Federal Court Cour fédérale

Date: 20230524

Docket: IMM-8568-22

Citation: 2023 FC 733

Vancouver, British Columbia, May 24, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

JOGINDER SINGH CHERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Joginder Singh Chera, is a citizen of India. Mr. Chera seeks judicial review of a decision rendered on August 19, 2022 [Decision] by a visa officer [Officer] of Immigration, Refugees and Citizenship Canada, who denied his temporary resident visa application. The Officer was not satisfied that Mr. Chera would leave Canada at the end of his

stay, as required by paragraph 179(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] Mr. Chera submits that the Decision is procedurally unfair because the Officer effectively made adverse credibility findings without giving him an opportunity to respond. Furthermore, according to Mr. Chera, the Decision is unreasonable because the Officer ignored contradictory evidence.

[3] For the reasons that follow, Mr. Chera's application for judicial review will be granted. Having considered the evidence before the Officer and the applicable law, I conclude that the Decision breached Mr. Chera's procedural fairness rights. Moreover, I find that the Decision lacks a clear and logical justification of its outcome.

II. **Background**

A. ***The factual context***

[4] Mr. Chera is a sixty-seven-year-old citizen of India. He lives with his wife, Ms. Gurmej Kaur Chera, with whom he has been married for over fifty years. They have two children. Their daughter, Jaswinder Kaur, lives in India, while their son, Satnam Singh, lives in Canada with his wife and children.

[5] Mr. Chera and his wife own and operate a farming business in India.

[6] On February 17, 2022, Mr. Chera applied for a six-month temporary resident visa under the “super visa” category, in order to visit his son and his two grandchildren in Canada. A super visa allows eligible parents and grandparents to visit family in Canada for longer periods of time than with a normal visitor visa. At the same time, Mr. Chera would be able to attend the wedding of his son’s business partner, who is also a friend of the family. In his “super visa” application, Mr. Chera disclosed that he had made previous visa applications to Canada, and that some of them were denied.

B. ***The Officer’s Decision***

[7] The Decision takes the form of a standard letter where the Officer indicates that he was not satisfied that Mr. Chera would leave Canada at the end of his stay. The Decision also includes the Officer’s notes located in the Global Case Management System [GCMS] (*Sharma v Canada (Citizenship and Immigration)*, 2020 FC 381 at para 7).

[8] In the letter of refusal sent to Mr. Chera, the Officer indicated that Mr. Chera’s application was rejected based on the following factors: 1) his significant family ties in Canada and his lack of such ties outside Canada; 2) the length of his proposed stay in Canada; and 3) the purpose of his visit, which would not be consistent with a temporary stay.

[9] In the GCMS notes, the Officer first listed the previous stays of Mr. Chera in Canada, from August 2013 to January 2015, from February 2015 to August 2016, and from September 2016 to September 2019, adding up to a total of about six (6) years.

[10] The Officer continued by discussing the purpose of Mr. Chera's visa application, namely, to visit his son and his grandchildren and to attend the wedding of his son's business partner on May 26, 2022. As the wedding had already passed at the time of the Decision, the Officer considered this purpose as "moot". The Officer then noted that, in his Family Information form [Family Form], Mr. Chera indicated that his wife was accompanying him, while he stated the opposite in his written reasons for travel and return [Written Statement]. The Officer held that he would not give any weight to Mr. Chera's Written Statement because of this contradictory information as to whether his wife would also travel to Canada.

[11] The Officer determined that Mr. Chera did not demonstrate sufficient ties outside Canada to motivate his return in India, because: 1) Mr. Chera has only been working as a farmer for three (3) years in India; 2) his wife would travel with him to Canada; and 3) Mr. Chera only has a daughter in India, who no longer lives with him and his wife. Furthermore, the Officer determined that he could not give weight to Mr. Chera's current employment in India as a factor of return because of the nature of Mr. Chera's previous stays in Canada.

C. *The standard of review*

[12] While the Minister of Citizenship and Immigration [Minister] submits that the standard of reasonableness applies to the judicial review of the Decision, Mr. Chera argues that procedural fairness issues are not decided according to any particular standard of review, as the Court must verify whether the procedure was fair having regard to all the circumstances. I agree with Mr. Chera.

[13] The Federal Court of Appeal has repeatedly held that procedural fairness does not require the application of the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69 [*CPR*] at para 54). Rather, it is a legal question that must be assessed on the basis of the circumstances and which requires the reviewing court to determine whether or not the procedure followed by the administrative decision maker respected the standards of fairness and natural justice (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54).

[14] Thus, when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review, the reviewing court must take into account the particular context and circumstances at issue. Its role is to determine whether the process followed by the administrative decision maker was fair and offered the affected parties a right to be heard as well as a full and fair chance to know and respond to the case against them. The reviewing court owes no deference to the decision maker when considering issues of procedural fairness.

[15] However, the reasonableness standard of review applies to the challenge of the merits of a visa officer's findings on temporary resident visa applications (*Abbas v Canada (Citizenship and Immigration)*, 2022 FC 378 [*Abbas*] at para 14; *Perez Pena v Canada (Citizenship and Immigration)*, 2021 FC 491 [*Perez Pena*] at para 12; *Brar v Canada (Citizenship and*

Immigration), 2020 FC 445 at para 7). Reasonableness focuses on the decision made by the administrative decision maker, which encompasses both the reasoning process and the outcome (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 83, 87). Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court must therefore consider whether the "decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99).

[16] A judicial review must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must begin its inquiry by examining the reasons provided with "respectful attention", and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13), without "reweighing and reassessing the evidence" before it (*Vavilov* at para 125).

[17] The onus is on the party challenging the administrative decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious

shortcomings” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

III. **Analysis**

A. ***Procedural fairness***

[18] Mr. Chera first claims that the Officer made an adverse credibility finding based on a perceived inconsistency in the information submitted about his wife’s presence on his visit to Canada, but failed to provide him with an opportunity to respond, in violation of his procedural fairness rights. He also maintains that the Officer breached procedural fairness by forming a subjective opinion about his intent to stay in Canada based on his past immigration applications, without providing him with an opportunity to respond. Mr. Chera further argues that the Officer’s statement that he was not a *bona fide* visitor amounted to a veiled credibility finding.

[19] I agree with Mr. Chera.

[20] The Court has repeatedly held that, while procedural fairness owed to visa applicants sits at the low end of the spectrum, a visa officer’s credibility concerns will trigger an applicant’s right to receive an opportunity to address those concerns (*Zubova v Canada (Citizenship and Immigration)*, 2019 FC 444 at para 18, citing *Pan v Canada (Citizenship and Immigration)*, 2010 FC 838 at para 26). In *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at paragraph 24, Justice Mosley said the following:

> [I]t 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. <u>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</u>. (…)
>
> [Emphasis added.]

[21] In the context of visa applications, the Court has distinguished between findings based on the sufficiency of evidence, which do not trigger a duty to inform an applicant, and adverse credibility findings, which require that a visa officer provide the applicant with an opportunity to respond (*Perez Pena* at para 35). Perceived inconsistency in information provided by an applicant will engage a procedural fairness obligation if it results in the visa officer losing confidence in the applicant's reliability (*Thedchanamoorthy v Canada (Citizenship and Immigration)*, 2018 FC 690 at para 27). I acknowledge that the line between an insufficiency of evidence and a veiled credibility finding is sometimes difficult to draw and that "[t]he reference to a bona fide concern in the [d]ecision must not be conflated with a credibility concern" (*Abbas* at para 22, citing *D'Almeida v Canada (Citizenship and Immigration)*, 2019 FC 308 at para 65 and *Patel v Canada (Citizenship and Immigration)*, 2020 FC 517 [*Patel*] at para 14). However, "negative *bona fide* findings can sometimes amount to veiled credibility findings reflecting concerns about the genuineness of an application" (*Abbas* at para 25, citing *Patel* at para 12 and *Al Aridi v Canada (Citizenship and Immigration)*, 2019 FC 381 at para 29). It all depends on the particular facts of each case.

[22] In the present circumstances, the Officer clearly stated in the GCMS notes that he was concerned with the inconsistency between the Family Form and the Written Statement concerning whether Mr. Chera's wife would be travelling with him or not. The Family Form contains a "checked box" stating that Mr. Chera's wife would accompany him to Canada. However, Mr. Chera's Written Statement as well as his son's statement of attestation both indicate, in a detailed fashion, why Mr. Chera's wife would remain in India. They both mention that she had to stay behind to take care of a relative and to carry on the farming business with the help of neighbouring farmers. Furthermore, the submissions made by Mr. Chera's representative in support of his visa application also reiterate that Mr. Chera's wife would not accompany him on his visit to Canada.

[23] In the GCMS notes, the Officer held the following:

> The client indicates on his Family Application form that his spouse is accompanying, however, in the client's written reasons for travel and return, the client claims his wife is staying behind to look after the farm in his absence with the help of other farming neighbours. I do not give the client's statement any weight given the contraction [sic] noted above and in the fact that in the client's initial PG-1 application he declared a stay of 3 months which turned into 1.5 years.

[24] In my view, this statement made by the Officer clearly demonstrates that "the Officer's concern was rooted in the credibility of [Mr. Chera] rather than the sufficiency of the evidence submitted" (*Egheoma v Canada (Citizenship and Immigration)*, 2016 FC 1164 [*Egheoma*] at para 12). The Officer chose, for no reason apparent from the Decision itself, to prefer the "checked box" of the Family Form over Mr. Chera's and his son's detailed written statements. The inconsistency found by the Officer apparently provided sufficient reasons to believe that

Mr. Chera's wife would travel with him to Canada. In concluding this way, the Officer in fact disregarded Mr. Chera's Written Statement — as well as his son's statement —, which in the circumstances meant that the Officer had issues with the credibility of Mr. Chera's written testimony. I further observe that the Decision is silent on the main reason given in the Written Statement for Mr. Chera's wife staying in India, namely, to assist her niece.

[25] Despite the able submissions made by counsel for the Minister, I am not persuaded that the Officer's determination on the presence of Mr. Chera's wife is not a credibility finding. Clearly, the Officer's determinations on this front are not based on Mr. Chera's failure to meet his positive obligation to provide sufficient evidence in accordance with the statutory requirements for a visa application (*Abbas* at para 21).

[26] Accordingly, I agree that the Officer's concern regarding the presence of Mr. Chera's wife on his visit to Canada should have been raised with him and that Mr. Chera should have been given an opportunity to provide further information about the apparent contradiction regarding his wife's intention to remain in India (*Egheoma* at para 14). In sum, the Officer made a veiled credibility finding and, in such a situation, the Officer had the obligation to offer Mr. Chera the possibility to clarify the issues arising from his application.

[27] Additionally, I find that Mr. Chera should have been given an opportunity to address the Officer's concerns with respect to his previous lengthy stays in Canada between 2013 and 2019. The continued presence of a foreign national in Canada is not, in and of itself, a reasonable ground to refuse a temporary resident visa if compliance with the requirements of Canadian

immigration laws was not a concern in the past: "[t]he simple fact [an] Applicant has legally remained in Canada cannot reasonably support a conclusion that [he] would choose to go "underground" or try to stay in Canada without authorization once [his visa] expires" (*Momi v Canada (Citizenship and Immigration)*, 2013 FC 162 at para 24; *Gu v Canada (Citizenship and Immigration)*, 2010 FC 522 at para 21). Even if Mr. Chera stayed one and a half year with his first temporary resident visa — instead of the three (3) months he had initially declared —, nothing in the record indicates that he was not legally authorized to do so. I further observe that Mr. Chera also complied with the requirements of the subsequent visas or permits he was granted, and that he always returned to India further to his previous temporary stays.

[28] In the particular circumstances of this case, I therefore determine that the Officer's *bona fide* findings amounted to veiled credibility findings, and that Mr. Chera was not afforded an opportunity to respond to the Officer's credibility concerns. Such a breach of procedural fairness is sufficient to justify the Court's intervention and to overturn the Decision.

B. ***Reasonableness of the Decision***

[29] Because of my conclusion on procedural fairness, it is not necessary to examine the reasonableness of the Decision. However, I will briefly make the following remarks.

[30] Mr. Chera submits that there is no reasonable basis for the Officer's conclusion that he will overstay his temporary resident visa. Such a conclusion, according to Mr. Chera, is based on speculation and suspicions that are not adequately tied to the reasons provided in the Decision.

Furthermore, says Mr. Chera, the Officer overlooked contradictory evidence about his family and financial ties in India.

[31] Again, I agree with Mr. Chera's submissions.

[32] The Officer found that Mr. Chera did not demonstrate sufficient ties to India to motivate his return. In the GCMS notes, the Officer mentioned, among other things, that Mr. Chera had limited family members in India, as he only has a daughter there, while his son lives in Canada. I am not convinced that such a finding, without any further explanations, meets the standard of reasonableness. From the Decision itself (including the GCMS notes), it is impossible to know why the Officer found that Mr. Chera's son in Canada is a factor which should receive more weight than the presence of his wife and daughter in India. I find it unreasonable for the Officer to refer to Mr. Chera's relationships in Canada against those he has in India without explaining how he weighed those relationships against one another (*Zoie v Canada (Citizenship and Immigration)*, 2022 FC 1297 at paras 21–22). In other words, the Decision lacks justification on that aspect.

[33] Furthermore, in dismissing the evidence on Mr. Chera's wife remaining in India, the Officer also ignored evidence to the contrary, without any reasonable explanation. As pointed out by counsel for Mr. Chera, a decision maker cannot ignore evidence directly contradicting a key element relied upon to reach its conclusion (*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). In this case, the Officer's key factual findings on the presence of Mr. Chera's wife were at odds with critical evidence that runs counter to the Officer's conclusion, something which has been described by the Federal Court of Appeal as a "badge of unreasonableness" (*Delios v Canada (Attorney General)*, 2015 FCA 117 at para 27).

[34] The Minister claims that, in any event, Mr. Chera's application for a temporary resident visa was moot, since the wedding at the source of the request had passed at the time the Decision was rendered. I do not find this reasoning to be convincing, as the wedding of his son's business partner was only a secondary purpose of the visit for Mr. Chera. The primary purpose of Mr. Chera's visa application was to visit his son and grandchildren. Indeed, the raison d'être of the "super visa" category in which Mr. Chera made his application is to let a parent or grandparent visit their children or grandchildren for a longer period at a time (*Gonzalez Zuluaga v Canada (Citizenship and Immigration)*, 2017 FC 1105 at para 2). The specific context of Mr. Chera's temporary resident visa application could not be brushed aside by the Officer simply because Mr. Chera would have also attended a wedding during his stay in Canada.

[35] At the hearing before the Court, counsel for the Minister insisted on the exceptional attributes of super visas and on the fact that Mr. Chera's wife held a valid temporary resident visa allowing her to travel to Canada, and that the Officer reasonably weighed all the evidence on the record before rejecting Mr. Chera's application. However, I underline that neither the Decision nor the GCMS notes discussed to any extent the "super visa" application or the ability of Mr. Chera's wife to use her temporary resident visa.

[36] I agree with the Minister that extensive reasons are not required for visa officers' decisions to be reasonable, given the large volume of decisions they are issuing on a daily basis (*Nimely v Canada (Citizenship and Immigration)*, 2020 FC 282 at para 7). In addition, visa officers are certainly entitled to considerable deference given the level of expertise they bring to these matters. However, while the duty to provide reasons is minimal in the context of temporary visa applications and brief reasons are often reasonable, the Court must still be "able to understand why the decision was made" (*Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 at para 32). The particular nature of the decision-making process in visitor visa applications does not relieve the visa officers of the obligation to provide transparent, justified, and intelligible reasons (*He v Canada (Citizenship and Immigration)*, 2021 FC 1027 [*He*] at para 20). It is crucial for an applicant to "understand the basis on which [their] application has been refused" (*He* at para 18). In the case of Mr. Chera, I am not persuaded that the reasons provide an adequate justification for the Decision. Moreover, the errors alleged by Mr. Chera are sufficiently central or significant to render the Decision unreasonable.

IV. **Conclusion**

[37] For the above-mentioned reasons, Mr. Chera's application for judicial review is granted. The Decision was procedurally unfair and does not constitute a reasonable outcome based on the law and the evidence. Therefore, the matter must be referred back to a new visa officer for redetermination.

[38] The parties proposed no question of general importance for certification and I agree that none arises in this case.

JUDGMENT in IMM-8568-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, without costs.

2. The August 19, 2022 decision of the visa officer, denying Mr. Joginder Singh Chera's temporary visa application, is set aside.

3. The matter is referred back to Immigration, Refugees and Citizenship Canada for redetermination on the merits by a different visa officer.

4. There is no question of general importance to be certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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