Federal Court Cour fédérale

Date: 20220214

Docket: IMM-73-21

Citation: 2022 FC 189

Ottawa, Ontario, February 14, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

IRFAN SAFDAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the application for judicial review of a decision of an officer at the Visa Section of the Embassy of Canada in Warsaw, Poland [Officer], denying the Applicant's application for a temporary work permit.

Background

[2] The Applicant is a citizen of Pakistan. In June 2020, he filed an application for a two-year work permit as a religious moderator/relations education worker in connection with a positive Labour Market Impact Assessment [LMIA] obtained by King Travel Can Ltd. [King Travel] with whom the Applicant had worked part time since 2012. The documentation submitted in support of his application included his CV; confirmation of his prior employment with King Travel as a Umrah consultant; his educational background including a Bachelor of Commerce degree from the University of Punjab in 2006; confirmation of acceptance and completion of a one-year European Certification of Informatics Professions [EUCIP] programme at the College of Computer Training [CCT] in Ireland (May 2007–2008, a post-graduate diploma in ICT Management from the same institution (May 2008–June 2009) and confirmation of acceptance in a Diploma in ICT Systems Support at CCT (May 2009–2010); and, his International English Language Testing System [IELTS] result from December 2006 in which he achieved and overall band score of 5.0.

[3] The Applicant's application was denied on November 18, 2020.

Decision under review

[4] The November 18, 2020 refusal letter is a standard form document. It indicates that the application was refused because, pursuant to s 200(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations], the Officer was not satisfied that the Applicant would leave Canada at the end of his stay based on the purpose of his visit; the limited

employment prospects in his country of residence; his current employment situation; and, his personal assets and financial situation. Further, that the Applicant had not demonstrated that he would be able to adequately perform the work he seeks as he had not submitted sufficient evidence of abilities in English (a requirement listed on the LMIA), such as test results from an approved testing organizations. The letter states that he was welcome to reapply if he felt he could respond to these concerns and demonstrate that his situation meets the requirements.

[5] It is well established that an officer’s notes entered in the Global Case Management System [GCMS] system comprise part of their reasons. Here the GCMS notes are found in the certified tribunal record [CTR], they state:

> … Pa has an LMIA to work as a religious moderator/religious education worker for King Travel. LMIA requires abilities in English. Pa failed to submit sufficient evidence of abilities in English in support of his application; provided Ielts results dating back to 2006 and educational certificates; on the basis of information on file, I am not satisfied that pa has the abilities in English required and, based on review, I am not satisfied that the applicant has sufficiently demonstrated that he is able to perform the work offered in Canada. Have also noted that the pa’s spouse in Pakistan does not work while pa has also 2 children to support. Pa’s income in Pakistan is $200/mo which is very low income for a family of 4. I am therefore not satisfied that pa’s financial ties to Pakistan are indeed sufficient to compel pa to leave Canada upon expiry of any status granted to him. Refused.

Legislation

Immigration and Refugee Protection Regulations, SOR/2002-227

> **200 (1)** Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act — an officer shall issue a work permit to a foreign national if, following an examination, it is established that
>
> ……..

> **(b)** the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;
>
> …….
>
> **(3)** An officer shall not issue a work permit to a foreign national if
>
> **(a)** there are reasonable grounds to believe that the foreign national is unable to perform the work sought;

Issues and Standard of Review

[6] The Applicant’s submission are, essentially, that the Officer ignored or failed to take into account aspects of his evidence. This gives rise to the question of whether the Officer’s decision was reasonable. The parties submit, and I agree, that the standard of review is reasonableness (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 23, 25).

[7] On judicial review, the reviewing court asks 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 that bear on the decision (*Vavilov* at para 99).

Analysis

English language ability

[8] The Applicant submits that the Officer erred in ignoring evidence or in making a perverse or illogical decision in refusing his application on the basis that the Applicant had not provided proof of his English proficiency. He submits that he provided his IELTS test with a overall band score of 5.0, proof of completion of three one-year post secondary diplomas at CCT in Dublin,

Ireland from 2007–2010 where the language of instruction was English, and a letter from King Travel confirming that the Applicant has been performing most of the duties set out in the offer of employment, outside of Canada, since 2012. The Applicant submits that the combination of the submitted documentation was strong evidence that he had adequate English training and was able to perform the work offered in Canada. Further, that the Officer failed to assess the Applicant's language ability or explain why the Applicant could not perform the intended work, contrary to IRCC policy as found in its Operational Bulletin, "*Foreign workers: Assessing language requirements*" [Operational Bulletin] and jurisprudence of this Court.

[9] The Respondent submits that the LMIA indicates that verbal and written English language ability is required to perform the intended work. While the Applicant did provide some evidence of his language ability, it was dated. His IELTS test results were from 2006 and the test report explicitly states that it is recommended that the candidate's language ability as indicated in the test report form be re-assessed after two years from the date of the test. The Applicant's subsequent education in Ireland does suggest some increase in his English language abilities but those courses ended in 2010, 10 years before his work permit application. And, while his documentation confirms that he subsequently worked part-time as an Umrah consultant, it does not specify what language he used during his work. Thus, based on the lack of recent evidence of language ability, the Officer reasonably found that the Applicant did not have sufficient current English language ability to perform the work sought and to deny the application on that basis. The Respondent points out that the Applicant can submit updated IELTS results with a new application.

[10] As a starting point I note that, pursuant to s. 200(3)(a) of the IRP Regulations, an officer may not issue a work permit if there are reasonable grounds to believe that the applicant would be unable to perform the work sought. The onus is on the applicant to provide sufficient supporting documentation to establish that they meet the requirements of the IRP Regulations (*Patel v Canada (Citizenship and Immigration)*, 2021 FC 483 [*Patel*] at para 30), including that they have the requisite language skills to perform the work offered where there are reasonable grounds to believe that such language skills are necessary to perform the work sought (*Sun v Canada (Citizenship and Immigration)*, 2019 FC 1548 at para 34). The assessment of a visa applicant's language ability is "both factual and discretionary" (*Brar v Canada (Citizenship and Immigration)*, 2020 FC 70 at para 13; *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 8).

[11] However, "a visa officer must explain, in light of the available evidence, how an applicant fails to meet the language standard" (*Bano v Canada (Citizenship and Immigration)*, 2020 FC 568 [*Bano*] at para 24). Put otherwise, while it is the Applicant's onus to provide the sufficient evidence to meet the eligibility requirements, it remains the Officer's task to evaluate the evidence before them and explain how it does not fulfill the eligibility requirement for which they are refusing the application (*Lakhanpal v Canada (Citizenship and Immigration)*, 2021 FC 694).

[12] In my view, in this matter, the Officer did not explain why and how they arrived at the conclusion that the Applicant did not have the required language ability to perform the work.

[13] The Operational Bulletin states that the an officer "should refer to the LMIA requirements, working conditions as described in the job offer and NOC [National Occupational Classification] requirements for the specific occupation, in determining what precise level of language requirement is necessary to perform the work sought".

[14] As stated in *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 782 [*Kaur*]:

> [24] While these are only guidelines and not legal requirements, the failure to clearly show a detailed analysis on how the applicant failed to satisfy the officer that they would be able to perform the work sought is obviously missing, in that the decision is not justified, transparent and intelligible on this front, such that it is neither reasonable nor correct.

[15] Here, the LMIA, under job information, describes the NOC Code and Title as 4217 – other religious occupations, religious moderator/religious education worker. The LMIA also specifies verbal and written English language as requirements for the position but does not specify a level of proficiency.

[16] The King Travel employment offer describes the duties of the proposed position as: escorting individuals and groups in Umrah and or Hajj (Islamic pilgrimages) to Mecca and on guided tours to Medina; assisting with religious rites on these pilgrimages; providing religious education through explaining and performing all rituals required for Hajj or Umrah; visiting and describing points of interest and planning and carrying out pilgrimage activities for these historical sites; and, answering enquiries and providing information concerning them. It makes no reference to language requirements and does not require a specific level of English proficiency.

[17] It is true that the Applicant's evidence as to his language ability is not recent. However, this is not a case where no objective evidence was provided. The Applicant provided his 2006 IELTS results as well as evidence that he lived in Ireland and completed three one-year academic programs, in English, there between 2007 and 2010. The acceptance letter for the 2007 program states: "you have met the English Language minimum requirement for this course. IELTS score of 5.0 or above…". His CV also indicates that for two of these years he worked part-time as an assistant supervisor at Little Caesars, in Dublin, which required proficient verbal and written communication skills. The Applicant also provided evidence that he has performed essentially the same work for King Travel for the last eight years.

[18] The Officer does not explain why the Applicant's evidence was insufficient to establish that his proficiency in English did not meet the LMIA requirement. The Officer states the LMIA requires "abilities in English" and "on the basis of the information on file", the Officer is not satisfied that the Applicant "has the abilities in English required" and "based on a review", concludes that the Applicant has not established that he "is able to perform the work offered in Canada". Unlike *Patel v Canada (Citizenship and Immigration)*, 2021 FC 573 (at para 27), referenced by the Respondent, here the NOC job description and requirements were not referred to by the Officer and were not included in the CTR. The Officer does not describe the Applicant's expected duties, provide a standard against which the Applicant's language abilities would be assessed as against his ability to perform those duties, nor does the Officer explain how the evidence failed to prove his abilities met that standard. No basis is offered for the Officer's implicit finding that the Applicant's English proficiency either never met an unspecified standard or has slipped below that standard subsequent to his three years of living and studying in Ireland.

The Officer’s conclusion that, based on the documentation provided, the Applicant did not meet the language requirement is not intelligible or justified.

[19] And while the Respondent submits, for example, that King Travel does not state that the Applicant’s work was conducted in English and that judicial notice can be taken of the meaning of an IELTS score, the Officer’s reasons do not address the letter or the Applicant’s score in the context of the performance of his offered work or at all.

[20] In *Vavilov*, the Supreme Court of Canada held that “Where a decision maker’s rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility” (*Vavilov* at para 98). Here neither the Officer’s reasons nor the record explain why the Applicant’s documentary evidence as to his English language proficiency, while dated, was not sufficient to permit him to perform the work sought.

Possibility of overstay

[21] The Applicant also submits that the Officer erroneously focused on the Applicant’s economic incentives to work in Canada, to the exclusion of the many pull factors in Pakistan which would be likely to lead him to leave Canada before his visa expired. Further, that the Officer erred by failing to consider the Applicant’s prior compliance with immigration laws.

[22] The Respondent makes no submissions on these issues. When appearing before me, counsel advised that the Respondent’s position is that, while it did not concede the economic

incentive issue, no submissions would be made and that the language ability issue is determinative.

[23] As the Applicant points out, this Court has recognized that persons who apply for temporary work permits in Canada are doing so because they can earn more money here than in their home country. In that sense, anyone who seeks or is granted a temporary work permit will have a financial incentive to stay in Canada beyond a specified term: "Accordingly, a financial incentive to remain in Canada cannot, on its own, justify refusing an application. Otherwise, no application could succeed" (*Rengasamy v Canada (Citizenship and Immigration)* 2009 FC 1229 at para 14).

[24] Indeed there is a clear line of authority employing this reasoning (see *Ul Zaman v Canada (Citizenship and Immigration)*, 2020 FC 268 at para 53 [*Ul Zaman*] citing *Rengasamy at para 14; Cao v Canada (Citizenship and Immigration)*, 2010 FC 941 [*Cao*] at paras 7-11; *Dhanoa v Canada (Citizenship and Immigration)*, 2009 FC 729 at para 18); *Kindie v Canada (Citizenship and Immigration)*, 2011 FC 850 at para 13; *Chhetri v Canada (Citizenship and Immigration)*, 2011 FC 872 at para 12-14 [*Chhetri*]).

[25] In *Ul Zaman* Justice Pamel held that the officer had erred in focusing on economic incentives to the exclusion of other evidence. There, rather than weighing the evidence of the strength of the Applicant's ties to the home country against the other evidence, the visa officer put overwhelming weight on the Applicant's strong economic incentives to remain in Canada

and his stated plans to eventually apply for permanent residency (*Ul Zaman* at para 51 citing *Chhetri* at para 14).

[26] Similarly, in this matter the Officer appears to have failed to have considered that in his work permit application the Applicant indicated, while it was his hope to ultimately become a permanent resident of Canada through the Ontario Immigrant Nominee Programme, that he would return to his family, his wife and two young children as well as his mother and siblings, who all reside in Pakistan, if that goal was not achieved within the two-year period of his authorized stay. There is also no evidence in the record that the Applicant has any family in Canada, yet the Officer does not assess this. Nor does the Officer appear to have considered that the Applicant has a past history of compliance with visa requirements during his attendance in Ireland for his studies (*Calaunan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1494 at para 28; *Murai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 186; *Momi v Canada (Citizenship and Immigration)*, 2013 FC 162 at para 20). Or, that the Applicant demonstrated that he has been employed continuously as an Umrah consultant in Pakistan since 2011, including employment there by King Travel.

[27] In my view, the Officer erred in only considering the Applicant's low income in Pakistan and resultant financial draw to Canada and in failing to weight this against the "pull" factors mitigating toward the Applicant's return to Pakistan.

[28] Accordingly, the Officer's decision was not reasonable.

JUDGMENT IN IMM-73-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. The decision is set aside and the matter shall be remitted to another officer for redetermination;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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