

Federal Court



Cour fédérale

Date: 20210927

Docket: IMM-6572-20

Citation: 2021 FC 1003

Fredericton, New Brunswick, September 27, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

GAO LI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Mr. Li seeks judicial review of a decision of an immigration officer (the Officer) denying his application for a study permit. For the reasons that follow, this judicial review is granted as the Officer's decision is not reasonable.

Background

[2] Mr. Li is a 48-year-old citizen of China who entered Canada in January 2020 as a temporary resident. Mr. Li was issued a six-month visitor visa effective from January 9, 2020 and expiring on July 9, 2020. This visa and temporary resident status were subsequently extended until November 15, 2020.

[3] On November 12, 2020, while still in Canada, Mr. Li applied for a study permit to attend the Culinary Management Program at Centennial College in Ontario, pursuant to subpara 215(1)(f)(iii) of the *Immigration and Refugee Protection Regulations, SOR/2002-227* (Regulations or IRPR). This provision allows foreign nationals to apply from within Canada if they have completed a prerequisite course of study.

[4] In his application, Mr. Li indicated that he had completed an online English language prerequisite course from June 1, 2020 to November 6, 2020, at the International Language Academy of Canada (ILAC).

[5] In the interim, on July 20, 2020, Immigration, Refugees and Citizenship Canada (IRCC) issued a new Program Delivery Instruction (PDI) pertaining to study permits during the COVID-19 pandemic.

Decision Under Review

[6] In a decision dated December 10, 2020, the Officer refused Mr. Li's application for a study permit. The Global Case Management System (GCMS) notes outline the reasons as follows:

Client did not completes (*sic*) programs pre requisite course on the time upon entry.
Client studied pre requisite course outside the initial 6 months upon entry. Since the pre requisite course was completed when the client was not authorized to study the client cannot apply for SP-EXT under R215(1)(f)(iii).
Client Exceeded the time duration allowed under R188(1)(c).
Client must apply aboard (*sic*).
Application Refused.

Relevant Legislative Provisions

[7] Subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 states:

Application before entering Canada

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

[8] Paragraph 183(1)(c) of the Regulations states:

General Conditions

183 (1) Subject to section 185, the following conditions are imposed on all temporary residents:

[...]

(c) to not study, unless authorized by the Act, this Part or Part 12; and

Conditions d'application générale

183 (1) Sous réserve de l'article 185, les conditions ci-après sont imposées à tout résident temporaire :

[...]

c) il ne doit pas étudier sans y être autorisé par la Loi, la présente partie ou la partie 12;

[9] Paragraph 188(1)(c) of the Regulations states:

No permit required

188 (1) A foreign national may study in Canada without a study permit

[...]

(c) if the duration of their course or program of studies is six months or less and will be completed within the period for their stay authorized upon entry into Canada;

Permis non exigé

188 (1) L'étranger peut étudier au Canada sans permis d'études dans les cas suivants :

[...]

c) il suit un cours ou un programme d'études d'une durée maximale de six mois qu'il terminera à l'intérieur de la période de séjour autorisée lors de son entrée au Canada;

[10] Subparagraph 215(1)(f)(iii) of the Regulations states:

Application after entry

215 (1) A foreign national may apply for a study permit after entering Canada if they

[...]

Demande après l'entrée au Canada

215 (1) L'étranger peut faire une demande de permis d'études après son entrée au Canada dans les cas suivants :

[...]

(f) are a temporary resident who) il est un résident temporaire qui, selon le cas :

[...]

(iii) has completed a course or program of study that is a prerequisite to their enrolling at a designated learning institution; (iii) a terminé un cours ou un programme d'études exigé pour s'inscrire à un établissement d'enseignement désigné;

[11] Finally, section 221 of the Regulations states:

Failure to comply with conditions

221 Despite Division 2, a study permit shall not be issued to a foreign national who has engaged in unauthorized work or study in Canada or who has failed to comply with a condition of a permit unless

(a) a period of six months has elapsed since the cessation of the unauthorized work or study or failure to comply with a condition;

(b) the work or study was unauthorized by reason only that the foreign national did not comply with conditions imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c); or

(c) the foreign national was subsequently issued a temporary resident permit under subsection 24(1) of the Act.

Non-respect des conditions

221 Malgré la section 2, il n'est délivré de permis d'études à l'étranger qui a déjà étudié ou travaillé au Canada sans autorisation ou permis ou qui n'a pas respecté une condition imposée par un permis que dans les cas suivants :

a) un délai de six mois s'est écoulé depuis la cessation des études ou du travail sans autorisation ou permis ou du non-respect de la condition;

b) ses études ou son travail n'ont pas été autorisés pour la seule raison que les conditions visées aux sous-alinéas 185b)(i) à (iii) ou aux alinéas 185a) ou c) n'ont pas été respectées;

c) il s'est subséquemment vu délivrer un permis de séjour temporaire au titre du paragraphe 24(1) de la Loi.

Issues

[12] The following are the issues for determination:

1. Should the Court consider the Officer's Affidavit?
2. Do procedural fairness issues arise?
3. Is the decision of the Officer reasonable?
4. Do certified questions arise?

Standard of Review

[13] In reviewing a decision on the reasonableness standard, the Court considers that a decision “must be justified, intelligible and transparent [...]” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 95 [*Vavilov*]). 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).

[14] Procedural fairness issues are considered on the correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43); *Mission Institution v Khela*, 2014 SCC 24 at para 79).

Analysis

1. *Should the Court consider the Officer's Affidavit?*

[15] The Respondent submitted an Affidavit from the Officer dated June 25, 2021. Although the Applicant did not object to this Affidavit, the lack of an objection does not prevent the Court from considering if the contents of the Affidavit are appropriate to consider in the context of the judicial review.

[16] This Affidavit expands upon the limited reasons provided by the Officer and at paragraph 14 goes into detail on the Program Delivery Instructions issued on July 20, 2020.

[17] This Court has held that an Officer is not permitted to bolster or bootstrap their reasons through a subsequent affidavit (*Singh v Canada (Citizenship and Immigration)*, 2020 FC 687 at para 24; *Seemungal v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 524 at para 21; *Adbullah v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185 at paras 12-15).

[18] In my view, the Affidavit tendered by the Officer falls squarely into the category of an attempt to bolster reasons after the fact. The Affidavit contains a lengthy discourse on the Program Delivery Instructions (PDI) issued on July 20, 2020. However, the PDI is not referenced in the Officer's decision as being the rationale for the refusal. Accordingly, I will not consider the contents of the Affidavit and will rely only upon the information in the Certified Tribunal Record.

2. *Do procedural fairness issues arise?*

[19] Mr. Li argues that the Officer's notes indicate that she initially approved the study permit and then denied it, and therefore the doctrine of *functus officio* precludes the Officer from revisiting her initial decision.

[20] Although the Officer's notes from December 9, 2020, indicate that she initially determined that Mr. Li would be eligible for a study permit, upon further consideration of the application she determined that he was ineligible to apply in Canada. However, the Officer's first impression that Mr. Li would qualify for a study permit was never communicated to him, and the only reason the Applicant is aware of this initial determination is because it is noted in the Officer's notes that he received after her decision.

[21] Accordingly, the case relied upon by the Applicant in support of this position, *Yan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 855 [*Yan*] is distinguishable. In *Yan*, the Officer communicated their positive decision verbally to the applicant during an interview, before later refusing their application for permanent residence.

[22] In any event, the doctrine of *functus officio* only applies "after the formal judgement had been drawn up, issued and entered [...]" and is subject to an exception for administrative error (*Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 860; *Salewski v Canada (Minister of Citizenship and Immigration)*, 2008 FC 899 at para 45). That is not the case here as there is no evidence that the Officer issued a study permit.

[23] Accordingly, no procedural fairness issues arise on this issue.

3. *Is the decision of the Officer reasonable?*

[24] Mr. Li's application for a study permit was made pursuant to subpara 215(1)(f)(iii) of Regulations. The Officer determined that this provision did not apply to Mr. Li's circumstances as he had completed a prerequisite course after the July 9, 2020 expiry of his six-month visitor visa, contrary to para 188(1)(c) of the Regulations.

[25] Mr. Li argues that because the ILAC program was an online program, he was not required to obtain a study permit and therefore para 188(1)(c) of the Regulations does not apply to his circumstances. In other words, Mr. Li was not study-permit exempt by virtue of para 188(1)(c), but rather was exempt because his program was an online program. He points to the IRCC Operational Manual, which states:

Since by definition distance learning does not require one to be in Canada, a study permit **cannot be issued** for this type of course. For example, if a foreign national authorized to work in Canada is prohibited from engaging in studies as per a condition of their work permit, they are allowed to engage in distance learning courses.

[26] In response, the Respondent argues that subpara 215(f)(iii) and para 188(1)(c) of the Regulations must be read together, such that the prerequisite course referred to in subpara 215(f)(iii) must have been completed within the 6-months of initial entry, regardless of whether the program was online or in-person.

[27] In support of this position, the Respondent relies upon the July 20, 2020 PDI and the decision in *Zhang v Canada*, 2016 FC 964 [*Zhang*].

[28] The facts in *Zhang* are different from this case. In *Zhang* the Applicant was refused a study permit after she completed an ESL program outside of the time period referred to in para 188(1)(c). However, there is no indication in *Zhang* if the ESL program was an online program, as is the case here. More importantly, the Officer in *Zhang* refused the application based upon para 183(1)(c) on the grounds that the Applicant had engaged in unauthorized study. Unlike *Zhang*, the Officer in Mr. Li's case did not reference either para 183(1)(c), or s. 221.

[29] Here, the Officer imported the 6-month time limitation in para 188(1)(c) into the considerations of subpara 215(1)(f)(iii) being the provision Mr. Li applied under. However, on a plain reading of subpara 215(1)(f)(iii), it does not incorporate para 188(1)(c). Had that been the intention of the legislative drafters then appropriate language would have been used. In considering Mr. Li's application, the Officer appears to have conflated these provisions.

[30] Furthermore, the Officer does not appear to have turned her mind to the fact that the PDI was issued almost two months after Mr. Li began his online program. There is also no consideration if the PDI applied to Mr. Li's circumstances. The PDI specifically refers to "prospective students who wish to begin a program of study" that "normally requires in-person attendance." It is not clear if the PDI was intended to cover Mr. Li's circumstances where his program started two months before the PDI was issued, as an online program.

[31] In any event, the failure of the Officer to address, even briefly, the actual provision Mr. Li was applying under and the potential impact of his online course, renders the decision

unreasonable as it lacks an “internally coherent and rational chain of analysis [which] is justified in relation to the facts and law” as required by *Vavilov* (at para 85).

4. Do Certified Questions Arise?

[32] The Applicant asks to certify the following questions:

1. What is “unauthorized study” as defined in s. 221 of the IRPR?
2. Can distance learners engage in unauthorized study?

[33] The test for certifying a question was outlined by the Federal Court of Appeal in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9:

It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge’s reasons [citations omitted].

[34] The Respondent submits that no certified questions arise on the facts of this case.

[35] In my view, this case turns very much on the particular facts at issue and not the more general questions posed by the Applicant. Accordingly, I decline to certify the questions posed.

JUDGMENT IN IMM-6572-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Officer is set aside and the matter is remitted for redetermination by a different officer; and
2. No questions of general importance are certified.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6572-20

STYLE OF CAUSE: GAO LI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

DATE OF HEARING: AUGUST 16, 2021

JUDGMENT AND REASONS: MCDONALD J.

DATED: SEPTEMBER 27, 2021

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