Federal Court  Cour fédérale

Date: 20140807

Docket: IMM-8257-13

Citation: 2014 FC 781

Ottawa, Ontario, August 7, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

VOLODYMYR PUIDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of an Immigration Officer [Officer] in the Visa Section of the Canadian Embassy in Kyiv, Ukraine [Embassy], dated December 9, 2013 [Decision], which refused the Applicant's application for a Canadian study permit.

BACKGROUND

[2] The Applicant is a 29-year-old citizen of Ukraine who is currently in Canada on a visitor's visa. He holds a diploma in Computer Technologies from the Ivano-Frankivsk University of Oil and Gas in Ukraine, and was provisionally accepted to study at the B.C. Institute of Technology [BCIT], in the Business Information Technology Management Program. However, his application for a Canadian study permit was refused in the Decision under review here.

[3] The Applicant was married in Ukraine in January 2012, and his wife remains in Ukraine. His mother lives in Canada, and in November 2012, he entered Canada on a temporary resident visa to visit her. He has remained in Canada since, having obtained an extension to his visitor's visa until March 31, 2014.

[4] While in Canada, the Applicant applied to and was provisionally accepted by BCIT. In November 2013, he applied for his Canadian study permit. His application was processed by the Citizenship and Immigration Canada [CIC] visa office at the Embassy in Kyiv, and was refused on December 9, 2013.

DECISION UNDER REVIEW

[5] The Officer's letter of December 9, 2013 outlines the requirements of the Act relating to applications for a study permit, and states:

> I am not satisfied that you meet the requirements of the Act and the Regulations. I am therefore refusing your application.

[6] An attached checklist gives the reasons for this conclusion as follows:

> You have not satisfied me that you would leave Canada at the end of your stay. In reaching this decision, I considered several factors, including:
>
> - your family ties in Canada and your country of residence
> - length of proposed stay in Canada
> - purpose of visit
> - your current employment situation
> - your personal assets and financial status

[7] The notes in CIC's Global Case Management System [GCMS notes] provide further information on the rationale for the Decision. The Officer's notes of December 9, 2013 state in full:

> 28y.o. married man; no children; requests SP to do Business Information Technology management program fm Jan,2014 to May,2015; PA was issued TRV in 2012 to visit his mother in Cda for a short period leaving behind his wife/job in Ukraine; PA unded [sic] up applying for extension of his visitor status followed by SP application in Cda which was turned down; PA does not seem to have job in Ukraine anymore; PA's mother is willing to cover the cost of PA's studies – no info re:stable/good income provided; not satisfied that PA will comply with TRV requirements and will return home at the end of his authorized stay; PA's ties to Ukraine are very weak; suspect PA might try to remain in Cda for good; not satisfied that PA would do it properly; refused;

ISSUES

[8] The Applicant raises the following issues in this proceeding:

a. Was the Officer's Decision unreasonable because:

i. It was based on mere suspicion;

ii. The Officer ignored the evidence provided; or

iii. The Officer did not provide sufficient analysis for the Applicant to understand why the Decision was reached?

b. Was the Applicant denied procedural fairness because the Officer did not provide him with an opportunity to address the Officer's concerns?

[9] In addition, the Respondent raises the preliminary issue of whether some of the material in the Application Record submitted to the Court by the Applicant should be struck from the record because it was not before the Officer when the Decision was made.

STANDARD OF REVIEW

[10] 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.

[11] There is no dispute that the Officer's Decision was discretionary in nature, and his or her evaluation of the evidence and ultimate conclusions are reviewable on a standard of reasonableness: *Adulateef v Canada (Minister of Citizenship and Immigration)*, 2012 FC 400 at paras 5-6. Whether the Officer provided adequate reasons or analysis in support of the Decision is not a stand-alone ground of judicial review, but is rather encompassed within the Court's assessment of whether the Decision was reasonable, as described below: see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 14-16.

[12] There is also no dispute that questions of procedural fairness are to be reviewed on a standard of correctness: see *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53.

[13] 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 *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. 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."

STATUTORY PROVISIONS

[14] The following provisions of the Act are applicable in these proceedings:

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.

[15] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] are applicable in these proceedings:

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;

[…]

Class

210. The student class is prescribed as a class of persons who may become temporary residents.

Student

211. A foreign national is a student and a member of the student class if the foreign national has been authorized to enter and remain in Canada as a student.

[…]

Study permits

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

[…]

(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 autorisée qui lui est applicable au titre de la section 2;

[…]

Catégorie

210. La catégorie des étudiants est une catégorie réglementaire de personnes qui peuvent devenir résidents temporaires.

Qualité

211. Est un étudiant et appartient à la catégorie des étudiants l'étranger autorisé à entrer au Canada et à y séjourner à ce titre.

[…]

Permis d'études

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 :

[…]

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;

[…]

ARGUMENT

Applicant

[16] The Applicant says that there was a total absence of analysis of the evidence he submitted, and the Officer based his or her Decision on mere suspicion.

[17] The conclusion that the Officer was not satisfied that the Applicant would leave Canada at the end of his authorized stay was merely based on suspicion, as indicated by the words "suspect PA might try to remain in Canada" in the GCMS notes. The Officer indicated in the checklist that several factors were considered, but two of these factors – family ties and current employment situation – were discussed in only a cursory fashion in the GCMS notes.

[18] Regarding the Applicant's employment situation, the Officer wrote "PA does not seem to have job in Ukraine anymore," which is again based on suspicion, the Applicant argues. The Officer's observation that "no info re: stable/good income provided" was also incorrect.

[19] With respect to family ties, the Applicant says that the Officer made a gratuitous comment that the Applicant left his wife and job in Ukraine, without referring to any evidence or drawing any explicit inference. Based on this gratuitous comment, the Officer then concluded that "PA's ties to Ukraine are very weak." The Applicant says these comments cast aspersions on him, and should not be left unexamined.

[20] The Applicant says that when he informed his employer of the refusal of his study permit and the finding that he did not have a job in Ukraine anymore, the employer was shocked and volunteered to provide proof that the Applicant still has a good and stable job in Ukraine. He says his wife was also affected by the finding that his ties to Ukraine were weak. They have remained in close contact, and his wife continues to provide him with steadfast support and encouragement.

[21] The Applicant points to *Serrudo Sempertegui v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1176 as an analogous case. There, the Court concluded that "[t]he visa officer's suspicions were not based on reasonable inferences drawn from the known facts" and there was "no objective basis for the decision," such that the decision was unreasonable. To the same effect, the Applicant points to: *Groohi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 837 at para 14 (absence of any true analysis of the evidence by the visa officer); *Thomas v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1038 at paras 13-17 (to arrive at a conclusion within the range of reasonable outcomes, the officer had to first consider and analyze the relevant evidence). The Applicant says there must be objective reasons to reasonably question an applicant's motives. As in *Cao v Canada (Minister of Citizenship and Immigration)*, 2010 FC 941, the Officer here made no serious effort to test the strength of his ties to Ukraine, and failed to consider the Applicant's statements about those ties and weigh them in light of the totality of the evidence. While the GCMS notes state the basis for the Decision, they do not provide a sufficiently detailed analysis to demonstrate that the appropriate factors were considered and to show why the Decision was made: *Rudder v Canada (Minister of Citizenship and Immigration)*, 2009 FC 689 at paras 32-34; *Alem v Canada (Minister of Citizenship and*

Immigration), 2010 FC 148 at paras 13-14, 18-20 [*Alem*]. The Decision was vague and subjective and did not allow the Applicant to take any future action.

[22] Moreover, the Applicant says the Officer asked himself the wrong question, in the same manner observed in *Murai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 186 at para 16:

> The Officer in question asked himself the wrong question. Rather than asking himself "will she leave Canada once given ingress?" as he did, (see affidavit of Gregory Chubak para 4) he should have followed the Live-in Caregiver's manual and asked himself "will this person stay illegally in Canada if not successful under the program?" Based on the Applicant's past performance, any reasonable person would say "no, she will not stay in Canada illegally".

[23] The Applicant says the error committed by the Officer was therefore an error of law apparent on the face of the record: *De La Cruz v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 111 at para 16, 26 FTR 285.

[24] The Applicant also argues that the Officer's failure to provide him with an opportunity to respond to the Officer's concerns amounts to a breach of natural justice: *Bonilla v Canada (Minister of Citizenship and Immigration)*, 2007 FC 20 at para 27. The Officer was required to allow the Applicant to respond to concerns about the credibility, accuracy or genuine nature of the information he submitted: *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24 [*Hassani*]. His application was complete, and supported by numerous documents, and yet the Officer concluded he was not a genuine prospective student in the face of evidence that showed otherwise. In view of the total absence of analysis of the evidence, the

Applicant argues, it cannot be said that the concerns that led the Officer to refuse his application for a study permit arose directly out of the Act.

[25] The Applicant says the Officer was not concerned with the Applicant's credibility or with whether his documents were genuine. The Officer had a duty to provide an explanation for why the application was rejected and the elements that weighed against approval, not simply a litany of factors: *Alem*, above, at para 14. Moreover, there was a duty to ensure the GCMS notes clearly reflected the process followed in making the Decision, to ensure that irrelevant comments did not form a part of those notes, and to provide the Applicant with an opportunity to rectify or address any concerns raised through the use of extrinsic evidence: *Jesuorobo v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1092 at paras 8-10 and 14-15.

Respondent

[26] The Respondent raises a preliminary issue that additional evidence filed by the Applicant in support of this application should be struck from the Court's record, and any arguments based upon this evidence should be ignored. Judicial review proceedings examine a decision in light of the information before the decision-maker and decide whether or not there are grounds for overturning the decision. As such, the only evidence to be considered is the evidence that was before the decision-maker. Otherwise, the judicial review process might be transformed into a hearing *de novo*: *Abbot Laboratories Ltd v Canada (Attorney General)*, 2008 FCA 354 at paras 35-38 [*Abbott Laboratories Ltd*]. There are exceptions to this rule, such as where the evidence is relevant to a question of procedural fairness or bias, but such concerns are not addressed by the additional evidence attached to the Applicant's affidavit in this proceeding. Therefore, only the

materials that were before the decision-maker, which are contained in the Certified Tribunal Record, should be considered here: *Spidel v Canada (Attorney General)*, 2011 FC 601 at paras 9-13 [*Spidel*].

[27] The Respondent says there is no basis to displace the Officer's findings of fact or ultimate conclusion. The Officer assessed the application in accordance with the relevant criteria and reasonably concluded that the Applicant failed to meet the requirements of the visa sought.

[28] A visa applicant has the burden of establishing that he or she will depart Canada when the authorized period expires, and a visa officer is required to assess and weigh the evidence presented to determine whether it establishes, on a balance of probabilities, that the applicant has discharged this burden: *Wang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 619 at paras 13-14; *Tran v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1377 at para 4. Furthermore, a decision-maker is presumed to have weighed and considered all of the evidence unless the contrary is shown: *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (CA) [*Florea*] at para 1.

[29] In the present case, the Respondent says, the Officer determined that the application fell short of the requirements set out in the Regulations because it failed to establish that the Applicant would leave Canada at the end of the authorized period. This determination was based on numerous factors, including:

- the Applicant's ties to Ukraine are weak;
- the Applicant was 28-years-old, married, and without children;

- the Applicant was issued a temporary resident visa in 2012 to visit his mother;
- at the time of his travel to Canada in 2012, the Applicant's wife and employment were in Ukraine;
- the Applicant's temporary residence in Canada has been extended;
- the Applicant no longer appears to be employed in Ukraine;
- the Applicant's mother is willing to pay for his studies; and
- the Applicant did not provide information regarding his mother's employment or income.

[30] These findings indicate weakness in the Applicant's relative ties to Ukraine and his ability to financially support his proposed studies in Canada, and this provides a reasoned basis to refuse the application.

[31] The Respondent says that the Applicant summarizes law and evidence in his submissions to the Court, but fails to specify how the Officer's findings or ultimate conclusion were unreasonable. Furthermore, there is no indication that the Officer did not consider all of the evidence actually submitted by the Applicant, and new evidence submitted after the fact cannot make the Decision unreasonable: *Spidel*, above, at para 10.

[32] The Applicant is asking the Court to re-weigh the evidence already considered by the Officer, and this is not a proper basis for judicial intervention: *Khosa*, above, at paras 61, 64; *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42 at para 30.

[33] With respect to the procedural fairness issue raised by the Applicant, the Respondent says there was no duty on the Officer to provide an opportunity for the Applicant to respond to his or

her concerns. Visa applicants are owed a degree of procedural fairness that falls at the low end of the spectrum, because there are no substantive rights at issue since an applicant has no right to enter Canada: *Obeta v Canada (Minister of Employment and Immigration)*, 2012 FC 1542 at para 15 [*Obeta*]; *Wang v Canada (Minister of Employment and Immigration)*, 2006 FC 1298 at para 20. The onus is on each applicant to provide all relevant supporting documentation and a visa officer need not notify him or her of any deficiencies. The onus does not shift to the visa officer simply because an application is "complete"; the applicant had a burden to put together an application that is not only complete but relevant, convincing and unambiguous. Where an officer's concerns arise directly from the requirements of the Regulations, there is no duty to raise doubts or concerns with the applicant: *Obeta*, above, at paras 25-26, citing *inter alia Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 526 at para 52; *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 526 at para 52; *Hassani*, above, at para 24.

[34] In the present case, the Respondent argues, the Applicant's application appears complete yet not convincing with respect to the requirements set out in the Regulations. There were no credibility concerns with the materials submitted; they simply did not meet the requirements on a balance of probabilities. In such circumstances, no duty arises to provide an opportunity to respond.

Applicant's Reply Submissions

[35] The Applicant submits that the Officer's GCMS notes must be supported by affidavit evidence, and that in the absence of such evidence, the Decision must be set aside: *Pan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 220 at paras 12-14.

[36] The Applicant also responds to the Respondent's argument that some of the evidence attached to his affidavit should be struck. He says that certain of the exhibits (Exhibits "A" to "G") were before the Officer. Exhibits "I" to "L" are important because, as the Respondent concedes, additional evidence may be introduced relating to procedural fairness and jurisdiction (*McConnell v Canada (Canadian Human Rights Commission)*, 2004 FC 817). Here, the Officer only discussed the factors of family ties and current employment in a cursory fashion. Exhibits "I" to "K" are important because the Officer violated tenets of natural justice by basing his or her analysis of his current employment situation on suspicion. Exhibit "L" is important because the Officer breached procedural fairness by basing his or her analysis of family ties in the country of residence on suspicion. The Court in *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 43 Imm LR (2d) 291, 1998 CanLII 7505 (FC) stated that visa officers cannot be coy about their concerns; they act as a questioner and a judge, and therefore have a duty to be scrupulous about exposing their concerns.

[37] The Applicant reiterates that the Officer did not analyze the documents he submitted, but merely listed the factors and stated a conclusion. The Officer subjectively formed an opinion, unsupported by the evidence, that the Applicant would not return to Ukraine. There is a heavier onus on a visa officer to justify his or her decision: *Hameed v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 10 at para 22, 268 NR 185 (FCA). The Officer is obligated to refer to the evidence, analyze the evidence, and explain why he or she prefers certain evidence on the point in question: *Syed v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1404.

[38] The Applicant says the Court must intervene here because a breach of procedural fairness has occurred: *Guan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 274 at para 21. The Officer had a duty to document the reasons for concern in his or her notes, and provide an opportunity for the Applicant to respond: *Menon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273 at paras 16-17.

[39] The Applicant says the Respondent's arguments here are reminiscent of those made in *Karami v Canada (Minister of Citizenship and Immigration)*, 2009 FC 788 [*Karami*], where it was argued that there is no duty to notify an applicant of concerns regarding the application except when the officer relies on extrinsic evidence, and no duty to provide an opportunity to respond to concerns before concluding an assessment. The Applicant says this line of argument did not succeed in *Karami* because there are basic procedural requirements that must be satisfied before these principles apply: namely, the respondent must show that the Officer truly considered and analyzed all of the evidence. Here, as in *Karami*, the issue is the Officer's analysis of the evidence. As in that case, we know very little here about how the Officer evaluated the evidence and arrived at his or her conclusion (see also *Nadarasa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1112 at paras 26, 29).

ANALYSIS

[40] The Applicant says that he was denied procedural fairness in a Decision that lacks intelligibility and an evidentiary basis to support its conclusions. The Applicant has also, as part of this application, attempted to bring before the Court evidence that was not before the Officer. He claims this evidence supports his argument for procedural fairness, but it does not. For the

usual reasons, the Court can only consider the evidence that was before the decision-maker. None of the exceptions to the usual rule are established here. See *Abbott Laboratories Ltd*, above at paras 35-38. All materials attached to the Applicant's affidavit, and anything in the affidavit, that were not part of the record before the Officer must be struck from the record, as well as all submissions based on such materials.

[41] A reading of the full Decision against the record that was before the Officer reveals that the Officer, in applying the discretion and duty given to him under s. 179 of the Regulations engaged in the usual practice of identifying and then balancing the factors that supported the Applicant leaving Canada by the end of the authorized period, and which suggested he might not. After weighing the evidence, the Officer concluded that the Applicant had not established that he would leave. It is obvious why he came to this conclusion. The Applicant came to Canada on a visitor's visa to see his mother, but extended his stay even though he said he had a job and a wife in Ukraine. As part of his study permit application the Officer found that **"**PA does not seem to have **[a]** job in Ukraine anymore." The Applicant says there is no evidence to support this finding and points to the Employment History section of his study permit application which says he is the "Sales Manager of Medical Equipment" for a Ukrainian company called "Med-Invest Agency Ltd.." However, what the Applicant fails to point out is that the same document indicates that his employment with this company terminated in November, 2012.

[42] Given this information, and the evidence that shows the Applicant extending his stay in Canada, it is obvious why the Officer would point out that he does not seem to have a job in the Ukraine to go back to.

[43] In my view, the Officer's conclusions have an ample grounding in the evidence. The decision has "justification, transparency and intelligibility" and it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." See *Dunsmuir*, above, at para 47.

[44] The Applicant picks up on the word "suspect" in the penultimate line of the GCMS notes and says the Decision is based upon mere suspicion. However, words have to be read in context and, when the Decision and record are read as a whole, it is clear that there were sound evidentiary reasons for the Officer's conclusion, and that "suspect" is merely shorthand for some thing like "I have reached the conclusion." The Officer clearly applies s. 179 of the Regulations when he says "not satisfied that PA will comply with TRV requirements and will return home at the end of his authorized stay." There is nothing to rebut the presumption that the Officer examined and considered all of the evidence or failed to engage in an appropriate weighing of positive and negative factors. The Court cannot re-weigh the evidence and reach a different conclusion that favours the Applicant. See *Florea*, above, at para 1.

[45] There was no duty on the Officer to give the Applicant an opportunity to respond to his concerns. The onus was on the Applicant to provide all relevant supporting documentation. The Applicant has to provide an application that was complete and convincing. Where the Officer's concerns arise directly from the requirements of the Regulations – as they did here - there is no duty to put those concerns to the Applicant. See *Obeta*, above, at paras 25-26. The Officer had no credibility concerns. The application was complete, but it simply failed to persuade the Officer that the Applicant would leave Canada at the end of the authorized period.

[46] I can find no reviewable errors with the Decision.

[47] The Applicant was obviously disappointed with the Decision and he may be equally disappointed with my conclusions. However, he must bear in mind that he is not being accused of dishonesty or anything underhand. He may well have intended to return to Ukraine at the end of his study period. But the Officer was assessing the application, not the Applicant, and the Court cannot interfere and substitute its own discretion for that of the Officer.

[48] Counsel agree there are no questions for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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