Federal Court Cour fédérale

Date: 20130307

Docket: IMM-3998-12

Citation: 2013 FC 242

Ottawa, Ontario, March 7, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ANDRIY MAKLAKOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr Andriy Maklakov, is a citizen of the Ukraine. He brought this application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA* or the Act] of the February 22, 2012 decision of a Visa Officer [the Officer] at the Canadian Embassy in Kiev, Ukraine which refused his application for a study permit pursuant to subsection 11 of the Act.

[2] For the reasons that follow, the application is granted and the matter is remitted for reconsideration by a different Officer.

[3] Mr Maklakov made three previous applications for study permits, all of which were refused, and five applications for visitor's visas, four of which were refused. He was granted one visitor's visa in 2008 to attend to his dying mother in Canada. His troubled visa history is attributed to his earlier application in 2003 when he used a fraudulent letter from an employer to bolster his economic situation. He admitted his fraudulent documents upon questioning and has disclosed this in subsequent applications.

[4] The applicant has been denied visitor's visas and study permits since 2003, including in 2010, due to his "propensity for fraud and misrepresentation" and because his "study permit application is simply another means of entry into Canada."

[5] The decision which is the subject of this application for judicial review relates to the applicant's application for a study permit to attend SAIT Institute in Alberta. The applicant was accepted into the program, first to study English, and then to study film and video production to enhance his skills as a filmmaker in Ukraine. He submitted documents to show that he would live with his sister and brother-in-law who are well established in Calgary. He provided a statement from a Canadian bank with a balance of $20,000 to cover his tuition and related expenses. He indicated that his wife would continue to work and reside in Ukraine with their child while he studied in Canada and that he has a film business in Ukraine.

[6] The Officer found that the applicant did not meet the requirements under section 11 of the Act. The reasons for the decision include the letter of refusal, the Officer's notes and an accompanying checklist which indicated that the Officer was not satisfied the applicant would leave Canada at the end of his stay, due to two factors; "the purpose of your visit" and "your current employment situation". Under the heading "other reasons", the Officer noted "you have a history of misrepresentation and lack credibility".

[7] The Officer's notes also include the following:

> "(The applicant) is 34 years old, married, going to attend SAIT for a one year ESL course. Employed as an operator and director of editing at Vidoe [sic] Master Plus. Has been refused SPs on three occasions, Received TRV in 2008, Has admitted to submitting fraudulent docs in the past. (He) has also applied for a Film and Video Production course. (He) has a Canadian bank account showing 20,000 cad in savings. Spouse and minor child in Ukraine. (He) shows no source of funds. (He) has not provided a compelling reason for studies in Canada. He is an admitted fraudster and lacks credibility. I am not satisfied that the [*sic*] is a bona fide temporary resident. Application refused."

[8] The applicant raised three grounds for this judicial review: first, that the Officer denied the applicant procedural fairness because he was biased; second, that the Officer denied the applicant procedural fairness by not providing an opportunity for the applicant to address the Officer's concerns about his credibility; and, third, that the Officer's decision was unreasonable as it was based on erroneous findings of fact or failure to consider documentary evidence in support of his application.

[9] The respondent submits that given the applicant's history and admissions of fraud and misrepresentation, he had a higher burden to meet to establish the *bone fides* of his application. The applicant failed to do so because he did not provide sufficient evidence to establish the purpose of his study in Canada, his source of finances or how his business would operate in the Ukraine while he was in Canada. The respondent submits that the application was refused due to insufficiency of evidence and not due to credibility findings and, therefore, there was no duty on the Officer to convoke an interview and there was no reasonable apprehension of bias.

[10] With respect to the allegations of bias, the applicant and respondent agree that the test for bias is that set out by Justice de Grandpré, writing in dissent, in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, at p 394:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[11] As noted in *R v RDS* [1997] 3 SCR 484 by Justices L' Heureux- Dube and McLachlin, referring to the above noted test;

> 113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such

> allegations. Yet, this is a serious step that should not be undertaken lightly.

[12] Although the Supreme Court of Canada was referring to an allegation of bias against a judge, the same principle applies to other decision makers; allegations of bias are serious and should be made with caution.

[13] In the present circumstances, there is no evidence on the record to suggest that the Officer pre-judged the application. While the Officer was aware of the applicant's history which provided relevant background information, he considered the current application and the supporting documents before making his decision. I do not agree that the Officer showed any bias or that a reasonable person would conclude that the Officer would not decide the matter fairly.

[14] As the respondent submits, the applicant had a high burden to satisfy the Visa Officer of the criteria for a study permit given his misrepresentation in 2003. The respondent argues that the applicant failed to meet that burden with sufficient evidence. However, the Officer clearly regarded the past misrepresentation as a credibility issue, as he noted twice in his reasons. The applicant submits that this one misrepresentation, which he admitted in all subsequent applications, has resulted in refusals in all but one application.

[15] It is settled law that the requirements of procedural fairness are more relaxed for visa applications and that it would be practically impossible for Visa Officers to convoke interviews in all cases. However, procedural fairness will require interviews in some circumstances.

[16] In *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, Justice Mosley canvassed the jurisprudence with respect to the duty of fairness owed to visa applicants and noted at paragraphs 23 and 24;

> [23] In *Rukmangathan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, [2004] F.C.J. No. 317 (QL) [*Rukmangathan*], the Court offered the following guidance in determining what is required of a Visa Officer when different types of concerns arise:
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> > ¶ 22 …the duty of fairness may require immigration officials to inform applicants of their concerns with applications so that an applicant may have a chance to "disabuse" an officer of such concerns, even where such concerns arise from evidence tendered by the applicant. Other decisions of this court support this interpretation of Muliadi, supra [*Muliadi v. Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205 (C.A.)]. See, for example, Fong v. Canada (Minister of Employment and Immigration), [1990] 3 F.C. 705 (T.D.), John v. Canada (Minister of Citizenship and Immigration), [2003] F.C.J. No. 350 (T.D.)(QL) and Cornea v. Canada (Minister of Citizenship and Immigration) (2003), 30 Imm. L.R. (3d) 38 (F.C.T.D.), where it had been held that a visa officer should apprise an applicant at an interview of her negative impressions of evidence tendered by the applicant.
> >
> > ¶ 23 However, this principle of procedural fairness does not stretch to the point of requiring that a visa officer has an obligation to provide an applicant with a "running score" of the weaknesses in their application: Asghar v. Canada (Minister of Citizenship and Immigration), [1997] F.C.J. No. 1091(T.D.)(QL) at para. 21 and Liao v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 1926. And there is no obligation on the part of a visa officer to apprise an applicant of her concerns that arise directly from the requirements of the former Act or Regulations: Yu v. Canada (Minister of Employment and Immigration) (1990), 36 F.T.R. 296, Ali v. Canada (Minister of Citizenship and Immigration) (1998), 151 F.T.R. 1 and Bakhtiania v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 1023 (T.D.)(QL).

> In *Rukmangathan*, the Court concluded that the visa officer's problems with the applicant's application, namely, why he had taken further courses in Canada, the consideration that his marks were "low" (although they were in the mid-70s range) and the "poor quality" of two of his educational documents, should have been placed before the applicant for a response. The Court made this finding on the basis that most of the officer's concerns could not be said to have emanated directly from the requirements of the legislation.
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> [24] Having reviewed the factual context of the cases cited above, it 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. 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, as was the case in *Rukmangathan*, and in *John* and *Cornea* cited by the Court in *Rukmangathan*, above.
> **Emphasis added**

[17] In the circumstances of this case, given the Officer's concerns about the applicant's credibility and given that the applicant will never succeed if every officer takes a similar view of his history, the Officer had a duty to convoke an interview, whether in person or by other means, to explore his concerns about the applicant's credibility and to provide an opportunity for the applicant to respond.

[18] In this case, the applicant was aware that he had an uphill battle to support his application for a study permit which he attempted to address in his submissions setting out the purpose of studying in Canada, the acceptance from SAIT Institute, the financial information and the letter from his sister and brother-in-law. However, the credibility finding could not be overcome without

an opportunity to address this with the Visa Officer. The Officer's failure to convoke an interview constituted a breach of procedural fairness.

[19] A breach of procedural fairness will not always result in relief. However, in these circumstances, it is not inevitable that the result would have been the same if the Officer had conducted an interview. Therefore, the application should be remitted to be considered by a different Visa Officer.

[20] It is not necessary to address the arguments related to the findings of fact.

[21] The applicant also submits that costs should be awarded to him for the same reasons advanced to support this application and, generally, due to the Officer's failure to make a proper decision.

[22] Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules* provides as follows:

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.

[23] Based on a review of the jurisprudence, including *Ndererehe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 880 and *Johnson v Canada (Minister of Citizenship and*

Immigration), 2005 FC 1262, [2005] F.C.J. No. 1523, I do not find that any special reasons exist in this case to justify an award of costs.

[24] This Court's judgement is that the application is granted and the matter is remitted for reconsideration by a different Officer. No costs are awarded. No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is remitted for reconsideration by a different Officer. No costs are awarded. No questions were proposed for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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