Federal Court Cour fédérale

Date: 20241009

Docket: IMM-8449-23

Citation: 2024 FC 1601

Toronto, Ontario, October 9, 2024

PRESENT: Madam Justice Go

BETWEEN:

CHINAZAEKPERE ENOCH STANLEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Chinazaekpere Enoch Stanley [Applicant], a citizen of Nigeria, entered Canada on a study permit to pursue studies at the University of Manitoba. Upon overstaying his study permit, the Applicant applied for a study permit restoration and for a temporary resident permit [TRP].

[2] An immigration officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC] issued a decision dated October 14, 2022 refusing the Applicant a TRP and finding the Applicant not eligible for a study permit [Decision]. In coming to the Decision, the Officer consulted the website of Metalworks Institute of Sound & Music Production [Institute], where the Applicant studied, for the Institute's passing grade. The Officer found the Applicant had changed educational institutions without informing IRCC, failed most of the courses in which he was enrolled, and is not a bona fide student who will leave Canada at the end of the period authorized for his stay. The Officer also found the Applicant has not provided compelling and sufficient reasons to warrant the issuance of a TRP.

[3] The Applicant brings this application for judicial review of the Decision, arguing that the Decision was both procedurally unfair and unreasonable. As a preliminary matter, the Applicant requests an extension of time to commence this application for judicial review. The order granting leave for judicial review did not indicate whether the Applicant's request for an extension of time was granted.

[4] For the reasons set out below, I grant the Applicant's extension of time to commence this application. However, I dismiss the application as I find the Decision reasonable and there was no breach of procedural fairness.

II. Issues and Standard of Review

[5] This application raises the following issues:

a. As a preliminary matter, should the Court grant the Applicant an extension of time to commence this application for judicial review?

b. Did the Officer breach procedural fairness by relying on extrinsic evidence without offering the Applicant an opportunity to respond to their concerns?

c. Did the Officer err in finding that the Applicant did not provide any compelling and sufficient reason to warrant the issuance of a TRP?

[6] The Applicant and Respondent agree that the standard of reasonableness applies when reviewing the merits of the Decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25.

[7] With respect to the issue of procedural fairness, the standard of review is akin to correctness. The question for the Court is whether the procedure allowed the applicant to know the case to meet and have a full and fair opportunity to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56.

III. Analysis

A. *Should the Court grant an extension of time to commence this application for judicial review?*

[8] Subsection 18.1(2) of the *Federal Courts Act*, RSC, 1985, c. F-7 requires the Applicant to file his application for leave and for judicial review [ALJR] within 30 days after the Decision was communicated to him. The Applicant waited about nine months to file his ALJR.

[9] The Applicant submits that he did not file an ALJR within the 30-day window because he suffered from mental health issues and was unable to retain counsel during the prescribed time as

he was undergoing psychotherapy and evaluation by a certified clinical psychologist. Further, the Applicant submits that he misunderstood the advice he received from his former counsel regarding the deadline associated with this application. The Applicant submitted, as part of his ALJR, a report prepared by a registered provisional psychologist and a registered psychologist [psychological report] dated February 22, 2023, and an undated Medical Status Report from Dr. Aquaeno Ekanem.

[10] The test for extension of time is set out in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190, 167 FTR 158 [*Hennelly*] at para 3, which asks whether the applicant has demonstrated:

1) A continuing intention to pursue his or her application;
2) That the application has some merit;
3) That no prejudice to the respondent arises from the delay; and
4) That a reasonable explanation for the delay exists.

[11] Not all four elements must be resolved in the Applicant's favour, as the overarching consideration is whether it is in the interests of justice to grant an extension: *Canada (Attorney General) v Larkman*, 2012 FCA 204 [*Larkman*] at para 62; *Dun-Rite Plastics & Custom Fabrication Inc v Canada (Attorney General)*, 2018 FC 892 at 6. *Larkman* indicates that the *Hennelly* test should guide the Court in determining whether granting an extension of time is in the interests of justice, but that the importance of each question depends upon the circumstances of each case and that other questions may also be relevant: *Larkman* at para 62.

[12] Applying the test in *Hennelly*, I decide to exercise my discretion to grant the Applicant an extension of time to file his ALJR.

[13] While I agree with the Respondent that the granting of leave does not imply that the extension was also granted, the fact that leave was granted confirms the application has some merit.

[14] The Respondent does not argue, nor do I find, any prejudice to the Respondent arising from the delay.

[15] The Respondent's main contentions lie with parts 1 and 4 of the *Hennelly* test. Specifically, the Respondent observes that the psychological report is dated February 22, 2023, which is approximately 4.5 months before the ALJR was filed. The Respondent also points out that there is no evidence of the Applicant's continued intention to pursue the application after receiving the psychological report. Moreover, the Respondent submits that the Applicant's explanation for the delay lacks reasonableness because the psychological report mentioned preparations for an immigration application for citizenship in Canada, and yet no justification was provided for the subsequent delay in filing the ALJR. Therefore, the Respondent argues that the Court is left to speculate about the Applicant's personal circumstances subsequent to receiving the report: *Pingault v Canada (Citizenship and Immigration)*, 2021 FC 1044 [*Pingault*] at paras 16−18; *MacDonald v Canada (Attorney General)*, 2017 FC 2 at paras 13−16; *Strungmann v Canada (Citizenship and Immigration)*, 2011 FC 1229 [*Strungmann*] at para 15.

[16] I acknowledge that the Court in *Strungmann* at para 15 stated that a party requesting an extension of time must be able to provide satisfactory explanations to justify the delay in its entire duration. However, unlike *Pingault*, the Applicant in this case does present an explanation for the delay and submitted documents showing that he was diagnosed with learning disorders and borderline intellectual functioning, among other conditions.

[17] I further note that Dr. Ekanem's Medical Status Report indicates that the Applicant has "a long history of inattention, hyperactivity, emotional dysregulation and behavioural problems" and "was also known to be easily distracted with poor learning skills." Dr. Ekanem also noted that given the cultural norms prevalent in Nigeria, the Applicant was not clinically evaluated and no intervention was sought. Based on these medical reports, I find there is some evidence to support the Applicant's assertion that he was unable to submit this application within the time limit as a result of unstable health conditions.

[18] I disagree with the Respondent that because the psychological report was dated some four months before the ALJR was filed, it therefore could not justify the subsequent delay. What justified the delay was not the psychological report, but the Applicant's health conditions, which did not end on the day of the psychological report.

[19] As to the Applicant's continued intention to pursue the application, I agree with the Respondent that the Applicant has submitted insufficient evidence in this regard. At the hearing, counsel for the Applicant argued that after finishing his therapy sessions, the Applicant received encouragement that allowed him to retain counsel, thereby displaying his continuing intention to

pursue the application. I note counsel's submission was not reflected in the Applicant's affidavit for judicial review and I therefore reject this submission.

[20] However, in light of the Applicant's health conditions, the fact that leave was granted for the Applicant's ALJR, and the lack of prejudice to the Respondent arising from the delay, I find it is in the interests of justice to grant an extension in the circumstances of this case.

B. *Did the Officer breach the duty of procedural fairness?*

[21] The Applicant submits that the Officer erred by relying on extrinsic evidence without offering the Applicant an opportunity to respond to their concerns. Specifically, the Applicant argues that the Officer "contacted certain 'outside sources' and collected certain information regarding 'a passing grade for both tests and final exams' in the institution's website, which amounts to 'extrinsic evidence' that was not communicated to the Applicant and to which the Applicant never had a chance to respond."

[22] The Applicant submits that a high level of fairness was required from the Officer in this case, citing *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC). The Applicant also cites *Muliadi v Canada (Employment and Immigration)*, [1986] 2 FC 205, 1986 CanLII 6778 (FCA) [*Muliadi*] for the proposition that a visa officer has a duty to inform an applicant of his immediate impressions so that the applicant can address them. The Applicant further refers to *Rukmangathan v Canada (Citizenship and Immigration)*, 2004 FC 284 at para 22, which affirms *Muliadi*.

[23] Thus, the Applicant argues that it was a serious violation of procedural fairness for the Officer to have conducted additional research from "largely unknown sources" and relied on the information from the Institute's website without providing the Applicant with an opportunity to respond. The Applicant also asserts that the Officer disregarded evidence indicating that the Applicant had the sole responsibility to determine which term to register and the number of terms to complete his degree. Finally, the Applicant submits the Officer made a finding of fact which is material to a finding of lack of credibility without regard to the evidence, citing *Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, [1999] 1 FC 52, 1998 CanLII 8667 (FC).

[24] I reject the Applicant's arguments for the following reasons.

[25] As the Court confirmed in *Macaulay v Canada (Citizenship and Immigration)*, 2022 FC 1458 at para 29, when considering whether an officer erred in relying on "extrinsic" evidence, it is not the document itself that determines whether it is "extrinsic," but whether the information contained in that document is information that would be known by an applicant, in light of the nature of the submissions made.

[26] In this case, the Applicant provided transcripts from the Institute showing that he had completed 17 courses and achieved less than 50% in 13 of them. The information the Officer considered about the passing grade came from the Institute itself; it was publicly available, credible, and highly relevant to the Officer's determination about whether the Applicant is a bona fide student. The Applicant does not assert that he was unaware of the passing requirement

of the Institute or that he had failed 13 of the courses. As such, I find the Applicant fails to establish the passing requirement on the website of the Institute where the Applicant was enrolled constitutes "extrinsic evidence."

[27] I also find the Officer did not make any credibility findings, nor did the Officer fail to consider the Applicant's evidence. The Officer did not take issue with the number of the courses the Applicant took in each term, but rather with the number of courses he failed.

[28] For these reasons, I find there was no breach of procedural fairness.

C. *Did the Officer err in finding that the Applicant did not provide any compelling and sufficient reason to warrant the issuance of a TRP?*

[29] Subsection 24(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*] permits an officer to issue a TRP for a foreign national who is inadmissible or does not meet the requirements of the *IRPA* if the officer is of the opinion that it is justified in the circumstances.

[30] The Applicant submits the basic rationale for the issuance of a TRP is to "soften the sometimes harsh consequences of the strict application of the *IRPA* … in cases where there may be 'compelling reasons' to do so": *Osmani v Canada (Citizenship and Immigration)*, 2019 FC 872 at para 15, citing *Farhat v Canada (Citizenship and Immigration)*, 2006 FC 1275 at para 22.

[31] The Applicant puts forward the following factors in support of his argument that his case warrants relief under subsection 24(1) of the *IRPA*:

a. As a result of the refusal of his study permit extension, the Applicant unexpectedly found himself to be in the restoration period of his temporary status;

b. Despite his brief change in educational institutions, the Applicant continued to actively pursue his studies at the University of Manitoba and presented a letter and recent transcript to demonstrate his continued enrollment and commitment;

c. The Applicant presented sufficient proof of financial support for his studies and stay in Canada; and

d. The Officer did not consider the totality of the evidence and made a selective determination of the documentary evidence submitted by the Applicant.

[32] I find the Applicant's submissions lack merit. The Applicant merely restates his circumstances without explaining why the Officer's conclusion that they were not compelling was unreasonable.

[33] The Applicant fails to point to any evidence that the Officer overlooked. Further, contrary to the Applicant's assertion, I agree with the Respondent that the Officer explicitly stated in the Decision that they have "considered the application for a temporary resident permit and a study permit, and all submissions in their entirety," before concluding that a TRP was not justified in these circumstances.

[34] Moreover, as the Respondent points out, the Officer reasonably determined that the Applicant did not provide compelling and sufficient reasons to warrant the issuance of a TRP. The Officer indicated in their reasons that the Applicant failed to indicate any impediment that would restrict him from leaving Canada or any difficulty he might face should he be expected to return to his home country. The Applicant's arguments do not undermine these findings.

[35] Before the Court, the Applicant submits the Officer erred by failing to undertake a balancing analysis of the Applicant's compelling need to enter Canada against any potential health and safety risks associated with his entry, citing *Mousa v Canada (Citizenship and Immigration)*, 2016 FC 1358.

[36] The Applicant's argument does not reflect his submission requesting a TRP. In his submission to the Officer, the Applicant characterized himself as a "hardworking and diligent student who wishes to complete his studies in a timely manner." The only compelling circumstance that the Applicant highlighted was to overcome the ineligibility of "erroneously continuing his studies during the restoration period." I see no reviewable error in the Officer's finding that a TRP was not justified, after reviewing the submissions and evidence in their entirety.

[37] As an *obiter*, I note that had the Applicant submitted to the Officer some of the evidence that he put before the Court, the outcome of his TRP application might have been different. At the very least, the psychological report might have helped to explain the academic challenges the Applicant faced, and alleviated some of the Officer's concerns about the Applicant's bona fide as a student.

[38] While sympathetic to the Applicant's situation, my role is to examine the Decision in light of the relevant factual and legal constraints on the decision maker. In view of the evidence and submission the Applicant provided to the Officer, I see no basis to interfere with the Decision.

IV. Conclusion

[39] The application for judicial review is dismissed.

[40] There is no question for certification.

JUDGMENT in IMM-8449-23

THIS COURT'S JUDGMENT is that:

1. An extension of time is granted for the filing of the Application for Leave and Judicial Review.
2. The application for judicial review is dismissed.
3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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