Federal Court  Cour fédérale

Date: 20190425

Docket: IMM-5132-17

Citation: 2019 FC 526

Ottawa, Ontario, April 25, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

YE JUNG KIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection* Act, SC 2001, c 27 [*IRPA*].

[2] The applicant is a citizen of South Korea. He held a series of study permits in Canada from February 1, 2006, through August 31, 2017. On the day his last study permit was expiring, the applicant applied for a Post-Graduate Work Permit [PGWP]. This application was refused

on October 30, 2017, because the applicant had not provided proof that he had completed his program of study, a requirement for being eligible for a PGWP. The applicant does not dispute that this was the case. In fact, he had not completed his degree (a Master of Arts in Economics at the University of British Columbia) when he submitted his application for a PGWP. He argues, however, that the decision was made in a procedurally unfair manner and that it is unreasonable.

[3] For the reasons that follow, I do not agree.

[4] There is no dispute about how I should approach these issues. With respect to procedural fairness, I must determine for myself whether the process the officer followed satisfied the level of fairness required in all the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54). If it did, there is no basis to intervene on this ground. With respect to the decision itself, it is reviewed on a reasonableness standard. I owe deference to the officer because of his or her presumed expertise with respect to the applicable criteria and the largely fact-based nature of this kind of discretionary decision (*Ngalamulume v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1268 at para 16). I should examine the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). A visa officer is not required to give extensive reasons, but they must be sufficient to explain the result (*Pacheco v Canada (Citizenship and Immigration)*, 2010 FC 347 at para 36; *Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at paras 12-13; *Omijie v Canada*

(Citizenship and Immigration), 2018 FC 878 at paras 22-28). I should intervene on this ground only if the reasons given, viewed in the context of the record, fail this test.

[5] I begin with two procedural points.

[6] First, in his Application for Leave and Judicial Review, the applicant identifies the decision in issue as the October 30, 2017, refusal of the application for a PGWP. It appears that the applicant requested that this decision be reconsidered but the decision on this request is not before me.

[7] Second, the applicant's Application Record includes evidence that arose after the original decision, including a letter from the University of British Columbia dated November 30, 2017, confirming that the applicant had completed all the requirements for a Master of Arts degree in Economics and that the degree was conferred on November 15, 2017. (I note, parenthetically, that in his affidavit in support of the leave application, the applicant explained that the outstanding requirement for his degree as of August 31, 2017, was completion of a "thesis paper course." He states that he submitted his paper "on time" but he did not receive his final grade until after his study permit expired. The applicant does not say when he received the final grade.)

[8] The general rule is that the evidentiary record on an application for judicial review of an administrative decision is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access*

Copyright), 2012 FCA 22 at para 19 [*Access Copyright*]; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*]). The rationale for this rule is grounded in the respective roles of the administrative decision-maker and the reviewing court (*Access Copyright* at paras 17-18; *Bernard* at paras 17-18). The decision-maker decides the case on its merits. The reviewing court can only review the overall legality of what the decision-maker has done. This general rule admits of exceptions (as stated in *Access Copyright* at para 20 and *Bernard* at paras 19-28) but none apply here. As a result, I have determined that only the information that was before the decision-maker is admissible on this application.

[9] The applicant submits that the decision was rendered in a procedurally unfair manner. I do not agree. In effect, the applicant argues that there was a duty on the visa officer to notify him that he did not meet the prerequisites for obtaining a PGWP before refusing the application. The law is clear that there is no such duty. In *Masam v Canada (Citizenship and Immigration)*, 2018 FC 751, my colleague Justice Walker summarized the applicable principles of procedural fairness in this very context as follows (at para 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 1001at 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.

See also *Marsh v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 408 at paras 32-40 (which also concerns an application for a PGWP) and, more generally, *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 24, and *Singh v Canada (Citizenship and Immigration)*, 2016 FC 509 at para 26.

[10] The requirements of procedural fairness were met here. The onus was on the applicant to demonstrate that he was eligible for a PGWP. He failed to do so because, in fact, he did not meet the requirements of the program. He had not completed his degree when he submitted his application. The officer was not under a duty to alert the applicant to this deficiency in his application before rejecting it.

[11] Turning to the visa officer's decision itself, the applicant argues that the decision is unreasonable because the officer should have been guided by the wider policy objectives of the PGWP program and the *IRPA* itself as opposed to the strict eligibility requirements the officer applied. I disagree. The applicant had not satisfied a mandatory precondition for eligibility for a PGWP when he submitted his application. The officer had no discretion to disregard the requirements of the program as set out in the program delivery instructions (*Nookala v Canada (Citizenship and Immigration)*, 2016 FC 1019 at para 12; *Abubacker v Canada (Citizenship and Immigration)*, 2016 FC 1112 at paras 16-17; *Ofori v Canada (Citizenship and Immigration)*, 2019 FC 212 at para 20). It was entirely reasonable for the officer to refuse the application on the basis that the applicant did not qualify. The decision, while brief, could leave no one wondering why the result was reached.

[12] Foreign students in Canada like the applicant may be eligible for a permit for post-graduation employment but they must hold a valid study permit when they apply for a PGWP. This posed a problem for the applicant because his study permit was expiring on August 31, 2017, but he had not completed the requirements of his degree yet, another requirement to be eligible for a PGWP. One obvious solution would have been to apply for an extension of his study permit and then submit an application for a PGWP after he completed the requirements of his degree as opposed to applying for a PGWP when he did not qualify. There is no evidence before me to suggest that the applicant could not have proceeded in this way instead of how he chose to proceed.

[13] No doubt the applicant was disappointed by the rejection of his application for a PGWP but he could not have been surprised. The outcome of this application will also be a disappointment for him. However, the decision of the visa officer was rendered in a procedurally fair way and it is reasonable. There is no basis for me to interfere.

[14] The applicant proposes two questions for certification under section 74(d) of the *IRPA*:

> Do one-time opportunity programs such as the PGWP, resulting from a practical inability to reapply, require a higher degree of procedural fairness in the form of an email or letter communicating an intention to refuse allowing a one-time opportunity to remediate?
>
> Does the nature of programs such as the PGWP meant to advance Canadian interests, require a higher degree of procedural fairness in the form of an email or letter communicating an intention to refuse allowing a one-time opportunity to remediate?

[15] The applicant did not propose either of these questions in his written or oral submissions. Exceptionally, he was given an opportunity to file supplementary submissions following the hearing. The respondent filed responding submissions and opposes certifying either of the questions.

[16] To merit certification, a question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36; *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46 [*Lunyamila*]). The requirement of certification must not be taken lightly (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 19).

[17] I do not consider either question proposed by the applicant to merit certification. The result here does not turn on the requirements of procedural fairness but, rather, on the fact that the applicant submitted his application for a PGWP prematurely. In any event, the Court's jurisprudence is consistent on what these requirements are in the context of PGWP applications. Where the jurisprudence has sufficiently answered a question, an issue of general importance does not arise (*NK v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1377 at paras 62, 80, 102; *Osahor v Canada (Citizenship and Immigration)*, 2017 FC 666 at para 22). Moreover, the applicant's questions rest on a false premise. The applicant characterizes a PGWP as a "one-time opportunity." While a foreign national may receive a PGWP only once, there is nothing to suggest that he or she cannot apply more than once if previous applications are refused. The requirements of the program inevitably impose constraints on how many times a

given individual might be able to apply but this will depend on the specific circumstances of each case. In summary, the result here turns on the specific facts of this case. The questions proposed by the applicant do not arise on these facts, nor do they pose issues that need to be decided (*Lunyamila* at para 46; *Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 at para 10).

[18] For all of these reasons, the request to certify the above questions is denied and the application for judicial review is dismissed.

[19] Finally, in his written reply submissions with respect to the proposed certified questions, counsel for the applicant addresses the submissions of the respondent in inappropriately personal and inflammatory terms. It should not be necessary for the Court to remind counsel of the duty of civility or that such submissions are to be avoided (*Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 69).

JUDGMENT IN IMM-5132-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5132-17
STYLE OF CAUSE:	YE JUNG KIM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 1, 2018
JUDGMENT AND REASONS:	NORRIS J.
DATED:	APRIL 25, 2019

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