Federal Court Cour fédérale

Date: 20160708

Docket: IMM-5408-15

Citation: 2016 FC 784

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 8, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ELVIS CHRISTIAN DE LA CRUZ GARCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] An application for judicial review was filed under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, chapter 27 (IRPA) regarding the decision made by a visa officer to refuse the application for a study permit that had been filed by the applicant. The reason given was that the applicant had failed to convince the decision-maker that he would

leave the country at the end of his stay. Based on the following reasons, the decision is reasonable and the application for judicial review is dismissed.

[2] The applicant is a citizen of Guatemala. He is married and is the father of a young child. It appears that on November 5, 2015, the applicant tried to obtain a study permit, such as can be obtained under section 216 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). This study permit was intended to allow the applicant to begin studies to learn English. The studies in question were allegedly to begin on November 9—four days later—and to continue for a period of 40 weeks, at 24 hours per week.

[3] In his country of citizenship, this applicant held a position as a systems analyst for a relatively prestigious company from October 2009 to August 2015. As of August 5, 2015, he had just started a job with a high-profile multinational corporation, with a monthly salary of $1,650.00, which, we are told, is a significant salary in Guatemala. In addition, this individual had accumulated savings of over $40,000.00. Yet, according to the visa officer at the Embassy of Canada to Guatemala, it would cost several thousand dollars for the applicant to come and study English for 40 weeks in Canada—around $30,000. I would add that the applicant stated that his spouse also earns an income in Guatemala.

[4] The decision-maker in this case concluded that he was not convinced the applicant would return to his country of origin after his immersion period in an English program ended. This decision-maker wondered about this applicant’s departure from Guatemala, given that he had just started a new job with a prestigious multinational corporation. No explanation was given as

to the reasons why the applicant wanted to learn English, despite the fact that he had admitted to not knowing even the basics of the language. The decision-maker also held that the studies would cost several thousand dollars, and that the applicant's salary would be missed by his family back in Guatemala. The decision-maker did not understand why he would want to come and learn English in Montréal. The lost wages and the costs of studying abroad were not justified. The decision-maker therefore concluded that he was not convinced the applicant would return to Guatemala.

[5] The applicant did not indicate what he believed the appropriate standard of review to be. However, his main allegation was that the decision-maker had not allowed him to address his concerns, which, the applicant claimed, constituted a breach of the principles of natural justice. When an allegation is made that the principles of procedural fairness have been breached, the standard of review is the standard of correctness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502). Thus, the judge providing judicial review is not required to show deference to the impugned decision.

[6] When applying this standard of review, it is up to the applicant (upon whom the burden of proof rests) to prove that procedural fairness has been breached. In such matters, the degree of procedural fairness is limited. Yet, this was not done. Subsection 11(1) of the IRPA sets out the foreign national's duty to obtain a visa 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,	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite

following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[7] The Regulations allow for the provision of a temporary resident visa as long as certain conditions are met:

179 An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national	179 L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(b) will leave Canada by the end of the period authorized for their stay under Division 2;	b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;
. . .	[…]

As for study permits, they are governed by section 216 of the same Regulations, which reads as follows:

216 (1) Subject to subsections (2) and (3), an officer shall issue a study permit to a foreign national if, following an examination, it is established that the foreign national	216 (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis d'études à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) applied for it in accordance	a) l'étranger a demandé un permis d'études conformément

with this Part;	à la présente partie;
(b) will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;	b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;
. . .	[…]

[8] Thus the applicant has a fundamental duty to prove that he will return to his country. The decision-maker, in this case, held that the evidence was insufficient. It is the applicant's duty to present sufficient evidence when filing his or her visa or permit application so as to substantiate that he or she satisfies the requirements of the IRPA. The decision-maker was not required to specify in what way the application was insufficient, as the applicant seems to suggest. In my view, this is not a question of whether the evidence is credible or that a particular piece of evidence is believed not to be genuine, but rather it is a question of the evidence being sufficient, since the decision taken was only based on the insufficiency of the evidence.

[9] In my opinion, it is worth establishing the state of law in these matters. Before this Court, the case law has consistently established that the applicant's duty to prove that he will return to his country implies that satisfactory evidence must be presented. As I stated in *Bar v. Canada (Citizenship and Immigration)*, 2013 FC 317, there is no legal duty to speak with an applicant to suggest additional elements of evidence.

[10] This is also the opinion expressed by Mr. Justice Fothergill in *Hakimi v. Canada (Citizenship and Immigration)*, 2015 FC 657:

> [19] The onus was on the Applicant to satisfy the Officer that he was not an immigrant and that he met the statutory requirements of the IRPA and the Regulations (*Obeng v Canada (Minister of*

> *Citizenship and Immigration)*, 2008 FC 754 at para 20 [*Obeng*]). As this Court observed in Hong:
>
> > [31] Applications for student visa are to be analyzed on a case-by-case basis and the role of the Visa Officer does not amount to supplementing the applicant's evidence, as counsel for Ms. Hong seems to suggest. It is trite law that the onus is on the applicant to provide the Visa Officer with all the relevant information and complete documentation in order to satisfy the Visa Officer that the application meets the statutory requirements of the Act and the Regulations (*Tran v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1377. More particularly, in this case, it was the applicant's responsibility to provide the Visa Officer with all of the evidence in order to satisfy the Visa Officer of her financial capacity.

The same opinion was held by Mr. Justice LeBlanc in *Katebi v Canada (Citizenship and Immigration)*, 2014 FC 813.

[11] In fact, these decisions are variations on a theme, which was explained directly and concisely in *Hassani v. Canada (Minister of Citizenship and Immigration)*, [2007] 3 FCR 501, 2016 FC 1283:

> > [24] Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John* and *Cornea*, cited by the Court in *Rukmangathan*, above.

[12] In my view, the visa officer did not contest the information's authenticity or accuracy. No one is contesting the fact that the language training exists or that the applicant has the financial resources to take the training for a period of nine (9) months. The Court was not convinced that the negative response was based on anything other than the fact that the evidence provided did not satisfy the fundamental duty to prove that the applicant would leave the country at the end of his authorized stay. Procedural fairness does not stretch to the point of requiring a visa officer "to provide an applicant with a 'running score' of the weaknesses in their application" (*Rukmangathan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, at paragraph 23).

[13] In this case, the applicant wanted to argue that the decision-maker had based his decision exclusively, or almost exclusively, on that which he called generalizations. He took particular issue with the phrase "[m]ost serious students have started taking English before going to Canada to improve on the basis they've acquired." As I understand the argument, the applicant claims that this comment should be barred and constitutes a breach of procedural fairness, and therefore deference to this decision is not appropriate.

[14] That being said, with all due respect, the applicant's error is in failing to consider the circumstances of his application and the context in which the phrase was written. The visa officer has a certain expertise that one acquires through processing visa applications. Common sense, combined with experience, cannot be discounted. If this remark had been the sole basis for denying a visa application, the Court would have had a certain sympathy for the applicant. However, this statement made by the decision-maker is just one of a series of points:

- The visa application was allegedly submitted on November 5 for courses that were to begin on November 9;
- The applicant had just started a lucrative job with a multinational;
- There was no indication that the applicant's employer had requested language training or that a leave had been granted. The decision-maker therefore deduced that the applicant, after barely three months of employment, would have to quit his job;
- Not only would there be the lost wages, but the visa officer determined that the total costs would be approximately $30,000;
- The applicant gave no indication of the benefit that he hoped would come from taking such training;
- The applicant's spouse and his child would not accompany the applicant, which would add to the sacrifice and the costs.

After making the list of insufficiencies, the visa officer stated that he was "not satisfied that he is [*sic*] a genuine purpose to visit Canada." Since the file is insufficient—whereas a complete file would have addressed the issues raised in a way that makes sense—the visa officer concluded that he was not convinced that the applicant would leave Canada at the end of his stay.

[15] As I pointed out at the hearing, the absence of a breach of procedural fairness does not make a decision reasonable within the meaning of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[16] If the applicant had also contested the reasonableness of the decision taken by the visa officer, the Court would have determined that the decision taken was reasonable, within the meaning of paragraph 47 of the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The deference owed to the decision-maker is sufficient to dispense with the issue. The applicant did not prove that the decision was unreasonable.

[17] It must be recalled that the applicant bears the burden of proving that the decision rendered does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Without being a model of articulation, the decision is transparent and the facts and inferences show cause for it.

[18] The applicant has a different perspective on the reasons. For example, the fact that the applicant and his family have the financial means to cover the costs of the course and the stay is presented as a justification for his coming to Canada to study—because he can afford it. The applicant is reading into the visa officer's decision the suggestion that he would not be able to reintegrate into Guatemalan society. Lastly, the applicant seeks to circumvent the decision by reaffirming that his wife has her own source of income.

[19] This raises two points. Firstly, *Dunsmuir* acknowledges that a reasonable decision is not that which is correct or that which the reviewing judge would have preferred. It is sufficient for the decision to be among the possible acceptable outcomes.

[20] It is incongruous that an applicant should, without explanation, wish to get out of his country, leaving his wife and child behind, to come and learn English in Montreal. The applicant is leaving not only his family behind him, but also a high-paying job, and is committing to considerable expenditures without any indication whatsoever as to what benefit he might gain from all of this. This insufficiency of evidence also demonstrates the reasonableness of the decision of the individual who must decide if a person will return to his country of origin after

his stay in Canada. The burden of proof upon the applicant is to show that the decision is not an acceptable possible outcome.

[21] This brings us to my second point. That which the applicant puts forth is nothing but a different interpretation. It does not render the decision unreasonable. Furthermore, the respondent in no way suggested that the applicant would not be able to reintegrate into Guatemalan society. What the applicant was trying to do was to invoke the case law of *Bonilla v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 20 [*Bonilla*]. The applicant is responding to a false question. The question regarding the family's financial circumstances is similar. The decision-maker's point was to note the high costs, the lost income and the absence, given that he had only held his job for a short time. The fact that the applicant's spouse has her own source of income has no bearing on the fact that deciding to come and take language training is a costly choice when the applicant gave no evidence as to his motivation. This is the source of the insufficiency in the decision-maker's opinion. The ability to pay is not an issue.

[22] The applicant bases his argument mainly on the decision in *Bonilla*. Yet, this case is not useful as it is based on very different reasons. That which was criticized in *Bonilla* was that the visa officer was essentially basing his decision on a rather crude generalization suggesting that after four years of secondary studies, it was unlikely that an applicant would return to his country of origin, given the long separation from his family and culture.

[23] In our case, the true issue arises not from a generalization but rather from the fact that concerns about the evidence provided were not conveyed to the applicant. In my opinion, it was the sufficiency of the evidence that was lacking. The comments made by Mr. Justice de Montigny when he was a judge in this Court have not been disavowed and remain valid.

> [16] It seems to me the visa officer went beyond what was expected. The officer was under no obligation to alert Mr. Liu of these concerns since they were about matters that arose directly from Mr. Liu's own evidence and from the requirements of the Act and of the Regulations. An applicant's failure to provide adequate, sufficient or credible proof with respect to his visa application does not trigger a duty to inform the applicant in order for him to submit further proof to address the finding of the officer with respect to the inadequacy, deficiency or lack of credibility. . .
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> *Liu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1025 (cited case law omitted)

[24] Consequently, the application for judicial review is dismissed. There are no questions to certify.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There are no questions to certify.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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