Federal Court  Cour fédérale

Date: 20170726

Docket: IMM-5278-16

Citation: 2017 FC 727

Ottawa, Ontario, July 26, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ABDULRAZZAG SALEH S ALOMARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of an officer at the Embassy of Canada in Riyadh [Officer], dated December 19, 2016 [Decision], which refused the Applicant's application for a temporary resident visa [TRV].

II. BACKGROUND

[2] The Applicant is a 30-year-old citizen of Saudi Arabia. He previously resided in Canada on a student visa that was valid until November 30, 2015; however, he overstayed his visa and did not leave until July 10, 2016.

[3] On December 10, 2016, the Applicant applied for a TRV for the purpose of accompanying his wife and three sisters during the remainder of their academic studies in Canada. According to the Applicant, his wife and sisters had received scholarships from the Saudi Arabian government to study abroad on the condition that they be accompanied by a male family member.

[4] In the application, the Applicant explained that his overstay was due to his failure to renew his study permit because he had not completed the required training for his educational program. However, since his wife and sisters were still studying in Canada at the time, he chose to remain in Canada so they would continue to be accompanied by a male family member and maintain their scholarships.

III. DECISION UNDER REVIEW

[5] The Officer refused the Applicant’s application for a TRV in a Decision sent to the Applicant dated December 19, 2016.

[6] In the Decision, the Officer stated that the Applicant had failed to satisfy him that he would leave Canada at the end of the authorized stay. The factors considered in the Decision included: length of proposed stay in Canada; purpose of visit; and history of contravening the conditions of admission on a previous stay in Canada. Accordingly, the application was refused.

[7] In the Global Case Management System [GCMS] notes, the Officer noted that the Applicant had previously overstayed in Canada in 2016 and that an explanation for the previous unauthorized stay was on file. The Officer also noted that the Applicant was unemployed and had not complied with the terms and conditions of his prior stay in Canada. Accordingly, the Officer was not satisfied that the Applicant would comply with the terms and conditions of future stays in Canada.

IV. ISSUES

[8] The Applicant submits that the following are at issue in this proceeding:

A. Did the Officer reach an unreasonable decision by ignoring or failing to take into consideration material evidence, and relying on insufficient and deficient reasoning?

B. Did the Officer breach the Applicant's right to procedural fairness by impugning his credibility without providing him with an opportunity to respond?

V. STANDARD OF REVIEW

[9] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[10] A visa officer's assessment of an application in the context of a decision regarding the issuance of a TRV is reviewable on a standard of reasonableness: *Rahman v Canada (Citizenship and Immigration)*, 2016 FC 793 at para 6.

[11] The second issue is a matter of procedural fairness as it concerns the failure to provide an opportunity to respond and is reviewable under the standard of correctness: *Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 43 [*Khosa*].

[12] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[13] The following provisions of the *IRPA* are relevant in this proceeding:

Application before entering Canada	**Visa et documents**
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.	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 d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	…
Obligation on entry	**Obligation à l'entrée au Canada**
20 (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	20 (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
…	…
(b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	b) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

[14] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] are relevant in this proceeding:

Issuance	**Délivrance**
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:
…	…
(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;

VII. ARGUMENTS

A. *Applicant*

(1) Reasonableness

[15] The Applicant submits that the Decision is unreasonable because the Officer ignored material evidence that demonstrated the Applicant was a genuine temporary resident who would abide by the terms and conditions of his visa.

[16] First, the Applicant argues that the analysis is insufficient in that it consists of only three sentences: the Applicant is unemployed; the Applicant failed to comply with the terms and conditions of a previous stay in Canada; and the Officer was not satisfied that the Applicant would comply with the terms and conditions of future stays in Canada. This Court has found that

in the context of TRVs, listing a series of factors and a conclusion is insufficient: *Groohi v Canada (Citizenship and Immigration)*, 2009 FC 837 at para 14.

[17] Second, the Applicant claims that the reasons fail to engage with the evidence. Although the Applicant's explanation letter was acknowledged as on file, the contents were not examined. Similarly, the letters from his wife and sisters were not mentioned nor examined in the Decision. The failure to consider relevant evidence is a reviewable error: *De Seram v Canada (Citizenship and Immigration)*, 2007 FC 1123 at paras 29-30. Moreover, the letters explained why it was important for the Applicant to obtain a TRV; that is, to ensure his wife and sisters could continue their education. Additionally, the letters contained commitments from his wife and sisters to ensure the Applicant would not overstay again.

[18] The Applicant submits that the refusal of his application on the sole basis that he had previously overstayed is unreasonable. Individuals who have contravened the *IRPA* are not barred indefinitely from returning to Canada. See, for example, s 221 of the *Regulations*. Accordingly, the Applicant submits that the Officer failed to examine the application completely and carefully.

(2) Procedural Fairness

[19] The Applicant also submits that the Decision lacks procedural fairness because it impugned his credibility without providing him with an opportunity to respond.

[20] The Applicant argues that the absence of reasoning and analysis in the Decision indicates the denial was influenced by concerns regarding his credibility and the truthfulness of his personal statements. Additionally, the Decision notes that the purpose of the visit was a factor that was considered in the refusal of the application, which indicates the Applicant's credibility and intentions were in question. This Court has held that officers must provide an opportunity to respond when the credibility of an applicant or the documentation is impugned: *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 at para 24.

[21] As a result, the Applicant claims that he should have been afforded the opportunity to address the Officer's concerns about the circumstances of his previous overstay in Canada and whether he would contravene the conditions of a future stay.

B. *Respondent*

(1) Reasonableness

[22] The Respondent submits that the Decision is reasonable.

[23] The legislative framework requires applicants seeking to become temporary residents to establish that they will leave at the end of the authorized stay: s 20(1)(b) of the *IRPA*; s 179(b) of the *Regulations*. The evidence before the Officer demonstrated that, following a change in circumstances, the Applicant had chosen to overstay so that his wife and sister could continue their studies; this was the same purpose proposed for the new TRV. Additionally, the evidence showed that the Applicant had no established job or children in Saudi Arabia, which could not be

considered as positive factors in his favour. Despite the Applicant's assurances, it was reasonable for the Officer to find that the Applicant had failed to meet the onus of establishing that he would not overstay again.

[24] Contrary to the Applicant's submissions, the Officer did not need to refer to the individual letters submitted by the Applicant's wife and sisters because they did not address the Applicant's previous decision to overstay. Additionally, the Officer is presumed to have weighed and considered all the evidence unless demonstrated otherwise; in other words, the Officer was not required to refer to every piece of evidence contrary to his or her finding: *Wang v Canada (Citizenship and Immigration)*, 2010 FC 201 at para 19.

(2) Procedural Fairness

[25] The Respondent submits that the Decision is procedurally fair.

[26] Procedural fairness is relaxed for TRV applications because: the decision is highly administrative and does not resemble judicial decision-making; the decision is of low importance since applicants do not have the right to enter Canada and are free to apply again; and the Court must guard against imposing a level of procedural fairness that would encumber efficient administration: *Bahr v Canada (Citizenship and Immigration)*, 2012 FC 527 at paras 32-33.

[27] Contrary to the Applicant's submissions, the Officer did not make a credibility finding. Where an officer's concerns arise directly from the legislative requirements, there is no duty to raise such concerns with an applicant: *Singh v Canada (Citizenship and Immigration)*, 2012 FC

526 at paras 52-55. In this case, the Officer's concerns arose from s 179(b) of the *Regulations*. The onus was on the Applicant to provide a complete, relevant, convincing, and unambiguous application and the Applicant failed to establish that he would leave Canada at the end of the authorized stay. In these circumstances, the Officer was not obligated to put his or her concerns to the Applicant.

VIII. ANALYSIS

[28] At the hearing of this application in Vancouver, the Applicant, for the most part, appropriately relied upon written submissions. The gravamen of the Applicant's case is summarized in his Memorandum of Fact and Law as follows:

> 20. The officer's reasons are terse, cursory and devoid of any thoughtful analysis. The totality of the officer's reasoning and conclusion are made in three short sentences. The officer simply observed that Mr. AlOmari "is unemployed" and "failed to comply with terms and conditions of previous stay in Canada", and concluded in the next sentence that he is "not satisfied [Mr. AlOmari] will comply with terms and conditions of future stays in Canada."
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> Applicant's Record, Decision and Reasons at p 11
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> 21. As Justice Zinn observed in *Groohi*, a case involving the denial of visitor visa applications, "it is trite law that simply listing a series of factors, and stating a conclusion, is generally insufficient to meet the test of reasonableness, the reason being that it is impossible for a reviewing Court to appreciate and assess the train of thought or logical process engaged in by the decision-maker."
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> *Groohi v Canada (Citizenship and Immigration)*, 2009 FC 837
> *Jalota v Canada (Citizenship and Immigration)*, 2013 FC 1176
> *Singh v Canada (Citizenship and Immigration)*, 2010 FC 111
>
> 22. While Justice Zinn accepted the "proposition that the visa officer's decision as to whether an applicant has satisfied him or

her that the applicant will not overstay the visit to Canada is not one requiring a detailed and lengthy analysis", the Court cautioned:

> However, where the officer concludes, as here, that the applicant has failed to satisfy the officer of that essential fact, the applicant is entitled to know the facts which the officer considered, the weight accorded those facts, and the reasoning of the officer as to why the applicant failed to meet the burden.
>
> *Groohi v Canada (Citizenship and Immigration)*, 2009 FC 837

23. While the officer acknowledges that Mr. AlOmari's "explanation letter [is] on file", he does not examine any of its contents. Similarly, the officer's reasons do not make any reference to the four letters from Mr. AlOmari's wife and sisters. The officer appears to have treated these letters with indifference by either ignoring them altogether, or failing to take them into consideration.

Applicant's Record, Decision and Reasons at p 11

[29] I don't see anything in the letters of the Applicant's wife and sisters that is material to the issue of whether the Applicant would be likely to leave Canada at the end of the visa period that requires particular mention. The Applicant's case for a TRV is contained in the letter of explanation that he submitted to the Officer, in which he explained the reasons for his past overstay.

[30] The Officer's reasons are certainly terse, but I do not think they are "devoid of any thoughtful analysis." The Applicant, who overstayed in the past when it was convenient to do so has not established to the Officer's satisfaction that he would not overstay again should his personal or family needs require him to do so.

[31] In his letter of December 10, 2016, the Applicant provided the Officer with a fulsome explanation for his previous conduct:

> In November 2015, I made the mistake of not renewing my study permit because I was not able to complete my flight training during the unstable weather conditions of the fall and winter seasons. This bad decision and judgment call is what led me to overstaying.
>
> I could not leave until July 11, 2016 because I was required to remain with my wife and sisters who were actively studying. As outlined in the translated Saudi government scholarship rules, female students are required to travel and live with a male relative, such as a father, husband or brother. Leaving my wife and sisters would have led to them losing their scholarships, and ability to study.
>
> I should have sought the assistance of a lawyer to discuss how I could extend my stay in Vancouver, even though I could not complete my flight training during the fall and winter seasons. My current lawyer informed me that I could have extended my stay in Canada as a visitor until I was ready to get back to my studies. I wish I knew that because it would have saved me and my family a lot of time, stress and grief over the past four months.
>
> My wife and sisters were expecting to return to their studies in September 2016. However, the denial of my study permit and visa application has put their plans and dreams of completing their education in Canada at risk. They were unable to contact their schools in Vancouver, and postpone their classes until January 2017.
>
> As you may know, I have been living and studying in Canada since April 2008, and this was the first time I failed to renew my status. This experience has taught me an unforgettable lesson, because my mistake has impacted the ability of my determined, ambitious, and hardworking wife and sisters to complete their English studies and to obtain undergraduate degrees from Canada.
>
> I know clearly understand the rules for visitors in Canada, and the consequences of not following the rules. I understand that I must renew my status before it expires, and that overstaying could lead to the denial of future applications and it could lead to me being deported from Canada and to the denial of future applications and it could lead to me being deported from Canada and denied entry for a year. I have no intention of overstaying ever again, and I

> commit to returning to Saudi Arabia with my family at the end of our stay in Canada.
>
> I also understand that I cannot study or work in Canada without the proper authorization and permits. I will not return to my flight training until I apply for and receive a study permit to do so. My plan is to take care of my children while my wife is studying, and to apply for a study permit around spring time. I am applying for a visitor visa at the moment because it takes less time to process than a study permit, and my wife and sisters are anxious to return to their studies in January 2017.
>
> I apologize sincerely for my mistake, and I hope that you forgive me. My wife, sisters and I are praying to return to Vancouver together at the end of this month. We look forward to hearing from you as soon as possible, and I am available to answer any questions you might have.

[32] This is not a sworn statement and there is no personal affidavit of the Applicant filed with this judicial review application. Nevertheless, the Officer does not question the Applicant's sincerity. The Officer's logic is that the Applicant may well promise not to make the same mistake again, but the same factors that caused him to overstay in the past could also arise in the future. The Applicant has demonstrated that he is someone who might overstay if this is necessary to protect the interests of his wife and/or sisters. At least this is how I read the Decision.

[33] What this reasoning leaves out of account is that the Applicant makes it clear in his letter of explanation that he now knows that, in the future, he would not have to breach the conditions of a TRV because he is now aware, as he was not in the past, that there are legal ways of dealing with the kinds of problems that caused him to overstay in the past.

[34] The Respondent strongly asserts in this Application that there are no credibility issues that arise in the Decision and that it is merely an issue of whether the Applicant satisfied the evidentiary burden upon him to establish that he would be likely to leave Canada at the end of his authorized stay. The Officer's reasoning is that the Applicant could well succumb to the same pressures that caused him to overstay in the past. This fails to address the principal argument in the Applicant's submissions to the Officer that this is not likely to happen because he now knows there is a legal way to deal with problems that might arise if his visa has to be renewed in order for him to accommodate his wife and sisters. The Officer's reasoning that the Applicant has overstayed once so that he is likely to do it again in the future overlooks the crucial difference between the past and the future. So the Decision is not intelligible for this reason and/or it omits to take account of a crucial, material fact that renders the Decision unreasonable.

[35] So, I am willing to accept that the Decision is unreasonable for this reason. However, on the evidence before me, there would seem to be no point in returning this matter for reconsideration. The visa application makes it very clear that the TRV was required for January 2017 because this is when it was needed so that he could accompany his wife and sisters. It is now July 2017.

[36] The Applicant has provided no personal affidavit to explain where his wife and sisters now stand with regard to their enrollment and whether there is any purpose in returning this matter for reconsideration. If a visa is required to accommodate his sisters for a new period of time then, clearly, this would be a different visa application that an officer would need to consider on its merits. The Applicant is free to make that application at any time. In my view,

then, on the evidence before me, there is no practical purpose in returning this matter for reconsideration.

[37] Unlike the situation dealt with by Justice Mosley in *Grapendaal v Canada (Citizenship and Immigration)*, 2010 FC 1221, the Applicant has failed to demonstrate to the Court through a personal affidavit that a TRV is still needed. Indeed, the Applicant has not responded to requests from his counsel for instructions regarding the review hearing and counsel sought to withdraw for this reason (which I did not permit). But the fact is that there is no evidence before me to suggest that the Applicant has any real interest in this application or in having the Court return the matter for reconsideration. And he is free to apply for a TRV to meet whatever his present personal and family needs require.

[38] As regards procedural fairness, the situation in the present case is the usual one of the Applicant not providing sufficient evidence to convince the Officer that he will leave Canada at the end of the authorized stay. The fact that the Applicant may succumb in the future to the pressures that caused him to overstay in the past does not mean that the Officer questions the Applicant's present sincerity. The Respondent confirms that there are no credibility issues with the TRV application, and this is why the Decision is unreasonable; it fails to acknowledge and consider that the factors that gave rise to the overstay in the past (the Applicant's ignorance of the law and his not knowing that there was a legal solution to the problems he and his family faced) no longer exist. There was no procedural unfairness here; the Officer simply failed to consider a highly material fact.

[39] My conclusions are that this Decision is unreasonable but the Applicant has not explained or demonstrated that there is any practical purpose that can be served by returning this matter for reconsideration.

[40] Counsel concur that there is no question for certification and the Court agrees.

JUDGMENT IN IMM-5278-16

THIS COURT'S JUDGMENT is that:

1. The Application is allowed and the Decision is quashed. However, for reasons given, this matter need not be returned for reconsideration.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5278-16
STYLE OF CAUSE:	ABDULRAZZAG SALEH S ALOMARI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 29, 2017
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JULY 26, 2017

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