Federal Court  Cour fédérale

Date: 20220808

Docket: IMM-3897-21
IMM-3898-21

Citation: 2022 FC 1178

Vancouver, British Columbia, August 8, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

HIMANSHU BISHT

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Himanshu Bisht is a citizen of India who came to Canada initially on a study permit that was extended twice. The Applicant then obtained a visitor record that was extended once. A second visitor extension application, as well as a work permit application, were

refused. The refusals informed the Applicant that if his status documents had expired, which they had, he must leave Canada immediately or face enforcement action against him.

[2] The Applicant later obtained a positive Labour Market Impact Assessment [LMIA]. On the advice of the immigration consultant representing him at the time, the Applicant subsequently left Canada for the United States of America [USA] and immediately sought to re-enter Canada and apply for an employer-specific work permit with his positive LMIA at the border. With a valid visa (which the Applicant here did not have at that time), this strategy is known as "flagpoling" and, I understand, generally presents little risk to the LMIA work permit applicant.

[3] Because the Applicant was without status, however, when he sought to re-enter Canada from the USA, he was interviewed by a Canada Border Services Agency [CBSA] officer who wrote a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], also known as a section 44 report. Following the referral of the section 44 report to the Minister's delegate, the Applicant was interviewed by the Minister's delegate who issued an exclusion order pursuant to paragraph 41(a) of the *IRPA* for the Applicant's failure to comply with paragraph 20(1)(b) of the *IRPA*. The exclusion order bars the Applicant from re-entry to Canada for one year after his departure.

[4] Although the decisions to write the section 44 report and to issue the exclusion order are the subject of these judicial review applications, the Applicant seeks to have the decision of the Minister's delegate set aside solely on the ground of procedural fairness because of the

incompetence of his authorized representative (i.e. the immigration consultant). The Applicant otherwise concedes the reasonableness of the decisions based on the facts and record then before the CBSA officer and the Minister's delegate.

[5] The Court ordered the consolidation of the Applicant's applications for leave and judicial review on August 11, 2021, with Court File No. IMM-3897-21 to serve as the primary file for service and filing of the parties' material.

[6] The Applicant was scheduled for removal on August 25, 2021. The Court granted the Applicant's motion for a stay of removal and, subsequently, the leave applications.

[7] For the reasons below, I am persuaded that the applications for judicial review should be granted because of the former immigration consultant's incompetent representation of the Applicant, thus resulting in a breach of procedural fairness or denial of natural justice. My analysis below deals with a preliminary issue regarding affidavit evidence on which the Respondent sought to rely in these proceedings, followed by a consideration of the procedural fairness issue raised by the Applicant.

II. Additional Background

[8] The Applicant studied at the Manitoba Institute of Trades and Technology [MITT] between January 2018 and August 2019. He withdrew from his studies in August 2019 because of illness and a failed course. During his studies, the Applicant worked at a company called Nuburger. With the support of his employer and the assistance of his first immigration

consultant, the Applicant applied through the Manitoba Provincial Nominee Program [MPNP] for a work permit and eventual permanent residence. The first consultant applied to convert the Applicant's status from student to visitor. The latter application was approved but the MPNP application was refused.

[9] Following the MPNP refusal, the Applicant retained a second immigration consultant, Gursimranveer Singh Dhada, who suggested that, with the support of the Applicant's employer, he could pursue an application for an LMIA work permit. The Applicant alleges that he did not get a written retainer agreement with Mr. Dhada, and that he informed Mr. Dhada that his employer, Nuburger, would be paying his legal fees.

[10] According to the Applicant, Mr. Dhada advised the Applicant that he should go to the Port of Entry (at Emerson, Manitoba) to apply for his work permit once the LMIA is approved. Mr. Dhada also applied to extend the Applicant's temporary resident status through a new visitor record application, which was approved in December 2020, expiring in January 2021. Prior to the expiration of that status, Mr. Dhada further applied to extend the Applicant's status by filing another visitor record application. The Applicant's first LMIA application was refused, but his second was approved.

[11] Mr. Dhada informed the Applicant that Mr. Dhada would apply for the work permit online, instead of the Applicant going to the Port of Entry. This online application was refused in April 2021, as was the visitor record application.

[12] The Applicant asserts that Mr. Dhada only communicated the work permit refusal to him, and further, Mr. Dhada did not advise him of the 15-day period for filing an application for leave and judicial review of the refused work permit with the Federal Court. In addition, when the Applicant reviewed the GCMS notes obtained by Mr. Dhada regarding the reasons for the work permit refusal, it came to light that Mr. Dhada failed to include the Applicant's MITT educational history in the work permit application, a mistake which Mr. Dhada admitted to the Applicant. The GCMS notes corroborating this key omission are contained in the Applicant's record for the judicial review.

[13] The Applicant further indicates that he asked Mr. Dhada about the statement in his refusal letter that he must leave Canada immediately, but was informed that this was not the case because of his pending visitor record application, and that the Applicant could apply for restoration and a work permit at the border. Mr. Dhada did not provide the Applicant with an explanation of how the restoration process works. The Applicant went to the Port of Entry at Emerson on June 1, 2021 where he was found inadmissible to Canada for lack of a valid visa and status. The exclusion order was issued on the same date.

[14] When the Applicant contacted Mr. Dhada about the result of his advice, Mr. Dhada offered to refund the Applicant half of the fees paid. Mr. Dhada later admitted the visitor record application was refused in April 2021, and forwarded the refusal letter. The Applicant then retained his current counsel who sent Mr. Dhada a letter dated June 23, 2021 outlining allegations, and forwarding a copy of the Federal Court protocol with respect to allegations against counsel or other authorized representative [Protocol], along with copies of privilege

releases from the Applicant and Nuburger. On July 7, 2021, Mr. Dhada's counsel responded by letter disputing the allegations.

[15] While Mr. Dhada's counsel reserved the right to provide a written response to the allegations if the Applicant's application for leave at the Federal Court was granted, none was provided (following the service of the Applicant's Record on Mr. Dhada, through his counsel, in compliance with the Protocol), nor was his version of the facts supported with an affidavit. Further, Mr. Dhada did not seek to intervene in the judicial review.

III. Standard of Review

[16] Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The focus of the reviewing court is essentially whether the process was fair, bearing in mind the duty of procedural fairness is variable, flexible and context-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77; *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

[17] Were the Applicant pursuing judicial review of the merits of the decisions in issue, the Court would review them for reasonableness: *Vavilov*, above at paras 10, 25.

IV. Analysis

A. *Preliminary issue: Respondent's inadmissible affidavit evidence*

[18] I find the affidavit evidence submitted by the Respondent in this judicial review is inadmissible. The parties agreed at the hearing that nothing turns on the affidavit. I thus comment only briefly on it.

[19] The Respondent sought to rely in these proceedings, particularly in respect of the Applicant's stay motion, on the affidavit of the CBSA Enforcement Case Officer who was assigned to oversee the Applicant's removal from Canada. Paragraphs 8-13 of the affidavit describe events that post-date the issuance of the section 44 report and the exclusion order on June 1, 2021. The information in these paragraphs could not have been before the administrative decision makers and, in my view, the information is irrelevant to the judicial review.

[20] Paragraph 1 describes the Officer's role regarding the CBSA file for the Applicant, while paragraphs 2-7 describe the Applicant's immigration history in Canada and events leading up to and including June 1, 2021. In my view, these paragraphs are unnecessary because they do not add any otherwise unknown background or enrich the Court's understanding of this matter. Further, the Respondent has not argued that the Officer's affidavit falls within any recognized exceptions to the admissibility of new evidence on judicial review as prescribed in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20.

[21] For these reasons, I am persuaded that the Officer's affidavit is inadmissible in the context of the judicial review.

B. *Main issue: Lack of procedural fairness because of incompetent authorized representative*

[22] I am satisfied that the conduct of the Applicant's former representative resulted in substantial prejudice to the Applicant and affected the ultimate finding by the CBSA that the Applicant was inadmissible, leading to the issuance of the exclusion order.

[23] This Court long has recognized that, in extraordinary circumstances, the behaviour of counsel or an authorized representative may ground a breach of natural justice allegation, warranting redetermination by the decision maker, including a new hearing, but only if the conduct "falls within professional incompetence [or, negligence] and the outcome of the case would have been different had it not been for counsel's wrongful conduct" (citations omitted): *Rezko v Canada (Citizenship and Immigration)*, 2015 FC 6 at para 5. See also *Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51, 1993 CanLII 3026 (FCA) at pp 60-61; *Osagie v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368 at paras 24-27; *Rodrigues v Canada (Minister of Citizenship and Immigration)*, 2008 FC 77, [2008] 4 FCR 474 at paras 39-40; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 [*Memari*] at paras 36, 64; *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 at paras 15-19, 33; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 38; *Mcintyre v Canada (Citizenship and Immigration)*, 2016 FC 1351 at paras 33-34.

[24] The test for reviewable professional conduct is three-part, and the onus is on an applicant to establish that:

(i) the previous representative's acts or omissions constituted incompetence or negligence;

(ii) but for the impugned conduct, there is a reasonable probability that the outcome would have been different (in other words, a miscarriage of justice or prejudice has occurred as a result of the conduct); and

(iii) the representative had a reasonable opportunity to respond to an allegation of incompetence or negligence: *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 [*Rendon*] at para 22; *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850 [*Gombos*] at para 17.

[25] There is a strong presumption that there is a wide range of what is considered reasonable professional conduct. The onus is on the Applicant in this case to establish the acts or omissions in question, by the previous representative, were not the result of reasonable professional judgment and were prejudicial to the Applicant. Hindsight has no place in this analysis: *R v GDB*, 2000 SCC 22 at para 27, [2000] 1 SCR 520; *Gombos*, above at para 17.

[26] Further, a formal complaint to the former representative's regulatory body is not necessary, although I note that the Applicant here has submitted a complaint to the Immigration Consultants of Canada Regulatory Council (now continued as the College of Immigration and Citizenship Consultants under the *College of Immigration and Citizenship Consultants Act*, SC 2019, c 29, s 292). Notice of the allegations and an opportunity to respond to them are sufficient: *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 [*Guadron*] at para 16; *Basharat v Canada (Citizenship and Immigration)*, 2015 FC 559 at paras 14-15.

[27] With these principles in mind, I start the analysis by emphasizing that, as described above, the Applicant has followed the applicable procedure outlined in the Protocol, thus satisfying the third part of the applicable test.

[28] As for the remainder of the test, the Respondent attempts to draw a distinction between immigration consultants and lawyers in terms of competency and argues that the Applicant has to accept the consequences of hiring an immigration consultant rather than a lawyer: *Al-Abayechi v Canada (Citizenship and Immigration)*, 2018 FC 360 [*Al-Abayechi*] at para 23, citing *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 [*Brown*]. With respect to the Court's finding in *Al-Abayechi*, I disagree. While I accept that an immigration consultant may not have the same legal training as a lawyer, the jurisprudence, including in *Brown* at para 61, suggests that they nonetheless are held to the same standard of competency: *Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266 [*Cove*] at para 10; *Guadron*, above at para 10.

[29] While it is accepted in the jurisprudence that generally, applicants must abide by their choice of advisor (*Cove* at para 6), the real question for the Court's determination in the matter before it is whether the Applicant here has satisfied the test for reviewable professional conduct, regardless of whether the advisor is an immigration consultant or a lawyer.

[30] In my view, the sworn evidence submitted in support of this application demonstrates that the cumulative effect of the allegations summarized in the Additional Background section above amount to reviewable unfairness to the Applicant. I find most persuasive the allegations that Mr. Dhada failed to: (i) include the Applicant's MITT educational history in the Applicant's work

permit application which is corroborated by the GCMS notes; (ii) inform the Applicant, before the Applicant went to the Port of Entry in Emerson, that his visitor record application had been refused, and thus, he did not have status in Canada; and (iii) advise the Applicant of the consequence of attending the Port of Entry to "flagpole" despite not having legal status in Canada.

[31] I acknowledge that Mr. Dhada disputes, through his counsel, the allegation that he did not inform the Applicant of the refused visitor record application prior to the Applicant's attendance at the Port of Entry, as well as other allegations. In my view, however, the lack of a written retainer from Mr. Dhada, the GCMS notes that corroborate Mr. Dhada's error in omitting the Applicant's educational history from the LMIA work permit application, and Mr. Dhada's lack of formal response after being served with the Applicant's record in the judicial review, make it more likely than not, on a balance of probabilities, that events transpired as described by the Applicant in his affidavit evidence in this proceeding.

[32] Also in my view, the immigration consultant's errors resulted in a cascading or "snowball" effect to the Applicant's prejudice, eventually leading to the CBSA officer's decision to write the section 44 report, and to the decision of the Minister's delegate to issue an exclusion order against the Applicant. This Court has recognized that, on the particular facts of a case, the cumulative impact of the prejudice suffered by the Applicant as a result of inadequate representation can be sufficient to result in a miscarriage of justice. I am persuaded that, taken as a whole, the Applicant's allegations regarding the conduct of Mr. Dhada demonstrate that the representation of the Applicant was not adequate or reasonable: *Memari*, above at para 64. I thus am satisfied that a

miscarriage of justice occurred in the present circumstances because there is a reasonable probability that the result would have been different but for the incompetence: *Rendon*, above at para 31.

V. Conclusion

[33] For the above reasons, the Applicant's judicial review applications are granted. The impugned administrative decisions taken here are set aside, including the decision to issue an exclusion order. In my view, it would serve no useful purpose to remit the matter for reconsideration because the Applicant conceded the reasonableness of the decisions in the circumstances that existed as of June 1, 2021. The Court therefore leaves it to the Respondent to determine whether to reconsider the matter. If reconsideration is undertaken, however, the matter shall be reconsidered by different decision makers. The Court finds guidance for this result in *Enye v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 481 at para 11. See also *Vavilov*, above at para 142.

[34] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-3897-21 and IMM-3898-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's applications for judicial review are granted.
2. The decisions to write a section 44 report and to issue an exclusion order are set aside.
3. If the matter will be redetermined, it must be by different decision makers.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3897-21 AND IMM-3898-21
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