

Federal Court



Cour fédérale

Date: 20201221

Docket: IMM-4542-19

Citation: 2020 FC 1173

Ottawa, Ontario, December 21, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

SVETLANA ASANOVA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Svetlana Asanova, the applicant, is a citizen of Russia who has been living with her family in Thailand since August 2015. Wanting to move to Canada, she applied to do so under two different programs: the Atlantic Immigration Pilot Project (“AIPP”) for New Brunswick and the Provincial Nominee Program for Prince Edward Island.

[2] In connection with her AIPP application, the applicant secured a job offer to work as a cook at the Blue Canoe Restaurant in Waasis, New Brunswick. The applicant then applied to Immigration, Refugees and Citizenship Canada (“IRCC”) for a work permit. In support of this application, the applicant provided two employment letters of reference. One was from the Accountant and HR Director of the applicant’s own company in Russia. The letter stated that the applicant had “worked as a cook of the canteen of the Company ‘Private Entrepreneur Asanova S.V.’” between December 2009 and July 2013. The other letter, which was from the Accountant and HR Manager for Lana’s Business Co. Ltd. in Pattaya, Thailand, stated that the applicant had worked as a sous-chef at Lana’s Restaurant in Pattaya, Thailand since August 2018. Both letters itemized the applicant’s responsibilities at the respective businesses.

[3] As a result of certain concerns about the letters on the part of the IRCC officer who reviewed the work permit application, a procedural fairness letter was sent to the applicant. In response, the applicant provided additional documents pertaining to her self-employment in Russia and her employment in Thailand with Lana’s Business Co. Ltd.

[4] By letter dated June 5, 2019, the applicant was informed that her application for a work permit had been denied and that she had been determined to be inadmissible to Canada for misrepresentation because the information in her employment reference letters “does not appear to be genuine.”

[5] The applicant has now applied for judicial review of this decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). She submits that the

decision was made in breach of the requirements of procedural fairness and that it is unreasonable.

[6] For the reasons that follow, I agree with the applicant that the decision was made in breach of the requirements of procedural fairness. This application will therefore be allowed, the decision will be set aside, and the matter will be remitted to another decision maker for redetermination.

II. BACKGROUND

[7] The applicant was born in Kemerovo, Russia, in May 1988. In June 2010, she obtained a Master's Degree in Economics from Kuzbass State Technical University in Russia.

[8] According to the applicant, around the time she was completing her degree, she started her own restaurant business, "Private Entrepreneur Asanova S.V.", in Kemerovo. The business operated three canteen locations and employed about a dozen people. The applicant worked as a cook and as a supervisor of the employees. The business operated for about five years.

[9] The applicant closed her business in August 2015 and relocated to Thailand with her husband and their daughter. They settled in the city of Pattaya, where the applicant attended an English language program. After completing her studies, in August 2018 the applicant was hired as a sous-chef at Lana's Restaurant in Pattaya. (At or around this time, the applicant was completing a 120 hour course on Thai cooking at the Pattaya Cookery School.)

[10] When she started working at Lana's Restaurant, the applicant was also looking into the possibility of moving to Canada with her family. As mentioned above, she decided to pursue two different IRCC programs at the same time. In connection with the AIPP program, at some point in September 2018, the applicant secured a job offer from a restaurant in New Brunswick to work as a cook. The applicant then obtained the necessary approvals from the Province of New Brunswick.

[11] The applicant then submitted an application for a work permit to IRCC in March 2019. In conjunction with this application, the applicant's husband applied for an open work permit and her daughter applied for a study permit.

[12] The applicant submitted two employment reference letters in support of her work permit application – one from "Private Entrepreneur Asanova S.V." dated October 2, 2018, the other from Lana's Business Co. Ltd. dated March 20, 2019. Since these letters are material to the issues in this case, it may be helpful to set their contents out in full.

[13] The letter from "Private Entrepreneur Asanova S.V." was originally in Russian. The applicant provided a certified English translation. In English translation, the body of the letter states the following (*sic* throughout):

By this letter I confirm that Asanova Svetlana Viktorovna worked as a cook of the canteen of the Company "Private entrepreneur Asanova S.V." in the period from December 29th, 2009 till July 13th, 2013. Her labor hours were 48 hours per week. Her average weekly salary amounted to 10 000 rubles.

Her main duties were as follows:

- Control of kitchen work;

- Prepare of food stuffs and cooking of dishes;
- Inventory and check of food stuffs and equipment;
- Time-schedule making and supervision of the kitchen workers;
- Hire and training of personal;
- Planning of menu;
- Control and ordering of food stuffs supply.

[14] The letter was signed by the Accountant and HR Director. A contact telephone number was provided.

[15] The letter from Lana's Business Co. Ltd. was in English. The body of this letter states the following (*sic* throughout):

By this letter I confirm that Asanova Svetlana work as a sous-chef in Lana's restaurant "Lana's Business Co. Ltd." since August 2018 to now. She is currently working 48 hours per week and is currently earning 10.000 THB per week. Key Responsibilities of sous-chef and cook include but not limited to:

- Prepare and cook complete meals
- Schedule and supervise kitchen helpers
- Supervise activities of cooks and other kitchen workers
- Oversee kitchen operations
- Maintain inventory and records of food and supplies
- Clean kitchen and work area
- Plan menus, determine size of food portions, estimate food requirements and costs, and monitor and order supplies.

[16] The letter was signed by the Accountant and HR Manager. A contact telephone number was provided.

[17] The work permit application was reviewed by an IRCC officer with the Migration Section of the Canadian Embassy in Bangkok. Following this review, the officer sent the applicant a procedural fairness letter dated May 21, 2019, raising a concern about potential misrepresentation.

[18] In material part, the May 21, 2019, letter stated the following:

This refers to your application for a Work Permit.

Your application and documents have been reviewed and it appears that you do not meet the requirements for immigration to Canada.

Paragraph 40(1)(a) of the *Immigration and Refugee Protection Act (IRPA)* states that

40(1) A permanent resident or a foreign national is inadmissible for misrepresentation

- (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act.

Specifically, I have concerns that you have misrepresented the following material fact(s):

- *The information in your employment reference letters does not appear to be genuine.*

If it is found that you have engaged in misrepresentation in submitting your application, you may be found to be inadmissible under paragraph 40(1)(a) of the IRPA. This would render you inadmissible to Canada for a period of five years under paragraph 40(2)(a) of the IRPA.

I am providing you with an opportunity to respond to these concerns. You have 7 days from the date of this letter to submit additional information in this regard.

[19] This letter was emailed to the applicant on May 21, 2019. The applicant replied by email immediately, stating that she “would like to submit all additional documents” but asking “can you please clarify which documents you need for my application?” The IRCC officer replied by email the next day stating: “You may submit any documents that you choose in response to the concerns set out in our letter of yesterday.”

[20] The applicant then submitted a package of documents which, according to her covering letter, “confirms and gives more details of my previous and current work experience.” This package of documents included the following:

- An original (in Russian) and English translation of a letter dated May 23, 2019, from the Pension Fund of the Russian Federation confirming pension contributions on behalf of the applicant for periods spanning from December 28, 2009, until May 26, 2015.
- Originals (in Russian) and English translations of records of annual income for Private Entrepreneur Asanova Svetlana Viktornova for the years 2010 (dated April 13, 2011), 2011 (dated April 9, 2012), 2012 (dated April 16, 2013), and 2013 (dated April 23, 2014).
- An employment contract (in English) dated August 21, 2018, between the applicant and Lana’s Business Co. Ltd. The contract was signed by the applicant and by the Managing

Director of Lana's Business Co. Ltd. Among other terms, the contract describes the applicant's duties as a sous-chef as follows:

- Prepare and cook complete meals
 - Schedule and supervise kitchen helpers
 - Supervise activities of cooks and other kitchen workers
 - Oversee kitchen operations
 - Maintain inventory and records of food and supplies
 - Clean kitchen and work area
 - Plan menus, determine size of food portions, estimate food requirements and costs, and monitor and order supplies.
-
- A letter from the Accountant and HR Manager of Lana's Business Co. Ltd. dated May 22, 2019, setting out the applicant's monthly salary from August 2018 until April 2019.
 - Documents pertaining to the monthly withholding and remittance of income tax by Lana's Business Co. Ltd. from September 2018 until April 2019. The originals were in Thai and the applicant provided English translations. Attached receipts for the September and October 2018 remittances were both dated October 31, 2018. Attached receipts for the other remittances were all dated May 23, 2019.

III. DECISION UNDER REVIEW

[21] By letter dated June 5, 2019, the applicant was informed that her application for a work permit had been denied because she had misrepresented or withheld material facts in her application. After setting out paragraphs 40(1)(a) and (b) of the *IRPA*, the letter states:

On submitting your application, you misrepresented or withheld the following material facts:

- **the information in your employment reference letters does not appear to be genuine.**

The misrepresentation or withholding of this/these material fact(s) induced or could have induced errors in the administration of the Act because a work permit could have been issued to a person who does not meet the requirements of the job offer and a visa could have been issued to an inadmissible person.

You were given the opportunity to respond to this concern by our letter of May 21, 2019. I have carefully reviewed your response but it does not displace this concern.

[22] The letter goes on to reiterate that, as a result of this finding, the applicant is inadmissible to Canada for a period of five years.

[23] Global Case Management System (“GCMS”) notes that the officer made in connection with the application provide some additional insight into the officer’s original concerns with respect to the employment reference letters as well as the reasons for denying the application and finding the applicant to be inadmissible due to misrepresentation. These notes will be discussed below.

IV. STANDARD OF REVIEW

[24] The applicant has challenged both the manner in which the decision was made and the substantive reasonableness of the decision. Since my conclusion that the requirements of procedural fairness were not met is dispositive of this application, it is not necessary to address the reasonableness of the decision.

[25] There is no dispute in the present case about how a reviewing court should determine whether the requirements of procedural fairness were met. The reviewing court must conduct its own analysis of the process followed and determine whether the manner in which the decision was made was fair having regard to all the relevant circumstances. This is functionally the same as applying the correctness standard of review: see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 34 and 50; *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 54; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at paras 33-56; and *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31. That being said, invoking a standard of review is somewhat beside the point here. At the end of the day, what matters “is whether or not procedural fairness has been met” (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

V. ANALYSIS

A. *General Principles*

[26] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada held (at para 22) that “the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.” Further, the values underlying the duty of fairness “relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision” (at para 28).

[27] The common law duty of procedural fairness is “flexible and variable” (*Baker* at para 22). Several factors must be considered in determining what is required in the specific context of a given case, including: (1) the nature of the decision being made; (2) the nature of the statutory scheme under which the decision is made; (3) the importance of the decision to the individual(s) affected; (4) the legitimate expectations of the party challenging the decision; and (5) the procedures followed by the decision maker itself and its institutional constraints (*Baker* at paras 21-28).

[28] Applying these factors, reviewing courts have consistently found that in visa applications the requirements of procedural fairness fall on the low end of the spectrum (*Sepehri v Canada (Citizenship and Immigration)*, 2007 FC 1217 at para 3; *Asl v Canada (Citizenship and Immigration)*, 2016 FC 1006 at para 23). While an applicant must be afforded a fair process by the visa officer, what is required for the process to be fair is attenuated by the fact that generally what is at issue is whether the applicant will be permitted to visit, work or study in, or move to Canada – privileges that are extended to foreign nationals by the *IRPA* and related regulations in prescribed circumstances.

[29] Even so, at a minimum procedural fairness requires that an applicant for a visa have an opportunity to participate meaningfully in the application process. Consequently, the duty of procedural fairness can require that an applicant be given an opportunity to respond to a decision maker's concerns before a decision is made when those concerns go beyond simply whether the legislative or related requirements are met on the face of the application (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24). When, for example, an applicant for a visa may be unaware of the existence or the basis of the concern, procedural fairness can require prior notice of the concern before a decision is made so that the applicant has an opportunity to try to disabuse the officer of the concern. See *Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 at para 21; *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326 at paras 25-26; and *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at para 27.

[30] Further, when the concern relates to misrepresentation, the importance of having a meaningful opportunity to meet it is obvious given the potential consequences of a finding of misrepresentation: see *Toki v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 606 at para 17, and *Ntasi v Canada (Citizenship and Immigration)*, 2018 CanLII 73079 (FC) at para 10. If a finding of misrepresentation is made, an applicant will not only be denied the visa for which they applied; they will also be inadmissible to Canada for the next five years. Without question, this is an important consequence (cf. *Baker* at para 25). Consequently, a concern about misrepresentation triggers a higher level or degree of procedural fairness compared to that which is engaged in visa applications where this concern is absent: see *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 27.

[31] Often on judicial review the issue is whether a procedural fairness letter should have been sent when one was not. In the present case, however, a procedural fairness letter was sent to the applicant. The question here, then, is whether that letter actually satisfied the requirements of procedural fairness. A functional approach should be taken in answering this question.

[32] The purpose of a procedural fairness letter “is to provide enough information to an applicant that a meaningful answer can be supplied” (*Ntasi* at para 6). Thus, in assessing whether the requirements of procedural fairness were met, the governing question is: Did the letter inform the affected party of the decision maker’s concerns? Only if it did can it be said that the letter gave the affected party a meaningful opportunity to address the concerns. What this means is that if the decision maker had specific concerns about aspects of an application, the procedural fairness letter must state more than general concerns. It must state the

decision maker's concerns with sufficient clarity and particularity so that the affected party has a meaningful opportunity to address them. See *AB v Canada (Citizenship and Immigration)*, 2013 FC 134 at paras 53-54; *Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 at para 62; *Toki* at para 25; and my decision in *Kaur v Canada (Citizenship and Immigration)*, 2020 FC 809 at para 39.

B. *The Principles Applied*

[33] In assessing whether the process afforded to the applicant was fair, the “ultimate question” is whether she knew the case to meet and had a full and fair chance to respond (*Canadian Pacific* at para 56). The applicant has satisfied me that she did not know the case she had to meet with respect to the officer's concerns about her employment letters, despite the fact that what was meant to be a procedural fairness letter was sent to her. Rather than alerting the applicant to the officer's concerns, as it should have, the letter failed to convey the officer's concerns in a way that would provide the applicant with a meaningful opportunity to respond to them.

[34] The insufficiency of the procedural fairness letter can be demonstrated by comparing it with the officer's GCMS notes.

[35] The officer recorded three specific observations about the employment letters in the GCMS notes.

[36] First, the only online presence the officer could find for either Lana's Restaurant or the applicant's business in Russia were entries on the applicant's Facebook page. Under "About Svetlana Asanova" on that page, the officer found the following:

- Lana's Restaurant
August 2018 to present – Pattaya
- Catering Asanova
Restaurant Supervisor May 26, 2015 to May 26, 2016 –
Kemerovo
- Canteen Russia
Cook and Supervisor December 29, 2009 to May 25, 2015 –
Kemerovo
- Self employed Grazhinsky
Sales manager June 2007 to December 2009 - Kemerovo

[37] The officer found, however, that the link for Lana's Restaurant "contains no information at all, no address, no location, no business info." The links to the other stated employment were "equally blank." The officer does not appear to have taken any other steps to determine whether or not these businesses existed. (The officer does not appear to have had any concerns about the discrepancies between the dates of employment on the Facebook page compared to those provided in the work permit application.)

[38] Second, the officer found that the terms of employment in the letter from Lana's Restaurant were "strikingly similar" to those in the letter for the applicant's self-employment in Russia.

[39] Third, the officer found that the description of the applicant's duties at Lana's Restaurant was "taken almost word for word" from the Government of Canada's 2016 National Occupational Classification ("NOC") description for the occupation of "Cook". Similarly, the wording of the self-employment letter was also "very close" to the wording of the NOC.

[40] These observations led the officer to draw two tentative conclusions. First, the "complete absence" of online evidence of the applicant's self-employment (apart from that generated by the applicant herself on her Facebook page) "raises concern that the information in the employment reference letter is not genuine." Second, in the absence of "any independent online evidence of existence of Lana's Restaurant other than that generated by the applicant," the officer was "not satisfied that Lana's Restaurant exists." As a result, the officer was concerned "that information in the employment reference letter is not genuine." The officer therefore sent a procedural fairness letter to the applicant.

[41] The officer's notes regarding the documents the applicant submitted in response to the procedural fairness letter reflect a subtle but important shift in the officer's concerns. While the original concern was with respect to whether the applicant's business in Russia and Lana's Restaurant in Thailand even existed, after reviewing the new information, the officer became concerned more specifically with the nature of the applicant's experience with these businesses. For example, the officer noted (quite correctly) that the pension and income documents said nothing about the applicant's actual employment experience in Russia. Further, the officer found that the terms of the employment contract with Lana's Business Co. Ltd. were quoted directly

from the NOC and inferred from this that the document “was created for the purpose of supporting this application rather than as a genuine employment contract.”

[42] As we have seen, the officer was originally concerned about whether Lana’s Restaurant even existed. To be sure, if it does not exist, the applicant cannot have worked there as a sous-chef. In response to the procedural fairness letter, the applicant provided evidence that she worked for Lana’s Business Co. Ltd., which carries on business as Lana’s Restaurant, and this evidence was capable of supporting the inference that, in fact, Lana’s Business Co. Ltd. (and therefore Lana’s Restaurant) does exist. (As counsel for the applicant emphasized, the two tax remittances that pre-date the procedural fairness letter were especially probative in this regard.) To this limited extent, at least, the applicant was able to respond to the officer’s concern about whether Lana’s Restaurant exists. This was, however, essentially a matter of luck because the statement in the procedural fairness letter that there were concerns that “the information” in the employment reference letters “does not appear to be genuine” did not alert the applicant at all to the specific concern about whether Lana’s Restaurant exists. If she was actually working there (as she claimed), she would have no reason to think this might be a concern. Moreover, the letter did not alert the applicant to the officer’s concerns about what the applicant actually did there (or in Russia, for that matter). The letter gave no indication of the officer’s concerns about the similarities between the two employment reference letters nor about the similarities between the job descriptions in those letters and the NOC. Consequently, the applicant was not given a meaningful opportunity to respond to these concerns, if she could, or the ensuing concern about whether she actually had the experience as a cook that she claimed to have.

[43] Although these concerns became somewhat more focused after the applicant submitted the additional information, they were present in the officer's mind before the procedural fairness letter was sent. Not surprisingly, the additional information the applicant provided did not address them at all. An elaborate explanation of the officer's concerns was not required. A brief summary of what the officer had noted about the employment reference letters and the specific concerns that arose from those observations could well have sufficed to inform the applicant of the case she had to meet. It would also have enhanced the fairness of the process if the officer had been explicit about the concern that Lana's Restaurant did not even exist. The vague statement in the letter of May 21, 2019, did not alert the applicant to any of these things and, as a result, did not give the applicant a meaningful opportunity to respond. The requirements of procedural fairness were therefore not met.

VI. CONCLUSION

[44] For these reasons, the application for judicial review is allowed, the decision dated June 5, 2019, is set aside, and the matter is remitted for reconsideration by a different decision maker.

[45] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4542-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision dated June 5, 2019, is set aside and the matter is remitted for reconsideration by a different decision maker.
3. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4542-19

STYLE OF CAUSE: SVETLANA ASANOVA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

**HEARING HELD BY VIDEOCONFERENCE ON DECEMBER 7, 2020 FROM
OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)**

JUDGMENT AND REASONS: NORRIS J.

DATED: DECEMBER 21, 2020

APPEARANCES:

Ronald Poulton FOR THE APPLICANT

Suzanne Bruce FOR THE RESPONDENT

SOLICITORS OF RECORD:

Poulton Law Office FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario