Federal Court  Cour fédérale

Date: 20191008

Docket: IMM-1948-18

Citation: 2019 FC 1270

Ottawa, Ontario, October 8, 2019

PRESENT: Mr. Justice McHaffie

BETWEEN:

ANUPAM GUPTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Gupta claims that the refusal of his application for a temporary resident visa [TRV] was unfair and unreasonable. He asserts that he was not given a fair chance to respond to a concern about a misrepresentation that was raised in a fairness letter, and that this resulted in improper adverse credibility findings. He also argues that the refusal was unreasonable given his family ties in India, financial status and prior travel history, and that it was based on stereotypes, skepticism and discarding of favourable evidence.

[2] Although I agree that Mr. Gupta did not have a fair opportunity to respond to the misrepresentation concern, that concern was not the basis for the refusal. It was not relied on by the visa officer, and there is no indication that the officer made any credibility findings based on it or at all. Rather, the refusal was based on an assessment of the limited evidence in the application regarding economic conditions, travel history, financial status, family ties and travel history. Mr. Gupta had an onus to provide all relevant information to satisfy the visa officer that he would leave Canada at the end of his stay. The officer was not satisfied of this, and made a finding falling squarely within her mandate. That conclusion was reasonable.

[3] The application for judicial review will therefore be dismissed. Despite the lengthy time for processing of Mr. Gupta's claim, no special costs will be awarded.

II. The Visa Application and Decision at Issue

A. *Mr. Gupta's Visa Application*

[4] Mr. Gupta applied for a TRV online on October 21, 2016. He stated that the purpose of his visit was "Tourism" and that he planned to visit a friend in Edmonton between December 7, 2016 and January 15, 2017. The application indicated that Mr. Gupta had $7,000 available for his stay, and that he had been retired for at least the prior ten years.

[5] As required, Mr. Gupta's application included a "Family Information" form. In completing this form, Mr. Gupta gave information about himself, but did not refer to either his mother or father, which he conceded at the hearing was an oversight. His application did include a copy of the information page from his own passport, which gives the names of his father and

mother. But that page does not give his parents' date and country of birth, occupation, whether they are deceased, their present address, or whether they would accompany Mr. Gupta to Canada, all of which are required by the Family Information form. Mr. Gupta indicated in a supplementary affidavit filed on this application that his parents are alive and that the address on the passport page (which is Mr. Gupta's) is also his parents' address. However, this information was not available in the application and was not before the officer.

[6] With respect to prior travel to Canada, the application stated that Mr. Gupta had applied and received a visitor visa to enter Canada, and that his "last visa issued on 02/05/05, and it expired a year later." Mr. Gupta's application also included travel history information, including information that he obtained from the Canada Border Services Agency (CBSA) in response to a request under the *Access to Information Act*, RSC 1985, c A-1, showing travel to Vancouver in May 2005 and May 2006. Mr. Gupta included a copy of a boarding pass that showed he flew from Vancouver to London on "30OCT" but with no year of travel. Mr. Gupta advised in submissions that this boarding pass was from his departure from Vancouver in October 2006 after a six-month stay, pointing the Court to a stamp in his passport showing re-entry to India on November 2, 2006. While this may make sense, it is not an explanation that was before the visa officer in Mr. Gupta's application, and the application cannot be said to have shown that Mr. Gupta was in Canada through late October 2006.

[7] These travel dates are relevant since Mr. Gupta wished his application to be processed under the "CAN+" program. CAN+ is a program that provides timely processing of visas for nationals of certain countries who have travelled to Canada or the United States in the past ten

years. Information before the Court suggested that the CAN+ program has—or had—different requirements for nationals of different countries, but the Court accepts that the ten-year travel period was applicable to India. Applications that qualify under the CAN+ program can expect a shorter processing time and require less information regarding financial circumstances.

B. *Processing and Refusal of Mr. Gupta's Application*

[8] Mr. Gupta's application was treated by officers in the Visa Section of the High Commission of Canada in India, in New Delhi, and took some time to process. Unknown to Mr. Gupta, on November 9, 2016, an officer requested additional information from authorities in the United States. The request was apparently triggered by a notation related to a removal order, as it read: "Please provide detailed refusal reasons pursuant to code: 92A; 'ORDERED REMOVAL OR DEPARTED WHILE ORDER OUTSTD'. Also provide the passport number and a photo if available." The source of the underlying notation is not clear on the record, although the Global Case Management System [GCMS] notes indicate that the information was requested "regarding applicants [*sic*] removal from the USA."

[9] No response to the request for information was received from the United States for a number of months, so it appears that on March 10, 2017, the request was cancelled and a "fairness letter" was sent to Mr. Gupta. The letter advised Mr. Gupta that the immigration officer had concerns that he had misrepresented his response to the question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?" and gave him the opportunity to respond.

[10] Mr. Gupta responded to the fairness letter on March 19, 2017, indicating that the officer had not disclosed the basis for the misrepresentation concern, asking that the officer release any "extrinsic information" that had led to the concern, and referring to this Court's decision in *Guerrero v Canada (Citizenship and Immigration)*, 2015 FC 1048 [*Guerrero*].

[11] Mr. Gupta heard no further, so followed up with the High Commission in September 2017. This led to an exchange in which the High Commission re-sent its March 10, 2017 letter, and Mr. Gupta re-sent his March 19, 2017 response. No further information was provided by Mr. Gupta, and the High Commission sent no further response to the March 19, 2017 letter.

[12] On February 26, 2018, Mr. Gupta's TRV application was refused. As is standard, the refusal consisted of three parts: (i) a cover letter that stated that the application was refused and set out a general list of factors that are considered in making a decision on an application; (ii) a form (IMM 5621) with a check-box list of grounds for rejection, with some boxes checked; and (iii) a copy of the GCMS notes that included brief additional reasons from the visa officer.

[13] The IMM 5621 form includes the following statement: "Please note that only the grounds that are checked off apply to the refusal of your application." In Mr. Gupta's case, boxes related to two grounds were checked. The first reads:

> You have not satisfied me that you would leave Canada at the end of your stay as a temporary resident. In reaching this decision, I considered several factors, including:

Under this description, the form has a sub-list of ten factors, including “travel history,” “Purpose of visit,” and “any history of contravening the conditions of admission on a previous stay in Canada.” However, the only box in the sub-list of factors checked by the officer was the one reading “Family ties in Canada and in country of residence.”

[14] The second ground on the IMM 5621 form checked by the officer reads:

> I am not satisfied that you have sufficient funds, including income or assets, to carry out your stated purpose in going to Canada or to maintain yourself while in Canada and to effect your departure.

[15] Notably, the officer did not check either the box on the form that would indicate she was not satisfied the applicant answered all questions truthfully, or the boxes that related to inadmissibility for misrepresentation or withholding of material facts.

[16] In addition to the checked form, the GCMS notes of the officer on the date of refusal provide the following additional reasoning:

> Procedural fairness was sent to client in March 2017 and resent in September 2017 after receviing [*sic*] an updated email and mailing address. Applicant did not respond to concerns indicated in procedural fairness. I have considered all of the information in front of me and am not satisfied that the applicant is a bona filde [*sic*] temporary resident that will leave Canada at the end of any authorized stay. Considering economic conditions and employment prospects in home country, and taking into account factors including travel history, economic establishment and family ties, I am not satisfied that the applicant is a genuine visitor who would respect the terms of admission as a temporary resident in Canada. Refused.

III. Legal Framework and Standard of Review

[17] Subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] provides that a foreign national, before entering Canada, must obtain a visa, which will be issued if the officer is satisfied that the foreign national is not inadmissible and meets the requirements of the Act:

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.

[18] The "requirements of this Act" for someone seeking to become a temporary resident include that they hold the necessary visa and that they will leave Canada by the end of the authorized period:

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,	**20 (1)** L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
[…]	[…]
(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	**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

period authorized for their stay.	période de séjour autorisée.

[19] Section 179 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], specifies that an officer shall issue a TRV to an applicant if various criteria are established. These include, for the purposes of this application, that the individual will leave Canada at the end of the authorized period and they are not inadmissible:

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;
[…]	[…]
(e) is not inadmissible;	**e)** il n'est pas interdit de territoire;
[…]	[…]

[20] As Justice Rennie, then of this Court, noted in *Chhetri v Canada (Citizenship and Immigration)*, 2011 FC 872 at para 9, the effect of these provisions is to create an obligation on the foreign national to establish that they will leave at the end of the visa period:

> The combined effect of section 11(1) of the [*IRPA*] and Division 3 of Part 11 of the [*Regulations*] is to require visa officers to be satisfied that the individuals are not inadmissible and that they will leave Canada on expiry of their visa. It is often over-looked that it must be "established" that the foreign national will leave at the end of their visa. The combined effect of the *IRPA* and the *Regulations* does not leave much room for officers to give the applicant the benefit of the doubt; rather there is a positive obligation that it be established that the foreign national will leave before the visa be issued. [Emphasis added.]

[21] Relying on this Court's decisions in *Obeng v Canada (Citizenship and Immigration)*, 2008 FC 754 [*Obeng*] at para 20 and *Rahman v Canada (Citizenship and Immigration)*, 2016 FC 793 [*Rahman*] at para 16 (which cites *Obeng*), the Minister submits that there is also a "legal presumption that a foreign national seeking to enter Canada is an immigrant." This language derives from subsection 9(1.2) of the former *Immigration Act*, RSC 1985, c I-2, which stated that "A person who makes an application for a visitor's visa shall satisfy a visa officer that the person is not an immigrant": *Li v Canada (Citizenship and Immigration)*, 2001 FCT 791 at paras 9, 35.

[22] The language of former subsection 9(1.2) is not found in the *IRPA.* The requirement now reads that the applicant must establish that they will leave at the end of the authorized period. In *Abdulateef v Canada (Citizenship and Immigration)*, 2012 FC 400 at para 10, Justice Rennie described the onus in a manner that confirms that the two are simply opposite sides of the same coin: "the onus [is] on the applicant to prove that she is not an immigrant, but rather is a *bona fide* temporary resident who will leave at the end of her authorized stay." Given the statutory change, it seems preferable to focus the inquiry on whether the applicant will leave at the end of the stay, as the officer did in this case, rather than on whether they are an "immigrant."

[23] Regardless, the nature of the analysis undertaken by an officer on a TRV application is that described recently by Justice Mosley in *Bunsathitkul v Canada (Citizenship and Immigration)*, 2019 FC 376 at para 19:

> For a TRV application under paragraph 179(b) of the [*Regulations*], the Officer assesses various factors, including the purpose of the visit, family ties in Canada and in the country of residence, the economic and employment situation abroad, past attempts to emigrate to Canada (or elsewhere), any absence of prior travel history and the capacity and willingness to leave Canada at the end of the stay. [Citation omitted.]

[24] In conducting this assessment, the visa officer is under no obligation to ask for further information if an applicant has not met their burden; the applicant must put their "best foot forward": *Singh v Canada (Citizenship and Immigration)*, 2019 FC 969 at para 23.

[25] The standard of review applicable to the visa officer's refusal of Mr. Gupta's TRV application is reasonableness: *Obeng* at para 21. Parliament has conferred the power to undertake the assessment on the visa officer, and this Court will not interfere if the decision is reasonable, *i.e.*, it is justified, transparent, intelligible, and 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.

[26] The fairness of the process leading to the decision, on the other hand, is reviewable on a standard akin to "correctness," *i.e.*, the Court is to determine whether the process was fair in the circumstances: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 53-54; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

IV. Grounds for Challenge of the Refusal

[27] Mr. Gupta raises a number of challenges to the refusal which in essence amount to submissions that:

(a) the decision was unfair, as the basis for the concern raised in the fairness letter, and any extrinsic information on which it was based, were not disclosed to Mr. Gupta, depriving him of an adequate opportunity to respond;

(b) the officer implicitly made adverse credibility findings arising from the concern raised in the fairness letter, resulting in a pervasive skepticism about the claim;

(c) the officer's refusal of the TRV was unreasonable, as it referenced elements of the Indian economy (which has improved since Mr. Gupta's last visit); gave insufficient value to his "perfect track record" of respecting immigration requirements on prior visits to Canada; relied on generalizations and stereotypes regarding his family ties; and failed to apply the CAN+ program exemption regarding financial evidence.

[28] Mr. Gupta also seeks costs under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Rules*], on the basis that the unduly long processing time for his application (16 months, rather than the six business days that he was expecting for a TRV application processed under the CAN+ program) and the resulting loss of CAN+ eligibility constitute "special circumstances" for the purpose of that Rule.

V. Analysis

A. *Fairness*

[29] As Mr. Gupta points out, this Court has confirmed that where a visa officer has concerns about the credibility of an applicant, principles of fairness impose a duty to provide them with an opportunity to respond to the concerns: see, *e.g., Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 [*Punia*] at para 27. This is typically done through the issuance of a "fairness letter," as in this case. As Justice Russell pointed out in *Punia*, for the fairness letter to be fair, it has to allow an applicant to know what the concerns are: *Punia* at para 62. Where the concerns are based on extrinsic information of which an applicant is unaware, sufficient detail regarding that information is required to provide an opportunity to respond: *Guerrero* at paras 28-40.

[30] In the present case, the fairness letter stated only that the officer had "reasonable grounds to believe" that Mr. Gupta had not answered the questions in the application truthfully, and that specifically, they had concerns that Mr. Gupta had misrepresented the response to the question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?" It is clear that this concern was raised by the "'ORDERED REMOVAL OR DEPARTED WHILE ORDER OUTSTD" notation that led to the request for information from the United States.

[31] Mr. Gupta wrote to the High Commission indicating that he was unaware of the extrinsic information that the officer was relying on and requesting further information, but received no response. The record is unclear as to why no response was sent, although there appears to have been some degree of miscommunication, as Mr. Gupta's follow-up inquiries simply resulted in the same correspondence being re-sent.

[32] Had the visa officer relied on the notation, or reached a conclusion that Mr. Gupta had made a misrepresentation on the form or was inadmissible for this reason, this would have been unfair. The fairness letter was not adequate to meet the requirements of fairness described in *Guerrero* and *Punia*. Mr. Gupta did not have an adequate opportunity to respond to the concerns raised, as he was not provided with the basis for the concern despite his request.

[33] However, the concern raised during the processing of Mr. Gupta's application ultimately formed no part of the visa officer's decision. On the IMM 5621 form, the visa officer did not indicate a concern with the applicant's truthfulness or a misrepresentation. The GCMS notes refer to the fairness letter, but I agree with the Minister that in context, this is most reasonably read as being a recitation of the procedural history and not an adverse finding against Mr. Gupta. Rather, the factors referenced by the officer as having been the basis for the decision, both in the form and the notes, relate to matters unrelated to the misrepresentation concern.

[34] Fairness requires that an applicant be given an opportunity to respond "if an officer intends to base a decision on extrinsic information": *Guerrero* at para 28. Where no reliance is placed on the issue, and it does not affect the outcome of the decision, the lack of an opportunity to respond to the concern does not create a basis to overturn the decision.

B. *Credibility and Skepticism*

[35] The visa officer did not make any express credibility findings. However, Mr. Gupta argues that the officer implicitly found him not credible, a conclusion he says is shown by the lack of response to his request for disclosure; the officer's reliance on generalizations regarding family ties; her concerns about his financial status; and her failure to accord positive weight to his travel history and prior history of approvals and compliance. He submits that these "concealed credibility findings" coloured the entire decision, that the officer's skepticism was apparent, and that she had a duty to seek clarification or communicate her concerns and allow him to respond.

[36] I disagree. There is nothing in the officer's decision, either in the IMM 5621 form or in the GCMS notes, which suggests that she doubted Mr. Gupta's credibility, either expressly or implicitly. The situation is very different from that described by Justice Mosley in *Adeoye v Canada (Citizenship and Immigration)*, 2012 FC 680 at para 8, cited by Mr. Gupta, in which a Pre-Removal Risk Assessment officer clearly did not believe the applicant's assertions regarding an illegal detention, and discounted letters from a medical centre and a police inspector. Unlike in that case, there is no skepticism about Mr. Gupta's visa application apparent in the officer's decision.

C. *Refusal of the Application*

[37] Mr. Gupta raises a number of concerns regarding the reasonableness of the officer's refusal of his TRV application. I am not satisfied that any of them, individually or cumulatively, show the decision to be unreasonable.

[38] Mr. Gupta criticizes the officer's consideration of "economic conditions and employment prospects in home country," noting that he had received a visa and returned from visiting Canada earlier when the Indian gross domestic product was lower and the unemployment rate higher. However, the assessment of factors for the purpose of a TRV is not a comparative exercise to the results of an earlier application. It is an assessment by the officer based on the evidence in the application before them. Nor is a single factor to be considered in isolation from the entirety of the application. While the officer does not provide detailed analysis on the issue, there is no obligation to do so in the context of a TRV application. I cannot say that it was unreasonable for the officer to consider economic and employment conditions in India as a factor in the assessment of Mr. Gupta's application.

[39] Mr. Gupta asserts that the officer failed to provide a clear rationale for his travel history "disincentivizing his return." There is no indication that the officer reached this conclusion at all. The officer referred to Mr. Gupta's travel history, but did not itemize it on the form as a matter of concern, suggesting that if anything it was a positive factor. Notably, the evidence of prior travel history filed with the application was modest, and certainly did not cry out for extensive discussion. The officer's brief treatment of this factor was not unreasonable.

[40] Similarly, the officer's assessment of Mr. Gupta's family ties was reasonable in the circumstances. As noted above, Mr. Gupta failed to provide information in his application regarding his parents in India, for which the officer cannot be faulted. The onus was on Mr. Gupta to put forward complete information sufficient to satisfy the officer that he would leave Canada. His failure to ensure that his application was complete and accurate does not render the decision unreasonable, and the fact that his family ties did not prevent him from previously leaving Canada is of limited importance. I also see no evidence that the officer engaged in the "stereotyping" alleged by Mr. Gupta regarding his family status, and in particular his childlessness. Rather, the officer appropriately considered his family ties as a factor in the assessment of whether she was satisfied that he would leave Canada.

[41] Mr. Gupta also disagrees with the officer's concern regarding funds, including income or assets. He believes that the $7,000 he had available for his stay should have been considered ample, and that the officer misadjudicated his file by failing to apply the CAN+ program exemption for proof of financial sufficiency and economic establishment. However, given the absence of documents and information regarding the 2006 travel to Canada, Mr. Gupta's application did not contain adequate information to allow an officer to conclude that he qualified for the CAN+ program. He therefore cannot rely on the features of that program to argue that the assessment of his application was unreasonable. The officer assessed the sufficiency of the single statement in Mr. Gupta's application that he had $7,000 available for his stay, in conjunction with the other facts and factors. The officer's conclusion that she was not satisfied that the funds were sufficient was reasonable.

[42] Finally, Mr. Gupta argues that the officer disregarded contrary evidence regarding positive factors such as his track record of compliance with immigration laws. However, in addition to being presumed to have considered all the evidence before her (*Rahman* at para 17), the officer expressly indicated that she had considered Mr. Gupta's travel history, and this was not a factor which was identified as a concern or basis for refusal on the IMM 5621 form. Mr. Gupta's argument that the officer disregarded evidence that supported his application is unpersuasive.

[43] Overall, Mr. Gupta's challenges to the application effectively ask this Court to reweigh the factors and reassess the facts and conclude that a visa ought to have been granted. That is not the role of this Court on judicial review. The officer's assessment of the application, based on the information that was presented in that application, was reasonable.

D. *Special Costs*

[44] The ordinary rule under Rule 22 of the *Rules* is that no costs are to be awarded on an application for judicial review unless the court so orders "for special reasons":

Costs	**Dépens**
22 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.	**22** 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.

[45] Mr. Gupta seeks an order of costs on the basis of the delay in processing his TRV application, citing *Singh v Canada (Citizenship and Immigration)*, 2010 FC 757 [*Singh*] at para 56. In addition to the fact that Mr. Gupta was not successful on this application, I do not believe that special costs are appropriate in this case. While Mr. Gupta's application took some time to process, it was certainly not in the realm of the 14-year time period at issue in *Singh*. Mr. Gupta's other grounds for such an order, including alleged deprivation of temporary residence opportunities and prejudice to prospects of visa approvals from other countries, are unsubstantiated by evidence, and in any event flow from the refusal of his application. I am not satisfied that special reasons exist in this case that justify a costs award.

[46] This application will therefore be dismissed. Neither party proposed a question for certification and none arises. No question is certified.

JUDGMENT IN IMM-1948-18

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed, with no order as to costs.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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