing of applications, which include determining the eligibility of an applicant for a work permit pursuant to section 200 of the *Regulations* and determining the admissibility of the applicant with respect to the legislative requirements.

[29] The Respondent submits that the Officer identified the Applicant's proposed business and applied the test of whether the business would generate significant economic, social, or cultural benefits or opportunities for Canadian citizens or permanent residents. The Respondent submits that the Officer considered the evidence and concluded that the proposed or intended work did not meet those requirements.

[30] The Respondent disputes that the Officer ignored any of the evidence submitted by the Applicant or that the Officer's failure to refer to all the evidence demonstrates that it was ignored.

[31] The Respondent first submits that the Officer was not required to specifically address the letters of support, including that of PEI, because these letters were not evidence, rather assertions

and opinions. Second, the letters did not "squarely contradict" the Officer's conclusion that no significant benefits would be generated for Canadian citizens or permanent residents.

[32] The Respondent also disputes that the Officer should have noted and applied the Guidelines, which state that a letter of support from the province should count toward the evidence that their admission to Canada to operate a business may create significant economic, cultural or social benefits to Canada. The Respondent reiterates that the Guidelines should not be considered as they are not properly before the Court. The Respondent also argues that the Guidelines are not binding and are not the law; the Officer was required to make a decision based on the IRPA and *Regulations*. The Respondent adds that the Guidelines also use the word "may create a significant … benefit", not "will" or "would" create a benefit. Hence, the letter does not squarely contradict the Officer's conclusion.

[33] The Respondent adds that, in any event, the Officer implicitly applied the Guidelines, which set out indicators of significant benefit pursuant to subsection 205(a) of the *Regulations.* The Respondent notes that general economic stimulus, such as job creation or expansion of export markets and advancement of Canadian industry are such indicators and were not apparent in Ms. Sheng's application.

[34] The Respondent acknowledges that the PEI support letter states, "PEI is of the opinion that it will significantly benefit from the planned business activity of work of the candidate", but submits that this does not "squarely contradict" the Officer's conclusion that the business would not create significant economic or other benefits to Canadian citizens or permanent residents.

The Respondent submits that there is a distinction between benefits to PEI and benefits to Canadian citizens and permanent residents. The Respondent submits that the different language used in different parts of the Agreement and the *Regulations* signal the different meanings and should be respected.

[35] The Respondent relies on *Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 24, where the Court explained that the principle in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 1998 CanLII 8667 [*Cepeda-Gutierrez*] applies only where the evidence not mentioned by the decision- maker is critical and "squarely contradicts" the decision maker's conclusion.

[36] The Respondent further submits that the Officer was not required to address the two letters of support from the Applicant's representative because these letters were also not critical evidence and, like the PEI support letter, did not "squarely contradict" the Officer's conclusion. The Respondent submits that the Officer reasonably placed greater reliance on the business plan in concluding that the business did not meet the requirements.

[37] Finally, the Respondent argues that the Officer's failure to refer to the Provincial Agreement does not mean that the Officer ignored the context for Ms. Shang's application. The Respondent submits that the Officer's reasons demonstrate his awareness of the Provincial Agreement, given the short form reference to the application pursuant to "C11 Entrepreneur in PEI". The Respondent submits that the Officers' decision is consistent with the Provincial Agreement.

V. The Standard of Review

[38] There is no dispute that the Officer's decision, which is discretionary and applies the facts to the law, is reviewed on the standard of reasonableness. The Supreme Court of Canada's decision in *Vavilov* confirms that reasonableness is the presumptive standard of review and none of the exceptions noted in *Vavilov* apply to the review of the Officer's decision.

[39] In *Vavilov*, the Supreme Court of Canada provided extensive guidance on what constitutes a reasonable decision and on the conduct of a reasonableness review. A hallmark of a reasonable decision remains that the decision is justified, transparent and intelligible (*Vavilov* at paras 99, 100).

[40] A reviewing court begins by examining the reasons, with respectful attention, seeking to understand the reasoning process followed by the decision-maker to arrive at a conclusion. A reasonable decision is one that 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 paras 85, 102, 105-110).

[41] The Respondent points to other passages in *Vavilov*, including para 91, which reminds the reviewing court that "the written reasons given by an administrative body must not be assessed against a standard of "perfection" and need not include all the arguments and details".

[42] At para 100, the Supreme Court of Canada noted that decisions should not be set aside for minor "missteps" in the reasoning:

> [100] Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[43] The Supreme Court of Canada noted at para 101 that there are two types of fundamental flaws that will render a decision unreasonable: "[t]he first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it."

VI. The Relevant Statutory Provisions

A. *IRPA*

8 (1) The Minister, with the approval of the Governor in Council, may enter into an agreement with the government of any province for the purposes of this Act. The Minister must publish, once a year, a list of the federal-provincial agreements that are in force.	8 (1) Pour l'application de la présente loi, le ministre peut, avec l'agrément du gouverneur en conseil, conclure un accord avec une province; il publie chaque année la liste des accords en vigueur.
(2) Subject to subsection (3) but despite the other provisions of this Act, the	(2) Malgré les autres dispositions de la présente loi,

following must be consistent with the federal-provincial agreements:

doivent être conformes à l'accord :

(a) the selection and sponsorship of, and the acquisition of status by, foreign nationals under this Act; and

a) la sélection et le parrainage des étrangers, ainsi que l'acquisition d'un statut, sous le régime de la présente loi;

(b) regulations governing those matters, including regulations respecting the examination in Canada of applications to become a permanent resident, or respecting the foreign nationals who may be selected on the basis of an investment in Canada.

b) les règlements régissant ces matières, et notamment tout règlement concernant l'examen au Canada de certaines demandes pour devenir résident permanent ou concernant des étrangers dont la sélection est faite sur la base de placements au Canada.

(3) Subsection (2) is not to be interpreted as limiting the application of any provision of this Act concerning inadmissibility to Canada.

(3) Le paragraphe (2) n'a toutefois pas pour effet de limiter l'application des dispositions de la présente loi visant les interdictions de territoire.

[…]

[…]

30 (1) A foreign national may not work or study in Canada unless authorized to do so under this Act.

30 (1) L'étranger ne peut exercer un emploi au Canada ou y étudier que sous le régime de la présente loi.

(1.1) An officer may, on application, authorize a foreign national to work or study in Canada if the foreign national meets the conditions set out in the regulations.

(1.1) L'agent peut, sur demande, autoriser l'étranger qui satisfait aux conditions réglementaires à exercer un emploi au Canada ou à y étudier.

B. *Regulations*

205 A work permit may be issued under section 200 to a

205 Un permis de travail peut être délivré à l'étranger en

foreign national who intends to perform work that	vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes :
(a) would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents;	a) il permet de créer ou de conserver des débouchés ou des avantages sociaux, culturels ou économiques pour les citoyens canadiens ou les résidents permanents;

C. *Annex A of the Agreement*

- **Annex A** has been considered in its entirety, however only excerpts are set out below.
- Section 4: "Admission and Nomination" sets out PEI's obligations to assess and nominate candidates and Canada's obligations to issue a permanent resident visa to provincial nominees who meet all the requirements of the Provincial Agreement and the eligibility and admissibility requirements of IRPA. The relevant provisions state:

4.1. Prince Edward Island has the sole and non-transferable responsibility to assess and nominate candidates who, in Prince Edward Island's determination:	4.1. L'Île-du-Prince-Édouard a la responsabilité exclusive et non transférable d'évaluer et de désigner des candidats qui, à son avis :
4.1.1. Will be of benefit to the economic development of Prince Edward Island; and	4.1.1. contribueront au développement économique de l'Île-du-Prince-Édouard; et
4.1.2. Have the ability and intention to economically establish and permanently settle in Prince Edward Island subject to sections 4.3 through 4.9.	4.1.2. ont la capacité et l'intention de réussir leur établissement économique et de s'installer en permanence dans la province, sous réserve des clauses 4.3 à 4.9 de la présente annexe.
4.2. Canada shall consider Prince Edward Island's nomination as evidence that	4.2. Le Canada doit considérer la désignation faite par l'Île-du-Prince-Édouard comme la

Prince Edward Island has carried out its due diligence determining that an applicant will be of economic benefit to Prince Edward Island and has met the requirements of Prince Edward Island's Provincial Nominee Program. […]	preuve que la province a exercé sa diligence raisonnable pour s'assurer que le demandeur apportera un avantage économique à l'Île-du-Prince-Édouard et remplit les critères du Programme des candidats des provinces. […]
4.5. Provincial Nominee applicants will be nominated solely on the basis of economic benefit to Prince Edward Island and their ability and intention of becoming economically established and permanently residing in Prince Edward Island. Economic establishment will be determined on the basis of factors such as: current job or job offer, language ability, work experience, education and training, and business ownership skills and past experience.	4.5. Les candidats au Programme des candidats de l'Île-du-Prince-Édouard seront désignés uniquement en fonction de l'avantage qu'ils représentent pour l'économie de la province, ainsi que de la mesure dans laquelle ils sont capables et susceptibles de réussir leur établissement économique et de s'installer en permanence à l'Île-du-Prince-Édouard. L'établissement économique est déterminé selon des facteurs tels que l'emploi actuel ou l'offre d'emploi, les compétences linguistiques, l'expérience de travail, les études et la formation, les compétences en gestion d'entreprise et l'expérience antérieure.

- Section 5: Admission as a Temporary Resident, apply to potential nominees:

5.1. Prince Edward Island may support the application for a work permit in the following instances:	5.1. L'Île-du-Prince-Édouard peut appuyer la demande de permis de travail dans les situations suivantes :
5.1.1. Where a potential business nominee is required to enter Canada as a temporary resident in order to meet the requirements of the	5.1.1. Lorsqu'un candidat de la catégorie des gens d'affaires potentiels est tenu d'entrer au Canada à titre de résident temporaire afin de

Prince Edward Island business stream;	satisfaire aux exigences du volet des gens d'affaires de l'Île-du-Prince-Édouard;
[…]	[…]
5.3. Prince Edward Island is responsible for conducting due diligence to verify that, in the case of a business nominee or a potential business nominee:	5.3. L'Île-du-Prince-Édouard est tenue de faire preuve de diligence raisonnable pour vérifier que, dans le cas d'un candidat de la catégorie des gens d'affaires ou d'un candidat de la catégorie des gens d'affaires potentiels :
5.3.1. The proposed business is consistent with Prince Edward Island's requirements, and that the business plan is economically plausible,	5.3.1. L'entreprise proposée répond aux exigences de l'Île du Prince-Édouard et le plan d'affaires est plausible sur le plan économique;
5.3.2. The applicant is likely to establish the proposed business,	5.3.2. Le demandeur établira probablement l'entreprise proposée;
5.3.3. The applicant is reasonably able to carry out the functions of business ownership/management,	5.3.3. Le demandeur est raisonnablement en mesure d'assumer les fonctions liées à la propriété/gestion de l'entreprise;
5.3.4. In the case where an applicant is entering Canada on a work permit in order to establish a business and meet the requirements of nominations, that the applicant is likely to meet the requirements for nomination within the initial period authorized, an	5.3.4. Dans le cas où un demandeur est admis au Canada en vertu d'un permis de travail afin d'établir une entreprise et de satisfaire aux exigences relatives à la désignation, le demandeur est susceptible de satisfaire à ces exigences durant la période de séjour initiale autorisée; et
5.3.5. Having met the above conditions, that there are compelling reasons to authorize the business activities of the individual	5.3.5. Ayant rempli les conditions ci-dessus, il existe des raisons impérieuses d'autoriser les activités de l'entreprise de la personne

prior to completion of permanent residence processing.

avant de terminer le traitement de la demande de résidence permanente.

[…]

[…]

5.6. In the case of a business nominee, where Prince Edward Island has conducted the due diligence as described in section 5.3, and is of the opinion that entry of a foreign national under a work permit is of significant benefit to Prince Edward Island, the Prince Edward Island may support an application for a work permit pursuant to section 204(c) of the IRPR with a letter indicating that issue a letter indicating that:

5.6. Dans le cas d'un candidat de la catégorie des gens d'affaires, lorsque l'Île-du-Prince-Édouard a fait preuve de diligence raisonnable tel que décrit à la clause 5.3, et est d'avis que l'entrée d'un étranger en vertu d'un permis de travail présente un avantage considérable pour la province, l'Île-du-Prince-Édouard peut appuyer une demande de permis de travail en vertu de l'alinéa 204(c) du RIPR, si la demande est accompagnée d'une lettre selon laquelle :

5.6.1. Their admission to Canada to begin establishing or operating a business would generate significant economic, social or cultural benefits or opportunities for Canadian citizens or permanent residents in Prince Edward Island.

5.6.1. son admission au Canada pour commencer à établir ou à exploiter son entreprise générerait des avantages économiques, sociaux ou culturels importants ou des occasions de travail pour les citoyens canadiens ou les résidents permanents à l'Île-du-Prince-Édouard.

5.7. Where Prince Edward Island is considering an application for nomination under the business category of the Provincial Nominee Program, has conducted due diligence as described in section 5.3, and is of the opinion that entry of a foreign national under a work permit to carry out business activity

5.7. Lorsque l'Île-du-Prince-Édouard examine une demande de désignation au titre de la catégorie des gens d'affaires du Programme des candidats de la province, a fait preuve de diligence raisonnable tel que décrit à la clause 5.3 et est d'avis que l'entrée d'un étranger en vertu d'un permis de travail pour

is of significant benefit to Prince Edward Island, Prince Edward Island may support an application for a work permit pursuant to section 205(a) of the IRPR with a letter indicating that:	mener des activités commerciales présente un avantage considérable pour la province, l'Île-du-Prince-Édouard peut appuyer une demande de permis de travail en vertu de l'alinéa 205(a) du RIPR, si la demande est accompagnée d'une lettre selon laquelle :
5.7.1. The foreign national is being considered for nomination for permanent residence based on their stated intention to conduct business activity in the province;	5.7.1. la province envisage de désigner l'étranger pour l'obtention de la résidence permanente, en fonction de l'intention que celui-ci déclare avoir de mener des activités commerciales dans la province;
5.7.2. Prince Edward Island is of the opinion that the planned business activity will be of significant benefit to the province; and,	5.7.2. l'Île-du-Prince-Édouard est d'avis que les activités commerciales prévues qu'effectuerait l'étranger offriront des retombées importantes à la province; et
5.7.3. Prince Edward Island is requesting that Canada issue a work permit for a specific period, up to a maximum of two (2) years.	5.7.3. l'Île-du-Prince-Édouard demande que le Canada délivre un permis de travail temporaire d'une durée déterminée, jusqu'à concurrence de deux (2) ans.
5.8. Canada agrees to process applications for work permits supported by letters issued by Prince Edward Island as expeditiously as possible.	5.8. Le Canada convient de traiter aussi rapidement que possible les demandes de permis de travail appuyées par des lettres produites par l'Île-du-Prince-Édouard.
5.9. Upon receipt of the application for a work permit, together with a letter for support from Prince Edward Island, Canada will:	5.9. Dès qu'il a reçu la demande de résidence permanente et une lettre d'appui de l'Île-du-Prince-Édouard, le Canada :

5.9.1. Determine the eligibility of the applicant for a work permit pursuant to section 200 of the IRPR;	5.9.1. détermine l'admissibilité du demandeur à un permis de travail aux termes de l'article 200 du RIPR;
5.9.2. Determine the admissibility of the applicant with respect to legislative requirements; and	5.9.2. Détermine l'admissibilité du demandeur en ce qui concerne les exigences législatives; et
5.9.3. Issue a work permit to applicants who meet all the requirements of the Prince Edward Island and the eligibility and admissibility requirements of the IRPA and the IRPR.	5.9.3. délivre un permis de travail aux demandeurs qui satisfont à toutes les exigences de l'Île-du-Prince-Édouard et à tous les critères d'admissibilité prévus par la LIPR et le RIPR.

D. *The PEI Support Letter*

[44] The letter of support from PEI stated that "[t]he candidate [the Applicant] is being considered for nomination for permanent residence based on a stated intent to conduct business activity on PEI"; "PEI is of the opinion that it will significantly benefit from the planned business activity or work of the candidate"; and, "PEI has determined that the business plan is economically viable and consistent with PEI's requirements, and that the candidate is likely to establish the proposed business and meet the requirements for nomination…".

VII. The Preliminary Issue – The Guidelines and Annex A to the Agreement

[45] The Respondent seeks to have the Court ignore the Guidelines that guide visa officers in determining applications for work permits for business owners and self-employed persons because the Guidelines were not submitted to the Court by way of affidavit. While this is true, I

do not agree that in the present case, this is a sufficient reason for the Court to ignore the Guidelines. First, the Guidelines are well-known to the Respondent. The Respondent has not been taken by surprise by the Applicant's reference to the Guidelines and has easy access to the Guidelines, which are publicly available.

[46] There are operational manuals (collectively referred to as Guidelines) for many provisions of the IRPA and the *Regulations* that assist decision-makers in exercising their obligations and discretion. The jurisprudence has confirmed that the various guidelines are not law and are not binding, but such guidelines can assist the Court in determining the reasonableness of the decision under review.

[47] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Supreme Court of Canada explained the purpose and use of Ministerial Guidelines – in that case, with respect to humanitarian and compassionate applications. However, the same principle applies to other Guidelines issued to inform and "guide" decision-makers in immigration matters. At para 32, the Supreme Court of Canada stated "[t]here is no doubt, as this Court has recognized, that the Guidelines are useful in indicating what constitutes a reasonable interpretation of a given provision of the *Immigration and Refugee Protection Act*: *Agraira*, at para. 85." The Court also reiterated that guidelines are neither binding nor meant to be exhaustive or restrictive.

[48] The Respondent's reliance on *Leahy* at para 143 for the proposition that reviewing courts should not take judicial notice of internal policy statements unless they are before the Court attached to an affidavit is not persuasive. In *Leahy*, the Federal Court of Appeal allowed

Mr. Leahy's appeal from the decision of the Federal Court, which had dismissed his application for judicial review of the decision of the Minister of Citizenship and Immigration to withhold certain information from Mr. Leahy pursuant to the *Privacy Act*. In the context of the appeal, the Court of Appeal addressed the nature of the information that should be provided to a reviewing court to properly review a decision under the *Privacy Act* to withhold information. In that context, the Court of Appeal added a "post script" setting out the type of information a reviewing court needs to fulfill its role.

[49] At para 143, the Court of Appeal stated:

> Similarly, it is an easy matter for the decision letter to address item (4) [item 4 refers to the criteria that were taken into account]. This could be accomplished by referring to a single case that sets out the criteria, or to an internal policy statement or instructional document used by the decision-maker and those making recommendations to the decision-maker. Normally, reviewing courts do not take judicial notice of internal policy statements or instructional documents, so if these are relevant, they should be identified and appended to the supporting affidavit.
>
> [Emphasis added]

[50] In my view, the Court of Appeal's guidance is focussed on the review of access to information decisions. However, if this guidance is also applicable in other contexts, the Court of Appeal did not set out a hard and fast rule, rather that "normally" internal policy documents should be provided by way of an affidavit.

[51] In the present case, the Respondent submits that the Officer's decisions reflects the Guidelines, which set out indicators to determine whether the Applicant's business will generate significant benefits. The Respondent argues that the Officer implicitly applied the Guidelines and

points to the specific words used by the Officer that reflect the indicators. Yet, the Respondent submits that the Guidelines should not be considered. In my view, the Respondent cannot have it both ways – to suggest that the Officer's decision is reasonable because the Officer applied the indicators in the Guidelines (as well as the *Regulations*) and to argue that the Guidelines should not be considered. If the Respondent cites the Guidelines, the Respondent should not dispute that the Court cannot consider the Guidelines because they were not provided by way of an affidavit. The Respondent could have also provided the Guidelines with an affidavit. The affidavit would do no more than state that the attachment is the applicable Guidelines for officers considering work permit applications pursuant to section 205(a) of the *Regulations*.

[52] In addition, if the Officer considered the Guidelines, as the Respondent submits, the Officer should have considered all the relevant provisions of the Guidelines.

[53] Although the Respondent submits that their reference to the Guidelines is only in response to the Applicant's submissions and that if the Guidelines are not considered, their responsive submissions should also not be considered, this dissection is not practical.

[54] Moreover, whether or not the Guidelines are considered, the Guidelines are not binding on the Officer. In addition, the outcome of this Application for Judicial Review would be the same regardless of consideration of the Guidelines because the key flaw in the Officer's decision is that the reasons do not respond to the evidence submitted.

[55] With respect to excerpts of the Provincial Agreement which were included in the Applicant's Record, although not attached to an affidavit, the Court has considered the excerpts in the context of the whole Agreement, not only excerpts which may support one position or the other. The Provincial Agreement is relevant background and context for the decision and was noted by both the Applicant and Respondent.

VIII. The Officer's Decision is not Reasonable

[56] The Respondent has made thorough and detailed submissions about the evidence considered, presumed to have been considered or not required to be considered by the Officer, the test applied, the issues "grappled with" by the Officer, the relevant statutory provisions and the distinction between provincial nominees and potential nominees. The Respondent also submits that the Officer relied more heavily on the business plan. However, these are the Respondent's detailed reasons in support of the Officer's decision and not the reasons conveyed by the Officer in the letter and GCMS notes. While the Officer could have articulated the rationale for his conclusion with reference to the evidence that he considered and weighed or rejected in applying the statutory provisions, the Officer did not.

[57] There is no requirement for detailed or perfect reasons on a work permit application. Brief reasons are often sufficient to convey that the application was considered with regard to the statutory provisions, the relevant factors and the evidence. However, in the present case, the reasons do not convey the Officer's chain of analysis, which should have started with an acknowledgement of the Agreement or at least that the Applicant was a potential business nominee. There is no indication that the Officer considered the PEI support letter. While the

Officer was not required to accept PEI's opinion, which focussed on the benefits to PEI in the context of assessing the benefits to Canada more broadly, the letter is evidence in support of the application. The Respondent's argument that the letter did not need to be addressed because it did not "squarely contradict" the conclusion is an overly rigid application of the principle in *Cepeda-Gutierrez*.

[58] As noted above, in *Vavilov* the Supreme Court of Canada signalled that the courts should be cautious in disturbing administrative decisions and should not expect decision-makers to address every argument or piece of evidence. However, in the present case, there is no indication of what evidence the Officer considered other than the business plan. There is no indication that the Officer "grappled" with the evidence in support of the work permit and against it.

[59] As noted at para 128 of *Vavilov*:

> However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[60] In *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 at para 17 [*Patel*], the Court noted:

> [17] Again, while the reality of visa offices and the context in which its officers work include significant operational pressures and resource constraints created by huge volumes of applications, this cannot exempt their decisions from being responsive to the factual matrix put before them. Failing to ask for basic responsiveness to the evidence would deprive reasonableness review of the robust quality that *Vavilov* requires at paras 13, 67

> and 72. “Reasonableness” is not synonymous with “voluminous reasons”: simple, concise justification will do.

[61] As in *Patel*, the issue is not that the reasons are brief, but that they do not address the evidence that was before the Officer. The Court cannot read between the few lines of the reasons to decipher what the Officer took into account in rejecting the application.

[62] Although the Guidelines are not binding on Officers, the Guidelines with respect to the processing of work permits for potential business nominees note that an applicant must, among other requirements, have a letter of support from the province and that this letter should “count toward the evidence that their admission to Canada to operate a business may create significant economic, social or cultural benefit to Canada; additional documentation such as a business plan may be requested.” Given that the Applicant was required to submit the PEI letter of support, the Officer should have considered and addressed the letter in the reasons. While the Officer does not have to agree with PEI’s opinion, the Officer should explain that the letter was rejected or given lower weight in determining the main issue for the Officer – whether there is significant benefit to Canada. Even without regard to the Guidelines, the letter was submitted with the application and should have been acknowledged.

[63] The Respondent suggests that the PEI letter of support can be safely ignored because the letter does not address significant benefits to Canadian citizens rather it addresses only the benefits to PEI, and as such it does not “squarely contradict” the Officer’s conclusion.

[64] The Respondent relies on *Basanti*, at paras 24-25, which in my view reiterates the long standing principle established in *Cepeda-Gutierrez* , but does not further narrow it.

[65] In *Basanti* the Court stated at para 24-25:

> [24] It is well recognized that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). A failure to mention a particular piece of evidence does not mean that it was ignored (*Newfoundland Nurses* at para 16), and a decision-maker is not required to refer to each and every piece of evidence supporting its conclusions. It is only when a tribunal is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) [*Cepeda-Gutierrez*] at paras 16-17). However, *Cepeda-Gutierrez* does not stand for the proposition that the mere failure of a tribunal to refer to an important piece of evidence that runs contrary to the tribunal's conclusion necessarily renders a decision unreasonable and results in the decision being overturned. To the contrary, *Cepeda-Gutierrez* says that it is only where the non-mentioned evidence is critical and squarely contradicts the tribunal's conclusion that the reviewing court may decide that its omission means that the tribunal did not have regard to the material before it.
>
> [25] In this case, Mr. Basanti has not identified or given examples of evidence that was not assessed by the IAD, or of evidence that squarely contradicted the findings made by the IAD. It was his burden to do so in order to demonstrate the unreasonableness of the Decision, but he has not done so.

[66] In *Cepeda-Gutierrez* at paras 16-17, the Court stated:

> [16] […] A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that

> the agency directed itself to the totality of the evidence when making its findings of fact.
>
> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency"s burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[67] In the present case, there is no blanket statement that the Officer considered all the evidence, only the presumption that he did so.

[68] Unlike the finding in *Basanti*, the Applicant has provided examples of the evidence before the Officer that was not mentioned, that was closely related and relevant to the determination whether the business would generate significant benefits in accordance with section 205(a) of the *Regulations* and that contradicts the Officer’s conclusion. Whether this evidence “squarely” contradicts or simply contradicts is a matter of degree. Given that the Applicant was required to submit letters of support, this was important evidence. The Officer was not required to agree with the opinions in the support letters or to find that the letters satisfied him that the requirements of the *Regulations* were met, but the Officer was required to consider them and at least acknowledge why less or no weight was given to them. There is no indication in the reasons that the Officer did so.

[69] Moreover, the PEI support letter for applicants would be pointless if visa officers can ignore the opinion of PEI because it addresses only a local or provincial benefit. The PEI support letter addressed what it was supposed to address. Given the efforts made by the Applicant in providing the business plan and letters of support and by PEI in fulfilling its obligations under the Agreement, including assessing the documents and providing the support letter, the Officer's decision should have acknowledged this evidence and explained, even briefly, why it was rejected.

JUDGMENT in file IMM-2849-20

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is allowed.
2. The Applicant's application for a temporary work permit should be remitted to a different visa officer for determination.
3. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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