

Federal Court



Cour fédérale

Date: 20220614

Docket: IMM-4015-20

Citation: 2022 FC 892

Ottawa, Ontario, June 14, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DELLANO LINDELL DUNKLEY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Dellano Lindell Dunkley, seeks judicial review of the decision of a visa officer (the “Officer”) of Immigration, Refugees and Citizenship Canada (“IRCC”), dated August 18, 2020, refusing the Applicant’s Post Graduate Work Permit (“PGWP”) application on the grounds that he submitted his PGWP application outside the mandatory 180-day window.

[2] The Applicant submits that the Officer's decision is unreasonable because the Officer failed to account for how IRCC's lengthy processing time was beyond the Applicant's control. The Applicant also submits that his rights to procedural fairness have been breached.

[3] For the reasons that follow, I find that the Officer's decision is reasonable and that there was no breach of procedural fairness. This application for judicial review is dismissed.

[4] The Applicant's counsel failed to appear at the hearing for this matter. By the time Court was opened 20 minutes after the hearing's scheduled start time, the Registry Officer had made several attempts to contact the Applicant's counsel through email and phone, to no avail. The Court has yet to receive an explanation for the Applicant's counsel's absenteeism. I am left with little option but to render my decision on the Applicant's written submissions, as well as the written and oral submissions provided by counsel for the Respondent.

[5] It ought to be stressed that while this Court is amenable to offer reasonable accommodations to counsel appearing before us, this Court has little tolerance for the wasting of resources and time without justification. If counsel cannot be present at a hearing, it is incumbent upon them to notify the Court and counsel for the Respondent.

II. **Facts**

A. *The Applicant*

[6] The Applicant is a 24-year-old citizen of Jamaica. On August 5, 2016, he arrived in Canada and was issued a study permit that expired on December 19, 2019.

[7] According to the Applicant's official student transcript, he completed his three-year diploma in the Architectural Technology Program at George Brown College on April 18, 2019. He obtained his completion letter on May 15, 2019. A letter on the record dated June 10, 2019 from the President of George Brown College congratulates the Applicant on his graduation.

[8] Another letter from the International Centre at George Brown College dated November 8, 2019 confirms that while the graduation ceremonies took place in June 2019, the Applicant's Program Completion Date was April 18, 2019. The Applicant's Official Transcript also indicates that he was awarded an Ontario College Advanced Diploma on April 18, 2019.

[9] On June 11, 2019, the Applicant submitted his first PGWP application (the "First PGWP Application"). On September 29, 2019, IRCC requested that the Applicant submit his transcript. The Applicant states that while he submitted the documents to IRCC, they were not in fact received by IRCC. By letter dated October 29, 2019, an officer from the IRCC Case Processing Centre in Edmonton refused the First PGWP Application for non-compliance because the Applicant's education transcript was not submitted within the given timeframe. The letter states:

A letter was sent to you on September 29, 2019 requesting Education Transcripts. These documents were required to be submitted by October 06, 2019. As we have not received any documentation, your application is refused.

[10] On October 30, 2019, the Applicant submitted a reconsideration request. By letter dated November 6, 2019, an IRCC officer indicated that after considering the additional submissions, the initial decision to refuse the Applicant's application remains unchanged.

[11] On November 27, 2019, the Applicant submitted a second PGWP application at the Niagara Falls Port of Entry. The application was refused because it was submitted over 180 days after the Applicant completed his program.

[12] On December 3, 2019, the Applicant submitted a third PGWP application (the "Third PGWP Application"). A letter from the Applicant's immigration consultant (the "Immigration Consultant") dated December 3, 2019 states that the Applicant received his official transcript on June 4, 2019 and a letter confirming his graduation on June 10, 2019. Thus, the Applicant is eligible for a PGWP because he is still within the 180-days of receiving written confirmation that he met the requirements of his academic program. The Immigration Consultant's letter further requests that IRCC review the humanitarian and compassionate (H&C) considerations in the Applicant's case:

We are requesting your office to consider Humanitarian and Compassionate grounds on this application. The applicant initially applied for his PGWP online on June 11th, 2019; immediately after receiving his official notification that he has complied with the program. The officer assessing his application requested additional documents (transcripts) on September 29th, 2019. The applicant provided set[sic] documents; however, his application was still refused on October 29th, 2019.

Furthermore, the applicant called the call center and was advised that the documents were received by IRCC and were complete. We are providing screenshot from his portal showing the document was submitted to IRCC within the established timeframe; however,

his application was still refused for not compliance. The applicant should not be penalized for possible glitches or technical problems in the portal. At this point, it is important to indicate that we do not have a clear understanding about this situation the officer not reviewing the documents submitted properly or simply the document were never received.

[13] By letter dated August 18, 2020, the Officer refused the Third PGWP Application because it was not submitted within the 180-day timeframe to apply for a PGWP. The Officer's reasons further state:

Any request for Humanitarian and Compassionate or [Temporary Resident Permit] consideration should be submitted in a separate application to Case Processing Centre in Edmonton.

B. *Decision Under Review*

[14] On December 8, 2020, the Applicant received a letter from IRCC regarding the additional submissions he made in the Third PGWP Application. The letter states:

Your application was considered on its substantive merits and has been refused. You were provided with the reasons for refusal by letter dated 2020/08/18, thereby fully concluding your application.

Applicants must apply for a post-graduation work permit (PGWP) within 180 days of obtaining written confirmation, such as an official letter or transcript, from the designated learning institution (DLI) indicating that they have met the requirements for completing their program of study.

Calculation of the 180 days begins the day the student's final marks are issued or the day formal written notification of program completion is received, whichever comes first. The onus is on the applicant to provide proof of the date the transcript is received.

As per the information and documents available to me, you were issued an initial written notification of program completion on 2019/05/14 and your application was received on 2019/12/03.

After considering the additional submissions, the initial decision to refuse your application remains unchanged.

III. Issues and Standard of Review

[15] This application for judicial review raises the following issues:

- A. *Whether the Officer's decision is reasonable.*
- B. *Whether there was a breach of procedural fairness.*

[16] The applicable standard of review of the Officer's decision is reasonableness (*Zhang v Canada (Citizenship and Immigration)*, 2019 FC 764 at para 12). The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 (“*Canadian Pacific Railway*”) at paras 37-56). I find that this conclusion accords with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (“*Vavilov*”) at paragraphs 16-17.

[17] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is

justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85).

Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[18] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[19] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway* at para 54).

IV. Analysis

A. *Whether the Officer’s decision is reasonable.*

[20] The PGWP is established pursuant to paragraph 205(c)(ii) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227), which stipulates:

Canadian interests

205 A work permit may be issued under section 200 to a foreign national who intends to perform work that

[...]

(c) is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely,

[...]

(ii) limited access to the Canadian labour market is necessary for reasons of public policy relating to the competitiveness of Canada's academic institutions or economy;

Intérêts canadiens

205 Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes:

[...]

c) il est désigné par le ministre comme travail pouvant être exercé par des étrangers, sur la base des critères suivants:

[...]

(ii) un accès limité au marché du travail au Canada est justifiable pour des raisons d'intérêt public en rapport avec la compétitivité des établissements universitaires ou de l'économie du Canada;

[21] The eligibility criteria to apply for a work permit under the PGWP are outlined on IRCC's website (the "Program Delivery Instructions"). The Program Delivery Instructions stipulate that an applicant has up to 180 days after they graduate to apply for a PGWP.

[22] This Court has confirmed that the Program Delivery Instructions are a mandatory precondition to be eligible for a PGWP (*Kim v Canada (Citizenship and Immigration)*, 2019 FC 526 at para 11; see also *Ofori v Canada (Citizenship and Immigration)*, 2019 FC 212 at para 20; *Saggu v Canada (Citizenship and Immigration)*, 2020 FC 31 at para 11).

[23] The Applicant submits that he should not be penalized because of IRCC's lengthy process in rendering its decision in the First PGWP Application. The Applicant asserts that the First PGWP Application should have been granted, since he submitted the application on time and in accordance with the Program Delivery Instructions. The delay between the First PGWP Application and the first refusal should not count towards the 180 days as it was out of his control and affected his eligibility for a PGWP. The Applicant further argues that the Officer's decision failed to analyze important H&C considerations that were raised in his application.

[24] The Respondent submits the decision under review by this Court relates to the refusal of the Third PGWP Application, which was submitted on December 3, 2019, past the 180-day deadline. The Officer had no discretion to modify this requirement on H&C grounds and the refusal is thus reasonable (*Marsh v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 408 ("*Marsh*") at paras 44 to 47).

[25] The Respondent further submits that while the Applicant makes submissions related to the refusal of his First PGWP Application, attributing the delay in filing his third PGWP application to IRCC's delay and "technical issues", this previous decision is not before the Court. Such a collateral attack should not be permitted. The proper venue to raise allegations of error in the refusal of the First PGWP Application would have been on judicial review, which the Applicant chose not to do. Even so, the Applicant's assertions regarding the First PGWP Application are not supported by the evidence, nor has the Applicant filed an affidavit to support the facts he relies on, in accordance with Rule 10(2)(a)(v) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. The evidence on record includes a

screenshot purporting to show that the Applicant submitted his transcript to IRCC on time.

However, the entry accompanying the uploaded transcript is not dated and indicates that the transcript was uploaded, but not submitted to IRCC. As such, the Applicant has not shown that the need to re-apply for a PGWP was caused by an error or delay on behalf of the IRCC.

[26] The applicable policy and the jurisprudence of this Court clearly indicates that the Officer had no discretion to stray from the Program Delivery Instructions in determining the Applicant's eligibility for a PGWP. In the case at hand, the Applicant's completion letter was dated May 15, 2019. His Third PGWP Application was submitted on December 3, 2019, past the 180-day deadline to apply for a PGWP. Given the lack of discretion to modify the requirement that PGWP applications be submitted before the 180-day deadline, I do not find that it was unreasonable for the Officer to apply this requirement strictly.

[27] I also agree with the Respondent that this judicial review is restricted to the Officer's decision in relation to the Third PGWP Application. Even if it was not, the Applicant has failed to demonstrate that the need to re-apply for a PGWP was the result of an error or delay caused by IRCC. In response to the Applicant's argument related to IRCC's delay in reaching a decision on the First PGWP Application, I would note that during this period, the Applicant was given approximately one month to submit his transcript. The screenshot of the Applicant's IRCC portal account shows that his transcript was not properly uploaded to the IRCC portal, and therefore was never received by the IRCC. The entry, which is not dated, indicates: "Uploaded – not submitted to IRCC". I therefore agree with the Respondent that it is not because of IRCC's delay that the Applicant could not re-apply for a PGWP, but rather because his transcript was not

properly submitted to the IRCC. Furthermore, while the Immigration Consultant's letter states that the Applicant called the IRCC Call Center and was advised that "the documents were received by IRCC and were complete", the Applicant has not filed any affidavit to support this claim.

[28] Finally, with respect to the Applicant's arguments that the Officer should have considered the H&C factors in his case, I agree with the Respondent that since the Applicant failed to satisfy the criteria for a PGWP, the Officer had no discretion to modify the eligibility requirements on H&C grounds. As affirmed by this Court in *Marsh*, at paragraph 47:

Even with the new evidence before the Visa Officer, the Applicant would still have failed to satisfy the necessary criteria. There is nothing in the governing provisions for a PGWP that confers discretion on an officer to modify or waive the eligibility requirements on humanitarian and compassionate grounds. The Visa Officer cannot simply ignore the required conditions precedent for the grant of a PGWP.

[29] I find that the Officer's decision is justified in relation to the facts and law (*Vavilov* at para 85) and is therefore reasonable.

B. *Whether there was a breach of procedural fairness.*

[30] While the Applicant argues his rights to procedural fairness have been breached, his submissions on this point speak to the transparency and intelligibility of the Officer's decision. In my view, the Applicant's arguments go to the reasonableness of the Officer's decision, rather

than raising an issue of procedural fairness. As noted at paragraph 11 of this Court's decision in *Masam v Canada (Citizenship and Immigration)*, 2018 FC 751:

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.

[31] I therefore do not find that there has been a breach of procedural fairness as the Officer based their decision on the legislative requirements for the issuance of a PGWP, which the Applicant did not meet.

V. Conclusion

[32] For the reasons above, I find that the Officer's decision is reasonable and there was no breach of procedural fairness. Accordingly, this application for judicial review is dismissed. No questions for certification were raised, and I agree that none arise.

[33] It is worth reiterating that by failing to appear at the hearing of this matter or to notify the Court of his absence, the Applicant's counsel showed a disregard for this Court, for

Respondent's counsel, and, most importantly, for his client. I can only hope that this situation will not repeat itself in the future.

JUDGMENT in IMM-4015-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4015-20

STYLE OF CAUSE: DELLANO LINDELL DUNKLEY v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: MAY 30, 2022

JUDGMENT AND REASONS: AHMED J.

DATED: JUNE 14, 2022

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