Federal Court  Cour fédérale

Date: 20181218

Docket: IMM-713-18

Citation: 2018 FC 1273

Ottawa, Ontario, December 18, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

SYED FURQAN MUJTABA HAFIZ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] against a decision of a visa officer from the Embassy of Canada, Visa Section in Abu Dhabi, United Arab Emirates [the Officer] dated January 3, 2018, refusing the Applicant's application for a temporary resident visa [TRV application] under subsection 11(1) of the IRPA. The application for judicial review is allowed.

I. Background

[2] The Applicant, aged 33, is a citizen of Pakistan.

[3] The Applicant had previously applied for a temporary resident visa and for permanent residence under the Federal Skilled Worker Class, however, both applications were refused on October 11, 2017 and January 20, 2014 respectively. The Applicant's TRV application had been refused by the visa officer on the grounds of travel history, family ties in Canada and in country of residence, as well as purpose of visit.

[4] On December 15, 2017, the Applicant applied for a second temporary resident visa to Canada. In this TRV application, the Applicant mentioned that the purpose of his visit was to take an exploratory trip to Quebec, following an invitation letter dated December 12, 2017. The Applicant received this letter from Arton Investments, a financial intermediary, through his pending application for the Quebec Immigrant Investor Program.

II. Impugned Decision

[5] On January 3, 2018, under subsection 11(1) of the IRPA, the Officer refused the Applicant's TRV application dated December 15, 2017, because the Applicant did not meet the legislative requirements to obtain a temporary visa. The Officer was not satisfied that the Applicant would leave Canada at the end of his authorized stay. In the refusal letter, the Officer checked off the factors that applied to the refusal of the application:

Purpose of visit

Other reasons (“Previous submission of fraudulent documents”)

[6] The Global Case Management System records [GCMS notes] served as reasons for the Officer's decision. The reasons for refusing the TRV application were:

> Applicant previously found inadmissible for submission of fraudulent IELTS documents. Although period of inadmissibility has expired, I am not satisfied that applicant has a credible purpose in Canada. Noted stated reason i.e. business exploratory visit, yet recent TRV application was to visit Ontario.

III. Issues

[7] In his written submissions, the Applicant submits that the following issues are to be raised in the present matter:

1. Was the Applicant denied procedural fairness, considering that he was not provided an opportunity to address the Officer’s concerns?
2. Was the Officer’s decision reasonable?

[8] The applicable standard of review on issues regarding breaches of procedural fairness is that of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[9] The decision of a visa officer to refuse a temporary resident visa involves a question of mixed fact and law that is to be reviewed on the reasonableness standard (*Henry v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1039 at para 16).

IV. Relevant Provisions

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

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Obligation on entry	**Obligation à l'entrée au Canada**
20 (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish, (a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and (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.	20 (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver : a) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence; 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.

[11] Rule 179 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] states:

Temporary Resident Visa	**Visa de résident temporaire**
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 :
(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(b) will leave Canada by the end of the period authorized for their stay under Division 2;	b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;
(c) holds a passport or other document that they may use to enter the country that issued it or another country;	c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;
(d) meets the requirements applicable to that class;	d) il se conforme aux exigences applicables à cette catégorie;
(e) is not inadmissible;	e) il n'est pas interdit de territoire;
(f) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and	f) s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);
(g) is not the subject of a declaration made under subsection 22.1(1) of the Act.	g) il ne fait pas l'objet d'une déclaration visée au

paragraphe 22.1(1) de la Loi.

V. Submissions of the Parties

A. *Submissions of the Applicant*

[12] The Applicant submits that the Officer failed to provide him an opportunity to respond to the Officer's concerns regarding the credibility and genuineness of the information presented. As concluded in *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283, at paragraph 24, the Applicant submits that the Officer failed to fulfill his duty to provide him an opportunity to address his concerns "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". The Applicant argues that although "the procedural fairness owed by visa officers in on the low end of the spectrum", he should have been permitted to disabuse the Officer of his concerns (*Asl v Canada (Citizenship and Immigration)*, 2016 FC 1006 at para 23).

[13] The Applicant submits that he provided, in his TRV application, a letter from the province of Quebec indicating that his application for provincial nomination as an investor was received. The Applicant also submitted a letter from Arton Investments, in which it was explained that he intended to temporarily visit Canada through an exploratory business trip to Quebec. According to the Applicant, the Officer erred in failing to give him an opportunity to respond to the Officer's finding on credibility regarding his previous request to travel to Ontario. Further, the Applicant was not informed of the Officer's concerns regarding his inadmissibility for misrepresentation.

[14] The Applicant also argues that the Officer's decision is unreasonable because the Officer chose to give more weight to one factor rather than assessing all the other factors that could have been in favour of the Applicant's situation (*Malhi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1120 at paras 5-6). The Applicant submits that the Officer focused on the Applicant's purpose of travel and prior misrepresentation rather than considering other relevant factors which could satisfy the Officer that the Applicant would leave Canada at the end of his authorized stay. The Applicant argues that this error "amount[s] to a fettering of discretion that constitue[s] a reviewable error" (*Kenig v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1748, 84 ACWS (3d) 772 at para 13). Specifically, the Applicant submits that the Officer failed to consider evidence demonstrating his establishment in Pakistan, such as proof of two properties owned by the Applicant, proof of the Applicant's business and high income in Pakistan. The Officer also ignored the Applicant's previous travel history to Malaysia, Sri Lanka, Thailand, Denmark, Saudi Arabia and United Arab Emirates, as well as the Applicant's family (his wife and child) who currently reside in Pakistan and would not be accompanying him to Canada (*Totrova v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 886, 81 ACWS (3d) 138).

[15] The Applicant further submits that this Court has previously found that a visa officer had failed to consider factors identified at paragraph 9 ("Procedure: Assessing the application") of OP-11 dealing with Temporary Residents issued by Citizenship and Immigration Canada, in order to determine whether the Applicant would return to his country of residence (*Rudder v Canada (Citizenship and Immigration)*, 2009 FC 689 at para 32).

B. *Submissions of the Respondent*

[16] The Respondent, on the other hand, argues that the Officer did not violate the Applicant's right to procedural fairness. The Respondent also submits that the degree of procedural fairness in the case at bar falls at the low end of the spectrum (*Kindie v Canada (Citizenship and Immigration)*, 2011 FC 850 at para 5). The Respondent also relies on *Duc Tran v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1377, at paragraph 30, in which it was determined that "[t]here is no unfairness if the Visa Officer did not communicate all of [his/her] concerns to [the Applicant] or that [he/she] did not accord him an opportunity to respond to those concerns".

[17] The Respondent further submits that the onus is on an applicant to provide a visa officer with all of the relevant information and documentation for the consideration of his/her TRV application. It is therefore submitted by the Respondent that the Applicant should have provided further explanations regarding his past use of fraudulent documents. The Respondent further argues that an applicant has no statutory right to an interview.

[18] The Respondent also argues that the Officer's decision is reasonable, given all the evidence on file. The Officer was under no obligation to refer to every piece of evidence in his decision and reasons. The Respondent submits that "an officer's duty to provide reasons when evaluating a temporary resident visa application is minimal" (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 21). Consequently, it was reasonable for the Officer to only raise concerns on the Applicant's purpose of visit and inadmissibility for misrepresentation.

According to the Respondent, such findings are simply an assessment of the weighing of evidence, which is part of a visa officer's discretion and expertise, rather than a fettering of the visa officer's discretion.

[19] The Respondent notes that the Applicant's written submissions simply reflect his disagreement with the weight that was attributed to the evidence by the Officer. It is not this Court's role to re-weigh the evidence. The onus was on the Applicant to demonstrate that he would leave Canada at the end of his authorized stay (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 at para 32).

[20] The Respondent also submits that "previous immigration encounters are the best indicators of an applicant's likelihood of future compliance." (*Calaunan v Canada (Citizenship and Immigration)*, 2011 FC 1494 at para 28). It was therefore reasonable for the Officer to find that the Applicant would likely not comply with the IRPA and its Regulations in the future due to his past submission of fraudulent documents.

C. *Reply*

[21] The Applicant disagrees with the Respondent with regards to his previous inadmissibility for misrepresentation. The Applicant argues that he could not have reasonably predicted the Officer's concern with his past misrepresentation, especially when the period of inadmissibility had expired (*Popova v Canada (Citizenship and Immigration)*, 2018 FC 326; *Gu v Canada (Citizenship and Immigration)*, 2010 FC 522).

VI. Analysis

[22] For the following reasons, the application for judicial review is allowed. The Officer committed a reviewable error by failing to provide the Applicant an opportunity to respond to concerns.

A. *Was the Applicant denied procedural fairness, considering that he was not provided an opportunity to address the Officer's concerns?*

[23] In the context of the present application, the Court finds that the issue of procedural fairness is a determinative one as it is directly related to the Officer's concerns regarding the Applicant's purpose of visit in Canada, as well as his previous fraudulent documents.

[24] In his reasons, the Officer noted that he was not satisfied that the Applicant had a credible purpose to come temporarily to Canada. The Officer was concerned about the Applicant's true intentions to visit Canada. On one hand, in support of his TRV application dated December 15, 2017, the Applicant submitted evidence, including a letter of invitation from a financial intermediary, regarding his exploratory trip to Quebec. On the other hand, the Applicant had previously filed a TRV application in which he had specifically mentioned his intention to visit Ontario. This confusion led the Officer to raise a concern on the Applicant's purpose of visit, which also directly affected the Applicant's credibility. The Applicant had previously submitted a TRV application in order to visit Ontario and it was refused on the grounds of travel history, family ties in Canada and in country of residence, as well as purpose of visit. When the Applicant then applied under the Quebec Immigrant Investor Program, it was with the intention

of later taking an exploratory business trip to Quebec. The Applicant could not have anticipated every concern raised by the Officer, especially when it dealt with his past TRV application. "There are circumstances where a visa officer will be required to inform an applicant of concerns with an application, even where those concerns arise from the applicant's own evidence" (*Popova v Canada (Citizenship and Immigration)*, 2018 FC 326 at para 11). [Emphasis added.]

[25] While "the procedural fairness owed by visa officers is on the low end of the spectrum" (*Asl v Canada (Citizenship and Immigration)*, 2016 FC 1006 at para 23), the Court finds that the Officer committed a reviewable error by failing to provide the Applicant an opportunity to address his concern regarding the Applicant's credibility.

> 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. [Emphasis added.]
>
> (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24)

[26] In the same vein, the Court finds that the Applicant should have been given an opportunity to explain his past misrepresentation for submission of fraudulent documents. Again, the Officer's concern regarding the Applicant's previous fraudulent documents was not one that the Applicant could have predicted as it was not raised in the assessment of his previous TRV application. Further, the Court notes that the Officer acknowledged the fact that the Applicant's

period of inadmissibility for misrepresentation had already been expired. Given the expiration of the period for inadmissibility, the Court is of the view that the Applicant had no reason to believe that his inadmissibility for misrepresentation (which did not exist anymore) would impact his new TRV application dated December 15, 2017, especially when this was not a concern that the previous visa officer had raised in the Applicant's previous TRV application. The Court therefore concludes that the Officer also failed to provide the Applicant an opportunity to respond to his concern arising from his past inadmissibility.

[27] In light of the above reasons, the Court finds that there is no need to determine whether the Officer's decision was reasonable.

VII. Conclusion

[28] The application for judicial review is allowed. The decision of the Officer is quashed and the matter is referred back to a different visa officer for redetermination. No question of general importance is certified.

JUDGMENT in IMM-713-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The matter is referred back to a different visa officer for re-determination. No question of general importance is certified.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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