Federal Court  Cour fédérale

Date: 20200127

Docket: IMM-406-19

Citation: 2020 FC 134

Toronto, Ontario, January 27, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

MENGZHE LYU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This judicial review arises from a redetermination of Ms. Lyu's permanent residency application. It arose due to a prior decision of this Court finding a breach of procedural fairness in the original application process. This second time around, Ms. Lyu again raises procedural fairness arguments. I do not agree that they raise any reviewable errors. However, Ms. Lyu

validly argues that the visa officer made fundamental errors, resulting in an unreasonable decision, which requires that the matter be sent back again for a third determination.

II. Background to Ms. Lyu's Application

[2] Ms. Lyu is a citizen of China. She applied for permanent residence in Canada under the Federal Skilled Worker [FSW] program in 2014. Ms. Lyu is one of several individuals who successfully applied for judicial review of decisions of the Hong Kong Office [Office] denying their applications for permanent residence in Canada on the basis that they had misrepresented their relationship with a private firm based in China known as Beijing Fulai Weide Translation Co Ltd. (also referred to as "Fulai Weide" and "FLYAbroad"). Justice Southcott decided that original officer [First Officer] failed to meet her obligation of procedural fairness to identify concerns arising from the applicants' responses to the original procedural fairness letters, and give them an opportunity to respond to those concerns (*Ge v Canada (Citizenship and Immigration)*, 2017 FC 594 [*Ge*] at para 4).

[3] *Ge* was heard and then issued over two and a half years ago. While more comments about *Ge* are contained below, for now suffice it to say that Ms. Lyu's application for permanent residence was returned to the Office for redetermination by another visa officer [Second Officer].

[4] This judicial review of Ms. Lyu's redetermination decision [Decision], another refusal, arises largely as a result of the second interview which took place in Hong Kong on

October 17, 2017. The "call-in" notice for that second interview advised Ms. Lyu to be prepared for questions regarding her FSW qualifications and ensure her file documents were updated.

[5] However, the interview focused uniquely, once again, on Ms. Lyu's dealings with FLYabroad. Ms. Lyu maintained at that second interview that she had used FLYabroad only to (i) translate, (ii) label and (iii) submit documents to the Office, and not as an unauthorized representative. Ms. Lyu stated that she could not recall exactly how much she paid for those services, and did not recall what she did with her invoice.

[6] The Office advised Ms. Lyu by letter dated June 12, 2018, that it had concerns regarding her application, specifically with respect to her relationship with FLYabroad, and offered her the opportunity to provide further representations. Ms. Lyu's principal counsel (Ms. Ritter, who was not able to argue this judicial review) responded to this letter on July 10, 2018. Ms. Ritter made lengthy and detailed submissions, including arguing that the Second Officer again failed to meet the obligations of procedural fairness.

III. The Decision under Review

[7] In a letter dated November 21st, 2018, the Second Officer refused Ms. Lyu's FSW application, finding her explanations failed to address concerns regarding the truthfulness of FLYabroad not being an unauthorized representative. The key passage from the Global Case Management System [GCMS] notes, which forms part of the Decision, reads as follows:

> While I understand that the PA's perception appears to be that she did not use the service of [an] immigration consultant or

> representative as she had simply used the translation services, file review service, and courier services from Fulai Weide/FlyAbroad, and that, therefore, she did not need to submit the IMM5476. The fact is that she used the postal address of Fulai Weide/FlyAbroad in her application form. Therefore, if her application had been approved and a visa/COPR issued to her, this office would have had sent the documents to that postal address. Thus, by allowing us to involuntarily share our clients' personal/confidential information without proper authorization, it would have induced an error in the administration of this act and a breach of the Privacy Act. I note that authorising IRCC to send confidential info or documentation to another person is clearly listed as something a representative would do in the IMM5476 and IRCC website.

[8] The Office had conducted a site visit to FLYabroad's premises in July 2015 and determined that the company operated as a paid immigration consultancy. The Second Officer was concerned that Ms. Lyu "was and had been minimizing her relationship with FLYabroad by not recognizing that it is possible that she had obtained more services than she was claiming, even though she had provided the company's postal address." Given Ms. Lyu's continued use of FLYabroad's address, and the Hong Kong Office's site visit, the Second Officer found that it was likely Ms. Lyu had a greater relationship with FLYabroad than she claimed, and decided that she had not complied with the section 16(1) requirement to truthfully answer the Second Officer's questions.

[9] The Second Officer found that Ms. Lyu, when asked, did not disclose that she had used a representative to prepare her application, either through the use of the government's IMM5576 form, or in response to questions asked at the interview. Thus the Officer found her not to be truthful on the issue, refusing the application on the basis of sections 11 and 16 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]:

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
[…]	[…]
16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

IV. Analysis

[10] Ms. Lyu argues that (1) the call-in letter violated her rights to procedural fairness; and (2) the Officer made an unreasonable decision based on the evidence. The parties agree that these two issues are subject to the correctness and reasonableness standards, respectively, under the analysis recently set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. *Vavilov* minimally addressed the first standard, acknowledging leading cases on the standard relating to procedural fairness and maintaining the status quo of correctness (at para 23). To be reasonable, a decision must demonstrate the hallmarks of justification, transparency and intelligibility, and be justified in relation to the factual and legal constraints

applicable in the circumstances (at para 99). The applicant bears the burden to show that the decision is unreasonable (at para 100).

A. *There was no breach of procedural fairness*

[11] Ms. Lyu argues that the call-in letter did not refer to the real concern, namely her relationship with FLYabroad , as made clear by the sole focus of the Second Officer's questions. Ms. Lyu claims this prevented her from properly preparing for the interview. She referred to the call-in technique as a "bait and switch", in that she believed she was coming in to the interview to answer questions about her qualifications under the FSW program, only to be surprised by a barrage of questions about her use of FLYabroad. She maintains that had she known the true purpose of the interview, she could have better prepared, including refreshing her memory on the fees paid for her services, and seeking out her invoice.

[12] Ms. Lyu submits that it is unlawful for an officer to strategically withhold information such that an applicant does not know the case to meet and cannot participate meaningfully in the interview. She notes that this right is a principle that has been held as sacred even in the national security context, where immigration officers are required to disclose as much as possible regarding allegations and evidence of inadmissibility, such that an applicant is "in a position to participate meaningfully in the interview" (*AB v. Canada (Citizenship and Immigration)*, 2013 FC 134 [*AB*] at para 66). In other words, even though the duty of fairness may be low, an officer may not deceive an applicant as occurred here.

[13] I note that the duty of fairness owed to Ms. Lyu for her permanent residence interview abroad, falls at the relatively low end of the spectrum (*Gur v. Canada (Citizenship and Immigration)*, 2019 FC 1275 at paras 16-17). The letter that Ms. Lyu received was a standard form letter that was not customized to her situation.

[14] Given these two realities (the low threshold for visa office interviews, combined with the form letter), I find that no deception took place. In any event, the jurisprudence has established that a visa officer can disclose extrinsic evidence (such as information about FLYabroad) during an interview, and provide an opportunity to explain afterwards (*Kunkel v Canada (Citizenship and Immigration)*, 2009 FCA 347 at para 11).

[15] In brief, by the time of the second interview, Ms. Lyu well knew the context, history and sensitivities of her case, and precisely the concerns about FLYabroad that led to that interview. It therefore should have been apparent to Ms. Lyu that her history with FLYabroad would be a topic of interest given that in the previous judicial review, Justice Southcott clearly indicated he was not deciding the merits of the case, but rather the fairness aspects of it. There, he granted the judicial review on the fact that the First Officer had based his decision on concerns which the applicants had not been apprised of and thus had no opportunity to address.

[16] Turning to the case that Ms. Lyu primarily relies on, in *AB* the officer relied on extrinsic evidence withheld from the applicant at the interview to ultimately refuse his permanent residence application. Justice Noël held that breached the applicant’s rights to procedural fairness. The *AB* background and proceedings, done within a national security context, were

markedly distinct from what transpired in this situation, particularly because the applicant in *AB* was "in the dark" at the interview about the nature of the concerns, and all documentary and extrinsic evidence being used against him.

[17] That was far from the case here. Ms. Lyu both (i) knew about situation with FlyAbroad from the time of the initial (June 2015) procedural fairness letter, and (ii) had full access to the evidence in question, including extrinsic evidence relating to the FLYabroad investigation that was produced with the prior litigation, as was made evident from the record before this Court. In addition, she also (iii) had the opportunity to respond to the concerns in the second procedural fairness letter.

[18] Armed with the documentary evidence and background information, including the comprehensive decision from Justice Southcott on the issue, Ms. Lyu went into the interview well informed. She knew the case against her. Further, she had the opportunity to fill in any gaps in the post-interview procedural fairness letter (see *Haider v Canada (Citizenship and Immigration)*, 2018 FC 686 at paras 18-22). These factors fulfilled the relatively low duty of fairness.

[19] I mentioned at the outset that the Supreme Court provided scant comment on procedural fairness in *Vavilov*. This included any comment on fairness findings made at the Federal Court of Appeal (FCA) below. There, Justice Stratas, writing for the FCA majority, held that even if an applicant "should be provided with more at the time of a fairness letter in order to make submissions, I would still not give effect to [an applicant's] procedural fairness complaint" if

s/he "ended up being aware of the case to meet and was able to make meaningful submissions" (*Vavilov v Canada (Citizenship and Immigration),* 2017 FCA 132 at para. 17).

[20] Ms. Lyu asserts that she would have prepared differently for the interview had she known what questions would be asked of her. Yet, as the Respondent argued, she had the opportunity to provide additional evidence in response to the June 2018 procedural fairness letter (such as evidence regarding her relationship with FLYabroad, receipts for services, or additional witness statements), but failed to do so.

[21] As a result of the foregoing, I will not intervene on the basis of procedural fairness breaches. However, the outcome is different given the unreasonable rationale provided in the Decision, as will be explained next.

B. *The Decision was unreasonable*

[22] Ms. Lyu argues that the Second Officer made credibility findings against her based on specious reasoning, without regard to the evidence. The Respondent counters that there were sufficient grounds to doubt Ms. Lyu's truthfulness, resulting in a reasonable Decision.

[23] *Vavilov*'s revised framework for reasonableness requires the Court to take a "reasons first" approach to judicial review: *Vavilov* at paragraph 84, see also *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 26. Above all, a decision must be "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." (*Vavilov* at paragraph 85).

[24] The Decision states that Ms. Lyu was likely not being truthful because she would not recognize that "it is possible she obtained more services than [she was] claiming" even though she continued to use the firm's postal address. However, the Second Officer does not indicate what these "other services" could be. Ms. Lyu, the evidence shows, is a sophisticated woman, who worked in a professional-level position as a Health, Safety and Environment Officer for several years after obtaining her bachelor's degree, and then went on to obtain a master's degree in her field of specialty from a British University. She studied in English. [She provided qualifying benchmarks for her standardized English language tests with her FSW application]. The Officer simply did not justify why or how Ms. Lyu was lying.

[25] Furthermore, the Decision is not internally coherent, concluding that Ms. Lyu was untruthful about her relationship with FLYabroad based on (1) the Office's site visit, which confirmed that FLYabroad operations included services as a paid immigration consultancy; and (2) Ms. Lyu's continued use of the firm's postal address in her application. However, this is not conclusive proof Ms. Lyu was using the company as an unauthorized representative. By the Second Officer's own admission, he or she was "not questioning [Ms. Lyu's] ability to gather information and documents for her application". The Decision also notes that Ms. Lyu's own "perception appears to be that she did not use the service of [an] immigration consultant or representative."

[26] The Decision fails to reconcile this assessment with the stated concern that Ms. Lyu was "minimizing her relationship …by not recognizing that it is possible that she obtained more services than what she is claiming." The Second Officer cannot have it both ways. Having

accepted that s/he was not questioning Ms. Lyu's abilities, and noting Ms. Lyu's belief that she did not use the service to provide immigration consulting services, but rather for (i) translation, (ii) gathering and (iii) sending of documents, the Officer needed to justify the outcome.

[27] As Ms. Lyu argues, the Decision suggests that there was no way to convince the Second Officer that she was being truthful, despite the lack of any conclusive evidence that Ms. Lyu was using FLYabroad as an unauthorized representative, and the lack of evidence that Ms. Lyu would have needed services beyond those she claimed given her demonstrated and objectively verifiable language and professional abilities.

[28] The Second Officer committed yet another error in finding that Ms. Lyu should have submitted an IMM5476 (representative authorization) form indicating that FLYabroad was representing her. First, as Justice Southcott explained in *Ge* at paragraph 23, there was no onus on her to complete this form for any unauthorized representative:

> In the Respondent's Further Memorandum of Argument, the Respondent did not take issue with the Applicants' position that, at the outset of the application process, there was no statutory obligation upon them to disclose any receipt of advice from an unauthorized representative. At the hearing of these applications, the Respondent further acknowledged that there is nothing specific in the IRPA or the IRPR requiring such disclosure.

[29] As explained above, Ms. Lyu's claims that she used FLYabroad only for translation, bundling and logistics are certainly consistent (i) with her professional and language abilities, (ii) with the Second Officer "not questioning [Ms. Lyu's] ability to gather information and documents for her application", and (iii) with the instructions on the IMM5476 itself which state, before anything else on that form:

> You do not need to hire a representative, it is your choice. No one can guarantee the approval of your applications. All the forms and information that you need to apply are available for free at www.cic.gc.ca.
>
> …
>
> **Note:** You must use this form to appoint a paid or unpaid representative to conduct business with CIC or the CBSA on your behalf. You must also use this form to: 1. notify CIC if your representative's contact information changes, 2. If you wish to cancel the appointment of your current representative and represent yourself, or, 3. If you wish to cancel the appointment off your current representative and appoint a new representative.
>
> [My emphasis]

[30] Finally, I would be remiss without providing a few observations in light of this last issue raised by Ms. Lyu, which also raised points discussed in the first decision arising from Ms. Lyu's prior judicial review. In *Ge*, Justice Southcott pointed out that the Office's investigation included communications with a couple that had, in response to their procedural fairness letter, stated that they had "fallen prey to the fraudulent activities of a ghost consultant" (at para 8), in that FLYabroad had provided them with paid advice on Canadian immigration laws and policies, assisted them with completing their forms, as well as a template to respond to the procedural fairness letter.

[31] First of all, while there was evidence of one couple who "fell prey" to FLYabroad (innocently or not) as ghost consultants and their fraudulent activities, that does not mean that everyone who used their services, such as Ms. Lyu, engaged the company in the same manner or to the same extent. Indeed, other evidence obtained through the Office's investigation, also

contained in the record shows that at least one other applicant had used FLYabroad's services for very limited purposes, just as Ms. Lyu claims to have done (including organizing and filing).

[32] Ultimately, this judgment should in no way be taken to condone the use of ghost consultancies or consultants. To the contrary, the Court – as much as any immigration program in Canada, whether federal or provincial (or perhaps soon, municipal) – abhors the use of such practices, which are equally exploitative of Canada's judicial system, as they are of its immigration programs. But most of all, these unlicensed and undeclared entities and individuals end up harming their clients more than anyone. For these reasons, the sooner ways can be found to end the unauthorized practice of immigration in Canada including through ghost representation, the better. It will not only further access to justice, and the integrity of immigration programs, but equally importantly protect the public, who are often vulnerable immigrants or refugees.

V. Conclusion

[33] *Vavilov* states that "the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise" (at para 104). These reasons rely on logical fallacies and circular reasoning that—in direct contradiction of *Ge*, which returned the file for reconsideration in the first place—do not "add up". While there was no breach of procedural fairness, this Decision is unreasonable, falling short in coherence and justifiability on the facts. As a result, Ms. Lyu has met her burden, the application is granted, and the file will be remitted yet again to

a different officer for processing, with the new officer having regard to these reasons, along with those of Justice Southcott in *Ge.*

JUDGMENT in IMM-406-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The matter is returned for reconsideration by a different officer, who shall have regard to these reasons, as well as the reasons provided by Justice Southcott in *Ge*.
3. No questions for certification were argued, and I agree none arise.
4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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