Federal Court Cour fédérale

Date: 20241011

Docket: IMM-7880-23

Citation: 2024 FC 1613

Ottawa, Ontario, October 11, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SANJEEV KUMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this judicial review application made pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], Mr. Sanjeev Kumar, the applicant, challenges the decision of an immigration officer [the Decision maker] to deny him (and his family) the benefit of a temporary public policy, the purpose of which was to facilitate the obtaining of permanent residence in Canada from the current status of a temporary resident. The said public policy bears the title *Temporary Public Policy: Temporary Resident to Permanent Resident Pathway*. In this

particular case, the applicant sought to become a permanent resident as falling in the category of essential worker, non-healthcare. Clearly the program seeks to reward temporary residents who have taken jobs of an essential nature for the community and the economy.

[2] The program includes strict conditions for applicants to be eligible. Mr. Kumar failed one of those conditions, yet he is pleading for leniency in the application of the program due to his particular circumstances. The Court is sympathetic to the plight of the applicant and his family. Nevertheless, a reviewing court is not a court of first view. It merely reviews the legality of a decision made by the administrative decision maker, with an appropriate posture of respect and starting with following the principle of judicial restraint (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], at paras 13-14). In other words, the reviewing court does not substitute its view of the merits of a decision, but rather considers whether the decision is reasonable, or is correct in cases where there is an allegation of a violation of a principle of procedural fairness.

[3] In the case at bar, the Court finds that the Decision maker rendered a decision that was reasonable and did not violate a principle of procedural fairness. In that latter case, a standard of correctness would have applied.

I. The issue

[4] The applicant sought to benefit from a time-limited program which would have allowed his family to attain the status of permanent resident in Canada. It is not necessary for our purposes to review the constituent elements of the program. It will suffice to refer to one

essential requirement: that the applicant was “currently employed” on the day he made his application.

[5] In order to satisfy that criterion, the person must be employed, which requires that the person be paid by their employer; that excludes the situation of a volunteer. Furthermore, the immigration officers who administer the program receive general instructions under Guide 5069. Of particular interest and importance is the guidance as to how an applicant is to prove current employment in Canada. Guide 5069 states that the following must be submitted; the work permit in Canada, the specific period of employment, the total annual salary and benefits; the application must include the most recent pay stubs. In my estimation, this guidance is in the nature of common sense, no more.

[6] Although the applicant submitted that he was employed, he never produced the employment contract, which would have confirmed that he was an employee as opposed to a sub-contractor. Indeed the contract would have shown the total annual salary and benefits. None of this was available. Moreover, the work permit had expired by the time the applicant sought to benefit from the exceptional program. That made being employed at the time the application is submitted impossible.

[7] The application to gain access to the program was made on May 6, 2021. Mr. Kumar started working for H&D Roofing on May 1, 2019. Well before May 6, 2021, H&D Roofing was unable to employ Mr. Kumar due to a lack of available work. In fact, no pay stubs for 2021 were provided. The work permit for H&D Roofing was for a period from April 28, 2019 to April 26,

2021. The only pay stubs were from May 2019 to October 2020. The applicant's income tax return for 2021 showed employment with Fraserwood Construction Ltd. In his reply factum, the applicant mentions that the work permit for employment with Fraserwood Construction Ltd. was issued on July 19, 2021. In the result, there is no indication of employment with H&D Roofing after October 2020 and, at any rate, the work permit for Mr. Kumar had expired prior to May 6, 2021, the day on which he made his application.

[8] As there were evidently some issues with the application as made, a so-called "procedural fairness letter" was issued on January 31, 2023. A procedural fairness letter is issued when a decision maker, while reviewing a file, has concerns about issues that have emerged. The letter is for the purpose of allowing an applicant to address the identified concern.

[9] The letter identified the concern: the applicant appears not to have been employed in Canada in any occupation at the time the application for permanent residence was received. The letter spells out the conditions, one of which being that the applicant be employed.

[10] The applicant's response came on March 1, 2023. It states that the applicant was on an "implied status" and he was eligible for work. The explanation is that "due to Covid related uncertainties, my employer ran out of work and expressed his inability to provide me with another LMIA [Labour Market Impact Assessment] to extend my work Permit" (Applicant's Record, p 162). In fact, the applicant indicated having been afflicted with the Covid-19 early in 2021, followed by members of the family.

[11] It is not surprising that the information submitted on March 1, 2023, did not satisfy the Decision maker. It remained unclear whether the applicant was employed at the time he sought permanent residence. Thus, a second procedural letter was sent on May 4, 2023. This time round, the letter was very precise as to what was needed to satisfy the Policy's requirement:

> You have not provided the following documents that were requested;
>
> - Pay stubs showing compulsory deductions from H and D Roofing from 2019-2021 at **the time of application on May 6, 2021**
> - T4's from 2019-2021.
> - new schedule A for your spouse providing all missing dates in personal history from 2011/05- 2019/19 as well as addresses from 2019/03 – 2019 09.
>
> [Emphasis in original]

[12] The applicant's response is dated June 1, 2023. The requested pay stubs were not forwarded. In effect, the applicant conceded that his employment situation did not meet the requirements, as he sought an exemption in his case; he also explained why it was critical that he be considered eligible for the program. I reproduce the relevant passages from the June 1 response:

> In light of these circumstances, I respectfully request that you consider my situation and grant an exemption to the employment requirement. We are willing to provide any additional documentation or evidence to support this case, such as medical certificates, evidence of actively searching for employment, and any relevant updates regarding his current situation.
>
> This is My last chance to get permanent residency of this beautiful country, Canada. After this, the system doesn't allow me to score enough in express entry or BC PNP (as the scores are too high). Our Family is already discouraged by unwanted long processing times (Thanks to Covid, but you guys are doing great) and our

> work permits are also expiring this June 2023. Now we had no option left apart from this. We hope that the officer will take a lenient view, keeping in consideration the situation and the problems faced by me & my family due to Covid and its implications and will issue us a Passport Request for the Permanent residency.

[13] Furthermore, the applicant obtained a letter from H&D Roofing. That letter confirms that the applicant had been hired on April 26, 2019. It does not state when the applicant ceased working other than he and his family were afflicted with Covid-19 starting in January 2021. It also confirmed that, because of Covid, "there was not enough work to employ all of the workers". T4 slips were provided to the Decision maker for 2019 and 2020 with respect to H&D Roofing; nothing was offered for 2021 other than employment with Fraserwood Construction Ltd. starting in the second half of 2021. We know that work began there in July 2021. In other words, there is a gap in employment.

II. The decision

[14] Five days after the response to the second "fairness letter", on June 6, 2023, the decision came. It states that the applicant did not satisfy the requirement that he "be employed in Canada in any occupation at the time that the application for permanent residence is received". The decision goes on to relate that the procedural fairness letter of May 4, 2023, which raised the issue that it did not appear that the applicant was employed at the time of the application (May 6, 2021). The applicant "did not provide any information to dissuade concerns that you were employed at the time of the application". The application was therefore refused as the applicant did not meet the eligibility criteria of the program.

[15] The Global Case Management System contains notes made about the case as it proceeded. The notes add to the decision and are part of it (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 44).

III. The arguments

[16] The applicant's main contention is that the decision is not reasonable. As a secondary argument, he claims that the Decision maker ought to have offered him an interview. As I understand it, an interview would have afforded an opportunity to explain the practical difficulties he was faced with.

[17] In essence, it is argued that the Decision maker ought to have allowed for some "leniency" in the application of the criterion. There was a period of time during which there was an unintentional hiatus in employment: the applicant did not perform any work in spite of being willing and available for work. Covid was responsible for his employer's lack of work and he, and his family, were afflicted with the illness. He claims that the decision is unreasonable because the Decision maker failed to consider his peculiar circumstances.

[18] The applicant concedes at paragraph 23 of his factum that he fails the requirement to be employed at the time his application for permanent residence was received. He said: "The Applicant, through the evidence submitted by him, has sufficiently established his professional work in Canada, but the Covid-19 pandemic led to special circumstances owing to which there was a decline in the quantity of work being done by him. Had it not been for the pandemic, the

Applicant would have been in total compliance with all the work requirements". I note that the record shows that the applicant was without work from October 2020 to July 2021.

[19] In an attempt to argue that the Decision maker had some discretion, the applicant refers to Guide 5069 – *Temporary public policy: Temporary Resident to Permanent Resident Pathway (TR to PR Pathway)* to which the Court referred earlier. The Guide refers to the availability of immigration medical exams and police certificates as part of the record needed to make a determination for the permanent residency under the Policy. It allows, however, for some flexibility in obtaining these certificates in view of the pandemic. Hence, suggests the applicant, there exists the recognition of the limitations generated by the Covid pandemic. The Decision maker could have applied the same discretion about his employment situation. The Decision maker chose instead to adopt a narrow reading of the Policy, leading to a high burden of proof. The applicant says that "(a) similar approach as mentioned for medical and PCC [police certificates and clearances] documents ought to have been adopted in the instant matter of the Applicant as well, in light of the peculiar circumstances of the case, in the interest of equity" (para 24).

[20] The respondent argues that the decision is reasonable. The Decision maker obviously reviewed the record carefully as he issued two procedural fairness letters. In each, the identified difficulty was that the applicant had not established that he was employed at the time his application for permanent residence was received. The applicant was asked specifically for pay stubs that could demonstrate that he was employed. None were forthcoming because the applicant did not work from October 2020 until May 2021 when the application was made.

Indeed, the Guide referred to by the applicant requires that pay stubs be provided to prove current employment.

[21] The record shows that the Decision maker was fully aware of the H&D Roofing letter of June 1, 2023. But the letter only proves that the applicant was not working around May 6, 2021. Indeed the last pay stub was from October 2020.

[22] Nothing can be found in the Policy to suggest that a decision maker has any discretion to decide not to apply the requirements of the Policy. If there is to be leniency, it is provided for in the Guide (medical certificates and police certificates and clearances). It is also limited to these.

[23] The respondent referred the Court to many decisions of the Federal Court where our Court finds that the latitude required by the applicant does not exist: *Rohani v Canada (Citizenship and Immigration)*, 2024 FC 1037; *Keke v Canada (Citizenship and Immigration)*, 2024 FC 178; *Bello v Canada (Citizenship and Immigration)*, 2023 FC 1094; *Aje v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 811.

[24] With two procedural fairness letters, the process was better than fair. The applicant was given ample opportunity to respond to concerns clearly identified.

IV. Analysis

[25] This matter can be disposed of by simply noting that the applicant did not establish that the decision is unreasonable. It does not suffice to state that a decision is unreasonable. The

burden is on an applicant to show (on the civil standard of balance of probabilities) that it is unreasonable (*Vavilov*, para 100). That requires that it be shown that there are serious shortcomings, as opposed to merely superficial or peripheral ones.

[26] An applicant must show that a decision does not bear the hallmarks of reasonableness that are justification, transparency and intelligibility. The decision must be justified considering the relevant factual and legal constraints in a particular case. Here, the Court is looking for a failure of rationality internal to the reasoning process, or whether the decision is untenable in light of the factual and legal constraints that apply (*Vavilov*, para 101). With respect, nothing of the sort has been established in this case.

[27] In effect, at its highest, the applicant disagrees that the alleged discretion residing in the Decision maker was not exercised. The Decision maker, it is argued, ought to have shown leniency in deciding whether the applicant was employed at the time his application for permanent residence was received. That does not show a lack of reasonableness. There is no failure of rationality internal to the reasoning process. What is untenable in light of the constraints that bear on the decision? The applicant simply failed to discharge his burden, as a disagreement with conclusions reached by a decision maker is never sufficient on judicial review.

[28] As the Court put it to counsel at the hearing, the applicant is confronted with two significant hurdles. He needs to demonstrate that there is discretion left in the Decision maker to fundamentally disregard the conditions set in the exceptional program (created pursuant to s 25.2

of *IRPA*). Assuming that there is discretion or latitude, the applicant would then have to show that the refusal to exercise discretion was unreasonable.

[29] I cannot find anywhere the discretion the applicant contends the Decision maker has. Furthermore, the evidence is clear that between October 2020 and the termination of the work permit which allowed the applicant to work in Canada, H&D Roofing did not have work for the applicant. It could not even be suggested that the applicant had somehow an "implied status". Even more so, there cannot be an "implied status" when the work permit had expired on April 26, 2021, ten days before the May 6 application. There was no status left.

[30] The Minister of Citizenship and Immigration is authorized by s 25.2 of *IRPA* to establish the program under consideration:

Public policy considerations	**Séjour dans l'intérêt public**
25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.	**25.2 (1)** Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

As can be seen, the Minister can determine the conditions under which a person will be granted permanent residence on public policy considerations. Where leniency can be applied, the Guide provides for that possibility. The fact that no leniency, or latitude, or discretion is conferred other than for two categories of required information (medical and police) is a strong indicator that there is no discretion delegated by the Minister to those who apply the regime. I have not been satisfied that any such discretion exists, and I have not found anywhere under the program the basis for a suggestion that the Decision maker is given any ability to depart from the conditions provided for by the program. Where flexibility exists, it is provided for specifically.

[31] In order to avoid those significant gaps in employment, the applicant had to show that the Decision maker was given the general discretion to disregard criteria, or at least the criterion under consideration. That kind of discretion has not been shown to have been delegated to the Decision maker. Neither do we have any indication that the flexibility allowed for medical examinations and police certificates and clearances, due to the pandemic, was extended to showing that an applicant was employed in Canada at the time of the application.

[32] One of those conditions under the program is that the applicant be employed at the time of the application. The evidence is clear that the applicant had not been employed by H&D Roofing since October 2020 and that, at any rate, his work permit had expired well before May 6, 2021. The applicant found new employment only in July 2021.

[33] As for the allegation that the Decision maker violated somehow procedural fairness by not inviting the applicant to an interview, it is without merit.

[34] If, as indicated, an interview would have allowed the applicant to explain the circumstances such that the Decision maker could have had a better understanding, that cannot be a justification for requesting an interview that cannot lead to any other decision on the basis of a non-existent discretion to decline to apply a requisite criterion.

[35] The applicant was given ample opportunity to articulate fully his case as he was presented two procedural fairness letters, the second one being very explicit about supplying pay stubs which would be evidence of employment. There were no pay stubs because the applicant did not work past October 2020. In fact, it was only then, after a very explicit request was made, that the applicant called for an exemption to the employment requirement (response of June 1, 2023).

[36] On the correctness standard that applies where allegations of failure to provide procedural fairness are made, it is clear that there has not been any violation of the fundamental right to be heard. The applicant was afforded a complete opportunity to demonstrate his employment status at the appropriate time. Procedural fairness did not require that he be invited to an interview.

V. Conclusion

[37] Accordingly, the judicial review application is dismissed. There is no serious question of general importance to be certified, as the parties acknowledged.

JUDGMENT in IMM-7880-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. There is no question to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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