Federal Court Cour fédérale

Date: 20211216

Docket: IMM-6744-19

Citation: 2021 FC 1430

Ottawa, Ontario, December 16, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

RESHMA ANITHA D SOUZA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant seeks judicial review of a November 5, 2019 re-determination decision [Decision] of a visa officer [Officer] pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Officer refused the Applicant's application for a temporary resident visa and work permit [the Application] because the Officer was not satisfied that the Applicant's offer of employment [Employment Offer] was genuine.

[2] The application for judicial review is allowed.

II. Background

[3] The Applicant is a citizen of India. In December 2018, the Applicant submitted her Application to work as an in-home child caregiver in Calgary, Alberta. At the time, she was working in the United Arab Emirates. Her Application was based on a positive Labour Market Impact Assessment issued to her prospective employers [Prospective Employers].

[4] In September 2018, the Applicant and the Prospective Employers signed a two-year employment contract, which they subsequently amended to reflect slightly less hours of work. The Prospective Employers' two children were 8 and 15 years old at the time. In May 2019, the Application was refused. In July 2019, the Applicant applied for leave and for judicial review of the initial refusal. In September 2019, the Applicant agreed to discontinue her application for leave and for judicial review and the Respondent agreed to have another officer re-determine the Application.

[5] On re-determination, the Officer requested further information from the Prospective Employers. The Applicant's legal counsel submitted a September 20, 2019 letter [Legal Counsel's Letter], in which they provided several documents, including a written employment offer addressed to the female Prospective Employer, updated Notices of Assessment [NOA], and the Applicant's Employment Offer containing salary details. Ultimately, the Officer refused the Application because he was not satisfied that the Applicant's Employment Offer was genuine.

III. The Decision

[6] The Decision consists of a letter dated November 5, 2019 and the accompanying Global Case Management System notes. The Officer determined that the Employment Offer was not genuine. The Officer was not satisfied that the Employment Offer was consistent with the Prospective Employer's reasonable needs. Further, he was not satisfied that the Prospective Employers could support the Employment Offer.

[7] In the earlier application, the Prospective Employers indicated that the female Prospective Employer had turned down employment because they were not able to find childcare. In response to the Officer's request for additional information, Legal Counsel's Letter provided submissions in support of the Application and provided, among other requested information, the female Prospective Employer's written job offer dated October 25, 2018. The Officer mistakenly states the job offer is dated October 25, 2019. The Officer questioned why the Prospective Employers did not provide any job offers prior to the Officer's request. The Officer suggested that this indicated that the female Prospective Employer's search for work began only after the Officer requested evidence of job offers.

[8] The Officer considered the Prospective Employers' two most recent NOAs that showed an annual income of $81,423 and $79,717. The Officer took the higher number and added the female Prospective Employer's benefits of $5,861. The Officer determined that the Prospective Employers would be left with an income of approximately $65,000 after paying the Applicant's $27,300 salary. The Officer determined that $65,000 is not a reasonable income to live off,

particularly when compared to the benefits of retaining an additional $30,000. The Officer concluded that this was evidence that the Prospective Employers may not be able to fulfill the terms of the Employment Offer.

[9] With regard to the reasonable needs of the Prospective Employers, the Officer considered the age of their children and their need to hire a childcare provider. The Prospective Employers raised the best interests of the child, but the Officer found they provided little evidence of how the Applicant would improve the interests of the children. For example, the Officer noted that the Prospective Employers indicated that they needed a childcare provider to keep their 16-year-old out of trouble. However, there were few details of what trouble they expected or how a new caregiver would have more success than the teenager’s parents in dealing with a teenager. The Officer further found that it was unclear why the 16-year-old could not supervise the nine-year-old, especially given the costs of childcare.

IV. Issues and Standard of Review

[10] The issues in this case are:

> (1) Is the Decision reasonable?
>
> (2) Should the Court enter an indirect substitution or make a cost order in favour of the Applicant?

[11] The first issue does not engage one of the exceptions set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and is therefore reviewable on

the standard of reasonableness (*Vavilov* at paras 16-17, 23-25). In assessing the reasonableness of a decision, the Court must consider both the outcome and the underlying rationale to assess whether the "decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). For a decision to be reasonable, a decision-maker must adequately account for the evidence before it and be responsive to the Applicant's submissions (*Vavilov* at paras 89-96, 125-128).

[12] There is no standard of review for the second issue.

V. Preliminary Matter

[13] At the hearing, the Respondent submitted a supplementary Certified Tribunal Record for filing. The Applicant did not object. The Court accepts it for filing.

VI. Parties' Positions and Analysis

A. *Is the Decision reasonable?*

(1) Applicant's Position

[14] The Officer misread or overlooked evidence that was material to the female Prospective Employer's work situation. First, it was unreasonable for the Officer to conclude that the female Prospective Employer would refuse job offers. The Officer unreasonably speculated that in many families, both parents work without a caregiver. Furthermore, when the Officer reviewed the female Prospective Employer's job offer he mistakenly said the date was October 25, 2019 when it was actually October 25, 2018. The Officer then questioned why the Prospective Employers

had not provided earlier job offers. Finally, the Officer failed to account for the Prospective Employers explanation that she only had one written job offer because the rest were verbal.

[15] Second, the Officer failed to consider that the male Prospective Employer travels extensively for work. This led the Officer to generalize about his ability to assist his wife. This generalization had no basis in the record.

[16] Third, the Officer stated that the Prospective Employers failed to explain the reduction in work hours. This indicates that the Officer overlooked the letters from the Prospective Employers and the Applicant's counsel's submissions. Those letters explain that the change in proposed work hours was to accommodate the female Prospective Employer's intention to return to school.

[17] Finally, the Officer unreasonably concluded that the Prospective Employers intended to have the Applicant care for their 16-year-old son. This conclusion demonstrates that the Officer misread the Employment Offer, job description, and the Prospective Employer's letter. This evidence makes it clear that the Prospective Employers' intent is for the Applicant to care for their younger child.

[18] With respect to the Prospective Employers' ability to fulfil the terms of the Employment Offer, the Officer erred in determining that $65,000 "is not a reasonable salary at which to live in order to have a caregiver when compared to the benefits of having an additional $30,000." The

Applicant submits that the Officer departed from the established method for assessing financial sufficiency and adopted a methodology “without any apparent or known rules.”

(2) Respondent’s Position

[19] The Officer’s error with respect to the date of the female Prospective Employer’s job offer is inconsequential. One written job offer supports the Officer’s finding that there was insufficient evidence that the female Prospective Employer had turned down employment due to a lack of childcare.

[20] The Respondent submits that Legal Counsel’s Letter, which provided an explanation for the reduction in the Applicant’s work hours, is not evidence. This letter required corroboration. Therefore, it was reasonable for the Officer to conclude that the Prospective Employers did not provide a clear reason for the reduction in hours.

[21] The Officer did not err by stating that the Prospective Employers intended to have the Applicant care for both of their children. The Respondent notes the use of the word “children” in both the Application and the Employment Offer. The Respondent says the Officer was under no obligation to clarify this ambiguity for the Applicant.

[22] Finally, the Officer’s assessment of the Prospective Employers’ financial situation, viewed in the broader context, was reasonable.

(3) Analysis

[23] In *Aghaalikhani v Canada (Citizenship and Immigration)*, 2019 FC 1080 at para 24, Justice Gascon held that "when an administrative tribunal is silent on evidence clearly pointing to an opposite conclusion and squarely contradicting its findings of fact, the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its decision." Justice Gascon also held that when parts of the evidence are "misapprehended" and "where the findings do not flow from the evidence" the decision will not be reasonable (at para 17). Likewise, more recently, in *Vavilov* the Supreme Court of Canada stated:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.

[24] I am persuaded by the Applicant's submissions that the Officer overlooked or misapprehended material evidence, rendering the Decision unreasonable. First, the Officer fails to mention the Prospective Employers' evidence that further job offers were not adduced because they were made orally. The Officer simply declares that "it is unclear why those earlier offers were not provided."

[25] The Officer also incorrectly cites the date on the female Prospective Employer's job offer by one year. This mistake leads the Officer to infer that her job search began only after the Officer requested evidence of job offers. Based on this misapprehension of evidence, the Officer gives little weight to the female employer's prospects of future employment, which is the primary reason for the Officer's concerns about the Prospective Employers' reasonable needs.

[26] The Officer relies on this misapprehension when concluding that it is “unreasonable” for the female Prospective Employer to refuse work “given the number of families in Canada where both parents work without a caregiver.” There is no basis for this conclusion. This statement also indicates that the Officer overlooked the evidence of the male Prospective Employers extensive travel for work. Ultimately, I find the Officer’s findings related to the female Prospective Employer’s job situation unreasonable.

[27] Furthermore, I find the Officer’s conclusion about the Prospective Employers’ ability to fulfil the terms of the Employment Offer speculative and not based on the evidence. The Officer failed to explain why the Prospective Employer’s ability to pay the Applicant was insufficient. The Officer makes no mention of the Prospective Employer’s savings nor explains why an income well above the Low Income Cut Off leads to concerns that the Prospective Employers cannot reasonably fulfill the Employment Offer. The reasons do not permit the Court to understand how the Officer arrived at this finding.

[28] The Officer also expresses concern that the Prospective Employers could not reasonably fulfill the terms of the Applicant’s Employment Offer because they reduced the work hours in the updated contract by one hour per day. The Officer speculates that if the Prospective Employers’ needs increase to eight hours per day, the “financial arrangement would be even less reasonable.” While I am not convinced by the Applicant’s submissions that the change was “completely explained” by the Prospective Employer’s letter, the Officer nevertheless bases his finding on his assessment that $65,000 is not enough to live off. The Officer’s adverse inference concerning the updated employment hours flows from the flawed financial sufficiency analysis.

The “assessment of the employer’s capacity to pay should not be based on speculation” (*Bautista v Canada*, 2018 FC 669 at para 16).

[29] Finally, the Officer makes a number of errors regarding what child the Applicant would care for. The Officer erroneously states that the Prospective Employers “have indicated they want the Applicant to supervise the 16 year old to keep him out of trouble.” In their July 14, 2019 letter, the Prospective Employers explain that their “intention” is to hire a caregiver to care for the younger child. This would allow the female Prospective Employer to focus more of her attention on her 16-year-old son to ensure he does not “take the wrong path with peer group and pressure.” Furthermore, the Employment Offer only lists the younger child as the child in need of care. Finally, I note that the Officer questions why “a new caregiver would have more success” “if a teenager is disobedient to their parents.” This statement is also speculative and not based on the contents of the Application.

[30] Ultimately, I find that the Decision is based on overlooked or misapprehended evidence. The Decision is not justified, transparent, and intelligible. Therefore, it is not reasonable.

B. *Should the Court enter an indirect substitution or make a cost order in favour of the Applicant?*

(1) Applicant’s Position

[31] The Applicant requests a “directed verdict” on the ground that all factual findings have been made. The Applicant states that the Court can make a decision “without wading into the decision-making process on the basis of an incomplete factual record” and without weighing the

evidence "in place of the decision-maker." The Respondent has not submitted contrary evidence and therefore, the Court is not being asked to weigh evidence. The Applicant points to paragraph 142 of *Vavilov* where the Supreme Court of Canada stated:

> …An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose.

[32] It has been more than a year since the Applicant applied for her work permit. The Applicant submits that allowing a "directed verdict" will spare her from another lengthy delay.

(2) Respondent's Position

[33] The Respondent submits that this is not an appropriate case for indirect substitution – the correct term for "directed verdict" in the administrative context – because, contrary to what the Applicant submits, "there is not only one lawful response, or one reasonable conclusion." The Respondent also submits that this is not an appropriate case for a costs award because "[t]here is no evidence that the Respondent has unnecessarily or unreasonably prolonged the proceedings."

(3) Analysis

[34] In *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206, the Federal Court of Appeal [FCA] determined that the remedy of indirect substitution is an exceptional power under the law of judicial review (at para 79). It is available in cases where "the court concludes that

there is only one reasonable outcome, so that returning the matter to the administrative decision-maker would be pointless" (at para 82).

[35] I agree with the Respondent that this is not an exceptional case warranting indirect substitution. Although I have concluded that the Officer overlooked or misapprehended the evidence, this does not lead to the conclusion that there is "only one reasonable outcome."

[36] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Rules*], provides that no costs shall be awarded in respect of an application for judicial review unless the Court, for special reason, so orders. The *Rules* do not define "special reasons." At paragraph 7 of *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 [*Ndungu*] the FCA summarized the non-exhaustive circumstances in which special reasons will be found to justify an award of costs as well as situations that fall short of the "special reasons" standard. In *Sisay Teka v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 314, this Court held that the special reasons exception contemplated in Rule 22 is a "high bar" (at para 41).

[37] The Applicant submits that the Respondent has unnecessarily or unreasonably prolonged the proceedings and that this constitutes special reasons (*Ndererehe v Canada (Citizenship and Immigration)*, 2007 FC 880 [*Ndererehe*]). *Ndererehe* is distinguishable from the present case. In that case, unlike here, the prolonging of the proceedings led to the Applicants facing risk to their personal safety. Additionally, in *Ndererehe* the Court found that the Applicant's situation was

oppressive and threatening and that they had suffered since their application was refused (at para 23). Again, no such circumstances are present here.

[38] In *Ndungu*, the FCA made clear that an award of costs cannot be justified merely because "an immigration official has made an erroneous decision" (at para 7). In my view, this case does not meet the high bar for a costs award.

VII. Conclusion

[39] The Decision is not reasonable. It lacks the requisite degree of transparency, intelligibility, and justification. The application for judicial review is allowed.

[40] This is not an appropriate case for the Court to enter an indirect substitution or to award costs.

[41] The parties did not raise any question of general importance for certification and none arises.

JUDGMENT in IMM-6744-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review allowed.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6744-19
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