Federal Court  Cour fédérale

Date: 20210520

Docket: IMM-6014-19

Citation: 2021 FC 474

Toronto, Ontario, May 20, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

SALONI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of India who came to Canada on a study permit. Soon after she completed her studies, her study permit expired. She applied for a post-graduate work permit ("PGWP") to gain some experience in the Canadian workforce, but the permit was refused.

[2] Shortly thereafter, the applicant filed a second application, this time to restore her study permit and for a PGWP. An officer at the Immigration Appeal Division ("IAD") refused this application by decision dated June 4, 2019.

[3] The applicant asks this Court to set aside the officer's decision. The reason is that on the day she filed the second application (February 14, 2019), new Program Delivery Instructions came into effect for the issuance of PGWPs at Immigration, Refugees and Citizenship Canada ("IRCC"), which administers the PGWP program. The applicant submitted that the officer applied the old instructions to her application instead of the new ones. She also maintained that the officer should have given her an opportunity to make additional submissions or to file more evidence.

[4] For the reasons below, I conclude that the officer did not unreasonably apply the new instructions and was not obliged to give the applicant a further opportunity to adduce more evidence or to make additional submissions. The application is therefore dismissed.

I. Events Leading to this Application

[5] Some more facts are needed to understand this application.

[6] The applicant arrived in Canada on May 17, 2017. She had a study permit, valid until September 30, 2018. She studied at Canadore College in Ontario, which is a designated learning institute under the *Immigration and Refugee Protection Act,* SC 2001, c 27 (*"IRPA"*). She successfully completed two different programs in Business Management and Financial Services.

She completed her first course in December 2017 and the second in August 2018, before her study permit expired.

[7] The applicant received her transcripts from Canadore College in late October 2018. On November 2, 2018 she filed an application for a PGWP, with her transcripts serving as proof of her graduation from the designated learning institute. That application was refused by letter dated January 21, 2019 because the applicant's study permit had already expired. The old Instructions used by IRCC, which were in force at the time, required that a PGWP applicant submit his or her application for a post-graduate work permit *before* the expiry of his or her study permit.

[8] I pause to note that at the hearing, a factual question arose as to whether the applicant's November 2, 2019 application contained both a request for a PGWP and a request to restore or extend her study permit that had expired on September 30, 2019. However, the Certified Tribunal Record did not contain any application to restore or extend the expired study permit. IRCC's responding letter dated January 21, 2019 referred only to an "application for a Work Permit". The applicant's affidavit filed to support leave under *IRPA* s. 72 referred only to a work permit application on November 2, 2019, as did the applicant's written submissions to the Court. The evidence before this Court is therefore that the application made on November 2, 2019 was for a PGWP and did not include an application for a restoration.

[9] Returning to the chronology, after the applicant received the January 21, 2019 letter rejecting her request for a PGWP, the applicant filed a second application. The second

application included a request for the restoration of her study permit and for a PGWP. It was filed on February 14, 2019.

[10] These applications were also refused, by letter dated June 4, 2019. The letter stated:

> [X] Immigration legislation requires that foreign nationals wishing to remain longer in Canada submit an application for extension of their temporary resident status on or before the expiry of the authorized period. Your temporary resident status in Canada expired on September 30, 2018 and your application was received on February 14, 2019.
>
> [X] Foreign students in Canada are eligible for a work permit for post-graduation employment if they apply for the work permit while still in possession of a valid study permit. As your study permit expired on September 30, 2018, it has been determined that you are not eligible for a work permit in this category.
>
> [X] You are a person in Canada without temporary resident status who is not eligible for restoration under Section 182 of the *Immigration and Refugee Protection Regulations* [SOR/2002-227 ("*IRPR*")].

[11] The letter concluded by stating that the applicant was in Canada without legal status and was required to leave immediately.

[12] The officer's GCMS notes explain:

> APPLICATION REFUSED – Client had status on a study permit until 2018/09/30. Client had 90 days to apply for restoration ending on 2018/12/29. Client had applied for a WP-EXT on 2018/11/02 which was received after her initial status had expired. Client applied for this [i.e. the second post-graduate] study permit after her 90-day restoration and is no longer eligible to have her status restored. As her application for restoration is refused, her application for a study permit is also refused. Client is in Canada without legal status. Client advised to leave Canada.

[13] As noted, the applicant's second application was filed on February 14, 2019. On that day, new Program Delivery Instructions ("Instructions") came into effect for the PGWP Program. The applicant submitted that the new Instructions removed the requirement that applicants hold a valid study permit when applying for a PGWP and extended the deadline to apply from 90 days to 180 days (6 months), "to allow students to have more time to submit their post-graduation work permit application once they obtain their notice of graduation from their institution."

[14] The applicant argued that within 180 days of the date of applying for the post-graduation work permit, she had to either "hold a valid study permit", or to have "held a study permit" or be authorized to study in Canada without the requirement to obtain a study permit under *IRPR* paragraphs 188(1)(a*)* and (*b*). Because the applicant "held a study permit" that expired on September 30, 2018 and her application was filed within 180 days of that date, she was entitled to have her second PGWP application granted under the new Instructions.

[15] The respondent disagreed. The respondent argued that the applicant could have extended her study permit if she had filed for an extension before September 30, 2018 under *IRPR* subs. 183(5) – but she did not. The applicant also could have applied to restore her study period within 90 days after it expired under *IRPR* s. 182 – but she did not. The respondent did not contest that the applicant's application for a PGWP was made in time under the new Instructions, but maintained that she was not eligible for the PGWP under those new Instructions because she applied from within Canada without legal status.

II. Legal Principles

A. *Standard of Review*

[16] The parties both submitted that a reasonableness standard of review applies to the substantive issues raised by the applicant. I agree. The reasonableness standard was described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[17] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15. The focus of reasonableness review is on the decision actually made by the decision maker, including both the reasoning process (i.e. the rationale for the decision) and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, at para 85.

[18] For issues of procedural fairness, the standard of review is effectively correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 ["*CPR*"], esp. at paras 49 and 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, at para 35. The Court asks whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the

substantive rights involved and the consequences for the individual(s) affected: *CPR*, at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

B. ***Legal Framework: PGWPs***

[19] The PGWP Program is a program adopted by the Minister under s. 205 of the IRPR. Section 205 "extends to the Minister the authority to provide foreign nationals with limited access to the Canadian labour market where that access satisfies public policy objectives relating to the competitiveness of Canada's economy or academic institutions": Osahor *v Canada (Citizenship and Immigration)*, 2017 FC 666 (Gleeson J.), at para 14; Kaur *v Canada (Citizenship and Immigration)*, 2020 FC 513 (McHaffie J.), at para 8.

[20] For applicants, the PGWP program "allows foreign students who have graduated from a participating Canadian post-secondary institution to gain Canadian work experience. Skilled Canadian work experience gained through the program then helps graduates qualify for permanent residence in Canada": *Nookala v Canada (Citizenship and Immigration), 2016 FC 1019* (Mactavish J.), at para 1.

[21] The *IRPR* does not prescribe criteria for how the PGWP Program is to be administered. Rather, the regulations authorize the Minister to designate the work to be performed and define how, or on what basis, limited access to the Canadian labour market is to be provided: *Osahor,* at para 14. The criteria for the issuance of a PGWP are set out in the Program Delivery Instructions (the "PGWP-PDI"), an internal IRCC departmental document that is also publicly available online: *Nookala,* at para 12; *Osahor,* at paras 14-15; *Kaur,* at para 9.

[22] This Court has held that the IRCC must apply the PGWP-PDI strictly and that it has no discretion to disregard its mandatory requirements because the program delivery instructions set out binding criteria for the issuance of a PGWP: see *Kaur,* at para 9 and cases cited there. I note that this does not constitute an unlawful fettering of discretion. As Mactavish J., as she then was, noted in *Nookala*:

> [11] Fettering of discretion occurs when a decision-maker treats guidelines as mandatory: see, for example, *Canadian Reformed Church of Cloverdale B.C. v. Canada (Minister of Employment and Social Development)*, 2015 FC 1075... The operative portion of the document establishing the Post-Graduation Work Permit Program is not, however, a "guideline", as that term is used in the jurisprudence …
>
> [12] The Program document at issue in this case establishes criteria that *must* be satisfied for a candidate to qualify for a Post-Graduation Work Permit. While the Program document also provides information and guidance as to how the program is to be administered, nothing in the document confers any discretion on immigration officers to modify or waive the Program's eligibility requirements. Consequently, no fettering of discretion occurred when the immigration officer determined that Mr. Nookala was required to hold a valid study permit in order for him to be eligible for a Post-Graduation Work Permit.

III. Analysis

[23] The applicant raised several issues for review, which I have grouped together and will address in turn.

A. ***Did the Officer Unreasonably Apply the PGWP Instructions?***

[24] The applicant raised a series of issues about whether the officer applied the wrong Instructions, misinterpreted the Instructions, or misapplied them to the facts. The applicant also argued that she had a legitimate expectation that the new Instructions, released on February 14, 2019, would be applied, which was breached when the officer applied the former Instructions.

[25] In my view, the statutory regime in the *IRPA* and *IRPR* and the new Instructions constituted legal constraints on the officer. The officer's decision must therefore be justified in relation to those constraints: *Vavilov*, at paras 85, 90, 105-106 and 111-114.

[26] With respect to factual constraints, in *Vavilov*, the Supreme Court held that a reviewing court's ability to intervene arises only if the Court loses confidence in the decision because it was "untenable in light of the relevant factual … constraints" or if the decision maker "fundamentally misapprehended or failed to account for the evidence before it" [underlining added]; *Vavilov*, at paras 101, 126 and 194.

[27] I am unable to conclude that the officer misunderstood or misapplied the new Instructions, or misapprehended the evidence. In my view, the officer reasonably concluded that the applicant's study permit had expired and had not been extended or restored. I agree with both parties that the applicant was in time to apply for a PGWP under the new Instructions. However, the officer did not commit a reviewable error by concluding that the applicant did not qualify for a PGWP under the new Instructions because she did not hold a valid study permit on February 14, 2019. I will explain.

[28] The applicant's study permit expired on September 30, 2018. She was not authorized to stay in Canada after that date. She could have applied to extend it under *IRPR* s. 181(1) before the study permit expired. If she had done so, the time period of her authorized stay in Canada would have been extended until the day on which a decision is made (if it had been refused) or until the end of the new period authorized for her stay: *IRPR*, paragraphs 183(5)(*a*) and (*b*). However, the applicant never applied for an extension.

[29] At the hearing, the applicant submitted that it was her understanding that she had 90 days to apply for an extension under *IRPR* subs. 183(5) after she received IRCC's letter dated January 21, 2019. There is no merit in this position. Subsection 183(5) only applies "[i]f a temporary resident has applied for an extension of the period of their stay and a decision is not made on the application by the end of the period authorized for their stay …" The applicant had neither applied for an extension nor made any sort of application before September 30, 2018.

[30] After September 30, 2018, the applicant could have applied to restore her student status under *IRPR* s. 182. In relevant part, that provision requires an officer to restore temporary resident status, on certain conditions being met, if a student applies within 90 days after losing temporary resident status under specified *IRPR* provisions. The applicant in this case applied for restoration, but not within the required 90 days. She applied on February 14, 2019, which was more than 90 days after September 30, 2018.

[31] What was the effect of the applicant's absence of a valid study permit on her application for a PGWP?

[32] The respondent submitted that in the new Instructions, the section on eligibility states that an applicant must have held a valid study permit within 180 days of applying. However, that is only one of the criteria. The new Instructions also provide that to obtain a PGWP, the applicant must have either held valid temporary status or have left Canada when the application was made. The applicant did not qualify because neither of those conditions applied to her.

[33] I agree. It is true that the new Instructions permitted students who have been refused a work permit based on the previous Instructions to submit a new application under the new Instructions (i.e., under the longer 180-day time limit), but only if they are "eligible to apply". With respect to eligibility requirements, the new Instructions provided:

> - applicants may apply for a PGWP from within Canada if "their study permit is still valid" or they are on "implied status, meaning they submitted an application to extend or change their status to visitor or student before the expiry of their study permit and no decision has been made";
>
> - applicants whose study permit becomes invalid or expires must either
>
>   - leave Canada and apply for a [PGWP] from overseas; or
>
>   - apply to restore their status as a student by applying for a PGWP with the correct fees … and paying the fees to restore their status as a student …
>
> - under the heading "Post-Graduation Work Permit eligibility requirements": "To obtain a post-graduation work permit, the applicant must currently hold valid temporary status or have left Canada".

[34] The applicant did not meet any of these conditions. Her study permit had expired. She had not applied to extend before it expired or to restore it within 90 days of its expiry. So when

she applied for a PGWP, she did not hold valid temporary status in Canada and she had not left Canada.

[35] I recognize that one part of the new Instructions stated that within 180 days of applying for the PGWP, "applicants must also meet one of the following criteria: they hold a valid study permit [or] they held a study permit…" The applicant "held a study permit" less than 180 days before applying on February 14, 2019. Taken in isolation, this phrase may have been the source of some confusion on the part of the applicant. However, the seeming ambiguity of these passages does not override or alter the statement noted already that appeared at the top of the same webpage, and in several other places elsewhere in the new Instructions: "To obtain a post-graduation work permit, the applicant must currently hold valid temporary status or have left Canada".

[36] The doctrine of legitimate expectations does not assist the applicant in this case. In law, a legitimate expectation must be based on a clear, unambiguous and unqualified representation to the applicant about the administrative process (i.e., the procedures) that the decision maker would follow: see *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 (Binnie J.), at para 68; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 (LeBel J.), at para 95. Legitimate expectations may also arise from similarly clear, unambiguous and unqualified representations that a certain result will be reached, in which case more onerous procedures must be followed before backtracking or coming to a contrary result: *Baker*, at para 26; *Agraira*, at para 94. However, the doctrine of legitimate expectations cannot give rise to substantive rights: *Agraira*, at para 97.

[37] In this case, a reasonable expectation that the new Instructions would be applied does not yield a positive result for the applicant. Even under the new Instructions, the applicant was not entitled to a PGWP because her student status had expired by time she made her second application, and she no longer qualified for restoration of that status: *Ntamag v Canada*, 2020 FC 40 (Gagné ACJ), at para 21. Consequently, the applicant was without status in Canada when she applied for the second PGWP. The new Instructions are clear that applicants in that position must either have their status restored (an option unavailable to the applicant because she was out of time) or apply for the PGWP from outside Canada (which was not done). In addition, the Instructions do not promise any particular outcome and obviously cannot (and do not) guarantee the substantive outcome that the applicant will be issued a PGWP.

[38] Accordingly, I do not accept the applicant's submissions that the officer erred in applying the new Instructions or that the officer misapprehended the evidence. The officer did not commit a reviewable error under *Vavilov* principles.

B. ***Was the Applicant denied procedural fairness?***

[39] The applicant makes two procedural fairness arguments. The first is that she should have received an opportunity to provide an explanation or other evidence to the officer before the decision to reject her second PGWP application was made. The second was that the officer's decision letter did not contain "full detailed reasons".

[40] In my view, the applicant was not entitled to an opportunity to make additional submissions or file additional evidence. The applicable legal principles were well summarized by Walker J. in *Masam v Canada (Citizenship and Immigration)*, 2018 FC 751, at para 11:

> While a duty of fairness to applicants exists in PGWP cases, the duty does not require an officer to notify an applicant of a concern that arises directly from the legislation or related requirements or to provide the applicant with an opportunity to make submissions regarding the concern (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283; *Penez v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1001 at para 37). In each case, the applicant bears the onus of submitting to the officer all information relevant to eligibility with his or her initial application. It is in cases where an officer considers issues or facts extraneous to the application requirements that a duty arises to advise the applicant of the issue or concern. In those cases, the applicant would not have known that the particular issue or concern was relevant to his or her application and, in fairness, should be given an opportunity to make submissions.

See also *Marsh v Canada (Citizenship and Immigration)*, 2017 FC 408 (Russell J.), at paras 33-35; and *Kim v Canada (Citizenship and Immigration)*, 2019 FC 526 (Norris J.), at para 9.

[41] In this case, the applicant was required to satisfy the officer that she was eligible for the PGWP. She did not do so. The officer had no obligation to make disclosure of any concerns about the application not meeting the required standard in the new Instructions. The applicant did not submit that the officer referred to any extrinsic issues or materials in making the decision.

[42] In addition, I would not give effect to the argument that the officer's reasons were not sufficient. Even recognizing the culture of justification contemplated by the Supreme Court in *Vavilov*, given the nature of the applications, the contents of the letter dated June 4, 2019, as

supplemented by the officer's GCMS notes, provided satisfactory justification for the officer's decision: *Vavilov*, at paras 86, 94 and 99-101.

IV. Conclusion

[43] The application will therefore be dismissed. Neither party proposed a question for certification. There is no basis for a costs order.

JUDGMENT in IMM-6014-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.
3. There is no costs order.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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