Federal Court  Cour fédérale

Date: 20171221

Docket: IMM-2264-17

Citation: 2017 FC 1183

Ottawa, Ontario, December 21, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

XULI KONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Xuli Kong, seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the April 5, 2017 decision of an Immigration Officer [the Officer] at the Embassy of Canada in Beijing, China. The Officer refused Ms Kong's application for a temporary resident visa. The Officer found that the Applicant had misrepresented or withheld material facts regarding her personal financial situation. Specifically, the Officer found that the bank statements which the Applicant had

submitted could not be verified, and were fraudulent. As a result of this finding of misrepresentation, the Applicant is ineligible to reapply for a period of five years in accordance with section 40 of the Act.

[2] For the reasons that follow, the Application for Judicial Review is allowed. The Officer did not breach procedural fairness but reached a decision which is not reasonable.

I. Background

[3] In September, 2016, the Applicant, a citizen of China, applied for a temporary resident visa to visit her son and daughter-in-law in Canada for a period of approximately two months. In support of her application, she submitted, among other documents, a letter from her employer authorizing her vacation leave, information about the property she owned in China, her travel itinerary showing her return tickets, and her past travel history, which included travel to Canada. She also provided bank statements from several banks, along with English translations, which she had prepared herself, to demonstrate that she had sufficient financial resources to support her visit.

[4] Upon receipt of a letter from the Officer reviewing her application (the procedural fairness letter) which stated "[s]pecifically, I have concerns that the BOC [Bank of China] bank statement that you submitted in support of your financial status is not genuine", the Applicant provided additional copies of the BOC bank statements along with screen shots of the statements. The Applicant explains in her affidavit that her response to the procedural fairness letter noted that

she had made errors in the translation of a verification code on the bank statements (the 16 digits) which she had corrected. She also provided a letter from the bank to verify her accounts.

II. The Decision Under Review

[5] The Decision consists of the letter sent to the Applicant, dated April 5, 2017, which is a form letter with various boxes to check off as applicable. The letter advises that the application is refused, and that the Applicant is inadmissible. The letter has two boxes checked-off, which indicates: "[y]ou are a member of an inadmissible class of persons described in [the Act]. As a result, you are inadmissible to Canada pursuant to the following Section(s)" … "On misrepresentation: Section 40 (1) (a): For directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of the Act."

[6] The Global Case Management System [GCMS] notes maintained by the Officer and his or her supervisors are also part of the reasons for the decision. The GCMS notes are brief. The entries dated October 1, 2 and 4, 2016 indicate that Applicant planned to visit her son and daughter-in-law at a particular address in Canada. The entry dated October 13, 2016, with respect to the verification of the bank documents submitted by the Applicant, indicates that the Officer called the Applicant's bank and that "[a]ccording to the on line verification self-service check that the 16 digits listed on the official stamp actually can't be found in the system" [*sic*]. The Officer concluded "PA's Bank Statement is a fake." A procedural fairness letter was sent to the Applicant on October 13, 2016.

[7] The GCMS notes indicate that the Applicant's response to the Procedural Fairness letter was received on October 31, 2016.

[8] The Officer's entry dated April 5, 2017 indicates that he or she had reviewed all relevant information including, but not limited to the issues raised in the procedural fairness letter, the Applicant's response, including photos of the bank statements and translations, as well as the letter from the bank officer intended to certify the authenticity of the statements. The Officer noted that the letter has no letterhead, no stamp, is not professionally formatted and does not appear to be a letter issued by a bank official. The Officer added that the screenshots of the bank statements do not include any bank balances. The Officer concluded that "on the whole" the response to the procedural fairness letter did not allay the concerns regarding the veracity of the documentation. Accordingly, the Officer was satisfied that, based on all the information, the applicant had submitted fraudulent documentation which misrepresents a material fact, and which could have induced an error in the Act had it gone undetected.

III. The Issues

[9] The Applicant raises issues of procedural fairness and the reasonableness of the decision.

IV. The Standard of review

[10] Issues of procedural fairness are reviewable on a correctness standard (*Canada* (*Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). Where a breach of procedural fairness is found, no deference is owed to the decision maker.

[11] The Officer's decision with respect to the Applicant's eligibility for a temporary resident visa requires the Officer to assess the application and exercise his or her discretion and is, therefore, reviewable on a reasonableness standard (*Obeta v Canada (Minister of Citizenship and Immigration*), 2012 FC 1542 at para 14, 424 FTR 191 [*Obeta*]).

[12] Where the reasonableness standard applies, the Court considers whether the decision "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 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). The standard of reasonableness means that the Court should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir*).

V. The Applicant's Submissions

[13] The Applicant submits that the Officer breached procedural fairness by not identifying the concerns about the bank statement with more particularity, by not disclosing the information provided by phone from the Bank, which the Applicant characterizes as extrinsic evidence, and by not providing the Applicant with an opportunity to respond to the Officer's further concerns arising from her response to the procedural fairness letter.

[14] The Applicant submits the Officer based his refusal of her application on the concerns which had not been disclosed to her. She submits that she provided only a general response to the procedural fairness letter and did not address the Officer's particular concerns because they were not brought to her attention.

[15] The Applicant adds that she was not given an opportunity to respond to the further concerns noted by the Officer upon which he based his conclusion, i.e., that the bank statements were fraudulent, that the letter from the bank did not appear to be from a bank official and that the screenshots did not show bank balances. The Applicant argues that if the Officer had concerns with the veracity of the information, the Officer was required to convoke an interview or provide a further opportunity to respond.

[16] The Applicant also submits that the decision is not reasonable; the serious consequences of a finding of misrepresentation require that such findings be made with caution and only after an applicant has had an opportunity to defend against such an allegation, and with regard to all the evidence.

[17] The Applicant submits that she detected the error made in the verification code and corrected this information in her response to the procedural fairness letter. She argues that if the Officer had considered this information and contacted the bank to confirm the information, as he had done previously, the Officer would have concluded that the statements were genuine. Similarly, if the Officer doubted the authenticity of the letter from the Bank, the Officer should have followed up with the bank and called the phone number provided.

VI. The Respondent's Submissions

[18] The Respondent submits that there was no breach of procedural fairness and the Officer's decision, based on finding that the bank statements were fraudulent, is reasonable.

[19] The Respondent notes that the procedural fairness letter advised the Applicant of the Officer's concerns regarding the bank statements. The Applicant's response, which included other copies of the bank statements and a letter from the bank, did not include any markings to demonstrate that the documents had actually come from the bank.

[20] The Respondent submits that the Applicant's response to the procedural fairness letter did not address the Officer's concerns. Further, the Respondent submits that there was no additional duty on the Officer to put the same concerns to the Applicant a second time.

[21] The Respondent submits that there is a presumption that the Officer has reviewed all the documents submitted in support of the application. However, the Respondent acknowledges that the Applicant provided several supporting documents with her application and there is no mention of anything other than the bank statements in the Officer's notes.

VII. The Officer Did Not Breach Procedural Fairness

[22] It is well established that the duty of procedural fairness varies with the context and the duty owed in the context of an application for a visa is at the lower end of the spectrum.

[23] As noted by Justice Gagné in *Asl v Canada (Citizenship and Immigration)*, 2016 FC 1006 at para 23, [2016] FCJ No 985:

> [23] First of all, I would note that the procedural fairness owed by visa officers is on the low end of the spectrum (*Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 23). Of course, the duty of fairness in this context still "require[s] visa officers to inform applicants of their concerns so that an applicant

> may have an opportunity to disabuse an officer of such concerns." (*Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 at para 21*).*

[24] In *Hamza v Canada (Minister of Citizenship and Immigration*), 2013 FC 264 at paras 21-24, [2013] FCJ No 284, Justice Bédard considered the refusal of an applicant's permanent resident status as a skilled worker, extensively reviewed the applicable case law and provided a helpful summary of the relevant principles: the onus is on applicants to establish that they meet the requirements of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] by providing sufficient evidence in support of their application; the duty of procedural fairness owed by visa officers is at the low end of the spectrum; there is no obligation on a visa officer to notify an applicant of the deficiencies in the application or the supporting documents; and, there is no obligation on the visa officer to provide an applicant with an opportunity to address any concerns of the officer when the supporting documents are incomplete, unclear or insufficient to satisfy the officer that the applicant meets the requirements. Justice Bédard added at paras 25-28 that, as determined in *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24, 302 FTR 39 [*Hassani*], an officer *may* have such a duty when the concerns arise from the credibility, veracity or authenticity of the documents, rather than from the sufficiency of the evidence.

[25] In *Hassani*, Justice Mosley reconciled some of the pre-existing jurisprudence and found at para 24 (internal citations omitted):

> [24] Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one

> that arises in this context, such a duty *may* arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John*… and *Cornea*…cited by the Court in *Rukmangathan*, above.

[26] In the present case, the Officer alerted the Applicant to the concern, stating "[s]pecifically, I have concerns that the BOC bank statement that you submitted in support of your financial status is not genuine". In my view, this was sufficient information to advise the Applicant of the concern. The Applicant was given an opportunity to respond and did so.

[27] The Officer was not required to be more specific and advise that it was the 16 digit code that was the basis for the concern. The Applicant's own affidavit and her response to the Procedural Fairness letter reveal that she understood the concern. She states that she corrected the information regarding the code, at least on one statement, and that she provided a letter, from the bank, along with screen shots.

[28] I do not agree that the Officer breached procedural fairness by relying on "extrinsic" information provided by the Bank without disclosing this information and providing the Applicant with an opportunity to respond. The Officer is entitled to verify the information submitted by an applicant. The Applicant was advised of the Officer's concerns about the genuineness of the bank statements, which arose from the Officer's attempt to verify the statements with a call to the bank and the use of its on line self-service feature.

[29] In *Baybazarov v Canada (Minister of Citizenship and Immigration*) 2010 FC 665, 191 ACWS (3d) 580, Justice Snider noted that the jurisprudence has clarified the visa officer's duty of procedural fairness in relation to extrinsic evidence (at para 10). Justice Snider reiterated, at para 11, that there is no obligation on an Officer "to apprise an applicant of concerns that arise directly from statutory requirements. Officers are also not required to give applicants a "running score" of weaknesses in applications". Justice Snider explained the duty at para 12:

> [12] Second, officers have a duty to notify applicants where: a) concerns arise about credibility, accuracy or genuineness of the information submitted (see *Nabin*, above, at para. 8); or b) the officer has relied on extrinsic evidence (see *Rukmangathan*, above, at para. 22; *Nabin*, above, at para. 8; *Mekonen*, above, at para. 4). The purpose of this duty is to allow applicants a fair and reasonable opportunity to know the case against them and to respond to concerns.

[30] Justice Snider explained that, in all cases, the focus is on providing a reasonable opportunity to respond, at para 14, citing *Mekonen v Canada (Minister of Immigration and Citizenship)*, 2007 FC 1133 at para 27, 66 Imm LR (3d) 222 ,

> [14] Ultimately, the underlying inquiry in the context of an officer using extrinsic evidence is as follows (*Mekonen*, above, at para. 27):
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> > […] the question is not whether the report is or contains extrinsic evidence of facts unknown to the person affected by the decision, but whether the disclosure of the report is required to provide the person with a reasonable opportunity to participate in a meaningful manner in the decision-making process.

[31] In the present case, the concern regarding the bank statements was stated and the Applicant had a reasonable opportunity to respond.

[32] The Applicant further submits that the duty of procedural fairness continues to apply to the concerns arising from her response to the procedural fairness letter and that a further opportunity or opportunities should have been provided to the Applicant to address these concerns until they were resolved or, alternatively, an interview should have been held. The Applicant points to *Ge v Canada (Minister of Citizenship and Immigration)* 2017 FC 594, 280 ACWS (3d) 587 [*Ge*] where Justice Southcott found that the Officer should have provided the applicants for permanent resident status with a second opportunity to address the concerns which arose based on their response to the first procedural fairness letter.

[33] *Ge* can be distinguished from the facts of the present case. In *Ge*, the Officer's credibility concerns arose from the applicants' responses to the procedural fairness letter and were unrelated to the concerns set out in the letter (at para 27).

[34] In *Ge*, Justice Southcott noted at para 29:

> [29] In my view, the concerns on the basis of which the Respondent now seeks to sustain the Officer's decisions were clearly credibility concerns, being determinations that the Applicants were not being candid in their procedural fairness responses. Yet the Applicants were not made aware of these concerns, as they arose only after the Officer received the Applicants' responses, and the Officer made the decisions without any further communications with the Applicants
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> [Emphasis added]

[35] Justice Southcott found that in the circumstances of *Ge*, the concerns should have been put to the applicants with an opportunity to respond – i.e., a second procedural fairness letter was called for.

[36] In the present case, although the documents submitted by the Applicant in response to the procedural fairness letter still raised concerns about the veracity of the bank statements, the concerns remained the same and did not trigger an additional or second duty of procedural fairness. The Officer's concerns about the genuineness of the information were squarely put to the Applicant. Applying the principles of the jurisprudence, it is clear that the Applicant bears the onus of supporting her application with sufficient and accurate, genuine information. The evidence referred to as "extrinsic" by the Applicant was the basis of the Officer's concerns about the genuineness of the Bank statements. These concerns were squarely put to the Applicant and she was given an opportunity to respond. Although the Applicant submits that she was unaware of the particular concerns, her own response sought to address the inaccurate codes at the bottom of the statements. The Officer found that the Applicant's response and the additional documents she submitted did not address his concerns. The Officer was not required to give the Applicant another opportunity to respond to the concerns. There was no breach of procedural fairness.

VIII. The Decision is not Reasonable

[37] Although the consequences of a finding of misrepresentation are serious, there is no higher duty of procedural fairness owed due to these serious consequences. As noted above, the duty of procedural fairness owed in the context of a visa application has been established in the jurisprudence and is at the lower end of the spectrum. The consequences of misrepresentation arise by the application of the Act. However, a decision which leads to a finding of misrepresentation must be reasonable and justified by the evidence on the record.

[38] In the present case, the Applicant submitted a range of supporting documents, none of which are mentioned in the GCMS notes, except for the Bank Statements. The Applicant had travelled to other countries including Canada previously and had returned to China each time. The Applicant was employed as a Professor and had submitted a letter from her employer noting that she was obliged to return to her job at the end of December 2016. The Applicant had provided documents to establish that she owned property and had other financial assets and family responsibilities in China. Although the Officer is presumed to have considered all the evidence submitted in support of the application, there is not even an acknowledgement of the evidence which would support a favourable decision on the visa application. The Officer's focus was exclusively on the bank statements from the Bank of China. The other supporting documents appear to have been overlooked.

[39] With respect to the Officer's concerns about the BOC bank statements, the Officer relied on a self-service verification from an on-line system rather than on information from a bank officer that could have alleviated the confusion about the bank stamp or code. The additional documents and explanations provided by the Applicant in her response to the procedural fairness letter, although rather convoluted, required more careful consideration by the Officer. The explanations were not sufficiently analyzed, or at least no such analysis can be discerned from the very cryptic GCMS notes. Nor did the Officer attempt to contact the bank to confirm the information submitted or, alternatively, to validate his concerns which were based on the on-line information. I also observe that the original bank statements were submitted, and although in Chinese, could have shed some light on the confusion regarding the validation codes.

[40] Although the reasons for a decision on a visa application are not expected to be detailed and are generally only the GCMS notes, these reasons do not permit the Court to conclude that the decision is "defensible in respect of the facts and the law". Given the totality of the information provided by the Applicant, both at the time she submitted her application and in her response to the procedural fairness letter, the Officer erred by focusing on only one set of Bank Statements, and nothing else. I can only conclude that the Officer failed to consider the other supporting documents and the explanations provided in response to the procedural fairness letter. The decision cannot be found to be justified or intelligible.

IX. An Award of Costs is not Warranted

[41] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 provides that:

No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[42] The Applicant submits she should be awarded costs because of the errors made by the Officer, the delay in processing the visa application and the Respondent's refusal to settle the matter, which resulted in additional expenses for the Applicant and Respondent, and has wasted judicial resources. The Applicant relies on *Ndererehe v Canada (Minister of Citizenship and Immigration)* 2007 FC 880, 317 FTR 23, and submits that there need not be any evidence of bad faith in order for the Court to find special reasons to award costs in immigration proceedings.

[43] In *Nedererehe,* Justice Mosley noted at paras 28:

> [28] In *Johnson v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1262, [2005] F.C.J. No. 1523, Justice Eleanor Dawson stated at paragraph 26 that:
>
> > [s]pecial reasons may be found if one party has unnecessarily or unreasonably prolonged proceedings, or where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith.
>
> [29] That is, I think, an accurate statement of what was intended by the choice of the words "special reasons" in the regulation. Something considerably out of the ordinary administrative failings or delays that may be encountered in processing refugee and visa claims. In this case, the question is not whether the respondent has acted in a manner that may be described as unfair or oppressive but whether the respondent has unnecessarily or unreasonably prolonged the proceedings. As noted above, I believe that this matter should have been brought to a speedier conclusion.

[44] Justice Mosley noted, at para 35, that a breach of procedural fairness or other legal error "will not alone constitute special reasons for awarding costs", but found that in the overall circumstances of the case, special reasons existed to award costs.

[45] In *Adewusi v Canada (Minister of Citizenship and Immigration),* 2012 FC 75 at para 23, 403 FTR 258, Justice Mactavish noted that the threshold for establishing special reasons to award costs is high and provided some examples from the jurisprudence where the threshold had been met. Such examples include where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith (citing *Manivannan v Canada (Minister of Citizenship and Immigration),* 2008 FC 1392 at para 51, [2008] FCJ No 1754 (QL)) and where there is conduct that unnecessarily or unreasonably prolongs the proceedings (citing *John Doe v Canada (Minister of Citizenship and Immigration),* 2006 FC 535,

[2006] FCJ No 674 (QL); *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 at para 26, [2005] FCJ No 1523 (QL); and *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1154, [2002] FCJ No 1576 (QL)).

[46] In *Ge*, above, Justice Southcott more recently considered the issue of costs and reiterated these same principles and examples, noting at para 40:

> [40] Special reasons that warrant an award of costs may exist if one party has engaged in conduct which is unfair, oppressive, improper or marked by bad faith, or has unnecessarily or unreasonably prolonged proceedings (see *Kargbo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 469, at para 19; *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, at paras 26-27). However, this Court has also held that errors on the part of a visa officer, absent bad faith, would not constitute special reasons for costs (see *Ndererehe v Canada (Minister of Citizenship & Immigration)*, 2007 FC 880; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 54).

[47] In this case, there is no evidence of bad faith or other conduct which unnecessarily prolonged the Officer's decision, although the decision was reached five months after the Applicants' proposed trip. Visa Officers have many applications to review and their careful scrutiny is essential. Despite the Court's findings that the decision is not reasonable and that the application should be re-determined by another visa officer, the circumstances do not, in my view, meet the high threshold of special reasons to support an award of costs.

[48] The Applicant's submissions, namely that the errors were clear and that the Respondent refused to settle the matter, which resulted in increased costs and wasted judicial resources, do not constitute "[s]omething considerably out of the ordinary, administrative failings or delays that may be encountered in processing refugee and visa claims." (*Nedererehe* at para 29). The

facts are not at all analogous to those in *Nedererehe*, where special reasons were found to justify an award of costs.

JUDGMENT in IMM-2264-17

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is allowed.
2. The finding that the Applicant misrepresented a material fact and is as a result, ineligible to reapply for a visa for a period of five years in accordance with section 40 of the Act is set aside.
3. The Applicants application for a temporary resident visa shall be re-determined by another Officer.
4. There is no award of costs.
5. No question was proposed for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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