Federal Court  Cour fédérale

Date: 20180322

Docket: IMM-3974-17

Citation: 2018 FC 326

Toronto, Ontario, March 22, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ANASTASIA POPOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Anastasia Popova, seeks judicial review of a refusal of her study permit application. For the reasons that follow, I am granting this application.

II. Background

[2] Ms. Popova is a Russian citizen. Her first application for a study permit was granted in 2012, and she attended Seneca College for two years, where she studied English. In 2014, she transferred to Centennial College, enrolling in a three-year diploma program in Advertising and Marketing Communications Management. During the course of her studies at Centennial College, she became pregnant and gave birth to her daughter in August 2015. As a result, she did not continue with her studies at Centennial College and, in December 2015, converted from student to visitor status, valid until July 6, 2017.

[3] In 2016, Ms. Popova re-enrolled in her Centennial College program and submitted her second application for a study permit. This application was refused via letter in December 2016 [2016 Refusal]. The computer notes underlying this 2016 Refusal read as follows:

> 22 year old single female Russian national; has a daughter born in Cda on 2015/08/17; PA originally entered Cda on SP 2012/11/18-2016/11/30; studied at Seneca CAAT, Toronto until 2014/09; attended Centennial College until 2016/01; was granted VR to accompany newborn child to 2017/07/06; now want to resume her studies and provided a letter from Centennial College confirming that she has been granted re-admission to 3 year Advertising & Marketing Communications Post-Secondary Advanced Diploma program; expected date of completion: 2017/12; tuition fees: C$6,792 per semester; presented personal funds in Cda: C$9,970 on 2016/11/07; parents in Russia has total savaging in bank acct; PA will need at least $26,584 to cover the first year tuition fees and living/transportation expenses for self and child; R220 not met; appln refused. [sic]

[4] After the 2016 Refusal, Ms. Popova lost her spot in the Centennial College program. She then applied for and was accepted into a similar program at Humber College, beginning in

September 2017. On July 6, 2017, just prior to the expiry of her visitor visa, Ms. Popova submitted her third application for a study permit, along with significant documentation to address the financial concerns that had led to the 2016 Refusal.

[5] Ms. Popova's third study permit application was refused several weeks later, on August 28, 2017 [2017 Refusal]. The deciding visa officer [Officer] found that Ms. Popova had not established that she would leave Canada at the end of her stay. The Officer indicated that three factors had been considered in reaching this conclusion: (i) Ms. Popova's immigration status in her country of residence, (ii) her family ties in Canada and her country of residence, and (iii) the purpose of her visit. Under "Other reasons", the Officer also wrote: "I am not satisfied that you have actively pursue a course or program of study in Canada while on a study permit" [sic].

[6] The Officer's computer-generated notes accompanying the 2017 Refusal read thus:

> VR expired 2017/7/6. No proof of valid Cdan immig status. P/a is single with a child born in Cda in 2015. Held SP for 4 yrs until Nov 2016 to attend ESL/BA at Seneca in Toronto. Per appln info, attended Seneca then Centennial. Insufficient proof of previous Cdn studies/academic progress. Based on submission, not satisfied p/a has actively pursued a course or program of study for the duration of stay in Cda while on a SP. On balance, not satisfied p/a is a BF t/r who will leave Cda by the end of the period authorized for her stay. [sic]

III. Analysis

[7] Ms. Popova argues that the Officer applied an improper legal test, ignored evidence, provided inadequate reasons, and failed to provide her an opportunity to respond to concerns.

[8] I am satisfied that the procedural fairness issue Ms. Popova raises, which is to be assessed on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 49), is both persuasive and determinative of this application: the Officer wrongly failed to provide Ms. Popova an opportunity to respond to concerns arising from her past studies in Canada. My conclusion on procedural fairness arises from the particular circumstances of Ms. Popova's case, as I will now explain.

[9] The 2016 Refusal was based on Ms. Popova's financial situation, with no indication that her study history raised any concerns. Her subsequent application therefore addressed the financial issues which led to the 2016 Refusal. However, as the Respondent concedes, Ms. Popova's study history was the determinative concern in the 2017 Refusal — it was on this basis that the Officer inferred that she was not a *bona fide* student: the Officer's reasons for refusal stated that "I am not satisfied that you have actively pursue[d] a course or program of study while on a study permit". The associated computer notes concluded that "[o]n balance, not satisfied [she] is a BF t/r [bona fide temporary resident] who will leave Cda by the end of the period authorized for her stay" [sic].

[10] It is true that the requirements of procedural fairness are relaxed for study permit applications (*Maklakov v Canada (Citizenship and Immigration)*, 2013 FC 242 at para 15). The onus is on applicants to prove their case, and a visa officer is not required to provide them with a "running score" of weaknesses or give notice of concerns arising from legislative requirements (see *Penez v Canada (Citizenship and Immigration)*, 2017 FC 1001 at para 37; *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 at para 24 [*Hassani*]).

[11] However, despite the fact that the duty of fairness is relaxed in study permit cases, it nonetheless continues to exist. 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 (*Rukmangathan v Canada (Citizenship and Immigration)*, 2004 FC 284 at paras 22-23, cited in *Hassani* at para 23). This is such a case. Given the conclusions of the 2016 Refusal, I am satisfied that Ms. Popova had no reason to believe that her study history would be fatal to her new application; she thus should have been given an opportunity to respond to the Officer's concerns.

[12] Finally, I will point out that the facts before me are similar to those in *Gu v Canada (Citizenship and Immigration)*, 2010 FC 522 [*Gu*], where Ms. Gu's study permit had also been rejected in part because she had not completed studies under previously issued study permits. Justice Mainville set aside the decision as a result of breaches of procedural fairness as follows:

> 22 In the CAIPS notes, the officer was concerned that the Applicant did not establish she had completed any studies in Canada under previously issued study permits or worked in Canada under the work permits issued to her. Indeed, if the Applicant was using work or study permits for other purposes, then this could certainly give rise to a valid concern about her commitment to leave Canada by the end of the new study permit she was requesting.
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> 23 However, these past permits had been issued and renewed by the Canadian immigration authorities, and there is no evidence of non-compliance with the Act and the Regulations on the part of the Applicant. In circumstances where past compliance issues have never been raised, I agree with the Applicant that if the officer had a concern about her compliance with past permits, the officer should have informed her of the concern and provided her with an opportunity to respond. As noted by Justice Beaudry in *Li v. Canada (Minister of Citizenship & Immigration)*, supra at para. 35:
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> > There is no statutory right to an interview (*Ali v. Canada (Minister of Citizenship and Immigration)*,

> (1998) 151 F.T.R. 1, 79 A.C.W.S. (3d) 140 at paragraph 28). However, procedural fairness requires that an Applicant be given the opportunity to respond to an officer's concerns under certain circumstances. When no extrinsic evidence is relied on, it is unclear when it is necessary to afford an Applicant an interview or a right to respond. Yet, the jurisprudence suggests that there will be a right to respond under certain circumstances.
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> […]
>
> 25 This is not a case where the officer had concerns with the application which was submitted. Rather the concerns related to past permits and past applications. In light of these circumstances, the Applicant was entitled to be provided with an opportunity to answer these concerns which she could not have reasonably foreseen as being of interest to the officer. Since the application will be returned to another Non-Immigrant Officer for redetermination, the Applicant is now well advised that she must address these concerns with this new officer.
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> [Emphasis added]

[13] The Respondent correctly observes that 2014 amendments to the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] have underlined the importance of a study permit holder actively pursuing their course of study. I am also cognizant that *Gu* precedes these amendments.

[14] However, *Gu* continues to be cited for the proposition that an interview may be required in student visa applications where the officer has formed an opinion that the applicant would have no way of anticipating (see *Cayanga v Canada (Citizenship and Immigration)*, 2017 FC 1046 at para 12). I find this principle applies to the particular facts of this case, given that Ms. Popova's study history was of no concern to the second visa officer — who decided her

application in 2016, after the amendments to the *Regulations* — but was of central concern to the Officer who refused her subsequent application.

[15] Further, I note in passing that the Officer's conclusions in respect of Ms. Popova's study pursuits are themselves questionable. The evidence indicates that Ms. Popova undertook her studies from 2012 until giving birth to her child in August 2015. Shortly afterwards, and due to this change of circumstances, she proactively converted to visitor status.

[16] The Officer's comment that Ms. Popova "[h]eld SP [study permit] for 4 yrs until Nov 2016 to attend ESL/BA at Seneca in Toronto" was therefore incorrect, and may suggest a misapprehension of the evidence relating to whether Ms. Popova had actively pursued a course of study while in student status. Certainly, her proactive change of status to reflect that she was no longer studying is suggestive of *bona fides* to remain in good status, rather than being suggestive of non-compliance, which once again, formed the basis of the 2017 Refusal.

IV. Conclusion

[17] As a result of the foregoing reasons, Ms. Popova's application is allowed.

V. Questions for Certification

[18] At the hearing, the Respondent proposed the following question for certification:

> In the review of a study permit application, can an Officer consider the applicant's study history in Canada when applying section 216(1)(b) of the Immigration and Refugee Protection Regulations in order to assess anticipated compliance?

[19] I will not certify this question because it is not dispositive of the application (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9). Indeed, the Respondent conceded that the proposed question would not be germane if this application was decided on the basis of procedural fairness, as it has been. Further, I believe that this question is addressed in the jurisprudence, including in the paragraphs of *Gu* excerpted above, and for that reason alone would not be appropriate for certification (see, for instance, *Lewis v Canada (Public Safety and Emergency Preparedness*, 2017 FCA 130 at para. 39).

VI. Costs

[20] Ms. Popova seeks her costs. Under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, costs are not payable in respect of Ms. Popova's application absent "special reasons". The Respondent submits that none exist. The threshold before costs will be awarded for "special reasons" is a high one (*Balepo v Canada (Citizenship and Immigration)*, 2017 FC 1104 at para 38). Costs are not warranted in this case.

JUDGMENT in IMM-3974-17

THIS COURT'S JUDGMENT is that:

1. This judicial review is allowed.
2. The decision is set aside, and the matter remitted for redetermination by a different visa officer.
3. There is no award as to costs.
4. No questions are certified.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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