Federal Court  Cour fédérale

Date: 20180608

Docket: IMM-4252-17

Citation: 2018 FC 597

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 8, 2018

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

SOPHIE KAVUGHO-MISSION

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Sophie Mission Kavugho, is a citizen of the Democratic Republic of Congo. From 2010 to 2016, she studied chemical engineering in South Korea, where she earned a Master's degree and worked as a researcher. After being accepted to pursue doctoral studies in chemical engineering at the *Université de Sherbrooke* in Quebec, Ms. Kavugho filed an

application for a study permit with the Canadian authorities. She was initially refused in January 2017, but filed a second application in February. In August 2017, more than six months after filing her application and well after the start of her courses scheduled for May 2017 at the *Université de Sherbrooke*, a visa officer [Officer] at the Canadian Embassy in Manila, Philippines rejected her application for a study permit [Decision]. The Officer was not satisfied that Ms. Kavugho would leave Canada and return to her country of residence upon completion of her studies. In addition, according to the Officer, Ms. Kavugho did not meet the other requirements of sections 216 et seq. of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] having regard to her financial position, employment prospects and immigration status in her country of residence.

[2] Ms. Kavugho claims that the Decision is unreasonable because it is based on factual considerations that are not supported in the evidence. She is asking the Court to allow her application for judicial review, to overturn the Officer's Decision and to refer the matter to another visa officer for reconsideration of her study permit application.

[3] Ms. Kavugho's application raises only one question: is the Decision to reject her study permit application unreasonable?

[4] For the following reasons, Ms. Kavugho's application for judicial review will be granted. Based on the record submitted to the Officer, I find that the Decision is unreasonable because the evidence does not support the Officer's key factual findings. The Officer instead ignored the aspects that contradicted his assessment and, under the circumstances, that is sufficient to cause

the Decision to fall outside the realm of possible and acceptable outcomes in respect of the facts and law.

II. Background

A. *The Decision*

[5] The Officer's Decision is brief. It takes the form of a form letter from Citizenship and Immigration Canada that reads, "prior to a decision being made regarding an application, a number of factors […] are taken into account". Those factors include, but are not limited to: 1) whether the individual in question has been accepted at a Canadian educational institution; 2) the individual is capable of paying for the trip and the tuition fees, and supporting him/herself during his/her stay in Canada; and 3) whether the individual in question will indeed leave Canada at the end of his/her authorized period of stay. In the appendix to the Decision are four pages where the Officer identifies the considerations that led to his refusal by checking the relevant boxes in a predefined form. In Ms. Kavugho's case, the Officer indicates that he is not satisfied that Ms. Kavugho will leave Canada at the end of her stay, for four main reasons: 1) Ms. Kavugho's immigrant status in her country of residence; 2) the employment prospects in her country of residence; 3) her current employment situation; and 4) her personal property and financial position. The Officer checked no other reasons in the Decision.

[6] In the Global Case Management System (GCMS), notes by the Officer dated August 8, 2017 (which are part of the Decision) provide further clarification on the reasons for his refusal. The Officer mentions in them that Ms. Kavugho will receive a salary of $17,000 as a PhD

student, that she has modest personal savings, that she will receive financial support from a third party and that she provided evidence regarding her parents' assets in the Congo. The Officer points out, however, that Ms. Kavugho will have to pay $46,000 in tuition fees for her doctoral program. The Officer then found, after weighing all the information and documents on the record, that Ms. Kavugho has limited funds available for pursuing her studies in Canada, that she did not demonstrate sufficient ties with her country of residence or her country of origin to want to return there, and that, ultimately, he is not satisfied that Ms. Kavugho will leave Canada after completing her studies.

B. ***Relevant provisions***

[7] The relevant provisions from the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA) are subsections 11(1) and 22(2), which state that an individual wishing to become a temporary resident of Canada must satisfy a visa officer that he/she "meets the requirements of this Act" and prove that he/she "will leave Canada by the end of the period authorized for their stay". Paragraph 216(1)(b) of the Regulations also requires an individual applying for a study permit to establish that he/she "will leave Canada by the end of the period authorized for their stay". Therefore, it is well accepted that an applicant for a study permit must satisfy the visa officer that he/she will not remain in Canada after his/her visa expires (*Solopova v. Canada (Citizenship and Immigration)*, 2016 FC 690 [*Solopova*] at para. 10; *Zuo v. Canada (Citizenship and Immigration)*, 2007 FC 88 at para. 12).

C. *Standard of review*

[8] There is no doubt that the standard of review for an evidence-based review of a study permit application and a visa officer's conclusion about whether an applicant will leave Canada at the end of his/her stay is reasonableness (*Penez v. Canada (Citizenship and Immigration)*, 2017 FC 1001 [*Penez*] at para. 12; *Solopova* at paras. 12-13). In fact, this is an "administrative decision made in the exercise of a discretionary power" by the visa officer (*My Hong v. Canada (Citizenship and Immigration)*, 2011 FC 463 at para. 10). And, as a discretionary decision based on factual findings, it is entitled to considerable deference by the Court, given the visa officer's particular expertise in this area (*Kwasi Obeng v. Canada (Citizenship and Immigration)*, 2008 FC 754 [*Obeng*] at para. 21).

[9] When the standard of review is reasonableness, the Court must show deference and refrain from substituting its own opinion for that of the decision-maker, provided that the decision is justified, transparent and intelligible, and 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 [*Dunsmuir*] at para. 47). The reasons for a decision are considered reasonable "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para. 16). As long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility and the decision is based on acceptable evidence defensible in respect of the facts and law, the Court must refrain from

substituting the decision made with its own view of a preferable outcome (*Newfoundland Nurses* at para. 17).

III. Analysis

[10] The Minister argues that the Decision not to grant Ms. Kavugho a temporary resident visa is reasonable and within the range of possible and acceptable outcomes defensible in respect of the facts and law. The Minister submits that the issues involved are essentially factual, are within the Officer's discretion and, therefore, call for a high degree of restraint (*Song v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 288 at paras. 5-7). The Minister reiterates that a visa applicant has the burden of satisfying the visa officer that he/she is not an immigrant and that he/she meets the requirements of the IRPA and the Regulations (*De La Cruz Garcia v Canada (Citizenship and Immigration)*, 2016 FC 784 [*La Cruz Garcia*] at paras. 9-10). Thus, the Minister states that, in this case, the Officer could reasonably conclude that Ms. Kavugho did not demonstrate that she had the financial resources needed for supporting herself during her studies. Regarding the requirement to leave Canada at the end of the authorized stay, the Minister adds that there is a statutory presumption that the foreign national who is seeking to enter Canada is presumed to be an immigrant, and that the onus is on the latter to satisfy the visa officer to the contrary (*Obeng* at para. 20). In addition, the Minister points out that, since it was up to the Officer to gauge the weight of the evidence before him and determine whether he was satisfied that Ms. Kavugho will leave Canada at the end of her stay, the Officer could legitimately use common sense and reason in the exercise of his discretionary power (*Obeng* at para. 36).

[11] I disagree with the Minister, and I do not share his reading of the evidence on the record.

[12] Even below the deferential standard of reasonableness, the fact remains that the reasons for a decision must allow the Court to understand why it was made and to determine whether the conclusion is within the range of possible and acceptable outcomes (*Newfoundland Nurses* at para.16). When viewed as a whole, the reasons must therefore be adequately supported and clear to allow the Court to find that they provide the justification, transparency and intelligibility required of a reasonable decision (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 53; *Construction Labour Relations v. Driver Iron Inc*, 2012 SCC 65 at para.3; *Dunsmuir* at para. 47).

[13] I accept and acknowledge that the Court's role is not to reconsider the evidence and substitute its own findings for those of the Officer (*Solopova* at para. 33; *Babu v. Canada (Citizenship and Immigration)*, 2013 FC 690 at paras. 20, 21). I also do not dispute that visa officers have broad discretionary power in the decisions they make under the IRPA and the Regulations, and that their decisions are entitled to considerable deference by the Court. However, in the context of a review for determining the reasonableness of a decision, the Court's role is limited to "finding irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction, such as a complete failure to engage in the fact-finding process, a failure to follow a clear statutory requirement when finding facts, the presence of illogic or irrationality in the fact-finding process, or the making of factual findings without any acceptable basis whatsoever" (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113 at para. 99; *Dandachi v. Canada (Citizenship and Immigration)*, 2016 FC 952 [*Dandachi*] at para. 23).

[14] I also agree that a decision-maker does not have to report every little detail in support of his/her conclusion. It is sufficient that the reasons allow the Court to understand why the Decision was made and to determine whether the conclusion is within the range of possible and acceptable outcomes (*Newfoundland Nurses* at para. 16). Even so, applying the reasonableness standard still requires the findings of fact and the overall conclusion of a decision-maker to withstand a somewhat probing examination (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 63). Where parts of the evidence are not considered or are misapprehended by the decision-maker or where the findings do not follow from the evidence, a decision will not withstand a probing examination (*Penez* at para. 18; *Dandachi* at para. 23). Admittedly, this type of situation is usually rare and exceptional in the context of judicial review, but the Officer's Decision in Ms. Kavugho's case unfortunately falls into this category. I come to this conclusion for two main reasons.

[15] First, the Officer states that he was not satisfied that Ms. Kavugho had the financial resources to complete her studies. However, even allowing the Officer all the necessary latitude, the evidence does not support such a conclusion. In support of her study permit application, Ms. Kavugho had, among other things, appended the following documents: 1) a Quebec Acceptance Certificate for studying; 2) a letter of acceptance to the PhD program in chemical engineering at the *Université de Sherbrooke*; 3) a letter from the PhD supervisor indicating that Ms. Kavugho will receive a salary of $17,000 per year during her studies; 4) a letter attesting to a scholarship to cover the lump sum amount of the tuition fees raised to $17,973 per year; 5) a bank account statement indicating a balance of $5,378 in Ms. Kavugho's name; 6) an official statement of financial support (form from the Minister of Immigration and Cultural Communities of Quebec)

from the *Groupement des artisans de Butembo* (GAB) about Ms. Kavugho; and 7) a cover letter explaining that the GAB has already taken responsibility for Ms. Kavugho's studies from 2010 to 2016.

[16] In another explanatory letter written by Ms. Kavugho about the funding for her studies, she explained that the cost of her courses comes to $7,510 per term and that her income sources would leave her with a surplus of over $1,000 per month to support herself. Also, the notes in the GCMS summarizing Ms. Kavugho's financial position show a total of $46,000 in tuition fees for her entire program of study and $87,000 in available funds.

[17] Under these circumstances, I must find that the evidence does not support the Officer's conclusion that Ms. Kavugho had limited funds for undertaking her PhD studies in chemical engineering. In his reasons, the Officer notes that she will receive an annual salary of $17,000 while studying, that she has modest personal savings, that she has a third-party financial guarantor and that she provided proof of her parents' funds, but that her studies will cost $46,000. However, the evidence clearly shows that, although Ms. Kavugho's total tuition fees will be $46,000 over three years, her total revenues will exceed $86,000 during her period of study. Nowhere does the Officer mention this evidence or indicate why he could not retain it.

[18] Naturally, I accept that the reasons for an administrative tribunal's decision do not have to be exhaustive, and that they simply have to be understandable. However, for a decision to be within the range of reasonable, it still must have the attributes of intelligibility and transparency, and the reasons must allow the reviewing court "to understand why the tribunal made its decision

and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses* at para. 16). I must point out that this is not the case here regarding Ms. Kavugho's financial resources.

[19] The *La Cruz Garcia* decision referred to by the Minister in his submissions is of little help to him since the facts in it differ from Ms. Kavugho's situation. Needless to say, the relevance of a precedent diminishes as the similarity of the factual framework involved decreases; this is precisely the case here with the *La Cruz Garcia* decision. In that case, the applicant was a well-paid analyst, was seeking a study permit to come to Canada to learn English, and had to leave both his job and his family to come and study in Canada. In addition, there was clear evidence of a shortfall in the applicant's financial resources. Thus, it was on the basis of a long list of inadequacies that the visa officer doubted the applicant's intention to leave Canada upon completion of the studies contemplated. In Ms. Kavugho's case, the Officer did not have that type of evidence for, on a number of levels, supporting his conclusion regarding insufficient financial resources.

[20] Second, there were simply no facts submitted to the Officer suggesting that Ms. Kavugho would remain in Canada illegally at the end of her authorized period of study. Instead, the evidence pointed in the opposite direction and actually showed the opposite. In July 2017, Ms. Kavugho had submitted a letter of intent in which she substantiates her motivation to pursue PhD studies in Canada. In that letter, however, she specifically wrote that she wants to contribute to her country of origin using the chemical engineering expertise that she will develop during her studies, that she wants to study and gain experience in Canada in order to be more effective in

her country when she returns there, and that the people of her country rely on people like her who have the opportunity to attend academic institutions in developed countries. Everything in that letter reflects Ms. Kavugho's desire and intention to leave Canada once she completes her studies.

[21] In addition, the statement of financial support required by the Government of Quebec sets out a commitment to cover all costs pertaining to the study period, including accommodation, food and clothing, tuition fees, as well as transportation costs to the country of origin or another destination at the end of the stay in Quebec. Also, the GAB's letter of February 2017 specifically stipulates that Ms. Kavugho [TRANSLATION] "will have to return promptly to the DRC to continue, at the GAB, developing the agri-food industry". Thus, not only did Ms. Kavugho explicitly state in her explanatory letters that she would be leaving at the end of her studies, but the GAB's document and the Quebec Government's form authorizing her studies also contained statements to that effect.

[22] In the absence of evidence suggesting or implying a risk of not leaving Canada or a lack of attachment to her country of residence or country of origin, and faced with evidence indicating exactly the opposite, justification for the Officer's conclusion was required. Yet, there is none.

[23] It is well known that a decision-maker does not have to explicitly spell out each of the details and facets of an issue when making his/her decision. A decision-maker is presumed to have weighed and considered all the evidence presented to him/her unless it is determined otherwise (*Newfoundland Nurses* at para. 16; *Florea v. Canada (Minister of Employment and*

Immigration) [1993] FCJ No. 598 (FCA) (QL) at para. 1). However, it is also recognized that conflicting evidence should not be overlooked. This is especially true when it comes to key elements that the decision-maker relies on for reaching his/her conclusions. Although the reasons must not be scrutinized by the Court, a decision-maker cannot act "without regard to the evidence" (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ no. 1425 (QL) [*Cepeda-Gutierrez*] at paras. 16-17). Thus, a blanket statement that a decision-maker has considered all the evidence will not suffice when the evidence omitted from the discussion in his/her reasons appears to squarely contradict his/her finding (Cepeda-Gutierrez at para. 17). When a tribunal overlooks evidence that clearly contradicts its findings, the Court can intervene and infer that the tribunal did not examine the contradictory evidence when arriving at its factual finding. That is the case here.

[24] In view of the statements specifying that Ms. Kavugho would leave at the end of her stay, and the lack of evidence to the contrary, the Officer could not reasonably conclude that Ms. Kavugho was not going to leave Canada at the end of her studies without mentioning and discussing the conflicting evidence on the record. He was required to provide an analysis explaining why he preferred to put his own conclusions before the evidence before him. He did not do so, and that is sufficient to justify the Court's intervention. Even though a visa officer can rely on common sense and reason in the exercise of his/her discretionary power, that does not in any way allow him/her to remain blind to the uncontradicted evidence submitted.

[25] The case law also recognizes that a conclusion for which there is no evidence before the decision-maker can be set aside by a reviewing court because that conclusion would therefore

have been reached without regard to the material brought before the tribunal (*Canadian Union of Postal Workers v. Healy*, 2003 FCA 380 at para. 25). Factual findings for which the tribunal has no evidence are among the grounds set out at paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c. F-7 to justify the Court's intervention in an application for judicial review (*Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319 at paras. 34-40).

[26] As broad as the range of possible and reasonable outcomes or the Officer's latitude may be, I find that the Officer's findings of fact regarding Ms. Kavugho's study permit are not among them. The Officer's reasons are incomprehensible because there is no evidence on the record to support them and they appear to be completely arbitrary in light of the evidence submitted. In the words of the Federal Court of Appeal in *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 27, the Officer's Decision here involves a number of "badges of unreasonableness".

IV. Conclusion

[27] The Officer's refusal to grant a study permit to Ms. Kavugho is not a reasonable outcome in respect of the applicable law and the evidence on the record. Under the reasonableness standard, the Court must intervene if the decision under judicial review falls outside the range of possible and acceptable outcomes in respect of the facts and law. That is the case here. Therefore, I must allow Ms. Kavugho's application for judicial review and remit her study permit application for reconsideration by another visa officer.

[28] Neither party proposed questions of general importance to be certified. I agree that there are none.

JUDGMENT in IMM-4252-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, without costs.

2. The August 10, 2017 decision of the visa Officer rejecting Ms. Sophie Mission Kavugho's study permit application is set aside.

3. The matter shall be returned to Citizenship and Immigration Canada for reconsideration by different visa officer.

4. No question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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