Federal Court  Cour fédérale

Date: 20211119

Docket: T-261-21

Citation: 2021 FC 1267

Ottawa, Ontario, November 19, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MANDEEP SINGH MULTANI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a 2020 decision by the Parole Board of Canada ("Board") refusing the Applicant, Mr. Multani, a record suspension under the *Criminal Records Act*, RSC 1985, c C-47 [*Criminal Code*].

[2] At the hearing, it was revealed that there is another related file, T-1051-21, regarding the same decision that has not yet been perfected. The Applicant has since left Canada.

II. Background

[3] The Applicant is a citizen of India who initially entered Canada in 2011 as an international student, and later changed his immigration status to temporary foreign worker. On or about May 5, 2013, he got into a motor vehicle accident, and was charged by police. On August 1, 2013, he was convicted under s. 253(1)(b) of the *Criminal Code* for being in care or control of a vehicle/vessel with a blood alcohol reading over .08.

[4] In 2014, the Applicant was involved in an incident of "causing a disturbance." The Applicant is unsure which incident it refers to. He cites two possibilities. In one, he was working at a restaurant, a fight broke out, he tried to break it up and move the fight outside, and ultimately, he called the police. He was not charged for this incident. In another possibility, he was involved in an argument between his landlord and roommate, and called the police. Police noted his name and contact information. In 2018, the Applicant was convicted of driving with an improper driver's license. He alleges that he was driving in the place of a friend who felt sick.

[5] The Applicant, in or about October 2017, contacted Pardons and Waivers Canada ("PWC") to seek pardon from his conviction. PWC is a private agency, but the Applicant incorrectly believed them to be the statutory authority to grant pardons.

[6] In October 2017, the Applicant was nominated in the British Columbia Provincial Nomination Program (“BCPNP”) to become a permanent resident of Canada, and submitted his application for permanent resident (“PR Application”) to Immigration, Refugees and Citizenship Canada (“IRCC”) on or about November 24, 2017. The Applicant hired the services of an individual that he believed to be an Immigration Consultant to assist him with his PR Application.

[7] In October 2019, the IRCC raised concerns about the Applicant’s admissibility to Canada on the basis that he withheld information about his conviction in his PR Application when he answered “no” to a question about his criminal convictions in Canada. He submits that the Immigration Consultant, who he now knows was not an authorized practitioner, submitted incorrect information. The Applicant then made written submissions to the IRCC stating he did not intend to withhold information.

[8] As it turns out, PWC had not made an application for record suspension in October 2017. Ultimately, this application was made in January 2020.

[9] The IRCC refused the PR Application on August 12, 2020, on the grounds that the Applicant was inadmissible to Canada for misrepresentation. The Applicant filed an application for leave and judicial review in the Federal Court to challenge this on August 24, 2020.

[10] On August 28, 2020, the Applicant received correspondence from the Board that his application for record suspension would likely be refused, and providing him 90 days to file

further written representations. The Board's decision was based on the fact that in their view, the Applicant was not an individual of good character, citing specifically an incident where he received a ticket for driving without a license, his involvement in the cause of a disturbance, and his the Applicant's failure to disclose his conviction to the IRCC. His representative made written submissions in response to this on October 2, 2020, containing a statement from the Applicant in relation to his interactions with police and explaining his withholding of his conviction from the IRCC.

[11] In November 2020, the Applicant's judicial review application was settled and discontinued. As part of this settlement, the IRCC set aside their decision and agreed to re-determine the PR Application. This has not yet been determined, and as noted, the Applicant has presently left Canada.

[12] The Board sent the Applicant a letter dated November 27, 2020, informing him of the refusal of his record suspension application, and enclosing their reasons (via Recommendation Sheet) dated November 15, 2020. Afterward, on December 18, 2020, the Board received correspondence from the Applicant's new counsel dated November 23, 2020, providing information and requesting an extension of time to respond to the Board's earlier proposal to refuse the record suspension. Though faint, a stamp on page 75 of the Certified Tribunal Record indicates that the Board received this on the date indicated in December. The name "Jessica M" is written faintly at the top.

[13] The Applicant's counsel then sent further correspondence to the Board dated December 22, 2020, containing further submissions in support of his record suspension application.

[14] On January 26, 2021, the Applicant's counsel wrote to the Board requesting it reconsider the decision to refuse his record suspension.

[15] On February 12, 2021, the Applicant filed a notice of Application for Judicial Review of the Board's November 15, 2020 decision to refuse his record suspension.

III. Issues

[16] The issues in this case are:

A. Did the Board breach procedural fairness?

B. Was the Board's decision reasonable?

IV. Standard of Review

[17] The standard of review applicable in this case is reasonableness (*Vavilov v Canada (Minister of Citizenship and Immigration),* 2019 SCC 65 [*Vavilov*]). As set out by the Supreme Court of Canada in *Vavilov* at paragraph 23 , "where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." I see no reason to deviate from this presumption here. As such, the standard of review in this case is that of reasonableness.

[18] As for the standard of review for procedural fairness, the standard of review is, essentially, correctness, though that is not a perfect way. As Justice Little succinctly summarized in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321:

> On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial review of procedural fairness involves no margin of appreciation or deference by a reviewing court. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond… In Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship), 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).

V. Analysis

A. *Did the Board breach procedural fairness?*

[19] In summary, the Applicant states that the Board did not consider the two further submissions by the Applicant (a request for an extension of time and provision of further information, dated November 23, 2020; and a detailed response dated December 22, 2020). As well, they assert that the Board provided insufficient information about the Applicant's involvement in the cause of a disturbance in 2014. Further, they submit that the Board referred to the Applicant's misrepresentation regarding his past as being to the Canada Border Services Agency, not the IRCC (as it actually was).

[20] Crucially, the Applicant submits that he was not afforded sufficient procedural fairness. Namely, the Applicant argues that the correspondence dated November 23 from Applicant's

counsel (which is marked as being received on December 18) was actually received earlier (asserting that it was delivered on November 26, 2020, as indicated by a Purolator printout). Resultantly, they submit that the Board had this correspondence – which, as mentioned, noted that the IRCC's allegations of misrepresentation were set aside, and the Applicant's desire for an extension of time to make further submissions.

[21] While I do not agree that in all cases a Purolator's delivery tracking supersedes the Board's stamped date, I note these were extraordinary times because of the COVID-19 pandemic, and a document shown to have been delivered yet not receiving a physical stamp, though rare, may have occurred during this extraordinary time. The Purolator receipt indicates that the correspondence was picked up from the law firm in Abbotsford on November 23, and was delivered at the proper address for the Board on November 26.

[22] A review of the correspondence from the Board dated August 28, 2020, says that, "As per the CRA, you are entitled to make written representations to the PBC for consideration before a final decision is rendered. <u>These representations should be forwarded to the PBC at the address below</u>" (emphasis in original). The address indicated is the same address as where Purolator delivered the submissions. The letter goes on to say, "The written representations … must be received within 90 days from the date of this letter. Once received, your written representation will be sent to the Board for consideration…" Ninety (90) days from August 28, 2020 would mean the Applicant had until November 26, 2020, to file these written representations. As indicated in their decision sheet, the Board completed their first vote on August 24, completed their second vote on November 15, and completed the review vote on November 27. November

27 was the day after the document is purported – by the Purolator delivery slips – to be delivered. It appears that the document was not before the decision-maker, but in hindsight, it appears that it was at the Board before the expiry of the time provided to make the submissions, and thus should have been considered.

[23] It is difficult to fault the decision-maker, as they likely did not have the material before them. However, the material was received at their office within the time allocated for submissions, so in my view, it should have been considered when they conducted the review vote the next day. I wish to reiterate that this was during an exceptional time with few people at their respective physical offices during that time in the pandemic, causing greater disorganization and the loss or misplacement of documents such as this; as a result, what would normally would be inconceivable – to favor the Purolator document over the stamp of the Board. But on these fact, this is the proper outcome, given that the delay between Purolator's delivery and the Board's receipt indicates something amiss.

[24] In essence, what happened was procedurally unfair to the Applicant. The Board to outlined a procedure whereby the Applicant can make further submissions, in response to the Board's correspondence indicating the application would likely be refused. The Applicant made submissions in accordance with that timeline, and despite being noted as delivered, these further submissions were not marked as received by the Board until a few weeks later, and as a result, were not considered by the Board in reaching their final decision on Review Vote. This strikes me as inequitable. In my view, what fairness dictates is that the Board should re-determine this matter, looking at all submissions before them, including any further submissions – which they

specifically invited, and were delivered prior to the deadline, but for some reason, not received nor considered.

[25] For this reason, I am of the opinion that the proper outcome in this case is to send it back for reconsideration, in order to ensure these further submissions made by the Applicant are considered by the Board.

[26] I am not going to consider the other issue, as this issue is determinative. The parties should confirm in advance of the reconsideration any future deadlines for dates for submissions and what will be before the decision-maker when it is reconsidered given all the other related applications before the Federal Court, the passage of 2 years time, and other outstanding decisions. The Applicant should consider the discontinuance of the other Application now before the Court, as there may be some duplication.

[27] The Applicant did not seek costs in their application, but did so when asked at the hearing. Given the extraordinary facts related to the pandemic, and the high bar for costs, I am going to decline to grant costs to the Applicant.

JUDGMENT IN T-261-21

THIS COURT'S JUDGMENT is that:

1. The application is granted and sent back for re-determination;

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-261-21
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