

Federal Court



Cour fédérale

Date: 20220609

Docket: IMM-975-21

Citation: 2022 FC 864

St. John's, Newfoundland and Labrador, June 9, 2022

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

XIAOKANG DU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS AND JUDGMENT

[1] Mr. Xiaokang Du (the “Applicant”) seeks judicial review of the decision of an officer (the “Officer”), refusing his application for permanent residence in Canada as a member of the “Canada Experience Class” within the scope of subsection 87.1(2) of the *Immigration and Refugee Protection Regulations*, S.O.R. 2001 – 227 (the “Regulations”).

[2] The Applicant worked at a restaurant in Canada from 2017 to 2019, pursuant to a work permit, as an Administrative Assistant. The letter of employment indicated that he earned a salary of \$25,480.00 per year.

[3] The Applicant obtained an offer of permanent employment from the same employer and a positive Labour Market Impact Assessment (the “LMIA”) for the same position. The employment offer provided that full-time employment would begin once the Applicant obtained permanent residency, and the salary would increase to \$40,950.00 per year.

[4] The Applicant received a Procedural Fairness letter, dated January 12, 2021. The Officer expressed dissatisfaction that the Applicant was employed as an Administrative Assistant for a salary of \$40,950.00 per year. The Officer asked the Applicant to provide copies of his bank statements from August 2017 to June 2019; a record of employment; the address where the duties were performed; and “any additional information/documentation that would allay my concerns”.

[5] By a letter dated January 20, 2022, an immigration consultant replied on behalf of the Applicant and provided the requested information and documents, including a copy of the LMIA. In this letter, the immigration consultant highlighted the fact that the salary of \$40,950.00 would be payable only if the Applicant obtained a permanent resident visa.

[6] The Officer denied the application for permanent residence on the grounds that the evidence submitted does not show that the Applicant meets the qualifications of the “Canada

Experience Class”. The Officer was not satisfied that the Applicant provided satisfactory evidence about his income.

[7] The Applicant argues that the decision is unreasonable, and that the Officer failed to engage with the evidence he had provided. He submits that the Officer misunderstood that he would not be paid the salary of \$40,950.00 unless and until he was granted a permanent resident visa.

[8] The Minister of Citizenship and Immigration (the “Respondent”) submits that the Officer reasonably assessed the evidence and reached a reasonable conclusion.

[9] The Applicant advanced arguments about the fairness of the Procedural Fairness letter. If these submissions raised an issue of procedural fairness, that issue is reviewable on the standard of correctness; see the decision in *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[10] Otherwise, the decision is reviewable on the standard of reasonableness, following the teaching in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.).

[11] In considering reasonableness, the Court is to ask if the decision under review “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 that decision”; see *Vavilov*, *supra* at paragraph 99.

[12] The Respondent objects to the two affidavits filed by the Applicant in support of his application for judicial review, on the grounds that the evidence was not before the Officer.

[13] Both parties addressed the propriety of these affidavits. I agree with the position of the Respondent, that these affidavits do not meet the exceptions for introducing evidence that was not before the decision maker. I refer to the decision in *Delios v. Canada (Attorney General)* (2015), 472 N.R. 171 at paragraphs 42-43.

[14] Turning to the merits of the decision, I agree with the arguments of the Applicant, that the reasons of the Officer do not show an understanding of the evidence that he submitted about the salary to be paid, once he became a full-time employee.

[15] In my opinion, the Applicant provided a full reply to the Procedural Fairness letter. It is not apparent that the Officer understood that reply.

[16] In written and oral submissions, the Respondent focused on certain notes contained in the Certified Tribunal Record about a telephone interview conducted by another officer with Mr. Bryan Wang, the President of the Applicant’s employer. The Respondent argued that these notes may have “triggered” the issuance of the Procedural Fairness letter.

[17] In my opinion, the impetus for the Procedural Fairness letter is not the issue. The Officer's treatment of the response to that letter is the issue, for the purpose of assessing the reasonableness of the decision.

[18] Considering the instructions in *Vavilov, supra*, the Officer was mandated to provide "justifiable, transparent and intelligible" reasons that show that the relevant evidence was considered. I am not satisfied that the reasons, in this case, meet that standard.

[19] It is not necessary to address the procedural fairness argument raised by the Applicant.

[20] In the result, the application for judicial review will be allowed, the decision of the Officer will be set aside and the matter remitted to a different officer for re-determination.

JUDGMENT in IMM-975-21

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Officer is set aside and the matter remitted to a different officer for re-determination. There is no question for certification.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-975-21

STYLE OF CAUSE: XIAOKANG DU v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE
BETWEEN TORONTO, ONTARIO AND ST. JOHN'S,
NEWFOUNDLAND AND LABRADOR

DATE OF HEARING: JUNE 6, 2022

REASONS AND JUDGMENT: HENEGHAN J.

DATED: JUNE 9, 2022

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