Federal Court  Cour fédérale

Date: 20191210

Docket: IMM-1277-19

Citation: 2019 FC 1581

Ottawa, Ontario, December 10, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SUMANPREET KAUR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of a Canada Border Services Agency ("CBSA") Officer (the "Officer") to issue an Exclusion Order against the Applicant under section 228 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"). Pursuant to subsection 41(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"), the Officer found the Applicant was inadmissible for failure to comply with conditions of her study permit under subsection 220.1(1) of the *IRPR*.

[2] The Applicant is an Indian citizen who has been in Canada on a valid study permit. The Applicant completed three of the four semesters required for her program. However, she could not secure courses required for the fourth semester. Several months later, she attempted to change her status from a study permit to a work permit by attending the Pacific Highway port of entry ("POE"). However, an exclusion order was issued at this time.

[3] The Applicant submits that the Officer's decision is unreasonable and that the Officer erred by failing to consider the totality of the evidence. The Respondent submits that the Officer's decision to issue the Exclusion Order is reasonable as the Applicant was not scheduled to return to school for any upcoming semesters when she had her interview at the POE.

[4] For the reasons below, I find that the Officer's decision is reasonable. Accordingly, this application for judicial review is dismissed.

II. **Facts**

[5] Sumanpreet Kaur (the "Applicant") is a 20-year-old citizen of India. The Applicant came to Canada on a study permit on April 21, 2017. She was enrolled in the Health Sciences Program at Langara College, and commenced her studies on May 1, 2017. The program typically takes two years (four semesters) to complete.

[6] The Applicant, at the time of the interview, had completed three of the four required semesters. She completed the May 2017, September 2017 and May 2018 semesters. She did not study in the January 2018 semester.

[7] The Applicant did not attend the September 2018 semester. The Applicant states in her affidavit that she had applied for courses in the September 2018 semester, but learned as of September 17, 2018 that the seats were filled. Therefore, she could not secure the courses required for the September 2018 session, and lost her $1,500 non-refundable registration fees as a result. The Applicant also was not enrolled for the January 2019 semester.

[8] On February 13, 2019, the Applicant attended the Pacific Highway POE in Surrey, British Columbia to request a change in her visa status from a study permit to a work permit.

[9] The Applicant spoke with a CBSA Officer ("First CBSA Officer") on February 13, 2019 in an interview. The Applicant stated that she was applying for a destitute work permit because she did not have enough money to support herself. The Applicant stated that she could not work the 20 hours per week that is allowed under the study permit because she is "not attending school and [she] need[s] to work more than 20 hours per week." When questioned by the First CBSA Officer on when she planned to go back to school, she stated "next September", referring to September 2019, and added that she had not registered for September 2019 classes yet because she needed to work first.

[10] The First CBSA Officer prepared a report under subsection 44(1) of the *IRPA* (the "s. 44(1) report") stating that in her opinion, the Applicant was inadmissible pursuant to subsection 41(a) of the *IRPA* for failing to comply with the *IRPA*. As reasoning, the s. 44(1) report stated that under subsection 29(2) of the *IRPA*, a temporary resident must comply with any conditions imposed under the *IRPR* and with any requirements under the *IRPA*. The First CBSA Officer wrote that the Applicant "is not actively pursuing her course or program of study in Canada as per Section 220.1 of the [IRPR]," and notes this as a basis for her s. 44(1) report.

[11] Following the s. 44(1) report, on February 14, 2019, a second interview was conducted by another CBSA Officer (the "Officer"). During this interview, the Applicant answered the Officer's questions about which semesters she had been enrolled in for her studies. At the conclusion of the interview, the Officer issued an Exclusion Order. The Exclusion Order was made pursuant to section 228 of the *IRPR*. It states the Applicant is inadmissible under subsection 41(a) of the *IRPA*, for failure to comply with conditions imposed under the *IRPR* pursuant to 29(2) of the *IRPA*. The Respondent notes that the basis of the Exclusion Order was the Applicant's failure to actively pursue her studies.

III. **Issues**

[12] There are two issues that arise on this application for judicial review:

1. Was the Officer's decision to issue the Exclusion Order reasonable?
2. Did the Officer breach procedural fairness in issuing the Exclusion Order?

IV. **Statutory Provisions**

[13] Under subsection 228(1) of the *IRPR*, a foreign national may be subject to a removal order without being referred to the Immigration Division on grounds of inadmissibility listed under this provision. The Respondent notes subsection 228(1)(iv) of the *IRPR* as the relevant provision, but in my view, subsection 228(1)(v) is the more appropriate provision and one that applies to the Applicant's facts. It reads as follows:

228 (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

[…]

(c) if the foreign national is inadmissible under section 41 of the Act on grounds of

[…]

(iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order,

(v) failing to comply with subsection 29(2) of the Act as a result of non-compliance with any condition set out in section 184 or subsection 220.1(1), an exclusion order, or

228 (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

[…]

c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :

[…]

(iv) l'obligation prévue au paragraphe 29(2) de la Loi de quitter le Canada à la fin de la période de séjour autorisée, l'exclusion,

(v) l'une des obligations prévues au paragraphe 29(2) de la Loi pour non-respect de toute condition prévue à l'article 184 ou au paragraphe 220.1(1), l'exclusion,

[14] Under subsection 41(a) of the *IRPA*, a foreign national may be inadmissible for failing to comply with the *IRPA* through an act or omission. It reads as follows:

41 A person is inadmissible for failing to comply with this Act

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and […]

41 S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, […]

[15] Under subsection 29(2) of the *IRPA*, temporary residents, which includes persons in Canada on a student permit, must comply with any conditions under the *IRPR* and *IRPA*. It reads as follows:

Obligation — temporary resident	**Obligation du résident temporaire**
29 (2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.	**29 (2)** Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

[16] A study permit holder is subject to the conditions under subsection 220.1(1) of the *IRPR*, which states as follows:

Conditions — study permit holder	**Conditions — titulaire du permis d'études**
220.1 (1) The holder of a study permit in Canada is subject to the following conditions:	**220.1 (1)** Le titulaire d'un permis d'études au Canada est assujetti aux conditions suivantes :
(a) they shall enroll at a designated learning institution and remain enrolled at a designated learning institution until they complete their studies; and	**a)** il est inscrit dans un établissement d'enseignement désigné et demeure inscrit dans un tel établissement jusqu'à ce qu'il termine ses études;
(b) they shall actively pursue their course or program of study.	**b)** il suit activement un cours ou son programme d'études.

V. **Preliminary Issue: Inadmissible Evidence**

[17] The Applicant submitted new evidence indicating that the Applicant has now registered for the September 2019 session. The Applicant writes in her affidavit that she is enrolling for an English course on a part-time basis for the May 2019 session.

[18] However, as the Respondent correctly notes, neither the fact that the Applicant is now registered for the September 2019 semester nor her statement that she is enrolling for the May 2019 semester were facts before the Officer at the time of the decision. Thus, such evidence is

inadmissible. The same holds for the September 2019 tuition record attached to the Applicant's affidavit. The receipt shows it was paid on April 8, 2019, two months after the decision of the Officer. This was not a record before the Officer when the Exclusion Order decision was rendered.

[19] As per the Respondent's submission, paragraph 11 and Exhibit B of the Applicant's affidavit are struck from the Applicant's Record.

VI. **Analysis**

A. *Whether the Exclusion Order was Reasonable*

[20] The Applicant submits that the Officer's decision is unreasonable because the Officer failed to consider the totality of the evidence and did not take into account all the relevant factors in her assessment of the Applicant's compliance with the study permit conditions. The Applicant argues that she had the intent to enroll in her classes and did register for the September 2018 semester by paying the $1,500 non-refundable and non-transferable fee, but was unable to continue with her enrolment due to the unavailability of courses.

[21] The Applicant also argues that she had applied for a change of status to a work permit within 150 days of learning that she was not enrolled for the September 2018 session. The Applicant claims that her intent was to work and earn money to support herself for full-time studies in the September 2019 session. She also claims she wanted to take a part-time course in the May 2019 session.

[22] The Respondent submits that the Officer's finding is factual and highly discretionary. The Respondent cites *Pompey v Canada (Citizenship and Immigration)*, 2016 FC 862 (CanLII) for the proposition that immigration officers are simply involved in a fact-finding process, and their role is to determine whether the information regarding the applicant's inadmissibility is accurate. The Respondent argues the Officer reasonably found that the Applicant was not actively pursuing her course or program of study as per section 220.1 of the *IRPR*.

[23] I agree with the Respondent's position. The Officer's role was to ascertain whether the Applicant was inadmissible for failing to comply with her study permit conditions, which were to remain enrolled in school until she completed her studies, and to actively pursue her program of study. The Applicant argues that she could not enroll in the September 2018 session due to the unavailability of courses, but the question remains as to why she did not take the next opportunity to enroll for courses in January 2019.

[24] Moreover, at the time of the interview, the Applicant made no mention of her desire to take a part-time course in the May 2019 session, and the Officer was not made aware of this intent. It was reasonable for the Officer to find that the Applicant had not been enrolled in school, and was not actively pursuing her program. Even if the Applicant was given the benefit of the doubt on why she did not enroll in the September 2018 session, it does not change the fact that the Applicant did not provide an explanation for her lack of enrolment in the January 2019 term, or her desire to enroll in the May 2019 term. The Applicant also had not registered for the September 2019 semester.

[25] During the hearing, the Applicant's counsel stated that the Applicant had intent to begin school again in the September 2019 session. However, the record does not support this intent.

The only time the Applicant mentions her "intention" to return to school is when the First CBSA Officer asks, "When are you planning to go back to school?", and the Applicant answers, "Next september [sic]". The Applicant's counsel noted during the hearing that the Applicant's intent was followed up by her subsequent registration for the semester. However, this action was taken after the interview with the Officer, and was not in evidence before the Officer.

[26] On the factual circumstances, I am not persuaded the Applicant had been actively pursuing her studies. It was reasonable for the Officer to find that the Applicant had not been in compliance with the study permit conditions.

[27] Furthermore, I am not persuaded by the Applicant's argument that she complied with the study permit conditions by applying for a change of status within the 150 days. Upon a reading of the Operational Guideline cited by the Applicant, the "change of status within 150 days" discussion is only applicable to students who: a) wish to change institutions or programs of study at the same institution; or b) wish to obtain official leave from their designated learning institutions.

[28] Neither situation applies to the case at bar.

[29] First, the Applicant had no intent of changing institutions or changing her program of study at Langara College. The Applicant's counsel submitted during the hearing that the Applicant had been planning to change her program of study, which would give her 150 days to change her status under the Operational Guideline. However, the record simply does not support this assertion. In fact, the record shows a contrary intent. In the interview, to the Officer's question as to why the Applicant could not "return home, save up enough funds and then come

back," the Applicant answers that her plan was to "have work permit, and work for three or four months and then complete my studies and then go home". The Applicant describes in her own words that her plan would be to "complete" her studies and head back home. Nowhere does she give an indication that she wishes to change her current program.

[30] Second, in the case where a student wishes to obtain leave, the 150 days are counted from the date leave is commenced, and the Operational Guideline states that leave must be authorized by the designated learning institution. However, the Applicant did not obtain leave from Langara College, and thus I cannot see how the Applicant could rely on this guideline.

[31] Therefore, the Applicant's argument that the Officer did not consider the 150-day timeline is inapplicable. The Applicant's attempt to change the visa status within 150 days did not bring her into compliance with the study permit conditions.

[32] I add that even if the Operational Guideline had been applicable to the Applicant, it is trite law that administrative guidelines are not binding and cannot be applied in a manner that unduly fetters a decision maker's discretion, unless they constitute delegated legislation (*Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 (CanLII) at paras 62-72; *Herman v Canada (Citizenship and Immigration)*, 2010 FC 629 (CanLII) at para 28; *Frankie's Burgers Lougheed Inc. v Canada (Employment and Social Development)*, 2015 FC 27 (CanLII) at paras 90-92). Therefore, given the facts before her, the Officer reasonably found the Applicant was not actively pursuing her studies.

B. *Procedural Fairness*

[33] First, the Applicant submits that the Officer breached procedural fairness by failing to take into account her evidence in support of the September 2019 semester enrolment. The Applicant relies on the 150-day timeline from the Operational Guideline for her attempted change in status. Second, the Applicant states the Officer relied on the fact that the Applicant is not enrolled in classes for the September 2019 semester, and that this reliance "turned out to be false" because the Applicant "clearly has now registered herself for the fall 2019 school semester".

[34] The Respondent correctly submits the Officer did not breach procedural fairness because she could not have considered a fact that had not materialized. The Respondent also submits that the Applicant was interviewed by the Officer in person, and that the Officer explained why she was issuing the Exclusion Order.

[35] I am not persuaded by the Applicant's first argument on the breach of procedural fairness because a failure to consider a particular piece of evidence goes to the substance of the decision. It is not an issue of procedural fairness.

[36] Also, it is apparent that the Applicant has an incorrect understanding of the doctrine of legitimate expectations. She claims that the Officer's reliance on a "false" statement breached her own procedural fairness. The doctrine of legitimate expectations applies where the conduct of a public authority in the exercise of its power, including established practices, conduct or representations, lead the applicant to rely on such conduct to her detriment. See *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 (CanLII) at

paras 29-42. The doctrine of legitimate expectations is not engaged in the case at bar because the Applicant did not rely on any conduct of the Officer nor did she suffer any detriment as a result.

[37] I agree with the Respondent that the Officer did not breach her duty of procedural fairness. The Applicant was provided with an opportunity to respond to concerns in an in-person interview, a s. 44(1) report was prepared prior to the issuance of the Exclusion Order, and she was provided with a copy of the Exclusion Order.

V. **Certified Question**

[38] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[39] The Officer's decision to issue the Exclusion Order is reasonable. The Officer properly considered the evidence before her. It was reasonable for the Officer to conclude that the Applicant was not in compliance with the study permit conditions, based on the facts and the interview. The Officer also did not breach her duty of procedural fairness. Therefore, this application for judicial review is dismissed.

JUDGMENT in IMM-1277-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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