Federal Court  Cour fédérale

Date: 20190212

Docket: IMM-2643-18

Citation: 2019 FC 182

Ottawa, Ontario, February 12, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MIRCEA GABRIEL ENACHE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision [the Decision] of an Immigration Officer [the Officer] of Immigration, Refugees and Citizenship Canada [IRCC] at the Embassy of Canada in Romania, dated May 23, 2018, refusing the Applicant's application for an electronic travel authorization [ETA] to Canada, based on misrepresentation, and finding the Applicant inadmissible to Canada for a period of 5 years.

[2] As explained in greater detail below, this application is allowed, because I have found that the Applicant was deprived of procedural fairness, as a result of the Officer making the Decision having knowledge of poison pen letters [PPLs] related to the Applicant and the subject of the Decision, which letters are protected by informer privilege such that the Applicant was not afforded an opportunity to respond to them.

II. **Background**

[3] The Applicant, Mircea Gabriel Enache, is a 41-year-old citizen of Romania. He obtained an ETA on December 17, 2017, and travelled to Canada on December 18, 2017, returning to Romania on April 3, 2018. Mr. Enache states that during this time he was on leave from his job at Marg General Group [MGG] in Romania.

[4] IRCC received a PPL, sent to its fraud tips email address on April 3, 2018, alleging that Mr. Enache had worked illegally while in Canada and that he intended to return to Canada and remain here permanently. The IRCC then re-opened Mr. Enache's ETA application and, on April 5, 2018, sent Mr. Enache a letter stating that his ETA application was under review and requesting updated information and documentation. The correspondence did not mention the April 3 PPL.

[5] On April 15, 2018, IRCC received a second PPL from the same source, sent to the Bucharest post's email mailbox for client/public correspondence. On April 20, 2018, Mr. Enache responded to IRCC's letter with the requested documents, including a letter from MGG confirming his employment. On April 23, 2018, the Officer asked an IRCC staff member to call

the publicly-listed number for MGG and confirm Mr. Enache's employment. This staff member spoke to a receptionist, who advised that Mr. Enache had not been employed at MGG since October 2017.

[6] The IRCC staff member asked the receptionist whether MGG had recently provided an employment letter for Mr. Enache. IRCC's Global Case Management System [GCMS] notes applicable to this matter state "…she said no, and that it shouldn't be the case since Mr. Enache is no longer an employee."

[7] On April 24, 2018, IRCC sent Mr. Enache a procedural fairness letter [PFL], advising him that there were concerns that his employment letter was fraudulent and that IRCC had contacted MGG, which confirmed that he was no longer an employee and that they did not issue him a letter of employment.

[8] Mr. Enache responded to the PFL on May 9, 2018, and included a new letter of employment, which Mr. Enache says was from his manager. The letter stated that a "decision maker" at MGG had authorized his leave from MGG to allow for his travel to Canada beginning December 2017, which is why the receptionist thought he no longer worked there.

[9] The GCMS notes reflect that the Officer reviewed the new letter and explanation, but found it not to be credible because: the Officer did not find it credible that human resources would not be informed of Mr. Enache's leave; MGG is a large company and as such would be unlikely to allow informal leaves without knowledge of others at MGG; Mr. Enache did not

provide a credible explanation as to the origin of his previous employment letter; MGG had clearly stated that it did not issue the original employment letter; the new letter is poorly written in Romanian; and, according to a search performed by the Officer, the phone number provided in the new letter is for a car rental service, Eurocar Craiova, not MGG. The Officer concluded that the new letter was fraudulent.

[10] The Officer referred the matter to a delegated authority to assess whether Mr. Enache was inadmissible to Canada for misrepresentation under s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, resulting in the Decision refusing Mr. Enache's application for an ETA and finding him inadmissible.

III. **Issues and Standard of Review**

[11] The Applicant's arguments raise the following issues for the Court's consideration:

A. Did the Officer breach procedural fairness by failing to disclose the poison pen letters to the Applicant?

B. Did the Officer conduct verification of the Applicant's employment in an unreasonable manner?

C. Did the Officer unreasonably dismiss the Applicant's response to the procedural fairness letter?

D. Did the Officer err in finding that the second letter of employment was fraudulent?

E. Did the Officer breach procedural fairness by failing to give the Applicant an opportunity to address her concerns about the genuineness of the second letter of employment?

[12] The parties agree, and I concur, that the procedural fairness issues are governed by the standard of correctness and the other issues by the standard of reasonableness.

IV. **Preliminary Issue – Informer Privilege**

[13] One of the questions that arises in the context of the first procedural fairness issue raised by the Applicant is whether the two PPLs are governed by informer privilege, a privilege which prohibits the disclosure of an informer's identity including all information which might tend to identify the informer (see *Canada (Citizenship and Immigration) v Hanjra*, 2018 FC 207 [*Hanjra*] at para 22). The test for application of this privilege is, first, that the informer provided information to an investigating authority and, second, that the informer provided the information under an express or implied guarantee of protection and confidentiality (see *Hanjra* at para 26).

[14] In the present case, the Applicant acknowledges that the first PPL is protected by informer privilege, because it was provided to IRCC through its fraud tips email address. The evidence in the record includes a copy of IRCC's webpage for its tip line, which expressly states that the information provided will remain confidential. However, the Applicant takes the position that the second PPL is not subject to privilege, because it was provided to IRCC through its public email mailbox.

[15] I disagree. While the substantive contents of both PPLs are redacted in the copy of the GCMS notes in the record in this matter, the unredacted portions clearly show the informer stating in both PPLs that he or she wishes the communication to remain confidential. Given that the first communication was made through the fraud tips line, where there was an express promise of confidentiality made by the receiving authority, and that the informer clearly had an expectation of confidentiality in relation to both PPLs, I find that the second PPL was made in response to that same promise, and that the test for informer privilege is met.

[16] At the hearing of this application, the Respondent's counsel filed with the Court a sealed copy of a confidential affidavit, which has not been reviewed by the Applicant's counsel, and which I understand attaches unredacted versions of the PPLs. At the hearing, I directed that this document be treated as confidential. For the sake of good order, my Judgment in this application also provides for the confidential treatment of the document.

[17] The Respondent's purpose in filing the confidential affidavit was to anticipate the possibility that the Court would consider it necessary to review the unredacted PPLs in order to make a decision on whether the second letter is privileged. In a recent decision, *Canada (National Revenue) v Atlas Tube Canada ULC*, 2018 FC 1086 at paras 11-13, in which the parties adopted a similar approach involving a document over which there was a disputed claim to solicitor-client privilege, I referenced the following explanation by Justice Mosley, at paragraph 12 of *Canada (National Revenue) v Revcon Oilfield Constructors Incorporated*, 2015 FC 524:

> [12] The Court has the power to receive documents for which solicitor-client privilege is asserted in a sealed envelope and review them so as to determine whether a proper claim of privilege has been made out. In *Canada (Privacy Commissioner) v Blood Tribe Department Of Health*, 2008 SCC 44 at para 17 [*Blood Tribe*], Justice Binnie explained that this power ought to be used sparingly: "Even courts will decline to review solicitor–client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue…"

[18] While that explanation was provided in the context of solicitor-client privilege, I consider the same principles to apply in the context of informer privilege, and I understand both parties to be in agreement that these principles should guide my decision whether to review the unredacted PPLs. In my view, for the reasons explained above, the record before the Court provides sufficient evidence surrounding the circumstances under which the PPLs were communicated to IRCC, that I have been able to decide the disputed question whether the second PPL was privileged without the necessity to review the PPLs. The confidential affidavit will accordingly remain sealed in the Court file.

V. **Analysis**

[19] In my view, the outcome of this application for judicial review turns on the first issue raised by Mr. Enache. He argues that he was deprived of procedural fairness, because the Officer rejected his application for an ETA, with knowledge of the PPLs related to the Applicant and the subject of the Decision, to which PPLs the Applicant had no opportunity to respond.

[20] Against the backdrop of the above determination of privilege, this issue raises a tension between two important principles of law. The principle of informer privilege protects against

disclosure of information such as the PPLs, in the interests of encouraging the public to report incidents of fraud. On the other hand, the principle of procedural fairness requires disclosure, to an applicant in an immigration proceeding, of certain categories of information in the possession of IRCC of which the party is not aware and which may affect the outcome of the application, to give the applicant an opportunity to respond.

[21] The Applicant relies on cases in which PPLs have specifically been found to engage the principle of procedural fairness. For instance, in *D'Souza v Canada (Citizenship and Immigration)*, 2008 FC 57 at para 14, the Court held as follows in the context of a family class sponsorship application:

> [14] It is not absolutely mandatory that extrinsic evidence in this form be given to the applicant. In some instances, putting the allegations from the anonymous source to the applicant may be sufficient. However, in this case, since Sharon, who was neither the applicant nor the sponsor, was being interviewed, procedural fairness demanded that she be shown the actual letter which casts aspersions on her. This may well have given insight as to its author. This is another ground for granting judicial review.

[22] Similarly, in *Patel v Canada (Citizenship and Immigration)*, 2012 FC 1389 at paras 29-32, the Court addressed the procedural fairness implications of a PPL in the context of an immigration officer's conclusion that the applicant's marriage was not genuine:

> [29] In my view this judicial review application must be allowed because the applicant's procedural rights were breached by the non-disclosure of the poison pen letter. That poison pen letter specifically refers to Hina Patel and accuses her of arranging false marriages and charging money for such arrangements. It accuses her of working illegally. It states she is attempting to blackmail the author, became pregnant and had an abortion. It names Mr. Patel as the person being sponsored.

> [30] Counsel for the respondent argues the poison pen letter was not relied upon. Counsel for Hina Patel argues it is clear from the Computer Assisted Immigration Processing System (CAIPS) notes the Visa Officer relied on the poison pen letter when she asked Mr. Patel whether his wife was ever pregnant.
>
> [31] Moreover, the Visa Officer did allude to the poison pen letter when she informed Mr. Patel "We have received information that your marriage to Hina is not genuine" to which Mr. Patel answered "No, it is true."
>
> [32] In my view, fairness required Mr. Patel be confronted with the entire letter in order to provide him with a fair opportunity to react to it. It is clear from the reasons both the Tribunal's decision and that of the Visa Officer that the contents of the poison pen letter had an impact on the decision, to the extent which can never be known. The poison pen letter should have been disclosed and handed over to the Royal Canadian Mounted Police (RMCP) for investigation.

[23] It does not appear that the PPLs at issue in those authorities were protected by informer privilege, or at least no argument to that effect was advanced. However, I do not consider that distinction to affect whether procedural fairness concerns arise as a result of an immigration officer being in receipt of PPLs which have not been disclosed to the subject thereof. While the need to respect informer privilege may affect how an immigration officer approaches a proceeding to achieve procedural fairness, in my view the question whether an applicant is deprived of procedural fairness, on the facts of a particular case, turns on an analysis which focuses upon the position of the applicant and whether he or she has been afforded a fair opportunity to know the case he or she is required to answer.

[24] On the facts of the present case, the Respondent argues that no procedural fairness concern arises, because the contents of the PPLs did not influence the Officer's Decision. In support of that position, the Respondent has filed an affidavit by the Officer, explaining the

process by which she approached the investigation and the resulting Decision. The Officer candidly acknowledges that the investigation was triggered by the receipt of the first PPL, but she states that she did not take either of the PPLs into account when concluding that Mr. Enache had submitted a fraudulent employment letter. The Officer states that this conclusion resulted from the information gathered during the investigation that followed the receipt of the first PPL.

[25] In response, Mr. Enache submits that these facts significantly resemble those in *Sapojnikov v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 964 [*Sapojnikov*], in which the Respondent similarly argued that the PPL in that case had not been relied upon by the officer who rejected the applicant's application for permanent residence. It is useful to set out Justice Mactavish's full analysis of the procedural fairness issue raised in that case:

> A. The Poison Pen Letter
>
> [19] The first issue relates to the failure of the CPC-O to disclose the poison pen letter to Mr. Sapojnikov before refusing his application for permanent residence.
>
> [20] It is a breach of procedural fairness not to disclose extrinsic evidence, such as a poison pen letter, that is subsequently relied upon in making a decision: *Qureshi v. Canada (Citizenship and Immigration)*, 2009 FC 1081 at para. 28, [2010] 4 F.C.R. 256.
>
> [21] The Respondent submits that the letter was not relied on in making the decision to refuse Mr. Sapojnikov's application for permanent residence. The Respondent notes that the CPC-O had attempted to contact the author of the letter in 2016, submitting that no further consideration was given to the letter after it had been unsuccessful in reaching the writer or the letter. I do not accept this submission.
>
> [22] As Mr. Sapojnikov notes, the poison pen letter arrived relatively early in the decision-making process, submitting that it would inevitably have set off credibility concerns with respect to the *bona fides* of his application.

> [23] It is particularly troubling that the content of the poison pen letter is discussed at some length in the GCMS notes of June 4, 2015, and that a procedural fairness letter was sent to Mr. Sapojnikov *the very next day*, seeking detailed information with respect to his company and the projects it had undertaken, as well as financial and tax information and police certificates.
>
> [24] The logical inference to be drawn from the close proximity in time of the two events is that the contents of the poison pen letter triggered concerns on the part of the CPC-O with respect to the credibility of Mr. Sapojnikov and the underlying purpose of his application for permanent residence, and that it played a role in the decision to send him the procedural fairness letter of June 5, 2015. For whatever reason, however, Mr. Sapojnikov was not made aware of the existence of the poison pen letter or of its contents.
>
> [25] Because the issue raised by the poison pen letter involves a question of procedural fairness, Mr. Sapojnikov was permitted to supplement the record on his application for judicial review: *Assn. of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 at para. 20, 428 N.R. 297. Mr. Sapojnikov produced an affidavit sworn by Mr. Kleiman in support of his application for judicial review in which Mr. Kleiman denies having sent the poison pen letter. It would have been up to a Visa Officer to determine the probative value of such a denial, but Mr. Sapojnikov was never afforded the opportunity to put this evidence before the Officer.
>
> [26] I recognize that the level of procedural fairness owed to visa applicants is at the lower end of the spectrum: *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 at para. 41, 195 D.L.R. (4th) 422 (F.C.A.). That said, as Mr. Sapojnikov's credibility played a key role in determining whether his application was motivated primarily for the purpose of obtaining status in Canada, it is hard to see how the poison pen letter would not have played at least some role in the Officer's evaluation of his credibility. As a result, it was fundamentally unfair for consideration to be given to the contents of the poison pen letter without Mr. Sapojnikov having been afforded an opportunity to address it.

[26] I agree with the Applicant's position that there are significant similarities between the circumstances canvassed in the above analysis in *Sapojnikov* and those in the case at hand. In

both cases, it was the contents of the PPL that triggered concerns on the part of IRCC and the resulting investigation. In both cases, the contents of the PPL do not seem to have been explicitly taken into account in the analysis resulting in the applicable decision. However, as Justice Mactavish held at paragraph 26, "…as Mr. Sapojnikov's credibility played a key role in determining whether his application was motivated primarily for the purpose of obtaining status in Canada, it is hard to see how the poison pen letter would not have played at least some role in the Officer's evaluation of his credibility."

[27] The Respondent argues that, in the present case, the Decision was based on a more objective determination than in *Sapojnikov*. It turned on whether Mr. Enache had submitted a fraudulent employment letter in support of his application. I accept that this may be a somewhat more objective inquiry than was at issue in *Sapojnikov,* where the issue was the applicant's motivation for wanting to come to Canada. However, as in *Sapojnikov,* the investigation in the present case is related to the credibility of the Applicant, as it is difficult to see how an investigation into whether someone has provided a fraudulent document would not engage at least to some degree consideration of the person's credibility. I therefore share the same concern as was expressed by Justice Mactavish, that the Applicant was deprived of procedural fairness by the impact of the PPLs to which he had no opportunity to respond.

[28] I wish to add that, in reaching this conclusion, I am casting no aspersions on the evidence of the Officer, who deposes that she did not take the PPLs into account in arriving at the Decision. Rather, the concern is that the Officer was aware of the PPLs and their contents and, when arriving at a conclusion that engaged Mr. Enache's credibility, it would be difficult to

conclude that the PPLs could not have influenced the conclusion, even subconsciously. There may be cases where the nature of a decision is such that a reviewing court can safely conclude that an undisclosed PPL did not influence the decision, such that no procedural fairness issue arises. However, in the circumstances of this case, I find that Mr. Enache was deprived of procedural fairness in the process that led to the Decision.

[29] This finding is determinative of this application for judicial review, requiring that the Decision be set aside and the matter referred back to a different officer to be re-determined, with the benefit of updated submissions to be made by Mr. Enache. It is therefore unnecessary for me to address the other issues raised by the Applicant. However, before concluding, I consider it necessary to return briefly to the tension to which I referred at the beginning of this Analysis, between the principles of informer privilege and procedural fairness. I expect this tension may present itself again when Mr. Enache's ETA application is re-determined, as he is now aware of the fact that the PPLs exist, but he is still not aware of their contents.

[30] None of my comments in these Reasons should be read as suggesting that the Officer should have favoured the principle of procedural fairness over that of informer privilege. In other words, I am not suggesting that the PPLs should have been given to Mr. Enache to give him an opportunity to respond. Nor is Mr. Enache arguing such an entitlement. This would clearly violate the privilege.

[31] However, the result of the tension referenced above is that IRCC can find itself with a dilemma, where it receives allegations from an informer that it considers credible, wishes to

investigate the allegations and make a decision as a result of that investigation, and yet is challenged to find a way to do so which does not violate the applicant's rights to procedural fairness. Clearly the law surrounding informer privilege is intended to encourage those with credible allegations of wronging to come forward (see *R v Barros*, 2011 SCC 51 at para 28), and it would be an unfortunate result if IRCC was unable to investigate and adjudicate resulting concerns. But how does IRCC do so without raising concern that the relevant applicant's right to procedural fairness is violated by the potential impact of the undisclosed PPL on the resulting decision?

[32] At the hearing of this application, counsel for both parties recognized this dilemma. The Applicant's counsel raised the suggestion that a solution could be for IRCC to employ an ethical wall or screen, such that, when an immigration officer receives a PPL and concludes that an investigation should ensue, the resulting investigative process and, importantly, the decision-making process is assigned to another officer who is not privy to the PPL. IRCC is then able to investigate allegations of wrongdoing without violating principles of procedural fairness, because the decision-maker is not aware of and therefore cannot be influenced by the contents of the PPL to which the applicant cannot be given an opportunity to respond.

[33] The Respondent's counsel raised concern that this Judgment and Reasons not extend beyond the facts under consideration and make pronouncements on procedures to be followed in this sort of case without the benefit of an understanding of the possible operational implications of such procedures. I take that point and am not intending to suggest that the solution proposed by the Applicant's counsel is necessarily the way such matters should be handled. Rather, the

extent to which that solution, or any other proposed solution to the tension identified in this Analysis, represents an appropriate process is best left to a case where such a process has been followed, such that the Court is not considering hypotheticals.

[34] I make these comments only because the tension is one which it seems to me may arise again in the re-determination of Mr. Enache's application, given that the PPLs remain privileged, and presumably must present itself in other cases as well, and I wanted to record the thoughtful submissions of counsel for both parties on the potential for addressing the dilemma raised by these sorts of cases.

[35] Neither party proposed any question for certification for appeal, and none is stated.

[36] Finally, as a housekeeping matter, I note that the style of cause in this matter incorrectly names the Respondent as the Minister of Immigration, Refugees and Citizenship Canada. My Judgment corrects this error.

JUDGMENT IN IMM-2643-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decision by the Officer is set aside, and the matter is returned to another officer to be re-determined in accordance with this Judgment and Reasons.

2. The material filed with the Court at the hearing of this application on January 31, 2019, in a sealed envelope marked "Sealed Confidential Affidavit", shall be treated as confidential pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106, and neither the Applicant nor the solicitor for the Applicant shall be given access to this material.
3. The style of cause is amended to read as set out in this Judgment and Reasons, to correctly state the name of the Respondent.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2643-18
STYLE OF CAUSE:	MIRCEA GABRIEL ENACHE V MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 31, 2019
JUDGMENT AND REASONS	SOUTHCOTT, J.
DATED:	FEBRUARY 12, 2019

APPEARANCES:

Ali Esnaashari	FOR THE APPLICANT
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT