

Federal Court



Cour fédérale

Date: 20230302

Docket: IMM-3329-22

Citation: 2023 FC 296

Vancouver, British Columbia, March 2, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

SURJIT SINGH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] By decision dated October 29, 2021, an immigration officer at the High Commission in New Delhi denied the applicant's request for a work permit under the Temporary Foreign Worker Program because the applicant did not comply with a request to provide language results.

[2] The applicant applied for judicial review of the officer's decision on the grounds of procedural unfairness and that the decision was unreasonable under the principles in Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65, [2019] 4 SCR 653.

[3] For the reasons that follow, the application is allowed. The decision will be set aside and the work permit application will be remitted for redetermination, without a costs award.

I. Facts and Events Leading to this Application

[4] The applicant is a citizen of India. In September 2018, the applicant filed an application for a work permit. On December 6, 2018, an officer refused the application. The applicant filed an application for judicial review of the officer's decision. The parties agreed to set aside the decision and have the application re-determined by a different officer.

[5] On redetermination, an officer requested additional documentation from the applicant, including pay slips, a secondary school certificate, training and education certificates. The officer contacted the applicant's employer in India to confirm his employment, salary and duties.

[6] In November 2020, the officer sent a procedural fairness letter to the applicant. The letter raised concerns that the proposed employer may not have the financial ability to hire foreign workers, and whether the business and job offer was genuine because the address of the business (a construction firm) led to a meat shop address. The applicant provided further information and the officer determined that the employer and job offer appeared genuine.

[7] On February 4, 2021, the officer sent the applicant a request for documentation concerning the applicant's English language abilities. This letter requested:

IELTS/CELPIP: Original IELTS or CELPIP language proficiency results (photocopies are not acceptable) Submit proof of English language ability This must be received at this office by 2021/03/03

[8] The letter advised that the applicant could submit documents to a specified email address.

[9] By email to the specified address on March 2, 2021, the applicant requested an extension of time until March 13, 2021, to respond to the request for proof of English language ability.

[10] By email to the same specified address on March 12, 2021, the applicant (through his legal counsel) filed a response to the officer's request. The response included the applicant's written submissions prepared by his counsel and supporting documents including affidavits from the applicant and his prospective employer. The applicant's submissions advised that neither the Labour Market Impact Assessment for the position, nor the employer's requirements, required proficiency in English. The submissions included an excerpt from the employer's affidavit, which confirmed that the employer had interviewed the applicant, that he was fully satisfied with the applicant's language proficiency in English and Punjabi and that English was not a job requirement for the position. In addition, the job was classified by the National Occupational Classification as "NOC 7271 – Carpenters" which did not set specific language requirements to work as a carpenter in British Columbia. The applicant submitted that he had therefore met the job requirements. The applicant advised that he was not in possession of an original IELTS or CELPIP language proficiency results. He submitted his high school certificate and the syllabus of his trade certification as proof of his language ability.

[11] About a year later, on March 10, 2022, the applicant filed an application for leave and judicial review in this Court seeking an Order for *mandamus* to compel a decision on the redetermination.

[12] On May 11, 2022, the applicant received a letter from the visa office, including a letter dated October 29, 2021, stating the application was refused. The visa officer determined that his application did not meet the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”) and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (“IRPR”) because the applicant “did not comply with [the] request to provide language results.”

[13] The officer’s notes in the Global Case Management System (“GCMS”) stated:

on 04 feb 2021 the applicant was requested to provide ielts or celpip results. did not respond. refused for non-compliance.

[14] The same GCMS entry set out the applicant’s request for an extension of time to respond made on March 4, 2021, but did not refer to the March 12, 2021 response filed by the applicant’s counsel on his behalf that included submissions regarding his English language proficiency.

II. Analysis

[15] As the parties agreed, on this application for judicial review, the standard of review is reasonableness for the substantive decision refusing the work permit, applying the criteria in *Vavilov: Li v Canada (Citizenship and Immigration)*, 2023 FC 147, at para 14; *Jandu v Canada (Citizenship and Immigration)*, 2022 FC 1787, at para 15.

[16] Questions of procedural fairness are reviewed on a standard akin to correctness, by asking whether the process leading to the decision was fair and just to the applicant in all the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)* 2018 FCA 69, [2019] 1 FCR 121, at para 54.

[17] The applicant challenged the officer's decision on both procedural unfairness and substantive unreasonableness grounds, on the basis that the officer did not consider the response dated March 12, 2021, filed by his counsel relating to language proficiency.

[18] The respondent contended that the officer's request for language proficiency information was specific to IELTS or CELPIP results, which the applicant did not submit and acknowledged he did not have. The respondent sought to support the officer's decision using evidence in the record about a need for English language proficiency in some website advertisements for the position.

[19] I agree with the applicant that the decision must be set aside.

[20] I am satisfied from reading the letter dated October 29, 2021, the GCMS notes and the contents of the record that the officer did not consider the applicant's submissions and supporting evidence dated March 12, 2021. As the applicant noted, that response to the procedural fairness letter dated February 4, 2021, was not included in the Certified Tribunal Record.

[21] The procedural fairness letter requested IELTS or CELPIP test results, but also asked that the applicant submit proof of English language ability. The officer's refusal was based on his failure to comply with the "request to provide language results". The GCMS notes stated that the applicant "did not respond" and the application was refused for non-compliance.

[22] In fact, the applicant did respond, in some detail, with respect to the language proficiency requirements for this particular job and his ability to meet them. He filed evidence (including sworn evidence from the prospective employer) supported by written submissions from his counsel.

[23] As a matter of substantive reasonableness, the officer had to consider the applicant's filed evidence and submissions in response to the procedural fairness letter in order to render a reasonable decision: *Vavilov*, at paras 125-128; *Federal Courts Act*, paragraph 18.1(4)(d). It appears from the record that the applicant's filing simply did not reach the officer and was therefore not considered prior to the impugned decision.

[24] The applicant requested a costs award. Section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, provides that no costs shall be awarded in specified immigration proceedings "unless the Court, for special reasons, so orders."

[25] A request for costs is understandable, as the applicant has had two decisions set aside and he had to file an application for *mandamus* just to receive a copy of the redetermination decision made six months earlier.

[26] However, for the Court to award costs, the circumstances must surmount a high threshold to meet the legal criteria for “special reasons”: *Radiyah v Canada (Citizenship and Immigration)*, 2022 FC 1234, at para 34; *Oladele v Canada (Citizenship and Immigration)*, 2022 FC 1161, at para 5; *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208, at para 7. In this case, the test is not met. Neither the respondent nor the officer has unnecessarily or unreasonably prolonged this legal proceeding, or acted in a manner that was unfair, oppressive, improper or actuated by bad faith.

[27] Although there will be no costs award, the Court’s Order will require that the redetermination occur promptly.

III. Conclusion

[28] The application will be allowed and the matter remitted for prompt redetermination, to ensure that a decision is rendered on the basis of all the evidence and submissions in the record.

[29] Neither party proposed a question to certify for appeal and none arises.

JUDGMENT in IMM-3329-22

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision dated October 29, 2021, is set aside and the application for a work permit is remitted to a different decision maker for prompt redetermination.
2. There is no costs award.
3. No question is certified for appeal under paragraph 74(d) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3329-22

STYLE OF CAUSE: SURJIT SINGH v MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JANUARY 11, 2023

REASONS FOR JUDGMENT AND JUDGMENT: A.D. LITTLE J.

DATED: MARCH 2, 2023

APPEARANCES:

Harry Virk FOR THE APPLICANT

Brett J. Nash FOR THE RESPONDENT

SOLICITORS OF RECORD:

Harry Virk FOR THE APPLICANT
Liberty Law Corporation
Abbotsford, British Columbia

Brett J. Nash FOR THE RESPONDENT
Attorney General of Canada
Vancouver, British Columbia