Federal Court Cour fédérale

Date: 20171106

Docket: IMM-318-17

Citation: 2017 FC 1001

Ottawa, Ontario, November 6, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

GUNES FIDAN PENEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Gunes Fidan Penez, is a citizen of Turkey who holds a degree in tourism. In November 2016, she applied to Capilano University in Vancouver, British Columbia, to study Tourism Management for International Students. She was accepted into the program and paid the $5,000 tuition fee deposit. She then applied to Citizenship and Immigration Canada [CIC] for a study permit. Ms. Penez was meant to start classes in early January 2017, but her

application for a study permit was refused in late December 2016 by an immigration officer [Officer] at the Canadian Embassy in Ankara, Turkey. The Officer was not convinced that Ms. Penez was seeking to enter Canada for the sole purpose of studying and that she would leave Canada at the end of her stay. Ms. Penez reapplied for a study permit two days later, providing the Officer with an additional letter setting out her intentions, but her application was again refused for the same reasons on January 4, 2017 [Decision].

[2] Ms. Penez has filed an application for judicial review of the Officer's Decision. She argues that the Decision is unreasonable because it was based on findings of fact unsupported by the evidence. She claims that the Officer ignored or failed to consider relevant evidence, notably her statement that she intended to go back to her country of origin after her studies. She further submits that the Officer breached his duty of procedural fairness by failing to send a procedural fairness letter and to allow her to respond to his concerns. She asks this Court to quash the Decision and to send it back for redetermination by a different immigration officer.

[3] This application raises two issues: 1) whether the Officer's Decision denying the study permit sought by Ms. Penez unreasonable; 2) whether the Officer breach the principles of natural justice by failing to send a procedural fairness letter and to give Ms. Penez an opportunity to respond to his concerns before refusing her study permit application.

[4] For the following reasons, Ms. Penez's application for judicial review will be granted. Having considered the evidence before the Officer and the applicable law, I conclude that the Officer's Decision is unreasonable, as the Officer ignored evidence directly contradicting his

conclusions and no evidence supported a number of his factual findings. This is sufficient, in my opinion, to push the Officer's Decision beyond the range of possible, acceptable outcomes based on the facts and the law, and to justify this Court's intervention. I must, therefore, send the matter back for redetermination. However, I agree with the Minister that the application for judicial review does not raise procedural fairness issues.

II. Background

A. *The Decision*

[5] The Officer's Decision is brief and takes the form of a standardized letter used by CIC where visa officers simply check the relevant boxes. According to the Decision, Ms. Penez was denied a study permit pursuant to subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and paragraph 216(1)(b) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [Regulations], on the basis that she did not satisfy the Officer that she "would leave Canada at the end of [her] stay".

[6] To reach the Decision that Ms. Penez would not leave Canada, the Officer checked off one single factor on the standard form used by CIC, namely the purpose of Ms. Penez's visit. None of the other factors listed under the heading "not satisfied that you would leave Canada at the end of your stay" was checked by the Officer, such as "family ties in Canada and in country of residence", "employment prospects in country of residence", or "current employment situation". In the Decision, the Officer however identified "other reasons" in support of his Decision, and stated that Ms. Penez's proposed studies were not reasonable in light of her

"qualifications, previous studies, employment, level of establishment, other educational opportunities available or [her] future prospects and plans".

[7] The Officer's Global Case Management System [GCMS] notes dated January 4, 2017 (which form part of the Decision) provide further light on the reasons for the Officer's refusal. They indicate that the Officer believed that Ms. Penez's purpose for entering Canada did not seem reasonable in the context of her background. In particular, the Officer noted that Ms. Penez appeared to have been unemployed from 2008 to 2014 and held irregular employment since 2014. The Officer further noted that Ms. Penez had provided no explanation as to why she intended to pursue studies at a "lower level" than the diploma she had already obtained in the same field of study. It is useful to reproduce the GCMS notes in their entirety. They state the following:

> Application reviewed. Previous refusal noted. 31 year old married Turkish national travelling to Canada to study for a tourism diploma. Applicant graduated in 2008 with a bachelor degree in tourism. No explanation on why she is pursuing studies at a lower level than what she has already obtained. Appears to have been unemployed from 2008 until 2014, and has been holding irregular employment since 2014. Purpose does not appear to be reasonable in context of applicant's background. Not satisfied that the applicant is a genuine student. Application refused.

[8] As part of the process leading up to the Decision, Ms. Penez had sent two motivation letters to the Canadian Embassy officials. In the first motivation letter sent prior to the first decision of late December 2016, Ms. Penez expressed interest in studying in Canada because it would positively contribute to her career and help her achieve her goal of managing her own hotel someday. In a second letter that followed the initial refusal, she reiterated that she hoped to go into her own business in the tourism sector and intended to return to Turkey. She claimed that

her husband had a good full-time job in Turkey and that her large family owned over a dozen real estate properties in Turkey. In that second motivation letter, Ms. Penez expressly indicated that she “fully intends to return to Turkey after completing [her] studies in Canada”.

B. *The relevant provisions*

[9] The relevant provisions of the IRPA are subsections 11(1) and 22(2), which provide that a person wishing to become a temporary resident of Canada must satisfy an officer that “she or he meets the requirements of the Act” and that “an intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay”.

[10] Paragraph 216(1)(b) of the Regulations further requires a study permit applicant to establish that he or she “will leave Canada by the end of the period authorized for their stay.” Thus, it is well accepted and clear that an applicant for a study permit bears the burden of satisfying the visa officer that he or she will not remain in Canada once the visa has expired (*Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 [*Solopova*] at para 10; *Zuo v Canada (Citizenship and Immigration)*, 2007 FC 88 at para 12; *Zhang v Canada (Minister of Citizenship and Immigration*), 2003 FC 1493 [*Zhang*] at para 7). This Court has taken the view that “[t]he visa officer has wide discretion in assessing the evidence and coming to a decision. However, the decision must be based on reasonable findings of fact” (*Zhang* at para 7).

C. ***The standard of review***

[11] There is no dispute that, when reviewing a visa officer's factual assessment of an application for a student visa and the officer's belief that an applicant will not leave Canada at the end of his or her stay, the standard of review is reasonableness (*Solopova* at paras 12-13; *Li v Canada (Citizenship and Immigration)*, 2008 FC 1284 [*Li*] at para 15). Such a decision by a visa officer is "an administrative decision made in the exercise of a discretionary power" (*My Hong v Canada (Citizenship and Immigration)*, 2011 FC 463 at para 10). As a discretionary decision based on factual findings, it is entitled to considerable deference in view of the visa officer's special expertise (*Obeng v Canada (Citizenship and Immigration)*, 2008 FC 754 at para 21).

[12] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making process", and the decision-maker's findings should not be disturbed as long as 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 [*Dunsmuir*] at para 47). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 17).

[13] Turning to the principles of natural justice and procedural fairness issues, they are to be reviewed according to the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53). This requires the Court to determine whether the process followed achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115). Therefore, the question raised by the duty to act fairly is not so much whether the decision was "correct", but rather whether the process followed by the decision-maker was fair (*Aleaf v Canada (Citizenship and Immigration*), 2015 FC 445 at para 21; *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35).

III. Analysis

A. *Was the Decision reasonable?*

[14] The Minister argues that the Officer's refusal in this case was well within the range of acceptable outcomes, particularly given the discretionary nature of visa decisions. The Minister contends that it was perfectly reasonable for the Officer to refuse Ms. Penez a study permit in light of Ms. Penez's history of unemployment, in addition to the fact that she was seeking to earn a tourism diploma when she already had a university degree in tourism since 2008. Since it was Ms. Penez's burden to demonstrate that she would leave Canada at the end of her study period (*Loveridge v Canada (Citizenship and Immigration)*, 2011 FC 694 at para 20), the Minister submits that her failure to rebut this presumption was well within the Officer's purview to assess, and that the Court should not revisit such factual findings.

[15] I disagree with the Minister.

[16] I do not dispute that the role of this Court is not to reweigh the evidence on record and to substitute its own conclusions to those of visa officers (*Solopova* at para 33; *Babu v Canada (Citizenship and Immigration)*, 2013 FC 690 at paras 20-21). Visa officers have a wide discretion when rendering decisions under section 216 of the Regulations and their decisions attract a high degree of deference from the Court given their specialized expertise. If the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, it should not be disturbed (*Dunsmuir* at para 47). However, while a reviewing court should resist the temptation to intervene and to usurp the specialized expertise that Parliament has opted to confer to an administrative decision-maker like the Officer, the Court cannot show "blind reverence" to a decision-maker's interpretation and assessment of the evidence (*Dunsmuir* at para 48).

[17] Under a reasonableness review, it is the Court's role to detect "irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction", such as "the presence of illogic or irrationality in the fact-finding process" or in the analysis, or the "making of factual findings without any acceptable basis whatsoever" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99; *Dandachi v Canada (Citizenship and Immigration)*, 2016 FC 952 at para 23). This will normally be exceptional, but this is where the Officer's Decision regrettably falls in this case. I add that conducting such an exercise does not amount to a reweighing of the evidence assessed by the Officer or of the various elements singled out in his

Decision. It is rather a process which leads me to a determination that the evidence required to reasonably support the refusal decided by the Officer was absent.

[18] I further acknowledge that a decision-maker is not required to refer to each and every detail supporting his or her conclusion. It is sufficient if the reasons permit the Court to understand why the decision was made and to determine whether the conclusion falls within the range of possible, acceptable outcomes (*Newfoundland Nurses* at para 16). But the standard of reasonableness also requires that the findings and overall conclusion of a decision-maker withstand a somewhat probing examination (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at para 63). Where parts of the evidence are not considered or are misapprehended, where the findings do not flow from the evidence and where the outcome is not defensible, a decision will not withstand such probing examination.

[19] I find that the exercise of discretion by the Officer in this case was arbitrary and fell outside the range of possible, acceptable outcomes. There are three main reasons for that.

[20] First, the Officer was unconvinced that, in light of her long record of unemployment or checkered employment, and her desire to pursue studies in the same field as the one in which she already held a diploma, Ms. Penez was a genuine student. I fail to see what logic or rational reasoning could lead the Officer to conclude that pursuing studies in an area where Ms. Penez already had a diploma could be an indication that she is not a genuine student. It is in fact the very opposite situation (i.e., applicants intending to study in areas totally disconnected from their

background and experience) that typically prompt visa officers to question the true intent behind a study permit application.

[21] Here, the Officer acknowledged that Ms. Penez's proposed studies in Canada were consistent with what she had previously studied in Turkey. The Officer noted that Ms. Penez's previous academic history did accord closely with her intended field of study in Canada. On its face, the field of study contemplated by Ms. Penez was complementary to her background and experience. In the circumstances, it was not reasonable, in my opinion, for the Officer to find that Ms. Penez was not a genuine student on the basis that she was seeking to come to Canada to obtain a diploma in a field she already knew, and that this could be an element for which to disqualify her.

[22] I further agree with Ms. Penez that the Officer failed to properly consider the rationale for Ms. Penez's further tourism studies. In her first motivation letter to CIC, Ms. Penez expressed interest in studying "tourism management" in Canada because it would positively contribute to her career and help her achieve her goal of managing her own hotel someday. In her second letter that followed the initial refusal, she reiterated that she hoped to go into her own business in the tourism sector. In those circumstances, discounting Ms. Penez's study permit application because she intended to continue in a field she was already familiar with was unreasonable.

[23] Second, there was simply nothing on the facts before the Officer to suggest that Ms. Penez would stay in Canada illegally at the end of her authorized period of study. The evidence instead pointed to the contrary. Twice, Ms. Penez explicitly stated in her second motivation letter

that she would leave at the end of her studies. In addition, her history showed that she had already studied and worked abroad previously, and had indeed returned to Turkey at the end of her stay. The Officer ignored that evidence in his assessment.

[24] While the reasons must not be read hypercritically by a court, a decision-maker cannot act “without regard to the evidence” (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) [*Cepeda-Gutierrez*] at paras 16-17). Moreover, “the more important the evidence that is not mentioned specifically and analyzed in the [decision-maker]’s reasons, the more willing a court may be to infer from the silence that the [decision-maker] made an erroneous finding of fact without regard to the evidence” (*Cepeda-Gutierrez* at para 17).

[25] It is well-recognized that a decision-maker is generally not required to make an explicit finding on each constituent element of an issue when reaching its final decision. Nevertheless, it is also clear that contradictory evidence should not be overlooked. This is particularly true with respect to a key element relied upon by the decision-maker to reach its conclusion. I accept that a decision-maker is presumed to have weighed and considered all the evidence presented to him or her unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL) at para 1). I also agree that failure to mention a particular piece of evidence in a decision does not mean that it was ignored and does not constitute an error (*Newfoundland Nurses* at para 16; *Cepeda-Gutierrez* at paras 16-17). But, when an administrative tribunal is silent on evidence clearly pointing to an opposite conclusion and squarely contradicting its findings of fact, the Court may intervene and infer that the tribunal

overlooked the contradictory evidence when making its decision (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez* at para 17). The failure to consider specific evidence must be viewed in context and will lead to a decision being overturned only when the non-mentioned evidence is critical, contradicts the tribunal's conclusion and the reviewing court determines that its omission means that the tribunal disregarded the material before it. This is the case here.

[26] The Officer was faced with express statements that Ms. Penez would leave at the end of her stay, coupled with the fact that she had effectively done so in a previous analog situation. In those circumstances, the Officer could not simply conclude that Ms. Penez would not leave at the end of her studies without mentioning and discussing the contradicting evidence on this issue. He had the obligation to provide an analysis and explain why he preferred his conclusion over this evidence. He did not.

[27] Third, there was strictly no evidence on the record to support the statement made by the Officer in his "other reasons" to the effect that Ms. Penez's proposed studies were not reasonable in light of her "level of establishment, other educational opportunities available or [her] future prospects and plans." Further to my review of the record, I detect no evidence related to the level of establishment of Ms. Penez, or to other educational opportunities that might be available to her. As to her future prospects and plans, the only evidence on the record referred to her admitted intention to go back to Turkey. In other words, for three of the six factors expressly singled out by the Officer in his "other reasons" for finding that Ms. Penez was not a genuine student and would not leave at the end of her stay, there is no evidence on the record to support them.

[28] The case law recognizes that a finding for which there is no evidence before the tribunal will be set aside on review because such a finding is made without regard to the material before the tribunal (*Canadian Union of Postal Workers v Healy*, 2003 FCA 380 at para 25). Findings for which there is no evidence before the tribunal do run afoul of paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7 (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 34-40).

[29] All of these errors suffice, in my view, to bring the Decision beyond the scope of possible, reasonable outcomes. However large the spectrum of possible, reasonable outcomes or the margin of appreciation of the Officer can be, I find that the Officer's finding on Ms. Penez's study permit tumbles outside of it.

[30] I acknowledge that a decision need not be comprehensive and that decision-makers can provide brief or limited reasons. Reasons need not be fulsome or perfect, and need not address all of the evidence or arguments put forward by a party or in the record. However, decisions need to be comprehensible. The reasons must permit the Court to understand why the decision was made and determine whether the conclusion falls within the range of possible, acceptable outcomes (*Newfoundland Nurses* at para 16). When read as a whole, in conjunction with the record, the reasons must allow the reviewing court to conclude that they provide the justification, transparency and intelligibility required of a reasonable decision (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3; *Dunsmuir* at para 47).

[31] Here, they do not. The Officer's reasons are incomprehensible because there is no evidence on the record to support part of it, and they appear to be entirely arbitrary in light of the evidence before the Officer. To borrow the words of the Federal Court of Appeal in *Delios Canada (Attorney General)*, 2015 FCA 117 at para 27, the Officer's decision in this case bears several "badges of unreasonableness". Further to a review of the record, I can only conclude that the Officer ignored or misconstrued the evidence in assessing Ms. Penez's application, and in reaching his conclusions on Ms. Penez' lack of a genuine intention to leave Canada at the end of her studies.

B. *Did the Officer err in omitting to provide Ms. Penez with a Procedural Fairness Letter*

[32] Given my conclusion on the unreasonableness of the Officer's Decision, I do not have to deal with the procedural fairness issue raised by Ms. Penez. However, in light of the extensive submissions made by both parties on this front, I will make the following remarks.

[33] Ms. Penez relies on the unreported decision in *Yazdanian v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 411 (QL) to contend that the Officer was required to offer Ms. Penez the opportunity to respond to concerns that could negatively impact her study permit application. Ms. Penez argues that refusing to give notice to applicants deprives them of the right to be heard and properly respond to concerns (*Keymanesh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 641 [*Keymanesh*]; *Beltran Velasquez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1024). Had she been afforded that chance, claims Ms. Penez, she would have been able to show the Officer that the program she sought to study in adapted very well to her education and work backgrounds, as well as her future plans.

[34] I do not agree with Ms. Penez on this point.

[35] It is well-recognized that the onus is on visa applicants to put together applications that are convincing, and that anticipate adverse inferences contained in the evidence and address them; procedural fairness does not arise whenever an officer has concerns that an applicant could not have reasonably anticipated (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 at para 52).

[36] Furthermore, the nature and scope of the duty of procedural fairness are flexible and will vary depending on the attributes of the administrative tribunal and its enabling statute, the specific context and the various factual situations dealt with by the administrative body, as well as the nature of the disputes it must resolve (*Baker* at paras 25-26; *Varadi v Canada (Attorney General)*, 2017 FC 155 at paras 51-52). The level and the content of the duty of procedural fairness are determined according to the context of each case. Its purpose is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully, and to have them considered by the decision-maker (*Baker* at paras 21-22). It is well accepted that applicants for a study permit are owed a degree of procedural fairness that falls at the low end of the spectrum. Procedural fairness owed to a student permit applicant has been described as "relaxed" (*Duc Tran v Canada (Minister of Citizenship and Immigration),* 2006 FC 1377 at para 2).

[37] Visa officers are therefore generally not required to provide applicants with opportunities to clarify or further explain their applications (*Onyeka v Canada (Citizenship and Immigration)*, 2009 FC 336 at para 57). The onus remains on applicants to provide all the necessary information to support their application, not on the Officer to seek it out (*Ismaili v Canada (Citizenship and Immigration)*, 2012 FC 351 at para 18; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 212 at para 11; *Arango v Canada (Citizenship and Immigration)*, 2010 FC 424 at para 15). Indeed, it is well-established that the Officer had no legal obligation to seek out explanations or more ample information to assuage concerns relating to Ms. Penez's study permit application by way of a 'Procedural Fairness Letter' or any other means (*Solopova* at para 38; *Mazumder v Canada (Minister of Citizenship and Immigration)*, 2005 FC 444 at para 14; *Kumari v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1424 at para 7). Imposing such an obligation on a visa officer would amount to giving advance notice of a negative decision, which has been rejected by this Court on many occasions (*Dhillon v Canada (Citizenship and Immigration)*, [1998] FCJ No 574 (QL) at paras 3-4; *Ahmed v Canada (Citizenship and Immigration)*, [1997] FCJ No 940 (QL) at para 8).

[38] The responsibility lied with Ms. Penez to satisfy the Officer that she would leave after her stay pursuant to section 11 of the IRPA and paragraph 216(1)(b) of the Regulations by means of the documentation she provided; it was not up to the Officer to apprise her of concerns that may have a negative bearing on the outcome of her application and invite her to respond, or to provide the applicant with a running score at every step of the application process (*Solopova* at para 41; *Sharma v Canada (Citizenship and Immigration)*, 2009 FC 186 at para 8; *Fernandez v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 994 (QL) at para 13).

[39] The case law submitted by Ms. Penez's counsel on this point is unhelpful, as the cases cited do not refer to matters involving study permits. Furthermore, they can be distinguished. In *Keymanesh* for example, the applicant already had some legal status in Canada, unlike a visa applicant who is seeking one. In that decision, Mr. Justice Barnes indeed specified that the case was very fact-specific and that any duty to give notice and the means by which notice is effected are contextual (*Keymanesh* at para 14).

[40] I am therefore of the view that, in the circumstances of this case, the Officer was not required to conduct an interview or inform Ms. Penez of deficiencies in her application. Contrary to Ms. Penez's submissions, this is not a situation where she had a right to be informed of the Officer's concerns. But she was entitled to a decision falling within the range of reasonableness, and this is where the Officer failed.

IV. Conclusion

[41] The Officer's refusal of Ms. Penez's application for a study permit did not represent a reasonable outcome based on the law and the evidence before the Officer. On a standard of reasonableness, the Court will intervene if the decision subject to judicial review does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. This is the case here. Therefore, I must allow Ms. Penez's application for judicial review and return it for redetermination by a different immigration officer.

[42] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT in IMM-318-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, without costs.
2. The January 4, 2017 decision of the immigration officer rejecting the study permit application of Ms. Gunes Fidan Penez is set aside.
3. The matter is referred back to Citizenship and Immigration Canada for re-determination on the merits by a different immigration officer.
4. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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