Federal Court  Cour fédérale

**Date: 20200122**

**Docket: IMM-1459-19**

**Citation: 2020 FC 101**

**Ottawa, Ontario, January 22, 2020**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**YUFEI ZHANG**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. INTRODUCTION

[1] This is an application under s 72 (1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, for judicial review of the decision of a Visa Officer, dated February 26, 2019 [Decision], granting the Applicant a fifteen-month Post-Graduation Work Permit.

## II. BACKGROUND

[2] The Applicant is a citizen of China. She obtained a Master of Finance degree from the Sobey School of Business at St-Mary's University in Halifax on September 28, 2018. The Applicant completed the program in approximately twelve months.

[3] Following graduation, the Applicant applied for a Post-Graduation Work Permit in November 2018. Along with her application, she provided a letter from the Director of Graduate Program Student Support and Recruitment at the Sobey School of Business stating that:

- the Master of Finance program at the Sobey School of Business is "equivalent to a two-year program";
- students complete their credits over "the fall, winter and summer session"; and
- the Master of Finance program is "similar in the amount of content covered as [their] two year (16 month full-time) MBA program."

[4] The letter also confirms that the Applicant completed all of the requirements to obtain her Master of Finance degree. The transcript and diploma provided by the Applicant confirm this as well.

[5] On February 21, 2019, the Visa Officer granted the Applicant a one-year Post-Graduation Work Permit based on the length of her study program. The Applicant requested that her

application be reconsidered, as she believed she was entitled to a longer work permit given that her study program was equivalent to a two-year program.

## III. DECISION UNDER REVIEW

[6] On February 26, 2019, following the Applicant's request for reconsideration, the Applicant received a letter from the Visa Officer granting her a fifteen-month Post-Graduation Work Permit.

[7] The Visa Officer's notes indicate that the fifteen-month work permit was granted on the basis that:

- the letter submitted by the Applicant from the Sobey School of Business provides no information as to the length of the study program;
- the Applicant took approximately twelve months to complete the study program;
- the program's website indicates that the minimum time required to complete the study program is twelve to fifteen months; and
- websites for other universities indicated that similar study programs take one year to complete.

[8] Based on this information, the Visa Officer found that the Master of Finance program appeared to be an intensive program – as opposed to a two-year program – that the Applicant completed within the program's usual length of time. The Visa Officer subsequently decided to

grant the Applicant a fifteen-month Post-Graduation Work Permit based on the most generous interpretation of the length of her study program.

## IV. ISSUES

[9] The issues to be determined in the present matter are the following:

1. Did the Visa Officer breach the Applicant's right to procedural fairness by not providing her with an opportunity to respond to the "extrinsic evidence" relied on by the Visa Officer?
2. Did the Visa Officer err in only granting a fifteen-month Post-Graduation Work Permit?

## V. STANDARD OF REVIEW

[10] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[11] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual

and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[12] Both the Applicant and the Respondent submitted that the standard of review applicable to the issue of procedural fairness was that of correctness.

[13] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[14] Furthermore, both the Applicant and the Respondent submitted that the standard of review applicable to the Visa Officer's assessment of the length of the Applicant's work permit was that of reasonableness.

[15] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to this issue is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Toor v Canada (Citizenship and Immigration)*, 2019 FC 1143 at para 6; *Baran v Canada (Citizenship and Immigration)*, 2019 FC 463 at paras 15-16; and *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at paras 22-23.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "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). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Khosa*, at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal

to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

## VI. STATUTORY PROVISIONS

[17] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] are relevant to this application for judicial review:

| **Specific conditions** | **Conditions particulières** |
|---|---|
| 185 An officer may impose, vary or cancel the following specific conditions on a temporary resident: | 185 Les conditions particulières ci-après peuvent être imposées, modifiées ou levées par l'agent à l'égard du résident temporaire : |
| (a) the period authorized for their stay; | a) la période de séjour autorisée; |
| (b) the work that they are permitted to engage in, or are prohibited from engaging in, in Canada, including | b) l'exercice d'un travail au Canada, ou son interdiction, et notamment : |
| (i) the type of work, | (i) le genre de travail, |
| (ii) the employer, | (ii) l'employeur, |
| (iii) the location of the work, | (iii) le lieu de travail, |
| (iv) the times and periods of the work, and | (iv) les modalités de temps de celui-ci, |
| (v) in the case of a member of a crew, the period within which they must join the means of transportation; | (v) dans le cas d'un membre d'équipage, le délai à l'intérieu duquel il doit se rendre au moy de transport; |
| … | … |

| | |
|---|---|
| **Work permits** | **Permis de travail — demande préalable à l'entrée au Canada** |
| 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 | 200 (1) Sous réserve des paragraphes (2) et (3), et de l'article 87.3 de la Loi dans le cas de l'étranger qui fait la demande préalablement à son entrée au Canada, l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments ci-après sont établis : |
| … | … |
| (c) the foreign national | c) il se trouve dans l'une des situations suivantes : |
| … | … |
| (ii) intends to perform work described in section 204 or 205 but does not have an offer of employment to perform that wo or is described in section 207 o 207.1 but does not have an offe of employment, | (ii) il entend exercer un travail visé aux articles 204 ou 205 po lequel aucune offre d'emploi n lui a été présentée ou il est visé aux articles 207 ou 207.1 et aucune offre d'emploi ne lui a présentée, |
| (ii.1) intends to perform work described in section 204 or 205 and has an offer of employmen to perform that work or is described in section 207 and ha an offer of employment, and an officer has determined, on the basis of any information provid on the officer's request by the employer making the offer and any other relevant information, | (ii.1) il entend exercer un trava visé aux articles 204 ou 205 po lequel une offre d'emploi lui a été présentée ou il est visé à l'article 207 et une offre d'emploi lui a été présentée, et l'agent a conclu, en se fondant sur tout renseignement fourni, à la demande de l'agent, par l'employeur qui présente l'offr d'emploi et tout autre renseignement pertinent, que : |
| … | … |

| | |
|---|---|
| **Canadian interests** | **Intérêts canadiens** |
| 205 A work permit may be issued under section 200 to a foreign national who intends to perform work that | 205 Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes: |
| … | … |
| (c) is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely, | c) il est désigné par le ministre comme travail pouvant être exercé par des étrangers, sur la base des critères suivants : |
| … | … |
| (ii) limited access to the Canadian labour market is necessary for reasons of public policy relating to the competitiveness of Canada's academic institutions or economy; or | (ii) un accès limité au marché d travail au Canada est justifiable pour des raisons d'intérêt publi en rapport avec la compétitivité des établissements universitaire ou de l'économie du Canada; |
| … | … |

VII. ARGUMENT

A. *Applicant*

[18] The Applicant submits that this Court should overturn the Visa Officer's Decision to only grant her a fifteen-month Post-Graduation Work Permit due to: (1) the failure to provide the Applicant with an opportunity to respond to the extrinsic evidence relied upon by the Visa Officer; and (2) the Visa Officer's unreasonable Decision concerning the permit length.

Consequently, she asks that this Court allow this application for judicial review, overturn the Decision, and remit the application back to a different Visa Officer to be re-determined.

(1) Breach of Procedural Fairness

[19] The Applicant argues that the Visa Officer breached her right to procedural fairness by relying on extrinsic evidence without first allowing her an opportunity to respond to the evidence.

[20] The Visa Officer's notes indicate that the analysis of the length of the study program was partly based on the information contained in the study program's website as well as websites for similar programs at other universities. The Applicant states that this is unreliable evidence that was not submitted with her application and therefore requires the Visa Officer to provide her with an opportunity to address the evidence. The Applicant submits that the Visa Officer's failure to do so in this case justifies allowing this judicial review.

(2) Reasonableness of Permit Length

[21] The Applicant also argues that the Visa Officer's Decision regarding the permit length was unreasonable. The Applicant points to the Visa Officer's incomplete assessment of the evidence, as demonstrated by the finding that no "information as to the length of the program" was provided, and the failure to properly apply the Operational Instructions and Guidelines for the Post-Graduation Work Permit Program [*Guidelines*].

[22] Firstly, the Applicant submits that the Visa Officer erred in the appreciation of the evidence by stating that the Applicant did not submit information concerning the length of the study program. The Applicant disputes this finding by pointing to the letter from the Sobey School of Business stating that the Master of Finance program is "equivalent to a two-year program." The Applicant argues that the Visa Officer clearly failed to consider this key piece of evidence as it is unreasonable to suggest that this statement does not explicitly provide the length of the study program since a "year" is a unit of time. As such, the Applicant submits that the only reasonable interpretation in this case is that the Applicant completed a two-year study program in approximately twelve months.

[23] Secondly, since the evidence clearly indicates that the length of the study program in question is two years, the Applicant argues that the Visa Officer unreasonably deviated from the *Guidelines* in only granting a fifteen-month permit.

[24] The Applicant notes that the *Guidelines* state that if a study program is two years or longer, the "length of the work permit should be 3 years." Moreover, the Applicant submits that the *Guidelines* clearly state that "if a student completes their studies in less time than the normal length of the study program (that is, they have accelerated their studies), the post-graduation work permit should be assessed on the length of the program of study."

[25] The Applicant therefore argues that since she has completed a two-year study program on an accelerated basis, she is entitled to a three-year Post-Graduation Work Permit. The Applicant submits that this interpretation is supported by the fact that the *Guidelines* indicate that a three-

year work permit “should” be granted and not “may” be granted, thus eliminating the Visa Officer’s discretion on this issue.

B. *Respondent*

[26] The Respondent submits that the Visa Officer’s Decision should be upheld because: (1) the Visa Officer did not violate the Applicant’s right to procedural fairness by simply relying on publicly available information to confirm its findings; and (2) the Visa Officer’s Decision concerning the permit length was reasonable given the length of the study program and the Visa Officer’s discretion.

(1) Breach of Procedural Fairness

[27] The Respondent argues that procedural fairness did not require the Visa Officer to afford the Applicant an opportunity to address the websites cited in the Visa Officer’s notes. This is because the evidence was publicly available, reliable, and was not determinative in this case. Rather, the evidence was simply used to confirm the Visa Officer’s findings concerning the length of the study program based on the evidence submitted by the Applicant. The Respondent cites this Court’s decision in *Bradshaw v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 632 at paras 62-75 [*Bradshaw*], in particular this Court’s statement at paras 64-65:

> [64] In *Majdalani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 294, 472 FTR 285 [*Majdalani*], Justice Bédard analyzed the prevailing jurisprudence regarding reliance on websites and publicly available documentation in the context of an H&C application. Justice Bédard noted that the pre-*Baker* jurisprudence generally took the approach that the applicant should be informed of novel and significant information which shows a change in country conditions that would affect the disposition.

> Justice Bédard noted that in the post-*Baker* jurisprudence, the courts have generally taken a more contextual approach, which considers, *inter alia*, the nature of the decision and the possible impact of the evidence on the decision.
>
> [65] Justice Bédard acknowledged, however, that the "novel and significant" approach also continues to be applied, elaborating at paras 33-34;
>
> > [33] In some cases, the Court has held that information publicly available, for example documents available on the internet originating from credible, reliable and well-known sources, is not considered "extrinsic evidence" or "novel and significant" information (*Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 at paras 39-40, [2008] FCJ No 77; *Pizarro Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 623 at para 46, [2013] FCJ No 692).
> >
> > [34] In other cases, the Court applied the "novel and significant" test, and it found the duty to disclose is triggered when the information contained in the document relied upon by the officer was not available and would not have been easily accessible to the applicant, or when the evidence could not have been anticipated (*Jiminez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1078 at paras 17-19, [2010] FCJ No 1382; *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932 at paras 35, 39, [2011] FCJ No 1156; *Adetunji v Canada (Minister of Citizenship and Immigration)*, 2012 FC 708 at para 38, [2012] FCJ No 698).

[28] The Respondent consequently argues that the websites relied on were not the sort of "novel and significant" extrinsic evidence that would trigger the duty to advise the Applicant. As such, the Applicant's right to procedural fairness was upheld in this case.

(2) Reasonableness of Permit Length

[29] The Respondent also argues that the Visa Officer's Decision to grant the Applicant a fifteen-month Post-Graduation Work Permit was reasonable given the length of the study program and the Visa Officer's discretion.

[30] Firstly, the Respondent notes that the Visa Officer was correct in finding that the letter provided by the Applicant from the Sobey School of Business does not explicitly state the length of the study program. Though it does indeed state that it is "equivalent to a two-year program," the word "equivalent" implies that, in fact, it is not a two-year program. Instead, the letter suggests that the length of the study program is one year, as it notes that students complete their credits "over the fall, winter and summer sessions." As such, it was reasonable for the Visa Officer to conclude that the length of the study program was twelve to fifteen months.

[31] Secondly, the Respondent argues that, even if the study program was considered to be a two-year program, the Visa Officer still has the discretion to only grant a fifteen-month permit. This is because s 185 of the *Regulations* affords the Visa Officer the discretion to modify the length of a work permit. Moreover, the Respondent notes that the program delivery instructions only state that a Post-Graduation Work Permit "may" be issued if the study program is two years or more. The Respondent therefore submits that this use of permissive language means that the Applicant is not entitled to a three-year permit even if the study program is considered to be a two-year program. As such, the Respondent submits that Visa Officer's Decision was, in any case, reasonable.

## VIII. ANALYSIS

[32] The Applicant did not attend the oral hearing of this matter. She informed the Court by letter on the eve of the hearing that she had a prior commitment she had known about for some time. She did not request an adjournment and, given the clarity of the written submissions, the Court felt it was able to proceed in the Applicant's absence. Counsel for the Respondent made only brief oral submissions that did not deviate in any way from their written submissions, which the Applicant had already seen and to which she had responded in writing in a fulsome way.

[33] The Applicant raises both procedural fairness and reasonableness errors.

[34] The Applicant says that the Decision is procedurally unfair because the Visa Officer relied on information from several university websites to the effect that the Master of Finance program is typically completed in twelve to fifteen months, and other similar programs are usually completed in one year. The Applicant says this information is "unreliable extrinsic information" and she should have therefore been given an opportunity to respond.

[35] There is no evidence before me that the information relied upon from the university websites is "unreliable." This remains no more than an unproven assertion by the Applicant.

[36] The university websites relied upon describe their similar programs as being one-year programs, which, reasonably speaking, confirm the information contained in the St. Mary's University website that the program is typically completed in twelve to fifteen months.

[37] The Applicant relies upon a letter from the Sobey School of Business dated August 30, 2018, which indicates that the Master of Finance program is "equivalent to" a two-year program. But it isn't entirely clear what "equivalent to" means in this context, which is why the Visa Officer searched online to ascertain the usual length of time required to complete the program. The search and the use of information contained in publicly accessible university websites (particularly the St. Mary's University website) is not a procedurally unfair use of novel and significant extrinsic information. This information was readily available to the Applicant (*Bradshaw* at paras 62-75) and was simply used to corroborate evidence the Applicant had already placed before the Visa Officer.

[38] The Applicant also says that the Decision is unreasonable because the Visa Officer "ignored the program length in the letter issued by the university."

[39] It was reasonable for the Visa Officer to conclude that the letter from the Sobey School of Business did not indicate that the Applicant had completed a two-year program. The letter says that students complete their credits "over the fall, winter and summer months" which, reasonably speaking, indicates they are expected to complete the program within a twelve-month period. The Applicant did just that. The letter from the Sobey School of Business does say that the "MFIN is similar in amount of content as our two year (16 month full-time MBA) program […]," but this does not make it a two-year program.

[40] The relevant *Guidelines* for "Accelerated Studies" provides as follows:

> **Accelerated studies**
>
> If a student completes their studies in less time than the normal length of the program (that is, they have accelerated their studies), the post-graduation work permit should be assessed on the length of the program of study.
>
> For example, if the student is enrolled in a program of study that is normally 1 year in duration, but the student completes the requirements for the program of study within 8 months, they may be eligible for a post-graduation work permit that is valid for 1 year.

[41] The evidence before the Visa Officer was clearly that the St. Mary's University program is usually completed within twelve months. The Applicant completed it within twelve months, but the Visa Officer granted her a fifteen-month work permit within the parameters and spirit of the *Guidelines*.

[42] The letter, which says the program is "equivalent to" a two-year program, is unclear in meaning, but the *Guidelines* are clear that the "normal" length of the program "should be" the basis for the work permit assessment. This is what the Visa Officer used. The Applicant was not, reasonably speaking, eligible for a three-year work permit. The Visa Officer was not unreasonable in his approach or his conclusions. The Visa Officer was, in fact, quite generous in using the fifteen-month measure when the Sobey School of Business' letter indicated a normal program length of one year and the Applicant only took one year to complete the program.

[43] No question for certification was submitted by the Applicant. Counsel for the Respondent also agrees that there is no question for certification. The Court concurs.

**JUDGMENT IN IMM-1459-19**

**THIS COURT'S JUDGMENT is that**

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1459-19 |
| **STYLE OF CAUSE:** | YUFEI ZHANG V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
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| **JUDGMENT AND REASONS:** | RUSSELL J. |
| **DATED:** | JANUARY 22, 2020 |

**APPEARANCES:**

| | |
|---|---|
| Christopher Ezrin | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |