Federal Court  Cour fédérale

Date: 20220527

Dockets: IMM-3005-20
IMM-3008-20

Citation: 2022 FC 779

Toronto, Ontario, May 27, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

KARAN SHARMA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of two decisions made by Canada Border Services Agency [CBSA] Officers on March 19, 2020. In the first decision [Permit Decision], a CBSA Officer refused the Applicant's application for a post graduate work permit [PGWP] because the Applicant failed to comply with the requirements of s. 220.1(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 [IRPR], leading to an inadmissibility report being issued. The Permit Decision is the subject of file IMM-3008-20.

[2] After reviewing the Officer's inadmissibility report, the documentation presented by the Applicant, and conducting a further interview, a different CBSA Officer [the Minister's Delegate] issued an exclusion order [Exclusion Decision] pursuant to subparagraph 228(1)(c)(iii) of the IRPR. The Exclusion Decision is the subject of file IMM-3005-20.

[3] As confirmed at the hearing of the applications, the proper Respondent for these applications should be the Minister of Public Safety and Emergency Preparedness. The style of cause has been amended accordingly.

[4] On February 24, 2022, Justice Heneghan ordered that the judicial reviews for the two matters be heard together. I address both applications in this judgment and a copy of my judgment will be placed on the Court file for each application.

[5] The Respondent asserts, as a preliminary matter, that the applications are moot as the Applicant has left Canada, which enforced the exclusion order and complicated the Applicant's ability to return to Canada or obtain a PGWP. However, I am unable to conclude on the record before me that the Applicant's departure would render a positive outcome of the underlying applications meaningless as it relates to the Applicant's PGWP application or his ability to obtain a temporary resident visa [TRV]. As such, this preliminary argument is dismissed.

[6] For the reasons that follow, I am of the view that there has been a breach of procedural fairness. Accordingly, the underlying decisions shall be quashed and the application for the PGWP sent back to another CBSA officer for redetermination.

I. Background

[7] The Applicant is a citizen of India who came to Canada in 2016 on a student visa.

[8] The Applicant took a two-year program in secretarial studies at the Collège de comptabilité et de secrétariat du Québec [CCSQ]. The course began on February 3, 2017 and was to be completed on October 5, 2018. During his studies, the Applicant became ill, allegedly with typhoid. He took a break from his studies from November 16, 2017 to the first week of February 2018 because of his illness. The Applicant alleges that he received verbal approval for this medical leave and sent various emails to CCSQ regarding his absence in November and December. He was subsequently suspended for failing to attend classes, although he says the suspension was taken back. The Applicant ultimately completed his program on May 31, 2019.

[9] In July 2019, the Applicant attempted twice to obtain a PGWP at two different border locations. On the second attempt, the application was refused and an exclusion order was issued. After seeking judicial review of that decision, the Respondent offered to settle the matter and the application for a PGWP was sent back for redetermination.

II. Decisions under review

[10] Before the Officer on redetermination, the Applicant presented a lengthy document package prepared by his counsel that included a letter relating to the Applicant's study program, which indicated that the program had taken the Applicant seven extra months to complete. It also included copies of medical documents relating to the Applicant's illness and emails with CCSQ during the time the Applicant was ill. The focus of the interview questions turned to

whether the Applicant could demonstrate that he had obtained authorization from CCSQ for the gap in his studies between November 16, 2017 and the first week of February 2018, thus establishing that he had maintained full-time status in the program during this time period.

[11] After the interview, the Officer contacted an administrative assistant at CCSQ who stated that the Applicant did not receive approval for his leave. The Officer did not discuss this conversation with the Applicant, but directed the Applicant to contact CCSQ to request documentation to support amongst other things, the assertion that he was on authorized medical leave. The Applicant was not able to provide this documentation.

[12] Relying in part on his discussion with the administrative assistant at CCSQ, the Officer concluded that the Applicant's leave did not fall within the definition of leave from studies in the Immigration, Refugees, and Citizenship Canada [IRCC] guidelines as the Applicant could not demonstrate that he had received approval for the leave from CCSQ. As such, the Applicant was not in compliance with paragraph 220.1(1)(b) of the IRPR and was therefore ineligible to obtain a PGWP. A report under subsection 44(1) of the IRPA was issued and the matter was referred to the Minister's Delegate for review.

[13] Based on a further review, including an interview eliciting essentially the same facts and evidence, the Minister's Delegate issued the Exclusion Decision against the Applicant.

[14] The Applicant voluntarily left Canada for India on October 23, 2021.

III. Issues and Standard of Review

[15] The following issues have been raised:

1. Are the applications moot because the Applicant left Canada for India?

2. Was there a breach of procedural fairness: a) because the Officer relied on extrinsic evidence that was not put to the Applicant; b) did the Officer's conduct give rise to a reasonable apprehension of bias; or c) did the Officer violate the doctrine of legitimate expectations by denying the Applicant a fair interview?

3. Did the Officer err by: a) attributing delay to the Applicant that was outside of his control; b) failing to consider and accept that there was implied consent and approval of the Applicant's absence; or c) failing to take into consideration the negative impact of the Permit Decision on the Applicant, thereby making the decision unreasonable?

[16] The standard of review for questions of procedural fairness is best reflected by the correctness standard, although they are not strictly speaking subject to a standard of review analysis. Instead, such questions are to be reviewed from the perspective of whether the procedure followed by the decision-maker was fair and just: *Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Sangha v Canada (Citizenship and Immigration)*, 2020 FC 95 at para 13.

[17] The standard of review of the substance of the decisions is reasonableness. None of the situations that would rebut the presumption that all administrative decisions are reviewable on a standard of reasonableness are present: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 9-10, 16-17.

[18] A reasonable decision is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision is reasonable if, when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 85, 91-95, 99-100.

IV. Analysis

A. *Are the Applications Moot because the Applicant left Canada for India?*

[19] The doctrine of mootness is well established: a case is moot where the decision of the court will not have the effect of resolving some controversy, which affects or may affect the rights of the parties. Where the decision of the court will not have a practical effect on such rights, the court will decline to decide the case unless there is good reason to hear it despite its mootness: *Borowski* v. *Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] at p. 353.

[20] To determine whether the applications are moot, it is necessary to determine if there remains a live controversy. If no live controversy exists, the onus shifts to the party seeking to have the case proceed to justify why the Court should nonetheless exercise its discretion to hear the matter. In this second part of the test, the Court will consider such factors as: (i) the adversarial context; (ii) judicial economy; and (iii) the role of the Court: *Borowski* at pp. 358, 360 and 362; *Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* v. *Canada (Attorney General)*, 2005 FC 1027 at para 25-29.

[21] The Respondent asserts that there is no longer a live controversy as it relates to the Exclusion Decision as the exclusion order was enforced by the voluntary departure of the Applicant from Canada on October 23, 2021. The Respondent contends that the result of this removal is that the Applicant cannot seek to return to Canada until after the exclusion order expires in October 2022 (one year after his departure) and will require a TRV to do so. The Respondent argues that even if the judicial reviews are successful, reconsideration may only occur when the Applicant can be present at a point of entry, which will require a TRV. Further, given the amount of time that has elapsed since the Applicant completed his studies on May 31, 2019, the Respondent asserts that he may not qualify under the criteria set out by IRCC for a PGWP. It argues that the situation is further complicated because TRVs are issued by IRCC and not the CBSA.

[22] The Applicant contends that the Respondent's argument is speculative. It asserts that if the judicial reviews were successful, it is unclear whether a TRV would be required and even if so, there is no basis to suggest that it would not be approved, or could not be dealt with in a timely manner. The Applicant further contends that there is no basis to conclude that the PGWP application could not continue. Further, he asserts that the Court could substitute its own decision for that of the CBSA and avoid the step of a further redetermination (*Vavilov* at para 142).

[23] I agree that the argument on mootness is speculative. The Applicant's departure from Canada does not interfere with his ability to proceed with the judicial reviews, nor is it clear that it would make the ability to obtain a PGWP nugatory. Even if the Applicant is required to obtain a TRV to be present at the port of entry, I do not consider this factor to be so complicated so as

to render the outcome of these judicial reviews meaningless to the parties. As acknowledged by counsel for the Respondent during questioning in oral submissions, at a minimum, the successful outcome of the judicial reviews could be relevant to any application by the Applicant for a TRV or his further eligibility for a PGWP. For these reasons, it is my view that the preliminary argument cannot succeed and that the merits of the judicial reviews should be considered.

B. *Was there a Breach of Procedural Fairness?*

(1) The Officer's Reliance on Extrinsic Evidence

[24] The Permit Decision states that following the interview with the Applicant, the Officer contacted CCSQ and spoke to the administrative assistant, Jocelyne Paré, to inquire as to whether the Applicant was authorized to take the leave. She replied that he was not. The Officer goes on to state:

> In an effort to allow the subject to address my concerns, I requested that the subject contact the school to request the following documents:
>
> - A letter of authorized leave from the school;
> - A transcript from the school;
> - The start date for his last class at the school;
> - Proof that the subject completed the internship and the dates;
>
> [emphasis added]

[25] The Officer notes that the Applicant was only able to provide the internship document and a document stating that he had failed a number of his classes and that this was the reason for his delay in completing his courses. He did not provide any documentation from the school relating to authorization for his leave.

[26] In rejecting the application for a PGWP, the Officer relied in part on his inquiries of the administrative assistant at CCSQ, and the response that there was no record of any approved leave in the Applicant's student file.

[27] The Applicant's evidence indicates that the Officer never told the Applicant about the conversation with the administrative assistant or the questions she was asked. The Applicant asserts that he is not familiar with the administrative assistant or her role within the school and that there is no information as to her authority at the school and the fullness of her knowledge of the school records. The Applicant contends that the nature of the discussion and the role of the administrative assistant is relevant to considering her response. He asserts there are a number of questions that he would have asked if he would have been informed of the inquiry, including how the Applicant was allowed to complete his studies if the leave was not authorized.

[28] The Applicant refers the Court to the decision in *Mehta v Canada*, 2003 FC 1073 [*Mehta*], wherein the Court considered the reliance by a visa officer on a telephone call made to the Applicant's place of employment that was not communicated to the Applicant as being a breach of procedural fairness. As stated by the Court in *Mehta*:

> [8] Where a visa officer relies upon extrinsic evidence, an error will be found if an applicant is not provided with an opportunity to respond to such evidence: *Shah v. Canada (Minister of Employment and Immigration)* (1994), 170 N.R. 238 (F.C.A.); *Sorkhabi v. Canada (Minister of Employment and Immigration)* (1994) 89 F.T.R. 224 (T.D.); *John v. Canada (Minister of Employment and Immigration)* (1997) 36 Imm. L.R. (2d) 192; *Chou v. Canada (Minister of Citizenship and Immigration)* (2001) 2001 FCT 996 (CanLII), 211 F.T.R. 90 (T.D.).
>
> [9] It is clear from the refusal letter that the visa officer relied upon her conversation with the peon as one of the reasons for her decision. The content of that conversation was not put to the

> applicant and the failure to do so, in accordance with the above noted authorities, constitutes a breach of procedural fairness. It may be that the officer would have come to the same conclusion in any event, but it is not evident or certain that such would be the case. Therefore, it cannot be said that this is one of those infrequent instances in which the breach was immaterial. ....

[29] The Respondent argues that this case is distinguishable from *Mehta* as the Applicant here was clearly aware of the Officer's central concern of whether the Applicant's leave from his studies was approved by CCSQ. The Officer directed the Applicant to contact CCSQ to request documents that demonstrated that the leave was authorized. However, he was unable to provide such proof.

[30] I agree with the Respondent that this direction amounts to asking the Applicant to make similar inquiries to those made by the Officer; however, by not stating who the Officer spoke to and what was asked, the same inquiries and the response received could not be directly addressed.

[31] It is uncertain from the Permit Decision whether the Officer spoke to Ms. Paré before he directed the Applicant to contact CCSQ or whether he made his own inquiries while he was awaiting the Applicant's response to his direction. In either case, it is unclear why the Officer was not forthcoming and did not share the details of his investigations with the Applicant. This is particularly troubling as the conversation grounds one of the four reasons for the Officer's conclusion that leave is not authorized and is presented as a separate reason from the Applicant's failure to produce documentation to support authorization from CCSQ.

[32] As stated by the Officer:

> ... the issue is whether or not the leave in question was authorized by the DLI:
>
> - When I contacted the school directly they informed me that there was no record of any approved leave in the subject's student records;
>
> - In the 3 emails that the subject sent to the school, he does not request leave authorization at any point in time. He simply states that he is sick and had to miss class due to his illness;
>
> - The subject was not able to produce any document stating that his leave from studies was approved by the educational institution;
>
> - The subject previously declared on his statutory declaration (attachment H from judicial review) from July 30, 2019 that the school suspended him around the same period of time as his leave and was refunded his remaining tuition fees. When asked during the interview, the subject declared that he had been suspended for absenteeism but claims to have been reinstated in school due to his suspension being later cancelled, however he cannot provide proof to this regard;
>
> From the above stated reasons, I believe on a balance of probabilities that the subject's leave from studies was not authorized by the DLI and as such does not meet the definition of a full time student as per the IRCC guides on the issuance of post-graduation work permits.

[33] While the Applicant was provided the opportunity to address the other three points reflected in the Officer's decision, he was not provided the opportunity to respond or fully engage with the evidence from Ms. Paré. It may be that the Officer would have still concluded that authorization had not been established, even without the knowledge obtained from the conversation with Ms. Paré; however, in my view the Applicant should have been entitled to

fully engage with and respond to this evidence: *Qurban v Canada (Citizenship and Immigration)*, 2021 FC 724 at para 2, 7-15.

[34] For this reason, it is my view that there has been a breach of procedural fairness. In view of this finding, I need not go on to consider the remainder of the issues.

[35] The Applicant argues that the Court should not send this matter back for another redetermination but should instead substitute its own decision for that of the CBSA. Such substitutions, however, are restricted to cases where, for example, the result of the redetermination would be inevitable (*Vavilov* at para 142). I do not consider the facts of this application to fall into this category. The underlying decisions shall accordingly be quashed and the permit matter returned to CBSA for redetermination by a different officer.

[36] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-3005-20 AND IN IMM-3008-20

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Minister of Public Safety and Emergency Preparedness as the proper respondent.

2. The application for judicial review is allowed and the March 19, 2020 decisions of the Officer and the Minister's Delegate are quashed.

3. The application for post graduate work permit is sent back to the CBSA for redetermination by another officer.

4. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-3005-20 AND IMM-3008-20
DOCKET:	IMM-3005-20
STYLE OF CAUSE:	KARAN SHARMA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-3008-20
STYLE OF CAUSE:	KARAN SHARMA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 25, 2022
JUDGMENT AND REASONS:	FURLANETTO J.
DATED:	MAY 27, 2022

APPEARANCES:

Jaswant Mangat	FOR THE APPLICANT
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mangat Law Professional Corporation Barristers and Solicitors Mississauga, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT