Federal Court  Cour fédérale

Date: 20201123

Docket: IMM-4417-19

Citation: 2020 FC 1084

Ottawa, Ontario, November 23, 2020

PRESENT: Madam Justice Pallotta

BETWEEN:

VIKELA KITA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Kita, is a citizen of Albania who applied for a temporary study permit to attend Seneca College in Ontario. At the same time, her husband, Mr. Rrezhda, applied for a temporary work permit. A visa officer of the Canadian embassy in Rome, Italy (Officer) refused Ms. Kita's application on the basis that the Officer was not satisfied Ms. Kita would leave Canada at the end of her stay. Mr. Rrezhda's work permit application, which was treated as part

of Ms. Kita's application, was also refused as a result. Ms. Kita seeks an order setting aside the Officer's decision and remitting the matter to a different officer for reconsideration.

[2] Ms. Kita submits that the Officer's decision was unreasonable. She submits that the Officer fettered their discretion by basing the decision on irrelevant considerations, and that the Officer's sparse reasons were neither intelligible nor transparent and failed to justify the decision. Ms. Kita also submits that the Officer breached procedural fairness by failing to provide an opportunity to respond to extrinsic evidence that supported the decision.

[3] I am not satisfied that the Officer's decision was unreasonable or that the Officer breached procedural fairness. I must therefore dismiss Ms. Kita's application for judicial review.

II. **Issues and Standard of Review**

[4] The issues on this application for judicial review are:

1. Was the Officer's decision to refuse the study permit and work permit applications unreasonable?

2. Did the Officer breach procedural fairness?

[5] The parties agree that the reasonableness standard of review applies to the merits of the Officer's decision to refuse the applications. The reasonableness standard requires a deferential but robust form of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 12-13, 75 and 85. A reviewing court must determine whether the

decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[6] The parties disagree on the appropriate standard of review for procedural fairness. Ms. Kita submits that *Vavilov* did not change the standard of review for issues of procedural fairness, which remain reviewable on a standard of correctness. The respondent, on the other hand, submits that the reasonableness standard applies, and that temporary visa determinations demand an extremely low level of procedural fairness. Ms. Kita counters that, while the requirements of procedural fairness vary depending on the circumstances of the decision, there is no concept of an "extremely low" standard of review for questions of procedural fairness. The central question is whether the procedure was fair.

[7] I agree with Ms. Kita that the presumptive standard of reasonableness does not apply to questions of procedural fairness: *Vavilov* at paras 23 and 77. A number of recent decisions from this Court have described the standard for such questions as one that reflects a correctness review: *Mannings v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 823 at para 43; *Pardo Quitian v Canada (Citizenship and Immigration)*, 2020 FC 846 at para 18; *Vyshnevskyy v Canada (Citizenship and Immigration)*, 2020 FC 881 at para 18.

[8] While the requirements of procedural fairness are flexible and context-specific (*Vavilov* at para 77), once they are defined, a reviewing court must determine whether the underlying decision was consistent with the requirements. At that point, a standard of review that is akin to correctness applies: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

[9] The procedural fairness question on this application for review is whether, having regard to all the circumstances, the Officer was required to send a fairness letter giving Ms. Kita an opportunity to respond to concerns about the applications before deciding to refuse them: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at 837–841.

III. **Analysis**

A. ***Issue 1: Was the Officer's decision to refuse the study permit and work permit applications unreasonable?***

[10] Section 216 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] states that an officer shall issue a study permit to a foreign national if, following an examination, it is established that certain criteria are met, including that the foreign national will leave Canada by the end of the period authorized for their stay: *IRPR*, subsection 216(1)(b). An applicant seeking a student visa bears the burden of providing the officer with all relevant information to satisfy the officer that he or she meets the statutory requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and the *IRPR*: *Akomolafe v Canada (Citizenship and Immigration)*, 2016 FC 472 [*Akomolafe*] at para 16.

[11] The Officer refused Ms. Kita's application on the basis that the Officer was not satisfied Ms. Kita would leave Canada at the end of her stay. The refusal letter states:

> - I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 216(1) of the IRPR, based on the purpose of your visit.
>
> - I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 216(1) of the IRPR, based on the limited employment prospects in your country of residence.
>
> - I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 216(1) of the IRPR, based on your personal assets and financial status.

[12] The Officer also recorded the following notes in the Global Case Management System (GCMS):

> [Ms. Kita] and spouse applying for study permit and open work permit respectfully provided bank letters showing savings of over l5,000US funds. Provenance of funds is unknown. Spouse was refused a US visa and did not declare it. [Ms. Kita] is currently unemployed.
>
> After careful review of available information, I am of the opinion that the applicant's [*sic*] incentives to remain in Canada may outweigh their ties to their home country and/or [country of residence]. Weighing the factors in this application. I am not satisfied that the applicants will depart Canada at the end of the period authorized for their stay.
>
> Refused.

[13] Ms. Kita argues that the Officer's decision to refuse her study permit application was supported by four factors: the unknown provenance of the savings in her bank account, the amount of the savings, Mr. Rrezhda's refused U.S. visa that was not declared, and Ms. Kita's unemployment. As a first sub-issue regarding the reasonableness of the Officer's decision, Ms. Kita submits that the Officer fettered or improperly exercised their discretion by considering

inaccurate factors, by considering irrelevant factors with no legal bearing on her eligibility for a study permit, and by making irrelevant, adverse inferences. As a second sub-issue regarding the reasonableness of the Officer's decision, Ms. Kita submits that the Officer's decision was not justified, transparent and intelligible, and that the reasons were not sufficiently clear or coherent to allow her to understand the Officer's negative decision.

[14] The two sub-issues presented by Ms. Kita overlap significantly, and the written and oral arguments were not necessarily divided in this way. In essence, Ms. Kita points to a number of specific errors regarding the factors that the Officer considered in exercising discretion, which she claims contributed to the unreasonableness of the Officer's decision. I will address each of the specific errors alleged, before addressing the overriding issue of whether Ms. Kita has established the Officer's decision is unreasonable. In doing so, I am mindful of the principle that reasonableness review is not a line-by-line treasure hunt for error: *Vavilov* at para 102.

(1) Did the Officer fetter or improperly exercise their discretion?

[15] Under section 216 of the *IRPR*, an officer considering a study permit application must be satisfied the foreign national is likely to leave Canada at the end of their stay. This involves an exercise of discretion; however, the discretion is not unconstrained. The parties agree that an officer's discretion must not have been exercised in bad faith, in a capricious manner, or in a manner inconsistent with statutory obligations. It would be unreasonable for an officer to base a decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before them: s. 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7. The parties also agree that an officer should not rely on considerations that are irrelevant or

extraneous to the statutory purpose. An officer has wide discretion in assessing the evidence and coming to a decision, but the decision must be based on reasonable findings of fact: *Akomolafe* at para 12.

[16] As noted above, Ms. Kita argues that the Officer in this case fettered or failed to properly exercise their discretion by relying on inaccurate factors, irrelevant factors, and irrelevant, adverse inferences.

[17] Ms. Kita submits that the Officer relied on an inaccurate factor by underestimating her available funds, which were not $15,000 USD as noted in the GCMS, but exceeded $30,000 USD. The respondent submits there was no error, and argues it is clear from the Officer's notation "[Ms. Kita] and spouse applying for study permit and open work permit respectfully provided bank letters showing savings of over 15,000 US funds" that the Officer simply meant to write "respectively" rather than "respectfully". To this point Ms. Kita responds that the reference to $15,000 USD is certainly the wrong figure, and a reviewing court should not guess what the Officer meant. I am not persuaded by Ms. Kita's arguments. The Officer's notes above clearly refer to bank letters. The record includes two bank letters from Ms. Kita and her husband, each reflecting savings of about $15,000 USD. Furthermore, a field in the GCMS record titled "Available Funds" indicates $40,000 CAD, which is roughly equivalent to $30,000 USD and consistent with both Ms. Kita's application form, which indicates available funds of $40,000 CAD, and the covering letter to Ms. Kita's application, which indicates available funds of $42,000 CAD. I am not satisfied that Officer underestimated Ms. Kita's available savings.

[18] Ms. Kita submits that the unknown provenance of her available funds was an irrelevant factor, as the *IRPR* does not require applicants to prove the provenance or origin of their funds. Section 220 of the *IRPR* only requires proof of sufficient funds for the program of study and Ms. Kita states that she provided such proof: in addition to savings of over $30,000 USD, Ms. Kita had already paid a part of her tuition, she and her husband planned to stay with family who would cover the accommodation costs, and her husband planned to work during their stay as a skilled tradesman. Thus, in raising the issue of the origin of the funds, Ms. Kita argues that the Officer imposed an arbitrary requirement, and erred by misapplying the criteria that were relevant to the exercise of discretion: *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 93.

[19] Furthermore, Ms. Kita argues the Officer fettered discretion by drawing an adverse inference from a concern, which was never articulated, that she and her husband obtained their savings by dishonest means as opposed to family generosity or fiscal responsibility, particularly when there were no grounds to question the provenance of the funds based on the evidence (i.e. that Ms. Kita's family are relatively affluent land owners in Albania, that she and her husband were living with his parents, and that her husband has a skilled trade). Ms. Kita contends the adverse inference was invalid and constitutes a defect in the logical process supporting the decision: *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 56.

[20] In my view, the Officer did not suggest that Ms. Kita and her husband obtained their savings through dishonest means. Also, the Officer did not refuse Ms. Kita's application for

failing to meet the requirements of section 220 of the *IRPR*, and the fact that section 220 only requires proof of sufficient funds does not necessarily render the origin of the funds irrelevant to the criteria under subsection 216 of the *IRPR*. Ms. Kita has not established that the *IRPA* and *IRPR* preclude an officer from considering the amount and origin of funds when deciding whether an applicant will leave Canada at the end of their stay. It was reasonable for the Officer to consider such factors in this case.

[21] Ms. Kita submits the Officer drew an adverse inference about her husband's truthfulness and integrity by stating that Mr. Rrezhda did not declare his refused U.S. visa. Ms. Kita argues that Mr. Rrezhda's omission was most likely inadvertent, since he disclosed that he had been refused a visa on his application form, but simply failed to provide sufficient details by only including information about his failed Canadian visa. Ms. Kita also submits that the Officer's failure to provide details about the refused U.S. visa or to explain its importance render it impossible to evaluate whether the Officer's reliance on this factor was reasonable. Regardless of whether the Officer relied on the factor to assess her husband's integrity or the likelihood of her return to Albania or both, Ms. Kita argues that by merely stating the factor, the Officer failed to provide sufficient details to ascertain whether the factor was considered in a reasonable way.

[22] In my view, the reasonableness of the Officer's decision does not depend on whether Mr. Rrezhda's omission was intentional or inadvertent. The Officer stated that Mr. Rrezhda was refused a U.S. visa and did not declare it. Ms. Kita has not alleged or shown that the statement was inaccurate, and she has not provided any details about Mr. Rrezhda's refused U.S. visa to demonstrate why it was unreasonable for the Officer to have considered it as a factor. Mr.

Rrezhda did not fully answer a direct question about his visa history on the application form, as he was required to do. It was not unreasonable for the Officer to have considered this factor.

[23] Furthermore, Ms. Kita must demonstrate that any alleged shortcomings or flaws in the Officer's decision are sufficiently central or significant to render the decision unreasonable, and she has not: *Vavilov* at para 100. The reasonableness of the Officer's decision does not turn on the U.S. visa factor alone, and the other factors provide sufficient support for the Officer's conclusion. The refusal letter refers to the purpose of Ms. Kita's visit, the limited employment prospects in Albania, and Ms. Kita's personal assets and financial status, all of which are supported by the GCMS notes and the record.

[24] Finally, Ms. Kita submits that her status as an unemployed person at the time of her application was an irrelevant factor. She submits that she only became unemployed in June 2018, the same month her application was submitted. During the two prior years, Ms. Kita had been working as an assistant at her mother's store. Ms. Kita submits she clearly has strong ties to her employer—her mother—and explicit plans that suggest she will return to the job after completing the college program in Canada. The respondent argues that Ms. Kita's unemployment is particularly relevant to whether she and her husband were travelling to Canada for a temporary purpose, since the application indicates that as of June 2018, Ms. Kita had moved from Korce, where her mother's store was located, to the distant city Tirane, where her husband worked and the couple lived with Mr. Rrezhda's parents after getting married in June 2018.

[25] I agree with the respondent. While the covering letter submitted with Ms. Kita's application asserted that the program at Seneca College would assist Ms. Kita in running her mother's store "where she [had] been working for the past two years", the letter also noted that Ms. Kita and her husband "maintain their residence where they live with Mr. Rrezhda's parents"—in a city that is distant from the store. The Officer did not rely on an irrelevant factor by considering Ms. Kita's unemployment when determining whether Ms. Kita would leave at the end of her authorized period of stay and return to Albania.

(2) Was the Officer's decision justified, transparent and intelligible?

[26] I will now turn to the second sub-issue: whether the Officer's decision was justified, transparent and intelligible.

[27] Ms. Kita argues that the Officer's reasons were not sufficiently clear and coherent to justify how the Officer reached a negative decision. She acknowledges that the reasons in temporary visa cases are brief, but submits that nothing exempts those reasons from the requirements of justification, transparency and intelligibility, as set out in *Vavilov*.

[28] After listing the four factors supporting the Officer's decision (the unknown provenance of bank account savings, the amount of the savings, Mr. Rrezhda's undeclared U.S. visa refusal, and Ms. Kita's unemployment), the Officer's GCMS notes indicate:

> After careful review of available information, I am of the opinion that the applicant's [*sic*] incentives to remain in Canada may outweigh their ties to their home country and/or [country of residence]. Weighing the factors in this application. I am not satisfied that the applicants will depart Canada at the end of the period authorized for their stay.

[29] Ms. Kita argues that the decision lacks justification, transparency and intelligibility because there is no rational connection between the four factors and the Officer's ultimate conclusion. She also argues that the Officer's sparse reasons were not coherent or intelligible. According to Ms. Kita, the key issue is quality rather than quantity. She submits it would have been possible for the Officer to write intelligible reasons in three sentences, but the Officer failed to do so.

[30] In my view, Ms. Kita has not established that the Officer's reasons lack justification, transparency or intelligibility.

[31] For the reasons set out in the previous sub-section, I am not persuaded there is a lack of rational connection between the four factors and the Officer's conclusion. The factors considered by the Officer were relevant to the applicable statutory provisions and supported by the evidentiary record. Ms. Kita disagrees with the Officer's assessment of the factors; however, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker: *Vavilov* at para 125. Ms. Kita has not established that the Officer considered and weighed the factors in a manner that would justify this Court's intervention.

[32] Furthermore, I am not persuaded that the reasons were unreasonably brief or sparse. Reasonableness review accounts for the diversity of administrative decision-making by recognizing that what is reasonable in a given situation depends on the constraints imposed by the legal and factual context of the particular case under review: *Vavilov* at paras 89-90. In my

view, when read fairly and in light of the record, the reasons supporting the Officer's decision were sufficiently transparent and intelligible.

[33] In conclusion, Ms. Kita has not established that the Officer's decision was unreasonable.

B. ***Issue 2: Did the Officer breach procedural fairness?***

[34] The procedural fairness question here is whether the Officer was required to send a fairness letter providing Ms. Kita an opportunity to respond to concerns before deciding to refuse the applications. Ms. Kita argues that the Officer was required to send a fairness letter regarding Mr. Rrezhda's refused U.S. visa, for two reasons.

[35] First, Ms. Kita submits the Officer was alleging misrepresentation, without specifically using the term. Ms. Kita relies on *Bayramov v Canada (Citizenship and Immigration)*, 2019 FC 256 at paragraph 15, which states "where a finding of misrepresentation is contemplated, the visa officer has a duty to inform the applicant of the concerns that may give rise to such a finding and provide the applicant with a meaningful opportunity to respond." However, the reasons do not support the allegation that the Officer made a finding of misrepresentation and I do not accept Ms. Kita's argument that a finding of misrepresentation was implied. As noted above, Mr. Rrezhda was required to answer a question regarding his visa history on the application form and failed to provide full particulars. The Officer simply made note of this. Therefore, Ms. Kita has not established that the Officer was required to send a fairness letter to inform the applicant of concerns that might give rise to a finding of misrepresentation.

[36] Second, Ms. Kita submits that the Officer relied on extrinsic evidence, and that in such circumstances, the duty of fairness mandates a fairness letter. While she acknowledges the respondent's position that an officer is not obligated to inform an applicant of concerns arising from requirements of the legislation or related regulations, Ms. Kita argues an exception arises when an officer relies on extrinsic evidence: *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 [*Rukmangathan*] at para 22. Ms. Kita argues that *Rukmangathan* makes it clear that an officer is not exempted from the requirement of procedural fairness when they rely on "extraneous evidence".

[37] A premise of Ms. Kita's argument is that extrinsic evidence means any evidence outside of the record and I am unable to agree with this premise. More importantly, however, the procedural fairness issue here does not depend on the meaning of extrinsic evidence because I disagree that the case law establishes an unqualified requirement to send a fairness letter whenever an officer relies on evidence that is outside of the record. The overarching principle is that the duty of procedural fairness is "eminently variable and its content is to be decided in the specific context of each case": *Baker* at para 21. Factors relevant to determining the content of the duty of fairness include the nature of the decision being made, the importance of the decision to the individuals who are affected by it, and their legitimate expectations: *Baker* at paras 23, 25 and 26. Therefore, I must conclude that Ms. Kita's characterization of the procedural fairness principles related to an officer's duty to notify is incomplete.

[38] The statement in *Rukmangathan* (at paragraph 22) that, "It is well established that in the context of visa officer decisions procedural fairness requires that an applicant be given an

opportunity to respond to extrinsic evidence relied upon by the visa officer and to be apprised of concerns arising therefrom," must be understood in context. The officer's decision under review in *Rukmangathan* was not a decision to refuse a student visa. Furthermore, in *Rukmangathan* Justice Mosley went on to delineate some circumstances when the duty of procedural fairness does not require an applicant to be given an opportunity to respond to concerns, such as when the concern arises from the requirements of legislation or related regulations. In my view, *Rukmangathan* does not set out in absolute terms that fairness mandates notification any time an officer relies on evidence outside of the record, nor does it provide an exhaustive list of conditions that would "exempt" an officer from a duty to notify. The fact that Mr. Rrezhda was refused a U.S. visa was within his knowledge, and this is not a case where Mr. Rrezhda could not have reasonably anticipated that the Officer would consult his visa or permit history: *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 at para 38; *Qin v Canada (Citizenship and Immigration)*, 2013 FC 147 at para 38.

[39] In the present case, Ms. Kita and Mr. Rrezhda were afforded the opportunity to produce full and complete written documents in relation to Mr. Rrezhda's refused U.S. visa: *Baker* at para 34. Mr. Rrezhda's application form included the question, "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" Mr. Rrezhda checked the box "yes", but in response to a subsequent question for further details, he only included information about his failed Canadian visa. The onus was on Ms. Kita and Mr. Rrezhda to satisfy the Officer that they fulfilled the requirements of their applications, and to provide complete application forms. An officer is under no duty to seek to clarify a deficient application: *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422 at para 42.

[40] Ms. Kita has not established that the Officer breached procedural fairness.

IV. **Proposed Question for Certification**

[41] Ms. Kita proposed the following question for certification at the hearing:

> What constitutes extrinsic evidence for the purpose of an application for a temporary resident visa?

[42] Ms. Kita argues this question is relevant to procedural fairness. She takes the position that information about Mr. Rrezhda's refused U.S. visa was extrinsic evidence, and that reliance on extrinsic evidence mandates a fairness letter. The respondent submits that the proposed question is not appropriate for certification, and that it has already been addressed in the jurisprudence.

[43] Section 74(d) of the *IRPA* provides that an appeal to the Federal Court of Appeal may only be made if this Court certifies a serious question of general importance. In order to be properly certified under section 74 of the *IRPA*, the question must be dispositive of the appeal, must transcend the interests of the parties, and must raise an issue of broad significance or general importance: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36 [*Lewis*]. The question must have been dealt with by this Court and must necessarily arise from the case itself, as opposed to the way in which the Court may have disposed of the case: *Lewis* at para 36.

[44] The proposed question for certification does not meet this test. Ms. Kita equates extrinsic evidence with any evidence that is outside of the record and argues that an officer's reliance on

such evidence mandates a fairness letter. However, I do not agree that the case law establishes an unqualified requirement for an applicant to be notified whenever an officer relies on evidence that is outside of the record, and in the present case, the procedural fairness issue did not turn on the question of what constitutes extrinsic evidence. Thus, the proposed question is not determinative of this application for judicial review and would not be dispositive of the appeal: *Lewis* at para 36; *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 3 and 46. In my view, the proposed question amounts to a reference of a question to the Court of Appeal, and it is not a proper question for certification: *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 12.

[45] Therefore, this Court declines to certify the proposed question.

JUDGMENT in IMM-4417-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No question is certified.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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