Federal Court  Cour fédérale

Date: 20180427

Docket: IMM-3704-17

Citation: 2018 FC 460

Ottawa, Ontario, April 27, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

KATERINA KOMLJENOVIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by the Applicant pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA], of a decision made by a Case Processing Agent [the Officer] of Immigration, Refugees and Citizenship Canada [Immigration Canada] dated August 16, 2017. The Officer refused the Applicant's application

for a Post Graduate Work Permit [PGWP] because the institution the Applicant attended did not meet the requirements of the PGWP program.

[2] While judicial review is dismissed on the ground that the decision meets the reasonableness standard set by the Supreme Court of Canada, the underlying circumstances are very unfortunate as discussed below. Hopefully the Minister's representatives will be able to offer relief.

II. Facts

[3] The Applicant is a 37-year-old citizen of Croatia. She is married and has two young children, the youngest of whom was born in Canada.

[4] In April 2015, the Applicant came to Canada on a Study Permit with her family. In September 2015, the Applicant commenced studies at the Canadian Institute of Management and Technology College [CIMT] in the Network Administration diploma program.

[5] CIMT is registered as a private post-secondary institution in Ontario under the *Private Career Colleges Act, 2005*, SO 2005, c 28, Sched L. CIMT is also a Designated Learning Institution [DLI] for study permit purposes.

[6] The Applicant could not receive a study permit unless her desired post-secondary institution is found on the DLI list. However, the fact that an institution is on the DLI list does not alone qualify its graduates for a PGWP. With respect to the DLI list and eligibility for DLI

graduates to receive a PGWP, the Immigration Canada website states, “make sure your program qualifies. Not all programs offered at [DLIs] are eligible.” [Emphasis in original]

[7] The issue of this case flows from the fact that while the Applicant attended a DLI institution, neither CIMT nor her program of study were PGWP-eligible, notwithstanding the uncontradicted evidence that both the institution’s and the Respondent’s representative told her they were.

[8] The evidence of the Applicant outlines the steps she took to ensure her program qualified for a PGWP, as the website directs:

> Before enrolling at CIMT College, I called Immigration Canada’s call centre at 1 (888) 242-2100 asking if CIMT College was a school accepted for Study Permit and Post-Graduate purposes. I was told by an IRCC associate who answered the phone that CIMT college is on the DLI list and therefore I would get a Study Permit and Post-Graduate Work Permit (“PGWP”).
>
> I also checked the IRCC’s website before I enrolled at CIMT College and didn’t seen anything on it that was a clear statement to me that I would not get a Post-Graduate Work Permit if I attended a private college.
>
> Also, before enrolling at the CIMT College my brother and I went to the college and spoke with an advisor at the school. We asked him if I would be able to get a Post-Graduate Work Permit after if I graduate from CIMT/ The advisor told us that I would.
>
> With the confirmation from both IRCC and CIMT College that I would get a Post-Graduate Work Permit upon graduating from CIMT, and because CIMT was on the DLI list I went ahead and enrolled at the college.

[9] She took these steps because she knew she needed these confirmations. Her evidence is:

> I needed these confirmations because it was my plan to complete a diploma program and then get a Post-Graduate Work Permit, and then apply for Canadian permanent residence. I knew that I would need to work in Canada after my studies to obtain enough Express Entry points to be eligible to apply for permanent residence in Canada. To do that, I needed a Post-Graduate Work Permit.The Applicant fulfilled the requirements of her two-year diploma course.

[10] What happened during and after she started her studies is set out in her affidavit:

> Over the past two years, we have spent more than $40,000.00 trying to create a new life for ourselves. I spent approximately $20,000.00 for my education alone including expenses for textbooks and transportation.
>
> I completed a Post Graduate Network Administration Diploma at CIMT College with excellent grades. I graduated with a 3.5 GPA.
>
> This was very difficult because I gave birth to my second child, Karlo, during my studies. Attached hereto this affidavit as Exhibit "B" is a copy of my child's Ontario birth certificate.
>
> Upon graduation from my program, I applied for a PGWP. Attached hereto this affidavit as Exhibit "C" is a copy of my PGWP Application.
>
> Unfortunately, my PGWP application was refused. My husband and I are very stressed by this. We have spent so much time, money and effort since coming to Canada in April 2015. We did everything legally and now are being told by Immigration Canada to go home. We simply do not know what we are going to do if we have to move our whole family from Canada back to Croatia and start all over again.
>
> I did my best to become a part of Canadian society. I found jobs and worked hard to support my family and raise my children in an unfamiliar world.
>
> My husband has also worked hard to establish himself since coming to Canada. He has always been employed in Canada.
>
> I have no more ties to Croatia. If I were forced to move back then I would have to start from scratch again. I would be forced to find a new home, new job and new school for my sons.

[11] I pause here to note that in my respectful view, her work and achievements are very commendable.

[12] The results of her achievements are truly unfortunate. I am not sure what she could have done differently, although the Minister's counsel suggests she should have made further inquiries with the Ontario government. While this may be the case, no such suggestion was made in either the Officer's reasons or in the Officer's affidavit filed for the hearing. I also note no such suggestion was made on the Respondent's website as it was at the time. This fairly obvious problem has since been addressed on the website – but not in time to assist the Applicant. That lack of clarity presented a formidable obstacle for the Applicant.

[13] In any event, while others may now benefit from the changes to the website, the Applicant did not receive a PGWP as she expected.

[14] The Applicant was refused for three reasons: she did not graduate from a public institution; she did not graduate from a private institution that operated under the same rules and regulations as public institutions; and the institution she graduated from was not authorized to confer degrees and she graduated with a diploma rather than a degree. The Officer's reasons state:

> Foreign students in Canada are eligible for a work permit for post-graduation employment only if they have engaged in full-time studies for at least eight months at a:
>
> - Public post-secondary institution, such as a college, trade or technical school, university or CEGEP (in Quebec);
> - A private post-secondary institution that operates under the same rules and regulations as public institutions;

- A private secondary or post-secondary institution (in Quebec) offering qualifying programs of 900 hours or longer leading to a diploma of vocational studies (DVS) or an attestation of vocational specialization (AVS); or

- A Canadian private institution authorized by provincial statute to confer degrees (i.e., bachelor's degree, master's degree, doctorate), but only if the student is enrolled in one of the programs of study leading to a degree, as authorized by the province, and not in just any program of study offered by the private institution.

As the institution you attended is not one of the above, it has been determined that you are not eligible for a work permit in this category.

III. Issues

[15] The Applicant submits three issues for determination:

1. Was Immigration Canada's policy regarding PGWP's precluded by statute?

2. Is the PGWP Policy unconstitutional for vagueness?

3. Was the Officer's refusal decision unreasonable?

[16] The real issue is whether the Officer's refusal decision was reasonable.

IV. Standard of Review

[17] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has determined that reasonableness is the standard of review for an officer's determination of eligibility for a PGWP:

Osahor v Canada (Minister of Citizenship and Immigration), 2017 FC 666 at para 11 [*Osahor*] per Gleeson J. Thus, the standard of review is reasonableness.

[18] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[19] The Supreme Court of Canada also instructs that judicial review on the reasonableness standard is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

V. Submissions and analysis

A. *Government Policy precluded by statute*

[20] The Applicant submits that IRPA and the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [*Regulations*], specifically section 200 of the *Regulations*

precludes the adoption and implementation of the PGWP Policy. The Applicant's position is that she met all of the criteria to receive a work permit under the mandatory language of section 200 of the *Regulations*. By extension, the Applicant argues that section 200 of the *Regulations* conflicts with the PGWP Policy, particularly the requirement that graduates of private institutions must be enrolled in one of the degree programs at a public institution.

[21] The Applicant refers to *Independent Contractors and Business Assn. of British Columbia v British Columbia*, 1995 CanLII 3302 (BC SC) which declared that a certain policy was in conflict with a provincial statute where the statute had occupied the field.

[22] The Federal Court of Appeal is better – and binding – authority for the same proposition, which I accept: *Sander Holdings Ltd. v Canada (Attorney General)*, 2005 FCA 9 at para 53:

> [53] It has also been held that policy guidelines that are in conflict with the primary legislation are impermissible (*Independent contractors & Business Assn. (British Columbia) v. British Columbia* (1995), 6 B.C.L.R. (3d) 177 (B.C.S.C.)).

[23] In this connection, both parties agree, as do I that the four public policy bullets in the Officer's reasons constitute Program Delivery Initiatives [PDIs], and that such PDIs are binding on decision-makers such as the Officer. These public policy PDIs are authorized by section 205(c)(ii) of the *Regulations* which refers to "public policy" and states:

Canadian interests	**Intérêts canadiens**
205 A work permit may be issued under section 200 to a foreign national who intends to perform work that	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) is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely,	c) il est désigné par le ministre comme travail pouvant être exercé par des étrangers, sur la base des critères suivants
[…]	[…]
(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;	(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;
[Emphasis added]	[mise en évidence ajoutée]

[24] As Justice Gleeson stated in *Osahor* at paras 14-15:

> [14] In effect, section 205 of the IRPR extends to the Minister the authority to provide foreign nationals with limited access to the Canadian labour market where that access satisfies public policy objectives relating to the competiveness of Canada's economy or academic institutions. The IRPR do not prescribe criteria but rather authorize the Minister to both designate the work to be performed and define how, or on what basis, limited access is to be provided. In doing so the Minister must be in a position to establish program criteria. As noted by Justice Mactavish at paragraphs 11 and 12 of *Nookala*:
>
> > [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.
>
> [Emphasis added]

> [15] As Justice Mactavish notes in *Nookala*, the PGWP- PDI is a document that provides information, guidance, and sets out program criteria. Ms. Osahor argues that *Nookala*, as well as the decisions of this Court in *Abubaker* and *Rehman* where Justices Sandra Simpson and Denis Gascon reached conclusions that accord with those of Justice Mactavish, can be distinguished from the case at hand. She submits that in each of these cases the PGWP-PDI requirements in issue found their basis in section 199 of the *IRPR*, a section that identifies criteria a foreign national must satisfy in applying for a work permit from within Canada. In effect Ms. Osahor argues that the finding in these cases is to the effect that the mandatory program criteria as established in the PGWP-PDI is *obiter*. I am unconvinced.

[25] I am not persuaded the PDIs relied upon by the Officer are contrary to the *Regulations*. It seems to me that the Minister formed the opinion that it was in the interest of the competitiveness of academic institutions or the economy, or possibly both, that public institutions be favoured over private institutions. That is not a policy in conflict with the *Regulations;* it is a policy authorized by and made pursuant to the *Regulations*. It is for the

Minister to determine who should be given limited access to Canada's labour market, provided of course that he or she acts within the statutory and regulatory boundaries, as happened here.

[26] On this basis, the Officer's decision is defensible in respect of the law and is therefore reasonable per *Dunsmuir*.

B. *Unconstitutional vagueness and section 7 of the Charter*

[27] The Applicant argues that the PGWP Policy is unconstitutionally vague. The Applicant refers to *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 81:

> [81] A vague law may be unconstitutional for either of two reasons: (1) because it fails to give those who might come within the ambit of the provision fair notice of the consequences of their conduct; or (2) because it fails to adequately limit law enforcement discretion: see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. In the same case, this Court held that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (p. 643).

[28] In the Applicant's submission, the PDI fails to give those who might come within their ambit, fair notice of the consequences of their conduct. Given the private institution in this case was on Immigration Canada's DLI list for study permits (as opposed to a PGWP), she argues:

> Presumably, in the mind of a foreign national student, if their selected private post-secondary institution is on the DLI, it is a private institution that the Respondent has found to operate under the same rules and regulations as public post-secondary institutions in Canada, given that both private and public institutions are mixed together on the DLI and the Respondent has given the selected private post-secondary institution its stamp of approval by including it on the DLI list.

[29] The Applicant's counsel says this is a systemic problem, causing foreign students to select expensive private post-secondary institutions in Canada that actually render them ineligible to obtain a PGWP. The Applicant notes that there is evidence that Immigration Canada officers have been unclear about the impugned policy because of its vagueness. The Applicant also notes that Immigration Canada has changed its website so that it now specifies whether an institution offers PGWP-eligible programs.

[30] The unconstitutionally vagueness argument does not succeed because in my view the PDI criteria are clear. They are not vague. It was difficult in practice to determine which institution qualified as can be seen in this case itself, but that does not mean the policy is unconstitutionally vague. Those going to *private* institutions outside Quebec must attend *either* a post-secondary institution that operates under the same rules and regulations as public institutions, *or* an institution authorized by provincial statute to confer degrees (i.e., bachelor's degree, master's degree, doctorate), but only if the student is enrolled in one of the programs of study leading to a degree, as authorized by the province, and not in just any program of study offered by the private institution.

[31] There is nothing on the record to support a finding that the Applicant attended an institution that falls into these categories.

[32] The Applicant then submits that her choice of academic institution is a fundamental choice that is protected by section 7 of the *Canadian Charter of Rights and Freedoms* [the *Charter*]. I am unable to accept this argument.

[33] To begin with, the relevant PDI does not restrict the Applicant's choice of academic institution; rather, it restricts her access to Canada's labour market.

[34] I am not persuaded section 7 of the *Charter* gives a foreign post-graduate student on a study permit the right to choose to go to a private degree-granting institution or private diploma-granting institution instead of a public institution contrary to the Minister's direction. That choice is precluded by the exercise of the Minister's public policy decision made in the relevant PDI. Nor does the Applicant meet the high threshold of psychological harm referred to in *Austria v Canada (Citizenship and Immigration)*, 2014 FCA 191 at para 99:per Sharlow JA

> [99] I do not accept this argument. I have no doubt that the termination of the appellants' permanent resident visa applications caused them financial loss, but financial loss alone does not implicate the rights to life, liberty and security of the person. The termination of their applications could have been profoundly disappointing to the appellants and perhaps for some psychologically damaging, but the evidence does not establish the high threshold of psychological harm necessary to establish a deprivation of the right to security of the person: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

[35] As a result, the constitutional arguments must fail.

C. *Unreasonable decision*

[36] With respect to the reasonableness of the decision, the Applicant directs the Court to section 186 of the *Regulations*, which pertains to a foreign national's ability to legally work in Canada without a work permit. In the Applicant's view, since she met all of the criteria of section 186, the Officer's was unreasonable. I am unable to accept this argument because

paragraph 186(1)(w) of the *Regulations* sets out when a foreign national may work in Canada *without a work permit.* This is not relevant to the PGWP program.

VI. Certified question

[37] The Applicant proposed two questions to certify, both opposed by the Minister:

> 1. Do the PGWP PDIs which state:
>
> > Foreign students in Canada are eligible for a work permit for post-graduation employment only if they have engaged in full-time studies for at least eight months at a:
> >
> > Public post-secondary institution, such as a college, trade or technical school, university or CEGEP (in Quebec);
> >
> > A private post-secondary institution that operates under the same rules and regulations as public institutions;
> >
> > A private secondary or post-secondary institution (in Quebec) offering qualifying programs of 900 hours or longer leading to a diploma of vocational studies (DVS) or an attestation of vocational specialization (AVS); or
> >
> > A Canadian private institution authorized by provincial statute to confer degrees (i.e., bachelor's degree, master's degree, doctorate), but only if the student is enrolled in one of the programs of study leading to a degree, as authorized by the province, and not in just any program of study offered by the private institution.
>
> conflict with the legislation, specifically paragraph 205(c)(ii) and section 200 of the Regulations?
>
> 2. Are the PGWP PDIs vague in violation of section 7 of the *Charter?*In my view, neither question should be certified. The first question is answered by the jurisprudence including *Osahor*. The second question does not arise because no *Charter* right is engaged in respect of either vagueness or the alleged entitlement to choice under section 7 of the *Charter*.

VII. Addendum re subsection 24(1) of IRPA

[38] The facts that lead to the refusal of the Applicant's PGWP are very unfortunate and the Court sympathizes with her. This Applicant did her best and it seems to me conducted adequate due diligence. Her apparent reliance on advice from the Respondent is not helpful to here because of the Federal Court of Appeal's conclusion, which I accept, that the doctrine of legitimate expectations is a procedural doctrine which has its source in common law; as such it does not create substantive rights and cannot be used to counter Parliament's clear and expressed intent: *Canada (Minister of Citizenship and Immigration) v Dela Fuente*, 2006 FCA 186 at para 19.

[39] The Applicant may apply for H&C relief pursuant to subsection 24(1) of IRPA per *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 22:

> [22] The objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of IRPA which surfaces in cases where there may be "compelling reasons" to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA. Basically, the TRPs allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments. (Immigration Manual, c. OP 20, section 2; Exhibit "B" of Affidavit of Alexander Lukie; *Canada* (*Minister of Manpower and Immigration) v. Hardayal*, [1978] 1 S.C.R. 470 (QL).)

[40] When I asked at the hearing if the Applicant has applied for relief under subsection 24(1) of IRPA, I was told she had. Minister's counsel indicated he hoped she had because she seemed like a great candidate. I agree with counsel's assessment and respect his candor.

VIII. Conclusion

[41] The decision falls within the range of possible and acceptable outcomes which are defensible on the facts and law. Therefore, judicial review must be dismissed. I have addressed consideration of subsection 24(1) of IRPA.

JUDGMENT in IMM-3704-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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