Federal Court  Cour fédérale

Date: 20210729

Docket: IMM-6526-20

Citation: 2021 FC 802

Ottawa, Ontario, July 29, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

STUART SIMBARASHE MUNYANYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*IRPA*"] of a decision made by a visa officer [the "Officer"] refusing to issue a Post-Graduate Work Permit [PGWP].

II. Background

[2] The Applicant is a 28-year-old foreign student from Zimbabwe. He arrived in Canada in May of 2012 on a study permit. In September of 2020, he obtained a Bachelor of Arts degree with a Major in Communication and a Minor in Sociology at Simon Fraser University [SFU].

[3] After his graduation, the Applicant applied for a PGWP, which was refused by letter dated December 11, 2020 [the "Decision"].

[4] As part of his application for a PGWP, the Applicant explained his part-time enrollment and gap in his studies as follows:

a) In the spring of 2017, the Applicant attempted to enroll in a mandatory course for his degree. He paid his fees late due to the shortage of foreign currency in Zimbabwe, which resulted in a late registration. Since the course was full by the time the Applicant attempted to enroll, he was not able to meet the criteria of a full-time student and was enrolled as a part-time student.

b) In the fall of 2018, there was another shortage of foreign currency that delayed the payment of the Applicant's tuition fees despite the Applicant's parents processing the necessary funds to pay the tuition in advance. Accordingly, the Applicant did not attend any classes that semester.

III. Decision Under Review

[5] The Officer refused the application under subsection 205(c)(ii) of the *Immigration and Refugee Protection Regulations* [the "*IRPR*"]. The Officer found that the Applicant did not meet the requirements for a PGWP, which are set out in the PGWP program delivery instructions [PDI], for the following reasons:

a) The Applicant was not enrolled in classes during the fall of 2018 semester;

b) The Applicant remained in Canada on a study permit during the fall of 2018 semester while not engaging in studies;

c) The Applicant did not change his status to visitor status during that missed academic semester; and

d) The Officer is not satisfied that the Applicant's reasons for not engaging in studies during the fall of 2018 semester make the Applicant eligible for a PGWP.

[6] On December 15, 2020, the Applicant filed this application for leave and judicial review of the Decision.

IV. Issue

[7] The issue in this application is whether the Decision was reasonable, namely, did the Officer unreasonably interpret and apply the restrictions within the PGWP-PDI, in declaring the Applicant ineligible for a PGWP because he did not change his status to a visitor status or leave Canada when not engaged in studies for less than 150 days?

V. Standard of Review

[8] In *Nootkala v Canada (Citizenship and Immigration)*, 2016 FC 1019, Justice Mactavish addressed the question of whether an Applicant must satisfy PGWP-PDI criteria. In addressing the issue, she applied a reasonableness standard of review. In *Osahor v Canada (Citizenship and Immigration)*, 2017 FC 666, Justice Gleeson applied a reasonableness standard of review to the issue of the interpretation and application of the PGWP-PDI within the framework established by the *IRPA*.

[9] The reasonableness standard applies.

VI. Analysis

[10] The Applicant concedes that the Officer was correct to say that foreign students in Canada are eligible for a PGWP if they maintained full-time student status during each academic session of their program of study and that the Applicant's studies were interrupted. However, he claims that because there are strong equitable factors at play concerning the Applicant, and

bearing in mind the particular circumstances of the matter, the Officer should have exercised discretion in favour of the Applicant and in failing to do so the decision was unreasonable.

[11] The Applicant also acknowledges that the exercise of discretion by a visa officer is exceptional. However, as Justice Reed expressed in *Yeung v Canada (Citizenship and Immigration)* (2000), 186 FTR 189 at paragraph 17, "[i]t is residual in nature, to be exercised in cases that present unusual facts, or where the applicant has come close to [meeting the requirements]."

[12] The Applicant argues that this case presents unusual facts, where the Applicant comes from a less developed country, Zimbabwe, and the economy is in such a poor state that there were shortages in foreign currency that caused the Applicant to miss enrollment in the fall of 2018. The Applicant alleges that Canada prides itself in being the destination of choice for international students and that this choice should not be limited to students from developed and Western countries that do not have problems with the availability of foreign currency.

[13] The Applicant submits that nowhere in the GCMS note does the Officer consider exercising their discretion. He notes that Justice Mandamin stated, in *Singh Tathgur v Canada (Citizenship and Immigration)*, 2007 FC 1293 at paragraph 10:

> …inaction on the part of a Visa Officer to consider whether to exercise discretion would be subject to judicial review as it would be the result of a failure to do an act he or she was lawfully required to do as provided for by section 18.1(3) of the *Federal Courts Act*.

[14] The Respondent's position is that the Decision was reasonable, given that: (i) the Applicant did not update his status to a visitor visa nor did he leave Canada during the period of time when he was not enrolled as a full-time student; (ii) he did not request permission from SFU to go on leave; and (iii) the Officer did not have the discretion to waive the PGWP program requirements and that it was therefore unnecessary for the Officer to address the Applicant's explanation as to why he was unable to maintain full-time student status, which the Officer did by a careful consideration of the materials.

[15] In light of the requirement to maintain full-time student status during the study program, the Applicant was simply not eligible for the PGWP.

[16] Moreover, the Respondent submits that the Officer's reliance on the PGWP eligibility requirements does not amount to fettering of discretion, since immigration officers do not have the discretion to waive these requirements.

[17] It is well established that officers are to apply the PGWP-PDI strictly and have no discretion to disregard its mandatory requirement (*Kaur v Canada (Citizenship and Immigration)*, 2020 FC 513 at para 9). As noted by Justice Mactavish at paragraphs 11 and 12 of *Nookala v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1019:

> [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.

[18] Applicants are eligible for a PGWP if they have (i) a valid study permit when applying for the work permit; (ii) maintained full-time student status in Canada during each academic session of the program or programs of study they have completed and submitted as part of their post-graduation work permit application; (iii) completed an academic, vocational or professional training program at an eligible institution in Canada that is at least 8 months in duration leading to a degree, diploma or certificate; and (iv) have received a transcript and an official letter from the eligible designated learning institution confirming that they have met the requirements to complete their program of study.

[19] In *Brown v Canada (Citizenship and Immigration)*, 2018 FC 452 at paragraph 20, the Court found that "[t]here is no conflict between the PGWP Policy and the *IRPR*. The Minister has authority to establish criteria by which subparagraph 205(c)(ii) of the *IRPR* is satisfied and therefore a work permit should be issued under subparagraph 200(1)(c)(ii) of the *IRPR*."

[20] As stated above, the Applicant was a part-time student during the spring of 2017 semester and did not attend any class in the fall of 2018 semester due to shortages of foreign currency in his home country.

[21] The PGWP-PDI states that, at a minimum, students must have part-time status with their institution to be considered to be actively pursuing their studies. Therefore, the "problematic" gap in studies is the fall of 2018 semester.

[22] Where an applicant took leave from their studies during their program, the officer must determine if the applicant was compliant with the conditions of their study permit. The PGWP-PDI states the following regarding leave from studies:

> Students may be required or may wish to take leave from their studies while in Canada. For the purpose of assessing if a student is actively pursuing their studies, any leave taken from a program of studies in Canada **should not exceed 150 days from the date the leave commenced and must be authorized by their DLI** [designated learning institution].
>
> A student on leave who begins or resumes their studies **within 150 days from the date the leave commenced** (that is, the date the leave was granted by the institution) is considered to be actively pursuing studies during their leave. If a student does not resume their studies **within 150 days**, they should do either of the following:
>
> - change their status (that is, change to visitor status or worker status)
> - leave Canada
>
> If they do not change their status or leave Canada, they are considered non-compliant with their study permit conditions.
>
> In cases where a student has taken multiple periods of leave in Canada during their program of study, the officer should consider the student's reasons for the various periods of leave. If the

> multiple periods of leave do not appear to support the expectation that the student is making reasonable progress toward the completion of their course or program of study in the time allotted by the course or program of study, the officer may determine that the study permit holder has not fulfilled the condition to actively pursue their course or program of study.
>
> Examples of reasons for leave include but are not limited to the following:
>
> - medical illness or injury
> - pregnancy
> - family emergency
> - death or serious illness of a family member
> - change in program of study within the same institution, outside a regularly scheduled break
> - dismissals or suspensions (dependent on degree of severity)
> - postponed program start date (see Deferred enrollment for more information)
>
> [Emphasis in original.]

[23] The Applicant did not engage in studies for a period of less than 150 days. The Officer, in their GCMS notes, notes that "it appears that client did not leave Canada during this time, nor did they change their status to a VR during their missed academic semester." However, these are not requirements for students who take a leave from studies for less than 150 days. The student must change their status to visitor status or leave Canada when they do not resume their studies within 150 days, which is not the case here. The only requirement when a student takes a leave for less than 150 days is that their designated learning institution must authorize the leave.

[24] The Respondent submits that the Applicant did not request permission from SFU to go on a leave and that "[i]t is evident that the Applicant would have been aware of the required conditions of holding a study permit visa; however, he failed to satisfy these conditions." Following the Respondent's reasoning, the Applicant did not respect the requirement to obtain leave from SFU and his application for the PGWP could therefore reasonably be refused on that basis.

[25] While the jurisprudence is of the effect that nothing in the PGWP-PDI confers any discretion on immigration officers to modify or waive the eligibility requirements, it does state that "Officers should exercise their best judgment and take into account all relevant factors when assessing a student's compliance with their study permit conditions."

[26] According to the SFU Website:

> SFU does not have a formal process for undergraduate students to request leave, and **you do not need to request the University's permission to take a term off from your studies**. However, taking a term off can impact your immigration status and your legal ability to work in Canada.
>
> …
>
> Consult with an International Student Advisor before you decide to take a Fall or Spring term off so that you can make an informed decision.
>
> [Emphasis in original.]

[27] Given that the Applicant (i) took a term off from his studies for a period of less than 150 days, (ii) did not need to obtain SFU's permission to take a term off, (iii) provided evidence that he was forced to take a term off due to the shortage of foreign currency in his home country, and

(iv) provided evidence that Standard Chartered Bank notified SFU that there was a shortage of foreign currency and that the parents had the funds to pay for the Applicant's tuition, but SFU did not approve of this payment arrangement, and taking into account that the Officer "should exercise their best judgment and take into account all relevant factors when assessing a student's compliance with their study permit conditions", I find that the Decision was unreasonable.

JUDGMENT in IMM-6526-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is referred to a different officer for reconsideration.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6526-20
STYLE OF CAUSE:	STUART SIMBARASHE MUNYANYI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 27, 2021
JUDGMENT AND REASONS:	MANSON J.
DATED:	JULY 29, 2021

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