Federal Court  Cour fédérale

Date: 20170426

Docket: IMM-3447-16

Citation: 2017 FC 408

Ottawa, Ontario, April 26, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KYLE DANA MARSH

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of an immigration officer in the Case Processing Centre in Vegreville [Visa Officer], dated July 30, 2016 [Decision], which denied the Applicant's application for a work permit.

II. BACKGROUND

[2] The Applicant is a 23-year-old citizen of the United States who studied at the University of Guelph from September 2011 to June 2016. During this period, his study status varied between full-time and part-time.

[3] During the fall of 2011 to summer of 2013 semesters, the Applicant remained in Canada under his mother's work permit. He began his studies as a part-time student in the fall of 2011, switched to full-time studies in the winter of 2012, and resumed part-time studies in the summer of 2013.

[4] After his mother returned to the United States, the Applicant continued his studies under a study permit valid from July 29, 2013 to July 31, 2015 and, upon its expiry, a second study permit valid from July 29, 2015 to September 30, 2016. He resumed his studies as a full-time student in the fall of 2013, switched to part-time studies in the summer of 2014, and resumed full-time studies in the winter of 2016.

[5] On June 17, 2016, the Applicant electronically applied for a post-graduate work permit [PGWP]. The application included the required forms and copies of his passport, university degree, and university transcript.

III. DECISION UNDER REVIEW

[6] A decision sent from a Visa Officer to the Applicant by letter dated July 30, 2016 refused to grant the Applicant a PGWP.

[7] In the Decision, the Visa Officer concluded that the Applicant was not eligible because he had not met the requirement of having engaged in full-time studies for at least 8 months. The Visa Officer also advised the Applicant that his temporary resident status would expire on September 30, 2016.

[8] In the Global Case Management System [GCMS] notes, the Visa Officer stated that the Applicant had not met the PGWP program requirements as the university transcript he provided indicated he had been a part-time student during the fall of 2014, the winter of 2015, and the fall of 2015 semesters.

IV. ISSUES

[9] The Applicant submits that the following is at issue in this proceeding:

1. Did the Visa Officer breach procedural fairness by failing to provide the Applicant an opportunity to respond to the Visa Officer's concerns?

V. STANDARD OF REVIEW

[10] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where

the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[11] Whether a visa officer erred by failing to bring his or her concerns to the attention of an applicant and offering the applicant an opportunity to address them is a question of procedural fairness and is reviewable under the correctness standard: *Dunsmuir*, above, at paras 79 and 87; *Singh v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 266 at para 8.

VI. STATUTORY PROVISIONS

[12] The following provisions of the *IRPA* are relevant in this proceeding:

Objectives – immigration	**Objet en matière d'immigration**
3 (1) The objectives of this Act with respect to immigration are	3 (1) En matière d'immigration, la présente loi a pour objet :
(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;	a) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;
(b) to enrich and strengthen the social and cultural fabric of	b) d'enrichir et de renforcer le tissu social et culturel du

Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

Canada dans le respect de son caractère fédéral, bilingue et multiculturel;

(b.1) to support and assist the development of minority official languages communities in Canada;

b.1) de favoriser le développement des collectivités de langues officielles minoritaires au Canada;

(c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

c) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;

(d) to see that families are reunited in Canada;

d) de veiller à la réunification des familles au Canada;

(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

e) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne;

(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

f) d'atteindre, par la prise de normes uniformes et l'application d'un traitement efficace, les objectifs fixés pour l'immigration par le gouvernement fédéral après consultation des provinces;

(g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

g) de faciliter l'entrée des visiteurs, étudiants et travailleurs temporaires qui viennent au Canada dans le cadre d'activités commerciales, touristiques, culturelles, éducatives, scientifiques ou autres, ou pour

	favoriser la bonne entente à l'échelle internationale;
(h) to protect public health and safety and to maintain the security of Canadian society;	h) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;
(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and	i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;
(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.	j) de veiller, de concert avec les provinces, à aider les résidents permanents à mieux faire reconnaître leurs titres de compétence et à s'intégrer plus rapidement à la société.

[13] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] are relevant in this proceeding:

Application after entry	**Demande après l'entrée au Canada**
199 A foreign national may apply for a work permit after entering Canada if they	199 L'étranger peut faire une demande de permis de travail après son entrée au Canada dans les cas suivants :
[…]	[…]
(c) hold a study permit;	c) il détient un permis d'études;
[…]	[…]

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.

VII. ARGUMENTS

A. *Applicant*

[14] The Applicant submits that the Visa Officer erred in failing to provide the Applicant an opportunity to respond to his concerns.

[15] In the GCMS notes, the Visa Officer noted that the refusal was based on the Applicant's part-time student status during the fall of 2014, the winter of 2015, and the fall of 2015 semesters. The Applicant explains that, due to switching study programs three times, he was required to take part-time studies during these semesters to catch up. Additionally, the Applicant experienced depression that required him to study part-time. The Applicant submits that he should have been provided with an opportunity to offer evidence regarding why he enrolled in part-time studies for the aforementioned semesters. Furthermore, the Applicant claims that, had

he known an explanation would be required for his part-time status, he would have provided supporting documentation, such as a letter from his therapist and documents pertaining to the study program switches.

[16] In support of his submissions, the Applicant refers to the Immigration, Refugees and Citizenship Canada [IRCC] Inland Processing manual [Guidelines] that instruct officers to schedule an interview with an applicant if the officer intends to refuse the application and requires additional detailed information. In the present case, the Visa Officer intended to refuse the application because more information regarding the Applicant's part-time status was required. Consequently, the Visa Officer violated the Guidelines by not offering the Applicant an interview or procedural fairness letter.

[17] The Applicant also refers to jurisprudence that allows the introduction of new evidence on the basis that it supports an allegation of procedural unfairness: *Nchelem v Canada (Citizenship and Immigration)*, 2016 FC 1162 at paras 13-14. As part of this judicial review, the Applicant has submitted medical documentation and information pertaining to his switching study programs that was not before the Visa Officer for the purpose of illustrating the evidence that he could have provided IRCC had he been afforded the opportunity to respond. The Applicant submits that the duty of fairness required the Visa Officer to inform the Applicant of the concerns regarding the periods of part-time status. As such, the failure to provide this opportunity was unfair, especially since the Applicant was not represented by counsel and did not know that the additional documents were required, given their absence on the IRCC document checklist for a PGWP application.

[18] The Applicant also relies on *Sandhu v Canada (Citizenship and Immigration)*, 2010 FC 759 at para 33, which found that visa officers should seek clarification to substantiate or eliminate doubt in cases where there is a doubt without a factual foundation and the applicant has submitted a complete application. The Applicant argues that he made a concerted effort to provide a complete application by submitting all the documents in the PGWP checklist.

[19] Additionally, the decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 32 found that where important interests are affected by a decision in a fundamental way, there must be a meaningful opportunity to present the various types of evidence relevant to the case and to have it fully and fairly considered. The Applicant claims that after graduating from a Canadian institution, he held a legitimate expectation of receiving a PGWP to obtain a meaningful Canadian experience and, consequently, he should have been provided with an opportunity to represent additional evidence relevant to his case.

[20] Furthermore, the Applicant submits that the purpose of the requirement for full-time status is to prevent individuals on study permits from working full-time while studying part-time at a Canadian institution. The Applicant only studied part-time as a necessity, not a choice. He also did not work full-time during his studies. The Decision contradicts the objectives of the *IRPA*. Consequently, the Applicant submits that he should not be penalized by the legislation and should have been afforded an opportunity to respond to the Visa Officer's concerns.

B. *Respondent*

[21] As a preliminary issue, the Respondent submits that the evidence that was not before the Visa Officer should be struck. Evidence that was not before the decision-maker when the decision is rendered cannot be introduced in a judicial review application: *Zolotareva v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at para 36. While the Applicant has challenged the procedural fairness of the Decision, this challenge does not require the introduction of new evidence.

[22] The Respondent submits that the Decision is reasonable. The Applicant does not meet the criteria for a PGWP, which requires continuous full-time study in Canada and completion of a program that is at least 8 months. The Applicant's university transcript demonstrates that he attended part-time studies during the fall of 2014, the winter of 2015, and the fall of 2015 semesters. The Applicant only attended 4 months of continuous full-time studies at the time of his graduation. Consequently, the criteria were not met and the Visa Officer did not err in the refusal of the PGWP.

[23] The Respondent also takes issue with the alleged breach of procedural fairness. First, the Applicant had the onus of putting his best application forward. He should have known that he did not meet the criteria for full-time study, but he chose not to submit any documentation or explanation that could have been considered. Second, the Applicant's explanation for not attending full-time studies does not render the Decision unreasonable. The application is not a humanitarian and compassionate application where an applicant may provide reasons to

overcome ineligibility. Moreover, the Visa Officer does not have discretion to modify, waive, or ignore the eligibility requirements: *Nookala v Canada (Citizenship and Immigration)*, 2016 FC 1019 at para 12 [*Nookala*]; *Rehman v Canada (Citizenship and Immigration)*, 2015 FC 1021 at para 19. Accordingly, the Visa Officer did not require more information to make the decision and an interview was not necessary.

[24] Furthermore, the Respondent also notes that the Applicant has been issued a new study permit, valid from September 20, 2016 to April 27, 2018. Upon completion of his new studies, the Applicant may reapply for a PGWP, providing he satisfy the criteria.

[25] The Respondent submits that there is no error in the Decision and this application for judicial review should be dismissed.

C. *Applicant's Reply*

[26] The Applicant submits that the facts of the present case contain an exceptional basis for providing evidence related to procedural fairness. The Court may receive documents that did not exist at the time of the application for judicial review where issues of procedural fairness or jurisdiction are involved: *McFadyen v Canada (Attorney General)*, 2005 FCA 360 at paras 14-15. As such, the Applicant has sought to clarify his mental health issues that led to his part-time studies and provide an account of what should have been before the Visa Officer had the breach of procedural fairness not occurred.

[27] Although some of the evidence was not before the Visa Officer, the Applicant has provided it to establish the breach of procedural fairness. If the Visa Officer had provided the Applicant an opportunity to provide the evidence, which was available at the time of the application, the Visa Officer would have been aware of the Applicant's exceptional basis for not enrolling in full-time studies at certain times, thereby allowing for a fully informed decision.

[28] Additionally, the Applicant takes issue with the Respondent's introduction of his new study permit, which was issued after the Decision. As stated previously, new evidence should only be admitted in exceptional circumstances and in support of a procedural fairness claim. The Respondent's rationale is neither exceptional nor linked to procedural fairness. As a result, the new evidence should be struck.

[29] With regards to the issue of procedural fairness, the Applicant submits that requesting additional documents does not correlate to ignoring program requirements. The procedure was incorrect and the matter should be reconsidered. The Visa Officer intended to refuse the Applicant's application because more information regarding his part-time study status was required. Additional information was necessary because a major concern needed to be addressed: *Yue v Canada (Citizenship and Immigration)*, 2002 FCT 1004. Yet the Visa Officer ignored the Guidelines and did not offer an interview or procedural fairness letter to obtain the information, which eventually led to the refusal of the application.

[30] The Applicant respectfully points out that the Respondent has not cited jurisprudence that rebuts the Applicant's arguments, but rather relies on a denial of the claims set forth in the Applicant's memorandum and hypocritical introduction of new evidence.

[31] The Applicant maintains that the Visa Officer's actions constitute a breach of procedural fairness and are a reviewable error that merit reconsideration.

VIII. ANALYSIS

[32] As the Applicant concedes, this application is principally concerned with procedural fairness.

[33] Essentially, the Applicant's case is that:

> When the Officer's concerns regarding the Applicant's part time studies arose, the Officer then owed a positive duty of fairness to the Applicant to provide him an opportunity to respond to the concerns, pursuant to the IRCC's own manual and common law, especially given that this was the main reason for the refusal.

[34] The fact is that the Visa Officer had no "concerns" about the Applicant's PGWP application. It was clear from the application that the Applicant did not meet the criteria for a PGWP.

[35] What the Applicant is really suggesting is that if an officer concludes, on the basis of the information contained in an application, that the relevant criteria are not met and the application must be refused, then the officer must give the applicant an opportunity to persuade the officer

to, nevertheless, grant the permit. This is not the law. If this proposition were accepted then every negative decision would require such an opportunity to respond, so that there would be no need for an applicant to submit a full and complete application in the first place. The jurisprudence is clear that, in this kind of situation, the onus is on an applicant to provide a full and complete application. It is not up to an officer to contact applicants and assist them in making an application that will ensure a positive decision. See *Singh v Canada (Citizenship and Immigration)*, 2016 FC 509 at para 26.

[36] In the present case, the criteria that had to be satisfied for the Applicant to obtain a PGWP were clear before he made his application. He knew, or ought to have known, precisely what he had to submit to satisfy those requirements. His application did not satisfy those requirements. Guide 5580 – Applying for a Work Permit – Student Guide clearly sets out at page 5 the qualification criteria.

[37] The Applicant now argues that he could have satisfied those requirements with additional information. That is debatable, but it is not the issue. The Applicant's PGWP application did not satisfy the necessary requirements. There is no law that says that the Applicant must be given another opportunity to, in effect, enhance and re-submit his application. But there is nothing to prevent the Applicant from submitting a new application at any time if he can satisfy the stated criteria.

[38] If the Visa Officer had needed clarification of any fact stated in the PGWP application, or if he had had credibility problems with the Applicant's submissions, then procedural fairness

might have necessitated giving the Applicant an opportunity to address those concerns. But that was not the case here. In this instance, the Applicant simply submitted a PGWP application that did not satisfy the criteria for a permit. The only duty on the Visa Officer was to make a decision based upon the facts before him.

[39] The Applicant has also misread the Guidelines. The Guidelines do not say that an interview must be granted if an officer "intends to refuse the application…." They say that an interview is required when "the officer intends to refuse the application *and needs more detailed information*" (emphasis added). In other words, if an officer intends to refuse an application because there is insufficient information to make a proper decision, then the officer should seek the additional information that is required to make a proper determination rather than just rejecting an application because it is incomplete.

[40] In the present case, the Visa Officer had all of the information required to make a proper decision. The materials submitted by the Applicant clearly demonstrated that the criteria for a PGWP were not satisfied on the facts of the case. The Visa Officer was under no obligation to then contact the Applicant and assist him in providing more information so that he could qualify. There was no breach of procedural fairness in this case.

[41] The Applicant has also attempted in this application to enter new evidence that was not before the Visa Officer and which he feels would have secured him a positive decision.

[42] First of all, an allegation of procedural fairness does not permit evidence on review that goes to the merits of the Applicant's PGWP application. The only evidence permissible is evidence that demonstrates he was not given an opportunity to make his case in a context where such an opportunity is required. The Court, in other words, does not require and does not admit, evidence of what that case is, or what it would have been. See *Bekker v Canada*, 2004 FCA 186 at para 11.

[43] Secondly, the Applicant was given every opportunity to place before the Visa Officer the new evidence that he now seeks to place before the Court. The criteria for the grant of a PGWP are clear so that in his application there was nothing to prevent the Applicant from submitting any evidence he wished to explain why he had not met those criteria and to request some kind of consideration of that evidence. Having failed to avail himself of this opportunity, the Applicant cannot say that the opportunity was not available to him.

[44] Thirdly, the Applicant does not argue that he satisfies the "continuous study" requirement. He argues that the Visa Officer should have considered humanitarian and compassionate factors and exercised discretion to grant him a permit even though he did not satisfy the criteria.

[45] Even if humanitarian and compassionate factors could be considered, the Applicant did not place them before the Visa Officer or ask him to take them into account. The Applicant is trying to suggest that the onus was upon the Visa Officer to seek out humanitarian and

compassionate factors that would assist the Applicant. I know of no jurisprudence to support this position and none was cited by the Applicant.

[46] A parallel can be drawn with the case of *Lingan v Canada (Citizenship and Immigration)*, 2014 FC 706 which addressed the irrelevance of humanitarian and compassionate factors in the context of a removal order:

> [8] Counsel for the applicant artfully attempted to turn this matter into something that it is not. This is not a humanitarian and compassionate application and it was not the remit of the Immigration Division to consider evidence that would be relevant to such an application (*Wajaras v Canada (Citizenship and Immigration)*, 2009 FC 200). To put it bluntly, once the conditions of paragraph 41(a) have been met, the Immigration Division has little choice but to issue the removal order.

[47] Even with the new evidence before the Visa Officer, the Applicant would still have failed to satisfy the necessary criteria. There is nothing in the governing provisions for a PGWP that confers discretion on an officer to modify or waive the eligibility requirements on humanitarian and compassionate grounds. The Visa Officer cannot simply ignore the required conditions precedent for the grant of a PGWP.

[48] In *Nookala*, above, Justice Mactavish had the following to say about a PGWP program set up under s 205 of the *Regulations*:

> [10] The standard of review to be applied to the immigration officer's decision in this case is that of reasonableness: *Ur Rehman v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1021 at para. 13, [2015] F.C.J. No. 1015.
>
> [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, 2015 F.C.J. No. 1089. 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: see, for example, *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 32, 3 S.C.R. 909.
>
> [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.
>
> [13] Mr. Nookala agrees that it was open to the Minister to establish the Post−Graduation Work Permit Program under section 205 of the Regulations. This provision allows the Minister to create programs allowing foreign nationals to receive work permits where the Minister deems it necessary for, amongst other things, reasons of public policy relating to the competitiveness of Canada's academic institutions or economy.
>
> (emphasis in original)

[49] I see no reason to distinguish the present case.

[50] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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