Federal Court  Cour fédérale

Date: 20180718

Docket: IMM-5340-17

Citation: 2018 FC 751

Ottawa, Ontario, July 18, 2018

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

SPOORTHY SUSAN DAWALITHA MASAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] As a preliminary matter and with the consent of the parties, the style of cause in this application is hereby amended to reflect the correct respondent, the Minister of Citizenship and Immigration.

[2] The Applicant, Spoorthy Susan Dawalitha Masam, is a citizen of India who came to Canada as a student on August 25, 2015. In this application for judicial review, she seeks the

Court's review of a decision made by an officer of Immigration, Refugees and Citizenship Canada (Officer) refusing her application for a post-graduate work permit (PGWP). The PGWP program allows foreign students who have graduated from an eligible Canadian post-secondary institution to gain Canadian work experience.

[3] After arriving in Canada, the Applicant successfully completed programs at two private Ontario colleges. First, she completed the Autism and Behavioural Science program at George Brown College on April 22, 2016. Second, the Applicant completed a Diploma in Business Administration at Canadian College for Higher Studies (CCHS) on August 25, 2017. The Applicant applied for a PGWP on October 1, 2017. At the time, both colleges were listed on the Designated Learning Institutions list on the Immigration, Refugees and Citizenship Canada (IRCC) website. It is the status of CCHS as an eligible institution for the PGWP program that is at the heart of this matter.

[4] By way of a standard form letter dated November 29, 2017, the Officer refused the Applicant's request for a PGWP on the basis that the Applicant had not made her application within the prescribed 90-day period after completion of her studies at an eligible institution.

[5] The Applicant received more detailed reasons for the decision by way of notes from the Global Case Management System (GCMS). The notes referred to the two diplomas received by the Applicant and concluded:

> The Canadian College For Higher Studies is a private, non degree conferring institution, and as such, is not eligible for consideration into time completed for the PGWP. Client has applied beyond 90 days of completion of studies at an eligible institution and as such

> is not eligible for a PGWP. Application refused, advised of possible restoration.

[6] The Applicant seeks judicial review of the Officer's decision on the basis that the procedure followed by the Officer was unfair and that the decision itself was unreasonable. For the reasons that follow, I find that the Applicant's right to procedural fairness through the PGWP application process was not breached and, further, that the Officer's decision was reasonable. As a result, this application will be dismissed.

I. Issues

[7] The Applicant raises three issues in this application:

1. Did the Officer breach the Applicant's right to procedural fairness by failing to provide the Applicant with an opportunity to respond to the issues identified by the Officer in refusing her PGWP application or by failing to provide adequate reasons for the refusal?

2. Did the Officer's decision unfairly deny the Applicant's legitimate expectation that she would be eligible for a PGWP upon completion of her program at CCHS?

3. Was the decision of the Officer to deny the Applicant's PGWP application reasonable?

II. Standard of review

[8] The issues of procedural fairness raised by the Applicant are reviewable for correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34). The Court's review focuses on procedure and whether, taking into account the substantive rights involved in the case and the other contextual factors identified by the Supreme Court of Canada in *Baker v Canada (Minister of*

Citizenship and Immigration), [1999] 2 SCR 817 at pp 837-841, the process followed was just and fair. In this case, in reviewing the first two issues noted above, I must determine whether the process followed by the Officer in arriving at the decision in question was fair to the Applicant in the circumstances of her case.

[9] The standard of review to be applied to the Officer's decision itself is that of reasonableness (*Nookala v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1019 at para 10; *Abubacker v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1112 at para 17). In judicial review proceedings, the reasonableness standard requires that a decision be justifiable, intelligible and transparent, and that it fall within the range of possible, acceptable outcomes in light of the facts and law applicable to the particular case (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

III. Analysis

1. *Did the Officer breach the Applicant's right to procedural fairness by failing to provide the Applicant with an opportunity to respond to the issues identified by the Officer in refusing her PGWP application or by failing to provide adequate reasons for the refusal?*

[10] The Applicant argues that the Officer breached the Applicant's right to procedural fairness in two ways. First, the Applicant submits that the Officer was required to afford her an opportunity, prior to the issuance of the decision, to address whether CCHS was an eligible institution for purposes of the PGWP program. The Applicant relies on the cases of *Yuan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1356, and *Popova v Canada*

(Minister of Citizenship and Immigration), 2018 FC 326 (*Popova*), in asserting that a duty of fairness exists in study permit cases. The Court in *Popova* stated (at para 11):

> There are circumstances where a visa officer will be required to inform an applicant of concerns with an application, even where those concerns arise from the applicant's own evidence (*Rukmangathan v Canada (Citizenship and Immigration)*, 2004 FC 284 at paras 22-23, cited in *Hassani* at para 23). This is such a case. Given the conclusions of the 2016 Refusal, I am satisfied that Ms. Popova had no reason to believe that her study history would be fatal to her new application; she thus should have been given an opportunity to respond to the Officer's concerns.

[11] While a duty of fairness to applicants exists in PGWP cases, the duty does not require an officer to notify an applicant of a concern that arises directly from the legislation or related requirements or to provide the applicant with an opportunity to make submissions regarding the concern (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283; *Penez v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1001 at para 37). In each case, the applicant bears the onus of submitting to the officer all information relevant to eligibility with his or her initial application. It is in cases where an officer considers issues or facts extraneous to the application requirements that a duty arises to advise the applicant of the issue or concern. In those cases, the applicant would not have known that the particular issue or concern was relevant to his or her application and, in fairness, should be given an opportunity to make submissions.

[12] In the Applicant’s case, the requirement that CCHS be an eligible institution for the PGWP program was fundamental to the Officer’s determination. The requirement arises directly from the eligibility criteria for the PGWP program. The eligibility criteria were set forth on the IRCC website. The Applicant knew or ought to have known that the eligibility of CCHS would be considered by the Officer. As a result, I find that the Officer was not required to provide the

Applicant with advance notice of the ineligibility of CCHS or to provide the Applicant with an opportunity to respond. The Applicant's right to procedural fairness was not breached.

[13] Second, the Applicant submits that the Officer failed to provide adequate reasons when rendering the decision. The Applicant states that the Officer referred only to the 90-day limitation period in the November 29, 2017 refusal letter and that it was the GCMS notes that made reference to the fact CCHS was not an eligible institution. I do not agree. First, in addition to citing the 90-day limitation period, the refusal letter states that the institution the Applicant attended was not one of the institutions listed in the PGWP eligibility criteria. Although CCHS is not referred to by name, there can be no confusion on the part of the Applicant as she had made her application based on her graduation from CCHS. Second, the Applicant requested, and was provided with, more detailed reasons in the form of the GCMS notes (which were submitted in the record). The GCMS notes made specific reference to CCHS. Therefore, the Applicant received full reasons within an acceptable timeframe. I find no breach of the Applicant's right to procedural fairness in this regard.

2. *Did the Officer's decision unfairly deny the Applicant's legitimate expectation that she would be eligible for a PGWP upon completion of her program at CCHS?*

[14] The Applicant's argument based on legitimate expectation is twofold. The Applicant submits that the listing of CCHS as a Designated Learning Institution on the IRCC website created a legitimate expectation that the Applicant would be eligible for a PGWP upon completion of her diploma at CCHS. The Applicant also submits that the fact other alumni of CCHS were issued PGWPs means that the Officer's decision in the Applicant's case was

inconsistent with prior PGWP decisions dealing with the same college, thereby ignoring the Applicant's legitimate expectation that CCHS was an eligible institution.

[15] The principle of legitimate expectation derives from the requirements of procedural fairness. If a public entity or official has, by its conduct, led an individual to expect that a process would be conducted in a certain manner, the Court will protect the individual's expectation. The principle is procedural only. It does not create substantive rights in the individual nor does it guarantee a specific result (*Furey v Conception Bay Centre Roman Catholic School Board*, 1993 CarswellNfld 116 at para 32; *Canada (Minister of Citizenship and Immigration) v Dela Fuente*, 2006 FCA 186 at para 9 (*Dela Fuente*)).

[16] The Applicant's arguments largely ignore the distinction between substantive and procedural rights. She asserts her legitimate expectation as a substantive right. On this basis alone, the Applicant's arguments do not succeed. In addition, even if the Applicant is arguing an issue of process, she has not pointed to any representation by the Respondent that would give rise to a legitimate expectation that the PGWP application process would be conducted in a certain manner.

[17] CCHS was listed as a Designated Learning Institution on the IRCC website at the time the Applicant made her PGWP application. There is no dispute between the parties in this regard. However, the listing of CCHS as a Designated Learning Institution is not a representation by the Respondent that CCHS is also an eligible institution for purposes of a PGWP. The list of Designated Learning Institutions establishes eligibility for study permits. It does not establish

eligibility for PGWPs, the issuance of which is subject to different criteria. In her reply memorandum, the Applicant states that the IRCC guidelines "clearly and unequivocally stated" that Designated Learning Institutions were eligible for the PGWP program but she has submitted no evidence in support of this proposition. Indeed, the screen shot of the IRCC website submitted by the Applicant with her affidavit contains bolded, specific warning language to applicants to ensure that their particular program qualifies for a PGWP as not all "programs offered at designated learning institutions (DLIs) are eligible". In the absence of an active or, in this case, implied, representation from the decision-maker, the Applicant's legitimate expectation argument fails.

[18] The Applicant cites *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 (*Mount Sinai*), in support of her argument of legitimate expectation. The issue in *Mount Sinai* was that the hospital, which was moving from Sainte-Agathe to Montreal, needed, and was promised on many occasions by the Minister, a revised operating permit. Without providing the hospital an opportunity to make submissions, the Minister informed the hospital that the promised permit would not be issued. Applying the doctrine of public law promissory estoppel and not that of legitimate expectation, the Court of Appeal ordered the Minister to issue the promised permit. The Minister's appeal was dismissed by the Supreme Court of Canada, again not on the basis of legitimate expectation. The facts of the Applicant's case are distinguishable. In *Mount Sinai*, there was a clear and unambiguous representation by the Minister that the revised permit would be issued. In this case, the Respondent made no representation to the Applicant regarding the PGWP eligibility of CCHS. Neither the principle of legitimate expectation nor that of promissory estoppel assists the

Applicant. As a result, I find that the Applicant has not established a breach of her right to procedural fairness based on a legitimate expectation that CCHS would be treated as an eligible institution for purposes of her PGWP application.

[19] The Applicant's second argument centres on her evidence that a number of CCHS alumni, one of whom graduated from the same program as the Applicant, were each granted a PGWP. She submits that the prior issuances of PGWPs to CCHS graduates created a legitimate expectation on her part of receipt of a PGWP.

[20] I am not persuaded by the Applicant's argument for two reasons. In substance, the Applicant is arguing that her legitimate expectation of receipt of a PGWP based on the success of other CCHS alumni gave rise to a substantive right to the issuance of the permit. This argument is contradicted by the case law as the principle of legitimate expectation is procedural (*Dela Fuente* at para 19). As stated above in these reasons, the Applicant cannot rely on the principle to create a substantive right to the issuance of the PGWP. If the Applicant intended to raise the doctrine of promissory estoppel based on the prior issuance of PGWP permits to CCHS alumni, I find that the evidence submitted by the Applicant does not constitute a clear and unequivocal representation by the Respondent to the Applicant from which he is estopped from reneging.

[21] If the Applicant is raising a procedural argument that her legitimate expectation meant that the Officer should have raised his concern regarding CCHS and have provided the Applicant an opportunity to submit her evidence regarding CCHS alumni, I disagree for the reasons given above. The Officer was under no obligation to seek submissions from the Applicant regarding

the eligibility of CCHS as the determination of that eligibility was directly required by the criteria properly established for the PGWP program.

3. *Was the decision of the Officer to deny the Applicant's PGWP application reasonable?*

[22] The Applicant makes a number of arguments in support of her contention that the Officer's decision was unreasonable. I have considered each of the Applicant's arguments and have assessed the Officer's decision against the eligibility criteria for the PGWP program and against the standard of reasonableness. I find that the Officer's decision was reasonable.

[23] The Applicant first argues that the Officer's decision to refuse her application for a PGWP was unreasonable because it was not consistent with the eligibility criteria created and published by the IRCC. She argues that the eligibility criteria were ambiguous and required only that she file her application within 90-days of completion of her studies. The criteria did not require that the application be made within 90-days of completion of studies at an eligible institution.

[24] I find that this argument is without merit. The PGWP eligibility criteria are not ambiguous in this regard. The criteria first list the types of educational institutions eligible for the PGWP program. The next section provides that application for a PGWP must be made within 90-days of the applicant receiving written confirmation from the educational institution that they have successfully completed their program. There is no question but that the written confirmation in question must have been received from an eligible institution (as listed

immediately prior to the 90-day requirement) otherwise the eligibility criteria become meaningless. The two requirements cannot be read in isolation.

[25] The Applicant refers to the decision of this Court in *Appidy v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1356 (*Appidy*). However, the case does not support the argument that application for a PGWP may be made within 90-days of graduation from any educational institution, which is the essence of the Applicant's argument. The passage relied on by the Applicant is an excerpt from the IRCC guidelines themselves. The Court in *Appidy* did not address the Applicant's argument. Rather, the issue before the Court was the on-line learning component of the particular applicant's studies and whether courses taken at two Ontario colleges could both be considered in assessing eligibility for the PGWP. The Court determined that the applicant's courses at both colleges had to be taken into account in determining eligibility because the courses taken at the first college were part of the requirements for his studies at the second college.

[26] In the alternative, the Applicant submits that CCHS was and remains listed on the IRCC website as a Designated Learning Institution. In her reply memorandum, the Applicant further submits that the IRCC unequivocally stated that CCHS, as a Designated Learning Institution, was an eligible institution for purposes of the PGWP program.

[27] The Applicant is correct in stating that both George Brown College and CCHS were and are listed on the IRCC website as Designated Learning Institutions. However, that fact alone does not mean either that CCHS or any one or more of its programs were eligible for the PGWP

program. The Designated Learning Institutions list is relevant to the issuance of study permits. The study permit and PGWP programs are separate programs involving different eligibility requirements. Not all Designated Learning Institutions qualify as eligible institutions for the PGWP program. Only those Designated Learning Institutions (and their programs) that meet the eligibility criteria specific to the PGWP program qualify an applicant for a PGWP. As a result, the listing of CCHS as a Designated Learning Institutions is not determinative as to whether or not it was an eligible PGWP institution when the Applicant made her PGWP application.

[28] Other than her reference to the Designated Learning Institutions list, the Applicant has submitted no evidence that CCHS was an eligible institution. In her affidavit, the Applicant attests to the fact that "George Brown College (Waterfront campus) and Canadian College for Higher Studies (Scarborough Campus) are listed on Designated Learning Institutions list" on the IRCC website. She does not attest that CCHS was listed as an eligible institution.

[29] The Respondent makes specific reference to the distinction drawn in the IRCC eligibility criteria between public institutions and private education institutions and argues that the Applicant has submitted no evidence that CCHS operated under the same rules as a public institution. I agree with the Respondent. Other than the issues she raises regarding the IRCC website, the Applicant has submitted no evidence that the Officer erred in concluding that CCHS was not an eligible institution.

[30] The Applicant's also submits that IRCC did not mention on their website that CCHS was not eligible for the PGWP program. There is no evidence either in support or in contradiction of

this statement in the record. Regardless, the IRCC was not required to include a negative statement to this effect on its website. The website set out the positive requirements for eligibility. The Applicant was required to ensure her eligibility and to provide the Officer with evidence to support her eligibility. The department was not required to list ineligible institutions or programs. Any such requirement would be unduly onerous and necessarily fraught with omissions.

[31] Finally, I return to the Applicant's evidence of the issuance of PGWPs to CCHS alumni and whether that evidence renders the Officer's decision unreasonable. In support of her application for judicial review of the decision, the Applicant submits her own affidavit and affidavits from CCHS officials stating that other CCHS graduates had received PGWPs based on their CCHS studies. The Applicant provides partially blacked-out copies of certain of the PGWPs as exhibits to the affidavits. This evidence was not before the Officer.

[32] The Applicant's evidence that other CCHS students received PGWPs based on their CCHS studies does not render the Officer's decision unreasonable. The Officer was required to consider the Applicant's PGWP application on the basis of the information before him or her. The evidence submitted by the Applicant does not establish that CCHS was an eligible institution or that all of its programs were eligible programs. The fact that a CCHS graduate received a PGWP in 2016 is not determinative of the Applicant's eligibility. The copy of the PGWP submitted in evidence does not detail the particular circumstances of the student or the program completed. It does not indicate the college from which the recipient graduated. The affidavit evidence from CCHS officials makes reference to other students who received PGWPs after

graduating from CCHS but, again, the affidavits provide few details. I find that the evidence is insufficient to demonstrate a consistent practice or pattern on the part of the Respondent of issuing PGWPs to graduates of CCHS such that the refusal by the Officer in the Applicant's case was unreasonable.

[33] In conclusion, I find that the decision of the Officer was reasonable. There is no evidence in the record that the Officer erred in the application of the PGWP eligibility criteria to CCHS. The Applicant has not established that CCHS was an eligible institution for purposes of the PGWP program. The Applicant was required to make her application within 90-days of completion of her program at an eligible institution. She completed her program at George Brown College, an eligible institution, on April 22, 2016. She applied for the PGWP on October 1, 2017, well after the expiry of the 90-day limit.

IV. Conclusion

[34] The application is dismissed.

[35] No question for certification was proposed by the parties and no issue of general importance arises on the record.

JUDGMENT in IMM-5340-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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