Federal Court  Cour fédérale

Date: 20200818

Docket: IMM-2834-19

Citation: 2020 FC 832

Ottawa, Ontario, August 18, 2020

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL

Applicant

and

SYED ATIQUR RAHMAN AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This case arises from two competing versions of events revolving around a payment of $15,000 to the spouse of the Respondent Syed Atiqur Rahman, an immigration consultant. Was the payment simply a loan to Mr. Rahman's spouse from family friends? Or was it an advance on a retainer for the Respondent to file a permanent residence application? In a parallel Small

Claims Court proceeding, the Court held the payment was a loan between (former) friends and ordered it repaid, noting Mr. Rahman's voluntary acknowledgement of liability and offer to pay it back. The Court also found that, until the breakdown of the relationship, Mr. Rahman had provided immigration assistance on a *pro bono* basis.

[2] In a complaint against Mr. Rahman to the Immigration Consultants of Canada Regulatory Council [ICCRC or Council], the Discipline Committee concluded that it was bound by the Small Claims Court finding; issue estoppel applied, and thus it was estopped from retrying the core question again - loan or contract for services. The Discipline Committee therefore dismissed the disciplinary action. The Council seeks judicial review of the Discipline Committee's decision, arguing error in the Discipline Committee's application of the issue estoppel test and breaches of the Code of Professional Ethics regarding Mr. Rahman's provision of *pro bono* services in this case.

[3] The following issues arise on this judicial review application:

1. What is the appropriate standard of review?
2. Did the Discipline Committee err in its analysis of issue estoppel? More specifically
    a. Did the Discipline Committee err in finding the ICCRC was a privy for the Complainant?
    b. Did the Discipline Committee err in its application of the issue estoppel test by failing to consider the discretionary part of the test?
3. Was the Discipline Committee's decision otherwise unreasonable? More specifically:
    a. Did the Discipline Committee err in finding the Codes of Professional Ethics did not apply to Mr. Rahman's conduct?
    b. Did the Discipline Committee err in its treatment of the evidence and explanation of its findings?

4. Is there a serious question of general importance for certification?
5. Should the Minister, who takes no position on the merits or outcome of the judicial review, be removed as a party?

[4] For the reasons that follow, I grant this judicial review application because the Discipline Committee unreasonably failed to consider the discretionary part of the issue estoppel test. Because this issue is dispositive, I find it unnecessary to address Issue 3 except to note that, in my view the Council did not raise Issue 3(a) before the Discipline Committee. The Discipline Committee's decision therefore is set aside and the matter is to be remitted to the Discipline Committee for redetermination.

[5] Below is additional background for context. My analysis will start with the standard of review applicable to Issue 2, followed by a consideration of the two subsidiary issues, and then address the remaining issues. As a preliminary matter, the Minister's name will be corrected to read simply "The Minister of Citizenship and Immigration": s 4(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[6] The ICCRC is the national regulatory body designated by the federal government to oversee licensed immigration professionals in the public interest: IRPA ss 91(2)(c), 91(5); *Regulations Designating a Body for the Purposes of Paragraph 91(2)(c) of the Immigration and Refugee Protection Act*, SOR/2011-142. Its mandate is to protect consumers of immigration services and maintain the integrity of Canada's immigration and citizenship system through effective regulation of immigration consultants. The ICCRC achieves its mandate by enforcing

professional and ethical standards among its members. The Respondent is an ICCRC member who provides immigration consulting services.

[7] The complaint against Mr. Rahman involves the following allegations (in summary):

- During a meeting with the Complainant, Ismat Luna and her husband, the Respondent discussed the possibility of employing Ms. Luna's sister for $60,000. The Respondent offered to file the permanent resident application on her behalf for a $30,000 fee and indicated it would be successful in 6-8 months.
- The Complainant and the Respondent subsequently negotiated an agreement with the following terms:
    - the Complainant and her family would pay the Respondent $15,000 in advance and $12,000 when the sister arrived in Canada, for a total of $27,000, in exchange for the Respondent employing the sister;
    - once the advance payment was made, a member of the Respondent's team would start the application process and provide a receipt;
    - the Respondent guaranteed the success of the application and stated that he would refund the money if the application were unsuccessful.
- No contract or retainer agreement was signed and the Respondent did not provide any receipt to the Complainant or her family.
- The Respondent directed the family to provide all requested documents and pay the equivalent of CAD $15,000 in Bangladeshi currency to his wife, who was visiting Bangladesh at the time. The family complied, providing both the documents and the payment.
- The Respondent sent a letter to the Bangladesh Ministry of Foreign Affairs to request permission for the sister to send him her passport which he later received.
- On several occasions he told the Complainant and her family that the application process would be completed shortly; he delayed the application and then blamed another colleague for not processing the file. The Respondent offered to return the sister's passport and the $15,000 as soon as possible; however, he only returned the passport.
- In subsequent discussions regarding the return of the funds, the Respondent made rude, threatening, offensive, abusive, and/or improper comments, and he eventually stopped responding to the Complainant's calls.

- The Complainant later learned the Respondent conducted himself similarly in the past with others in the Bangladeshi community in Canada.

[8] Mr. Rahman's response to these allegations is summarized below:

- The $15,000 paid to his wife was a personal loan and not for immigration services.
- He was not retained to pursue a permanent residence application on behalf of the Complainant's sister; when asked at the hearing if he ever sent them a retainer agreement, he answered "No. [I]n her case it was not reached[.]"
- Instead, he agreed to provide an assessment of her application, based on the documentation supplied including the sister's passport, on a *pro bono* basis.

III. Analysis

1. What is the appropriate standard of review?

[9] The parties disagree regarding the standard of review appropriate for Issue 2, with the Council advocating for correctness, while the Respondent submits that reasonableness should apply. For the reasons that follow, I find that reasonableness is the appropriate standard; I am not persuaded that the Discipline Committee's decision raises a general question of law central to the importance of the legal system as a whole.

[10] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. It is not a "rubber-stamping" exercise, but rather a robust form of review: *Vavilov*, above at para 13. Courts should intervene only where necessary. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility – and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at para 99.

The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, above at para 100.

[11] The presumption of reasonableness is rebuttable in two types of cases: (i) there is an explicit legislative intention to the contrary; and (ii) the rule of law requires the application of a correctness standard instead. General questions of law of central importance to the legal system as a whole fall within rule of law rubric: *Vavilov*, above at para 17. In discussing this category of questions, the Supreme Court acknowledged that the question of when an administrative proceeding will be barred by the doctrines of *res judicata*, of which issue estoppel is a subset, and abuse of process was considered a general question of law of central importance to the legal system as a whole: *Vavilov* above at para 60 citing *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 SCR 77 [*Toronto (City)*] at para 15. The Supreme Court cautioned, however, that case law on these questions, including *Toronto (City)*, must be "read carefully, given that expertise [of the administrative decision-maker] is no longer a consideration in identifying such questions": *Vavilov*, above at para 60.

[12] In *Toronto (City)*, the Supreme Court selected correctness review because it found that the application of *res judicata* and abuse of process "is **clearly outside the sphere of expertise** of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised": *Toronto (City)*, above at para 15 [emphasis added]. With expertise removed from the equation, as the Supreme Court instructs in *Vavilov*, I find that *Toronto (City)* does not support correctness review for all questions of *res judicata* or abuse of process before an administrative tribunal, especially in respect of narrowly construed issues:

Victoria University (Board of Regents) v GE Canada Real, 2016 ONCA 646 at paras 88-93. The presumption of reasonableness cannot be rebutted by arguments rooted in expertise because "the consideration of expertise is folded into" the presumption: *Vavilov*, above at para 58.

[13] Furthermore, the Supreme Court recognized that administrative decision makers may adapt common law or equitable principles to their administrative context; they are not required necessarily to apply such principles in the same manner as courts for their decisions to be reasonable: *Vavilov*, above at para 113. Whether the "decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination": *Vavilov*, above at para 113. While *res judicata* generally is central to the importance of the legal system as a whole, it does not follow that the Discipline Committee's contextual interpretation of one of the preconditions to the application of issue estoppel (i.e. the narrow issue of whether the ICCRC was a privy for the Complainant) must be reviewed for correctness: *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 28. See also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 25-27.

[14] With these principles in mind, I turn next to a consideration of Issue 2.

2(a) Did the Discipline Committee err in finding the ICCRC was a privy for the Complainant?

[15] The Council argues that the Discipline Committee's conclusion that the ICCRC was the Complainant's privy in the disciplinary action was unreasonable because it was neither a party nor a privy in the Complainant's Small Claims Court proceeding. I am not persuaded the

Discipline Committee's finding that the ICCRC was a privy for Ms. Luna in the disciplinary action was unreasonable. Based on the particular circumstances of this case, in my view there is sufficient "identity of interest" or common interest to ground the finding of privity.

[16] The Discipline Committee acknowledged that there are three preconditions for the operation of issue estoppel: (i) the same question has been decided; (ii) the judicial decision that created the estoppel was final; (iii) the parties to the judicial decision, or their privies, were the same as the parties to the proceedings in which estoppel is raised, or their privies: *Angle v Minister of National Revenue*, [1975] 2 SCR 248 [*Angle*] at p 254 (citing *Carl Zeiss Stiftung v Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p 935). Subsequent Supreme Court jurisprudence has confirmed these three preconditions: see for example, *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*] at para 25; *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 [*Penner*] at para 36.

[17] There is no dispute that this case meets the first two of the three preconditions. First, the Small Claims Court decided the same question at issue before the Discipline Committee - loan or contract for services. The Discipline Committee held that in the absence of a contract for services, Mr. Rahman's conduct did not fall under the Code of Professional Ethics and therefore, dismissed the proceeding. I note that the Code in effect 2012-2016 required ICCRC members to provide clients with a written retainer agreement or engagement letter. There is no equivalent requirement in the successor Code currently in effect.

[18] Second, the judicial decision that created the estoppel was final; neither the Complainant nor the Respondent appealed the Small Claims Court decision. That left for determination the critical third issue of mutuality of parties or their privies.

[19] There is no issue that Mr. Rahman was the main Defendant in the Small Claims Court proceeding and was the primary Respondent in the disciplinary action. There also is no question that Ms. Luna was the primary Plaintiff, and the only witness, in the Small Claims Court proceeding, and was the Complainant, and one of several witnesses, in the disciplinary action. I find the only relevant question in these circumstances is whether the ICCRC was a privy for Ms. Luna in the disciplinary action. I further find the question of whether the ICCRC could have been a privy for any of the parties in the Small Claims Court proceeding, or could have been a party itself through possible intervention as argued by Mr. Rahman's counsel, not relevant. I premise the latter finding in part on the Supreme Court's answer of "yes" to the question of whether "a decision taken without regard to requirements of notice and an opportunity to be heard [is] capable of supporting an issue estoppel:" *Danyluk*, above at para 37.

[20] As acknowledged by the Supreme Court, privity is a "somewhat elastic" concept determined on a case by case basis; it is impossible to be categorical about the degree of interest that will give rise to privity: *Danyluk*, above at para 23, citing J. Sopinka, S. N. Lederman and A. W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p 1088. The Federal Court also has recognized that "there must be some flexibility in identifying privies:" *Estensen v Canada (Attorney General)*, 2007 FC 538 [*Estensen*] at para 22. An "identity of interest" has

been held sufficient to find privity: *Estensen*, above at para 23; *ATL Industries Inc v Han Eol Ind Co*, 1995 CarswellOnt 136 at para 35, [1995] OJ No 250, 36 CPC (3d) 288, 53 ACWS (3d) 353.

[21] In the case before me, the disciplinary action was a direct result of Ms. Luna's complaint and evidence: *Bouten v Mynarski Park School District No. 5012*, 1982 CarswellAlta 128 at para 52, [1982] 5 WWR 448, [1982] AWLD 665, [1982] AWLD 676; *Rasanen v Rosemount Instruments Ltd*, 1994 CarswellOnt 960 at para 44, [1994] OJ No 200, 112 DLR (4th) 683, 17 OR (3d) 267. Neither the ICCRC nor Mr. Rahman presented any evidence regarding whether the disciplinary action would have been commenced on some other basis, absent the complaint. Further, both the ICCRC and the Complainant had an identity of interest in the outcome of the disciplinary action, that is the establishment of professional misconduct by Mr. Rahman and some form of discipline as a result. In my view, the ICCRC's public interest mandate described in paragraph 6 above does not detract from this common interest.

2(b) Did the Discipline Committee err in its application of the issue estoppel test by failing to consider the discretionary part of the test?

[22] I find that the Discipline Committee's failure to consider the discretionary part of the issue estoppel test was unreasonable because it found it had "no choice" but to apply issue estoppel once the three preconditions were met. I further find that this was not a case of an administrative decision maker adapting common law or equitable principles to their administrative context as per *Vavilov*, above at para 113. This issue therefore is dispositive.

[23] In summarizing the two-part test for the application of issue estoppel, the Supreme Court emphasized that the "rules governing issue estoppel should not be mechanically applied": *Danyluk*, above at para 33. The first step is to determine if the three preconditions have been met. If yes, then the decision maker still must determine whether, as a matter of discretion, it ought to apply issue estoppel because it would be unjust to do so: *Danyluk*, above at para 33; *Penner*, above at paras 36-39, 93. It is an "error in principle" not to weigh the factors favouring or disfavouring the exercise of discretion: *Danyluk*, above at para 66.

[24] In the case before me, the Discipline Committee found the three preconditions for the application of issue estoppel had been met and then held it "ha[d] no choice but to rule that issue estoppel applies and it is estopped from retrying the core question again". It simply failed to acknowledge or consider at all, whether directly or implicitly, the discretionary part of the test. As such, there was also no discussion in the decision about whether the Discipline Committee was adapting the test to its administrative context.

3. See paragraphs 3-4 above.

4. Is there a serious question of general importance for certification?

[25] I find that while there is a possible serious question of general importance in this case, it cannot be certified because it does not meet the first part of the applicable conjunctive test for certification. "[T]o be certified, a question must (i) **be dispositive of the appeal and** (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of

broad significance or general importance" [emphasis added]: *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9.

[26] After the hearing of this matter and before I rendered my decision, the Council sought to have the following question certified, further to Rule 18(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Immigration Rules]: Is a professional regulator (like ICCRC) a privy under the common law of a complainant who files a complaint with the regulator? I invited the parties to make submissions on the following reformulated question: Is the Immigration Consultants of Canada Regulatory Council or ICCRC a privy for a complainant to an ICCRC discipline proceeding? Had I decided that the Discipline Committee's privity finding was unreasonable, this issue would have been the dispositive issue in this matter. Because it is not dispositive, however, it does not meet the first part of the conjunctive test above and, therefore, I find that neither the original nor the reformulated question can be certified.

> *5. Should the Minister, who takes no position on the merits or outcome of the judicial review, be removed as a party?*

[27] I find that the Minister should not be removed as a party from this proceeding because, as discussed below, doing so would be inconsistent with the Immigration Rules.

[28] The Minister takes no position on the merits or outcome of this judicial review and, therefore, requests removal as an unnecessary party. The Minister submits that he likely was named as a co-respondent in the judicial review application because of Rule 5(2)(b) of the Immigration Rules. The Minister argues, however, that the issues raised by the other parties do

not implicate provisions of the IRPA or the *Citizenship Act*, RSC 1985, c C-29. While the Minister has a role in evaluating the ICCRC's regulatory function, he does not have legislative authority to oversee or intervene in the Council's day-to-day operations or its disciplinary processes.

[29] The Minister points to Rule 4(1) of the Immigration Rules, and Rule 104(1)(a) of the FCR, as this Court's authority to remove an unnecessary party. The Minister submits that this Court recently accepted a similar request: *Benito v Immigration Consultants of Canada Regulatory Council*, 2019 FC 1628 at paras 48-53 [*Benito*]. Further, the Minister notes that under the new *College of Immigration and Citizenship Consultants Act*, SC 2019, c 29 [CICCA], passed on June 21, 2019 but not in force yet, the College is to be named as the respondent in an application for judicial review of a decision of the College: CICCA, s 71.

[30] I note that at the hearing of this matter, both the Council and Mr. Rahman expressly took no position on whether the Minister should be removed as a party.

[31] I find the opening words of Rule 4(1) of the Immigration Rules qualify the applicability of FCR Rule 104(1)(a) in manner that does not permit the Court to remove the Minister as a party. The Federal Court has held that a party is "necessary" only if they are implicated in the relief sought and the issues raised "cannot be effectually and completely settled" without that party: *Hall v Dakota Tipi Indian Band*, [2000] 4 CNLR 108, 2000 CanLII 14944 [*Hall*]; *Sivak v Canada*, 2012 FC 272 [*Sivak*] at paras 34-44. These cases were relied on by the Minister in *Benito*, above at para 50. In *Hall*, the unnecessary party was the Crown, while in *Sivak* the

unnecessary party was the Minister of Foreign Affairs; neither derives their mandate from IRPA. Although Justice Norris did not consider the *Hall* and *Sivak* cases expressly in *Watto v Immigration Consultants of Canada Regulatory Council*, 2019 FC 1024 [*Watto No 1*] at paras 15-17, and *Watto v Immigration Consultants of Canada Regulatory Council*, 2019 FCJ 1138 [*Watto No 2*] at para 8, I nonetheless arrive at the same conclusion.

[32] The applicability of FCR Rule 104(1)(a) is subject to the following qualifier at the beginning of Rule 4(1) of the Immigration Rules: "Except to the extent that they are **inconsistent with** the Citizenship Act or the Immigration and Refugee Protection Act, as the case may be, or these Rules" [emphasis added]. In my view, reliance on the FCR to remove the Minister as a party would be "inconsistent with" the Immigration Rules, because Rule 5(2)(b) of the latter requires the Minister to be the respondent in any judicial review proceeding under IRPA where the Minister is not the applicant. This unsatisfactory situation for the Minister will be rectified when the CICCA comes into force.

IV. Conclusion

[33] Because the Discipline Committee failed to consider the discretionary part of the issue estoppel test, I find its decision to dismiss the disciplinary action was unreasonable. The decision therefore is set aside and the matter is to be remitted to the Discipline Committee for redetermination.

[34] Because the issue of whether the ICCRC was a privy for the Complainant in the disciplinary action is not dispositive of this judicial review, I find the possible serious question of general importance involving this issue cannot be certified.

JUDGMENT in IMM-2834-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;
2. The ICCRC Discipline Committee's decision is set aside;
3. The matter is to be remitted to the Discipline Committee for redetermination;
4. There is no question for certification; and
5. There are no costs.

"Janet M. Fuhrer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2834-19
STYLE OF CAUSE:	IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL v SYED ATIQUR RAHMAN AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 10, 2020
JUDGMENT AND REASONS:	FUHRER J.
DATED:	AUGUST 18, 2020

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