

Federal Court



Cour fédérale

Date: 20210521

Docket: IMM-3493-20

Citation: 2021 FC 481

Ottawa, Ontario, May 21, 2021

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CAJETAN UCHE ENYE

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

[1] This application challenges a decision made by an Immigration Officer [Officer] on July 29, 2020 to issue an Exclusion Order against the Applicant, Cajetan Enye. It is common ground that, when Ms. Enye attended at the Douglas border crossing, she was out-of-status. Her intention was to attempt to regularize her immigration status with the assistance of her immigration consultant. Things did not proceed as planned and instead of receiving a visa, she was given an Exclusion Order. Although Ms. Enye remains in Canada, she does so under the risk of immediate removal.

[2] Ms. Enye does not take issue with the Officer's decision *per se*. Instead, she claims that her immigration predicament was caused by the incompetence of her immigration consultant and this gave rise to a breach of procedural fairness. She says that had she been properly counselled and represented, she could have had her lawful immigration status readily restored and no Exclusion Order would have been issued.

[3] Although it is not a point of contention, it bears stating that the Officer's decision was lawful and reasonable based on the information provided. When Ms. Enye and her consultant appeared at the border, they were "flag poling", which is a euphemism for re-entering Canada after briefly reporting to the United States authorities. Ms. Enye's immigration status as a student had lapsed about eight (8) months earlier and, despite some ongoing efforts on her part and that of her employer, she had not managed to regain status. Ms. Enye blames this lack of success on the immigration consultant she had engaged on the advice of her employer. It appears that the consultant was actually retained by the employer at least in the sense that his fees were being paid through deductions from Ms. Enye's wages (see Applicant's Record at page 68).

[4] Ms. Enye's allegations against the consultant are several. They include the following:

- a. He failed to apply for the extension of her temporary resident status on time.
- b. He failed to apply for restoration of her temporary resident status on time.
- c. He misled the Applicant respecting filing applications and other work performed on her behalf.

- d. He failed to take steps to apply for a Temporary Resident Permit [TRP] from within Canada.
- e. He failed to prepare a TRP application for the Applicant to submit at the port of entry.
- f. He billed the Applicant's employer, who then billed the Applicant, for work that was not done.
- g. He failed to properly research and prepare for issues arising around immigration matters related to COVID-19 including understanding border restrictions and restoration timelines.
- h. He failed to maintain adequate records to provide proof of applications filed.
- i. He failed to properly determine and maintain awareness of who the client is when representing a work permit applicant while also representing the employer.

[5] In accordance with the Federal Court protocol dealing with allegations of incompetence made against immigration consultants and legal advisors, Ms. Enye's present counsel wrote to the consultant advising him of Ms. Enye's allegations and pointing out that the consultant could intervene and respond. It appears that the consultant later requested and received a copy of the Application Record but no further submissions have been received from him. In the meantime, a formal complaint has been made on Ms. Enye's behalf to the Immigration Consultants of Canada Regulatory Council. That process is ongoing and is unlikely to be resolved quickly.

I. Standard of Review

[6] The issue before the Court is one of procedural fairness that does not arise directly out of the decision-making process. The Officer did not breach any duties of procedural fairness owed to Ms. Enye. The task the Court must undertake is to determine whether Ms. Enye has established sufficient incompetence by her consultant that she was effectively deprived of her right to a fair hearing before the Officer. There is presumably only one correct answer to this problem.

II. Analysis

[7] It is well established in the Court's jurisprudence that the proven incompetence of a professional advisor may give rise to a breach of procedural fairness if it causes a miscarriage of justice in the sense that there is a reasonable probability that the decision would have been different: see *Yang v Canada (MCI)*, 2019 FC 402 at para 31, [2019] FCJ No 418. The additional requirement that the advisor be informed of the allegations and given a reasonable opportunity to respond has been met in this case.

[8] I am satisfied on the record before me that the requisite level of professional incompetence has been established and that, had the consultant taken timely and appropriate steps, Ms. Enye would have reacquired her status. She was, after all, working in a nursing role and had an employer that had sought to employ her under an approved Labour Market Impact Assessment.

[9] Inexplicably, the consultant failed to prepare or file an application for a temporary resident visa and took Ms. Enye to the border without any supporting documentation. That step was profoundly negligent because it placed her at risk for the issuance of an Exclusion Order.

[10] My finding that the consultant was negligent is further supported by the fact that he did not seek to counter Ms. Enye's allegations in this proceeding: see *Tapia Fernandez v Canada (MCI)*, 2020 FC 889 at para 31, [2020] FCJ No 937.

[11] For the foregoing reasons, this application is allowed and the Officer's Exclusion Order is set aside. It will be up to the Respondent to decide whether to reconsider the matter. In that event, the matter shall be reconsidered by a different decision-maker.

[12] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT IN IMM-3943-20

THE COURT ADJUDGES that this application is allowed and the decision to issue an Exclusion Order is set aside. If the matter is redetermined, it must be by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3493-20

STYLE OF CAUSE: CAJETAN UCHE ENYE v THE MINISTER OF
PUBLIC SAFETY & EMERGENCY PREPAREDNESS

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MAY 5, 2021

JUDGMENT AND REASONS: BARNES J.

DATED: MAY 21, 2021

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