Federal Court  Cour fédérale

Date: 20221222

Docket: IMM-597-22

Citation: 2022 FC 1791

Toronto, Ontario, December 22, 2022

PRESENT: Madam Justice Go

BETWEEN:

AHMED HASSAN BIN JAMIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Ahmed Hassan Bin Jamil [Applicant] challenges a decision dated November 29, 2021 [Decision] of a visa officer [Officer] at the Canadian Embassy in the United Arab Emirates [UAE] to refuse his application to enter Canada on a work permit through the Temporary Foreign Worker Program [TFWP].

[2] The Applicant is a citizen of Pakistan living in the UAE with his wife and their two children. The Applicant co-founded a business called Tagit RFID Solutions [Tagit] in 2009 in the UAE. RFID stands for Radio-Frequency Identification. He also worked for several years as a general manager for another company until 2013.

[3] In March 2019, the Applicant incorporated 44degNorth Technologies Incorporated [44degNorth] in British Columbia. 44degNorth operates in the RFID-based solutions industry, focusing on artificial intelligence and machine learning. The company currently has a location in Oakville and has one employee in Canada, a Key Account Executive.

[4] The Applicant obtained a positive Labour Market Impact Assessment [LMIA] on June 4, 2019 to work as a director of 44degNorth, which was valid for five months. He first applied for a work permit under the owner/operator category of the TFWP and was refused on May 14, 2020 [Initial Decision]. The Applicant sought judicial review of the refusal and the file was sent for redetermination by a different officer in September 2020.

[5] The Applicant submitted additional supporting documents on October 25, 2020 for the redetermination. The Officer was not satisfied that the Applicant would leave Canada at the end of his stay, as required by subsection 200(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[6] The Applicant seeks judicial review of the Decision. For the reasons set out below, I find the Decision reasonable and I dismiss the application.

II. Preliminary Issues

[7] At the hearing, the Respondent raised a preliminary issue, namely that a number of documents included in the Application Record [AR] were not part of the Certified Tribunal Record [CTR]. These documents are:

a. Pages 48 to 50 of the AR: An article about achievements of Tagit;

b. Pages 162 to 163 of the AR: Photos of the Applicant receiving award for Tagit;

c. Pages 164 to 168 of the AR: A document prepared in a question and answer format allegedly part of the Applicant's additional submissions for the redetermination of the work permit application [Questionnaire]; and

d. Pages 176 to 177 of the AR: An employment offer letter from 44degNorth to the Applicant about his role as the Director as well as his salary.

[8] At the hearing, the Applicant submitted that the above noted documents were before the Officer, and were not in dispute.

[9] The Respondent disputes that these documents were before the Officer. The Applicant does not offer any proof, other than his assertion, that they were before the Officer. As these documents are not included in the CTR, I find that they were not before the Officer. Even if I am wrong on this point, I find the documents do not support the Applicant's arguments. I will provide further reasons below.

III. Issues and Standard of Review

[10] The Applicant raises the following issues:

A. Whether the Officer breached procedural fairness by not providing an opportunity to respond to concerns; and

B. Whether the Officer erred in concluding that the Applicant will not leave Canada at the end of his stay.

[11] The parties agree that the issue of procedural fairness is reviewable on a correctness standard, and that the issue on the merits of the Decision is reviewable on a reasonableness standard.

[12] Reasonableness is a deferential, but robust, standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. 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 para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94, 133-135.

[13] For a decision to be unreasonable, the applicant must establish that the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep”: *Vavilov* at para 100.

IV. Analysis

[14] The Applicant argues that the Officer breached procedural fairness by relying on extrinsic evidence and making implicit credibility assessments without providing an opportunity to respond. The Applicant also argues that the Decision is unreasonable because the Officer ignored material evidence in the record and failed to justify the conclusions reached in a transparent and intelligible manner.

A. *Did the Officer breach procedural fairness?*

[15] The Applicant argues that the Officer breached procedural fairness by failing to make further inquiries when he raised concerns over the veracity of the evidence. For example, the Applicant points out the Officer's concerns regarding the accuracy of business projections and the Officer's reliance on extrinsic evidence such as the website www.salaryexpert.com: *Li v Canada (Citizenship and Immigration)*, 2012 FC 484 [*Li*] at para 36; *Kojouri v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389 at paras 18-19; *Olorunshola v Canada (Citizenship and Immigration)*, 2007 FC 1056 at paras 29 and 33.

[16] The Applicant acknowledges that procedural fairness does not usually require an officer to give an applicant the opportunity to respond, especially where there is no evidence of serious consequences from the decision: *Li* at para 49; *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815 at para 5; *Masych v Canada (Citizenship and Immigration)*, 2010 FC 1253 [*Masych*] at para 30.

[17] However, the Applicant submits that there are exceptions where serious consequences and undue hardship may arise from a decision, in which case the duty of procedural fairness requires applicants to have an opportunity to respond: *Li* at paras 35-37 and 49.

[18] Specifically, the Applicant asserts that there are serious consequences resulting from the expiry of the positive LMIA. The Applicant notes the lengthy process he has gone through to seek a work permit, and that the refusal of his work permit application and expiry of the LMIA means that the Applicant is unable to come to Canada to develop his business: *Li* at para 36; *Campbell Hara v Canada (Citizenship and Immigration)*, 2009 FC 263 at para 23.

[19] I am not persuaded by the Applicant's argument.

[20] The Applicant does not point to any case law confirming that the need to reapply for another LMIA constitutes a serious consequence. Further, as the Respondent accurately points out, the Applicant's positive LMIA had already expired by the time the Initial Decision was rendered in 2020.

[21] As such, I adopt the Court's consideration in *Masych* at paras 30 to 31**,** which found that the requirement for procedural fairness is relatively low in the context of work permit applications, due to the ability to reapply, and that a refusal in and of itself is not on its own a severe consequence warranting a higher duty of procedural fairness. See also *Soni v Canada (Citizenship and Immigration)*, 2020 FC 813 at para 37.

[22] Applying this low requirement of procedural fairness, I will now assess the rest of Applicant's procedural fairness argument.

Extrinsic evidence

[23] The Applicant submits that this Court has found that failing to provide an applicant with an opportunity to respond to concerns constitutes a breach of procedural fairness: *Hafiz v Canada (Citizenship and Immigration)*, 2018 FC 1273 at paras 22-23. The Applicant notes that requesting further documents and allowing further submissions is required especially where the concerns are around the credibility, accuracy, or genuine nature of the evidence: *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24; *Asl v Canada (Citizenship and Immigration)*, 2016 FC 1006 at para 23; *Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716 at para 6.

[24] The Applicant argues that the Officer's concerns around the accuracy of business projections and his reliance on extrinsic evidence constituted concerns of credibility, accuracy, or genuine nature, and should have led to further inquiries.

[25] I reject the Applicant's submissions.

[26] With respect to the Officer's reliance on www.salaryexpert.com, similar information was cited in the Initial Decision to raise similar concerns. The Global Case Management System [GCMS] notes dated May 14, 2020 stated in part:

> Submissions include a contract for a Key account executive who was hired in October 2019. I note that the wage is 18$. This is much lower than the average wage for a similar position in the Toronto area (this contract would amount to around $35K per year, versus an average of 84K per year according to https://www.glassdoor.ca/Salaries/toronto-key-account-manager-salary-SRCH_IL.0.7_IM976_K08,27.htm)[...]

[27] While the visa officer in the Initial Decision may have relied on a different website as the source of information for the average salary of similar positions, the Applicant cannot claim that he did not have notice of the visa office's concerns.

[28] Further, as will be seen below, the Applicant submits the Decision was unreasonable because the Officer failed to consider his submission contained in a letter dated October 16, 2021, which addressed the Officer's concerns about the salary of his employee. This submission contradicts the Applicant's position that he was not made aware of the Officer's concerns over the salary issue. I thus find the Officer did not breach procedural fairness by raising a concern already raised in the Initial Decision.

Veiled credibility assessment

[29] The Applicant points to the several instances where the Officer finds the evidence "vague", "not accurate", or "unclear" in the Decision. The Applicant argues that the Officer's finding that the Applicant did not have a legitimate business purpose in Canada was grounded in a veiled credibility finding.

[30] The Applicant submits that since the Officer had concerns about the accuracy of the evidence, such as the business forecasting, the Officer implicitly made a credibility assessment: *Khodchenko v Canada (Citizenship and Immigration)*, 2015 FC 819 at para 10. The Applicant relies on *Sallai v Canada (Citizenship and Immigration)*, 2019 FC 446 [*Sallai*] to note that where there are no explicit credibility findings, the "Court must look beyond the words of the decision to determine whether credibility is the issue, expressly or implicitly": at para 49.

[31] Therefore, the Applicant argues that procedural fairness and the corresponding duty to provide an opportunity to respond were engaged when the Officer made its credibility assessments, and that the Officer's failure to do so is a reviewable error.

[32] I find the cases cited by the Applicant are distinguishable.

[33] As the Respondent submits, and I agree, there is a distinction between findings of credibility and those based on sufficiency of evidence. In *Sallai*, Justice Kane quoted from her decision in *Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32 to explain the distinction between the two concepts:

> I note that in some cases it is difficult to draw a distinction between a finding of insufficient evidence and a finding that the applicant was not believed i.e. was not credible. The choice of words used, whether referring to credibility or to insufficiency of the evidence is not solely determinative of whether the findings were one or the other or both. However, it can not be assumed that in cases where an Officer finds that the evidence does not establish the applicant's claim, that the Officer has not believed the applicant.

[34] I find Justice Kane's comment aptly applies to the case at hand. Applicants of work permits bear the onus to put their best case forward: *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 [*Sulce*] at para 10. In this case, it was up to the Applicant to provide adequate information to support the projections in 44degNorth's business plan.

[35] I note with agreement the Respondent's contention that the Officer reasonably questioned the business projections since the Applicant did not make submissions on actions taken to develop 44degNorth's business in Canada, and that the Applicant did not contest the Officer's finding that supporting documents were not provided.

[36] The fact that the Officer found the evidence provided by the Applicant insufficient to satisfy the statutory requirements does not mean that the Officer disbelieved the information provided by the Applicant. The Officer's concerns about the accuracy of the business projections also did not amount to a veiled credibility finding. The Officer could find the Applicant credible and still question the accuracy of his business forecast. This is not a case where the "accuracy or genuine nature of the information submitted" was the source of the Officer's concerns: *Sulce* at para 18. As I will further explain below, the Officer's findings with regard to the lack of specifics in 44degNorth's business plan was reasonable. It was based on those same findings that the Officer found the plan to be "vague."

[37] As such, I find that the Officer did not breach procedural fairness by making any veiled credibility findings.

B. *Was the Decision reasonable?*

[38] The Applicant argues that the Officer's Decision was unreasonable because they did not grapple with the evidence before them and did not provide a rational chain of analysis. As a result, the Applicant argues that the Court is left to "read between the fine lines in order to decipher the rejection." The Applicant submits that the Officer's analysis only covered factors weighing against granting the Applicant a work permit, but failed to consider the factors in favour of the work permit.

[39] The Applicant points out the lower, minimal requirements for temporary work permits, as opposed to skilled worker permits, submitting that pursuant to subsection 200(1) of the *IRPR*, an officer shall issue a work permit if satisfied that the applicant meets all of the requirements of that section: *Li* at para 38.

[40] The Applicant also relies on *Singh v Canada (Citizenship and Immigration)*, 2021 FC 790 [*Singh*] to stress that to be transparent and intelligible, officers must "explain why an applicant has failed to satisfy the particular, material element at issue": at para 19.

[41] The Applicant challenges specific aspects of the Decision which I will analyse below.

Family ties

[42] The Applicant points out that the Officer completely ignored the fact that the Applicant's whole family is in the UAE, and that the Applicant has no ties in Canada other than his proposed business. The Applicant submits that an officer's decision must be set aside when evidence is

ignored, especially when it is material to the case: *Shao v Canada (Citizenship and Immigration)*, 2018 FC 610 at para 33.

[43] I reject the Applicant's argument that the Officer ignored material evidence supporting the work permit application. This case can be distinguished from *Singh* in which the applicant lived permanently in India.

[44] Further, the GCMS notes show that the Officer did consider the Applicant's family ties in UAE. However, the Officer also noted the precarious nature of the family's status in the UAE, the possible loss of status should the Applicant leave for more than six month, and the absence of any updated residence visa. Based on these facts, the Officer reasonably found the Applicant's ties to his country of residence weak.

44degNorth's business plan

[45] The Applicant argues that, unless the credibility of the evidence provided was at issue, the Officer had no reason to question the Applicant's legitimate business purpose in Canada. The Applicant asserts that the Officer failed to consider specific portions of the business plan that presented 44degNorth's business motivations and plans, and the benefit Canada will receive from the operation of his business in Canada.

[46] The Applicant contends that the similarity in reasons between the Initial Decision and the Decision under review suggests that the Officer failed to make their own assessment and instead regurgitated the findings of the previous officer. The Applicant asserts that the Officer in their

analysis therefore only restated the evidence rather than analyze it, which was found unreasonable by the Court in *Samra v Canada (Citizenship and Immigration)*, 2020 FC 157 at para 22, cited in *Singh* at para 15.

[47] I find the Applicant's arguments lack merit, and are made without pinpointing the Officer's actual findings in the Decision.

[48] Contrary to the Applicant's assertions, the Officer did provide a list of detailed concerns about 44degNorth's business plan. Among other issues, the Officer noted that the Applicant provided no bank statements for the company or personal account to confirm company operations or salary payments. The Officer also noted specifically:

> While [the business plan] provides some general market statistics, sources not cited and the business references in various sections of the plan are focused on the US-headquartered businesses […] rather than the Canadian market; unclear why applicant is choosing ON for the company's location. There is also a lack of discussion regarding companies based in Canada whom the Key Account Executive, located in Oakville, may more likely approach to establish a client base.

[49] These concerns, on top of noting that the Applicant did not provide any updates of the Key Account Executive's actions since their hiring in November 2019, all support the Officer's reasonable conclusion that the business plan "lacks specifics."

[50] Other than making broad assertions disagreeing with the Officer's findings, the Applicant fails to point out any reviewable error with respect to any of the above stated findings made by the Officer, nor am I able to find such an error.

[51] At the hearing, the Applicant submitted the Officer erred in finding that the Applicant has not explained how he would be active in the business in Canada in the future. The Applicant referred to the Questionnaire in the AR and noted that this document explained how the Applicant would transfer his skills and knowledge to the Canadians that he would hire.

[52] As the Respondent points out, the Questionnaire was not included in the CTR. Further, I note that the Questionnaire referred to a "2017 or 2018" balance sheet and income statement, and was described as an application submitted as a "new start-up company in Canada", which therefore did not have a business plan. It also contained the following phrase:

> Although anticipatory, Mr. Bin Jamil's application should be considered under the owner/operator for LIMA purposes…

[53] Read as a whole, I find this to be a document submitted by the Applicant when he applied for an LMIA, and not as a new document in support of the redetermination.

[54] Irrespective of whether the Applicant submitted the Questionnaire along with his work permit application, I find that the Questionnaire does not provide any evidence that would render unreasonable the Officer's conclusion about the insufficiency of the business plan. As noted above, the Questionnaire did not refer to any business plan. Nor did it describe the Applicant's ongoing involvement in the business moving forward, other than some general statements about knowledge and skill transfer.

[55] As such, the Officer's finding that the Applicant did not provide sufficient evidence about his involvement in the business in Canada was reasonable.

Key Account Executive salary/role

[56] The Applicant takes issue with the Officer's assessment of the Key Account Executive's salary.

[57] The Applicant notes that the Initial Decision stated that the employee's salary is lower than the market median and raised concerns on the ability for the Applicant to pay salaries for the creation or retention of employment opportunities in Canada. The Applicant points out the submissions in his letter dated October 16, 2021 to respond to these concerns on redetermination, which highlighted financial information demonstrating that $172,500 was dedicated to salaries and another $34,000 remained from the net income to pay out salaries. The Applicant relies on *Zhang v Canada (Citizenship and Immigration),* 2020 FC 53 to assert that the Officer had a legal obligation to engage with all the evidence and not selectively choose only that which supported a refusal: at para 12.

[58] The Applicant also argues that the Officer did not reasonably assess 44degNorth's business plan as a start-up, which begins with lower wages, and that the refusal of the Applicant's work permit takes away the company's opportunity for growth.

[59] Further, the Applicant argues that the Officer erroneously assessed the evidence when comparing the Key Account Executive's salary. The business plan noted that the Applicant was seeking someone with a "Diploma in Business or Sales", not someone with a university degree, and that the Officer rendered an unreasonable Decision by ignoring key evidence.

[60] I find the Applicant's submissions non-persuasive for three reasons.

[61] First, I agree with the Respondent that the Applicant's submissions to the Officer regarding the funds available to pay salaries do not contradict the Officer's finding that the Key Account Executive's salary was below market.

[62] Second, I agree that the Applicant did state in his business plan that the Key Account Executive's qualifications were to be a "Diploma in Business or Sales", and not a university degree. However, this distinction *per se* did not address the Officer's concern about the low level of the salary.

[63] Third, I reject the Applicant's argument that the Officer should have considered the start-up nature of the business when assessing the salary. It was up to the Applicant to address the concerns regarding the salary and submit this proposition to the Officer. The Applicant cannot fault the Officer for not considering submissions that the Applicant himself did not make.

[64] In conclusion, I find the Applicant has not raised any reviewable errors with respect to the Decision, nor has the Applicant demonstrated that the Decision lacks the requisite transparency, intelligibility and justification.

V. Conclusion

[65] The application for judicial review is dismissed.

[66] There is no question for certification.

JUDGMENT in IMM-597-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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