Federal Court  Cour fédérale

Date: 20190906

Docket: IMM-971-19

Citation: 2019 FC 1143

Toronto, Ontario, September 6, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

DILDEEP SINGH TOOR

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application judicially reviews a visa officer's decision to deny Mr. Toor's application for an open work permit. The visa officer was neither satisfied that his marriage was genuine nor that he would leave Canada at the end of the authorized period of stay.

II. Background

[2] Mr. Toor and his wife are citizens of India. He and his wife met in March 2012 and were married in February 2018. His wife has status in Canada under a study permit and is a full-time student at Kwantlen Polytechnic University in Surrey, British Colombia.

[3] Mr. Toor submitted an application for an open work permit under the International Mobility Program pursuant to sections 200 and 205 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. In November 2018, Mr. Toor was interviewed in New Delhi. His work permit was denied.

[4] In December 2018, approximately one month after the refusal, Mr. Toor reapplied, and was once again denied in February 2019. That second refusal is the decision [Decision] under review in this application.

III. Decision under Review

[5] The visa officer [Officer] was not satisfied that Mr. Toor would leave Canada at the end of his stay. The Global Case Management System [GCMS] notes indicate that the Officer reviewed the application, supporting documents, interview notes from November 2018, and the previous visa refusal and was not satisfied that there was any new information provided to establish that his marriage to the "inviter" was genuine, given that the only evidence tendered of their relationship was a marriage certificate. Thus, the Officer was not satisfied that Mr. Toor

met the requirements of an open work permit as a spouse pursuant to sections 200 and 205 of the Regulations.

IV. Issues and Standard of Review

[6] Mr. Toor contends that the Decision was both unreasonable and unfair. The refusal of a temporary resident visa involves a determination of mixed fact and law and is to be reviewed on the reasonableness standard (*Henry v Canada (Citizenship and Immigration)*, 2017 FC 1039 at para 16), whereas the standard of review for issues of procedural fairness is that of correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). An application for a temporary resident visa attracts a minimal standard of procedural fairness (*Thedchanamoorthy v Canada (Citizenship and Immigration)*, 2018 FC 690 at para 14).

V. Analysis

A. *Was the Decision reasonable?*

[7] Mr. Toor argues that the Officer ignored evidence and failed to provide adequate reasons. The Respondent counters that the onus is on an applicant to provide sufficient evidence in support of his application, which Mr. Toor failed to do. The Respondent further counters that the Officer's reasons were adequate.

[8] With respect to Mr. Toor's first argument, he argues that the Officer overlooked evidence that speaks to the genuineness of his marriage, namely, pre-wedding photographs, engagement photographs, post-wedding photographs, joint bank account details, WhatsApp chat history,

phone call details and Facebook details – documentation which is annexed to his Affidavit prepared in contemplation of this judicial review.

[9] However, there is no indication that these documents were before the Officer. They do not appear in the Certified Tribunal Record [CTR]. This is consistent with the GCMS notes, which make no reference to these documents. It is also consistent with the Officer's finding that she was not satisfied that "there is any new information provided to establish that the applicant's marriage to the inviter is genuine – only marriage certificate has been provided as evidence of relationship".

[10] As such, it cannot be said that the documents were ignored if they did not form part of the material submitted to the Officer. Mr. Toor had two separate occasions to challenge the CTR, namely (i) when it was first produced by the Respondent, and then (ii) when four supplementary pages that had been left out were subsequently produced by the Respondent. On neither occasion did Mr. Toor mention anything regarding a deficiency in the record, or otherwise challenge the contents of the CTR.

[11] Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, imposes a mandatory obligation on visa officers to produce a record containing all documents relevant to the matter that are in the possession or control of the tribunal (*Li v Canada (Citizenship and Immigration)*, 2018 FC 639 at para 22)). If the record produced to the Court is incomplete – in other words, if Rule 17 is breached – the visa officer's decision may be set aside. The guiding presumption is that of a complete CTR (*Togtokh v Canada (Citizenship and*

Immigration), 2018 FC 581 at para 16; *Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at para 18).

[12] The onus is on the applicant to prove that a document that is not in the CTR was in fact before the decision-maker (*Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at para 15). When the CTR does not contain or refer to a document, a bare assertion by the applicant that the document was sent will not meet this burden (*El Dor v Canada (Citizenship and Immigration)*, 2015 FC 1406 at para 32). Rather, evidence must support the proposition that documents were placed before the visa officer (*Ajeigbe v Canada (Citizenship and Immigration)*, 2015 FC 534 at para 16).

[13] While an applicant's affidavit is entitled to a presumption of truthfulness, this presumption "will only operate to a certain degree" (*Canada (Citizenship and Immigration) v Pereira*, 2014 FC 574 at para 30). Indeed, there is no positive obligation on the visa officer to fill in gaps in the evidence, nor to give the applicant the benefit of the doubt (*Désir v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 50 at para 19). Here, Mr. Toor has pleaded that a set of documents were before the visa officer, but he has failed to adduce evidence to support this proposition other than a bald assertion in his Affidavit.

[14] Based on the jurisprudence cited above, I am not persuaded by Mr. Toor's arguments. In contending that his Affidavit must be accepted unless successfully challenged by the Respondent, or opposed by a responding affidavit coming from the Officer, he is simply

attempting to reverse his onus to demonstrate that the documents which were not in the CTR were in fact before the decision-maker.

[15] Nor am I persuaded by the Mr. Toor's remaining argument that the reasons were inadequate. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] confirms that adequacy of reasons is not a standalone basis to quash a decision (at para 14). Under a reasonableness analysis, an administrative decision-maker does not have to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Newfoundland Nurses* at para 16).

[16] Mr. Toor, having been interviewed and advised of the deficiencies of his application, and then having received a refusal, was clearly on notice about the precise deficiencies in his first application, namely insufficient evidence on not only the marriage, but also his likelihood of compliance. He had, after all, failed in several prior attempts to obtain a Canadian visa. However, Mr. Toor's immigration consultant submitted the same documentation to the visa office, approximately one month after the first refusal, seeking a different outcome. Since Mr. Toor chose to submit what amounted to the same application package, with no new evidence and no written explanations to shore up the deficiencies from his first interview and work permit refusal, the Officer was not required to write extensive reasons. She had the same concerns as the previous officer. Those concerns were open to her.

[17] The length and depth of the Officer's reasons were entirely appropriate, given the type of application and its context. In my view, they clearly set out the Officer's concerns, essentially

agreeing with those of the previous refusal. The reasons were short, yet adequate. Guesswork does not play any role here. The Officer took note of the marriage certificate and determined that it was insufficient as evidence of their relationship. As such, the Officer was not satisfied that Mr. Toor met the requirements of an open work permit given the lack of evidence of their relationship. This finding was open to the Officer.

B. *Was the Decision procedurally fair?*

[18] Mr. Toor next argues that the Officer failed to inform him of her concerns and provide him with an opportunity to respond. The Respondent counters that visa officers do not have a duty to clarify a deficient application, relying on *Charara v Canada (Citizenship and Immigration)*, 2016 FC 1176 at paras 26-27 [*Charara*]. In that case, Justice Shore stated that "[a]n applicant who fails to discharge his burden of proof, submits an incomplete record, or leaves doubt as to the true purpose of the desired stay in Canada, cannot expect the officer to inform him of the deficiencies in his record or give him an opportunity to explain himself".

[19] Here, I agree with the Minister that the onus was on Mr. Toor to tender sufficient evidence. The Operational instructions, International Mobility Program addressing Spouses or common-law partners of full-time students [C42] under paragraph 205(c)(ii) of the Regulations states that applicants must "provide evidence that they are the spouse or common-law partner of a study permit holder who is a full-time student". And while Mr. Toor asserts that the Officer really made credibility findings which should have triggered the need for a further interview, that is neither how the Decision reads, nor was there any reason to reconvene an interview.

[20] Like in *Charara*, the Officer was under no obligation to provide the Applicant with advice or notice on this matter. Indeed, Mr. Toor already had due notice of the issues associated with his application the first time round. He decided not to heed the warnings he received at the interview, and then the clear issues set out in the initial refusal. He cannot now come to the Court claiming that his fairness was breached; as noted above, temporary resident visa applications attract a low standard of procedural fairness.

[21] It was entirely acceptable for the Officer not to call Mr. Toor in for a second interview so soon after the first when nothing had changed and no new information had been provided. Not only did Mr. Toor fail to challenge the initial refusal or note anything about it in his subsequent application, but he failed to submit evidence to meet his onus to provide clear and convincing evidence of the marriage and, in particular, to overcome the evidentiary shortfalls from the first application.

VI. Conclusion

[22] Mr. Toor had the opportunity after the first refusal to submit a strong application, and one that directly answered and addressed both the concerns and gaps noted in the first refusal, a mere month before he submitted his second application. Unfortunately, rather than putting his best foot forward, Mr. Toor chose to stand pat, hoping that a second kick at the can would yield a different result. The gambit did not pay off. The blame resides with him, and his immigration consultant, not with the Officer who acted both reasonably and fairly in refusing his application once again. This application is dismissed. No questions were proposed for certification.

JUDGMENT in IMM-971-19

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is dismissed.

2. No questions for certification were proposed, and none arise.

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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