

Federal Court



Cour fédérale

Date: 20190328

**Dockets: IMM-4176-18
IMM-4177-18
IMM-4172-18
IMM-4173-18
IMM-4178-18**

Citation: 2019 FC 381

Ottawa, Ontario, March 28, 2019

PRESENT: The Honourable Madam Justice Walker

Docket: IMM-4176-18

BETWEEN:

NADINE AL ARIDI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-4177-18

AND BETWEEN:

ANEEL EL DANAF

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-4172-18

AND BETWEEN:

DANEEL EL DANAF

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-4173-18

AND BETWEEN:

MALEK EL DANAF

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-4178-18

AND BETWEEN:

TALAL EL DANAF

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants are five members of a family from Lebanon, now living in Qatar. They are: Ms. Nadine Al Aridi (Principal Applicant), the mother; Mr. Malek El Danaf, her husband; and their three children, Talal (11 years old), Aneel and Daneel (twins who are 9 years old and who both have autism). The Principal Applicant applied for a study permit in order to pursue a three year program of study in Montréal, Québec. A visa officer (Officer) in the Canadian Embassy in Abu Dhabi, UAE, refused her application and the Principal Applicant seeks judicial review of the Officer's decision (IMM-4176-18).

[2] Mr. El Danaf and the three children each applied for a temporary resident visa (TRV), visitor class, in order to be able to visit Ms. Al Aridi during her studies. Their applications were rejected by the Officer and they too brought applications for judicial review of the Officer's decisions (IMM-4177-18, IMM-4172-18, IMM-4173-18 and IMM-4178-18).

[3] The applications for judicial review are brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[4] On October 24, 2018, Justice Gagné, as she then was, consolidated the family's applications for judicial review (Applications). On February 13, 2019, I heard the Applications together as they arise from the same facts and evidence. I will address all of the Applications in this judgment and a copy of the judgment will be placed on the Court files for each Application.

[5] For the reasons that follow, the Applications will be allowed.

I. Background

[6] The Applicants are Lebanese citizens who have lived in Qatar since 2009.

[7] Ms. Al Aridi, the Principal Applicant, was accepted to a three-year program in special care counselling at Collège LaSalle in Montréal. In her application for a study permit, she provided a letter of acceptance to the program and a 'Certificat d'acceptation du Québec' from the province. She submits that she had previously completed a Bachelor's degree in management and marketing from the University of Lebanon. She is currently unemployed but previously worked for four months as a teaching assistant in a pre-school class. The Principal Applicant states that she would like to continue her studies so that she can specialize in care for children with special needs.

[8] In his application for a TRV, Mr. El Danaf stated that he was employed in Qatar as a manager in an engineering firm. Mr. El Danaf and the children intended to visit Canada for several weeks to help the Principal Applicant transition at the beginning of her studies. In

addition, they would visit the Principal Applicant on occasion during the three years she would study in Canada.

[9] The Applicants submit that they have sufficient savings to pay for the Principal Applicant's education and to support the other family members in Canada when they visit. The Applicants submitted bank statements showing significant savings and evidence of ownership of four properties in Lebanon. The Applicants visit Lebanon as frequently as possible to see extended family and hold U.S. visitor visas.

II. Decisions under Review

[10] The Officer's decisions (Decisions) are dated July 9, 2018.

[11] The Officer found that the Principal Applicant failed to establish that she had met the requirements under the IRPA for the issuance of a study permit. The Officer was not satisfied that the Principal Applicant's primary purpose in coming to Canada was to actively pursue her studies or that she would return to her home country upon the conclusion of her program. The Officer stated, "I am also not satisfied that you are not an immigrant".

[12] With regards to the applications of the other Applicants for TRVs (visitor class), the Officer was not satisfied that Mr. El Danaf and the children would leave Canada upon the expiry of their visas. The Officer stated that they were not sufficiently established socially or economically in their current country, concluding in each Decision that "I am not satisfied that you are a bonafide visitor to Canada and not an immigrant".

[13] The substance of the Decision is contained in the Global Case Management System (GCMS) notes, which form part of the Decision in respect of the Principal Applicant's request for a study permit (*Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 15). The Officer found that the Principal Applicant had provided insufficient proof of previous education and official language proficiency, and was currently unemployed. The Officer acknowledged that the family had the equivalent of \$448,000 (CAD) in savings and that Mr. El Danaf earned \$8,900 (CAD) per month.

[14] The Officer concluded:

Although savings may be sufficient and PA has property in Lebanon, PA's establishment is still relatively weak and when considering the social and economic benefits of staying in Canada, I am not satisfied the PA has sufficient ties outside Canada to motivate her departure upon the end of an authorized stay. Additionally, I am not satisfied that it is reasonable for PA to pursue this program as I am not satisfied that this program would greatly improve her academic credentials or improve her employment prospects, therefore, based on the submission, and considering PA's past academic history and economic establishment, and the benefits of staying in Canada, on balance of probabilities, I am not satisfied that the proposed studies are reasonable and that PA's primary purpose would be to actively pursue the intended program as required under R220.1. I am also not satisfied that PA is a bonafide student who would exit Canada at the end of PA's stay and not an immigrant. Refused

III. Issues

[15] The parties raised the reasonableness of the Decisions and the fairness of the process undertaken by the Officer in reaching the Decisions in their written and oral submissions. The two arguments are intertwined and the application could be reviewed on either basis with the

same result. In my opinion, the Decision is most properly reviewed for fairness and the issue before me formulated as follows:

Did the Officer breach the Applicants' right to procedural fairness by basing the Decisions on a veiled credibility finding without affording the Applicants, primarily the Principal Applicant, an opportunity to address the Officer's credibility concerns?

IV. Standard of Review

[16] Issues of procedural fairness in the consideration by a visa officer of an application for a study permit or TRV are reviewed for correctness (*Kaur v Canada (Citizenship and Immigration)*, 2011 FC 219 at para 21 (*Kaur*); see also *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43). The review focuses on the procedures followed in arriving at the decision and not on the substance or merits of the case in question. I must assess whether the process followed by the Officer in the Applicants' cases was just and fair having regard to all of the Applicants' circumstances, the substantive rights at stake and the other contextual factors identified by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, Justice Rennie stated:

[54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 20) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

V. Legislative Background – Temporary resident visas

[17] The legislative provisions of the IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPRs), relevant to the Applications and the issuance of TRVs and study permits are set out in full in Annex A to this Judgment.

[18] By way of general background, every foreign national who wishes to enter Canada as a temporary resident must establish that they hold a visa and that they will leave Canada by the end of the period authorized for their stay (paragraph 20(1)(b) of the IRPA). A visa officer is required to issue a TRV if, among other requirements, the individual in question has applied in accordance with the IRPRs for a TRV as a member of the visitor, worker or student class, and has established that he or she will leave Canada by the end of the period authorized for their stay (paragraphs 179(a) and (b) of the IRPRs).

[19] A foreign national may only study in Canada if authorized to do so under the IRPA and the IRPRs (subsections 30(1) and (1.1) of the IRPA). A foreign national becomes a student and a member of the student class if they have been authorized to enter and remain in Canada as a student (section 211 of the IRPRs). A combination of subsection 216(1), section 220 and subsection 220.1(1) of the IRPRs requires a visa officer to issue a study permit to a foreign national if the individual has established that they:

- have applied for a study permit in accordance with the IRPRs;
- will leave Canada by the end of the period authorized for their stay;
- meet the requirements of Part 12 (Students) of the IRPRs;

- have been accepted to undertake a program of study at a designated learning institution (see also subsection 219(1) and the requirement for an acceptance letter from the designated learning institution). An individual who intends to study in Québec must hold a *Certificat d'acceptation du Québec* (subsection 216(3) of the IRPRs);
- have adequate financial resources to pay the tuition fees for the intended study program and to maintain themselves and any family members during the proposed period of study, including payment of all travel costs;
- have enrolled and will remain enrolled until completion of their studies; and
- will “actively pursue their course or program of study”.

VI. Analysis

[20] It is well established that the scope of the duty of procedural fairness owed to visa and study permit applicants is at the low end of the spectrum (*Hamad v Canada (Citizenship and Immigration)*, 2017 FC 600 at para 21). It is the applicant’s obligation to satisfy all requirements which arise directly from the provisions of the legislation and regulations and the visa officer is not required to inform the applicant of concerns regarding the sufficiency of the materials submitted in support of the application (*Kaur* at paras 24-25; *Chen v Canada (Citizenship and Immigration)*, 2011 FC 1279 at para 22). However, if the officer questions the authenticity of the documents or the applicant’s credibility, the officer has an obligation to allow the applicant to respond. The parameters of this obligation were explained by Justice Mosley in *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 at para 24:

[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.

[21] In the present case, the Officer's refusals of the Principal Applicant's application for a study permit and the other Applicants' requests for TRVs were based primarily on two concerns. First, the Officer was not satisfied that the Principal Applicant would pursue her studies in Canada. Second, the Officer was concerned that the family would not leave Canada at the end of Ms. Al Aridi's studies.

[22] The Applicants submit that they provided all documentation required under the IRPA and IRPRs to support both the Principal Applicant's request for a study permit and the other Applicants' requests for TRVs. In light of their documentation, there was no reason for the Officer to refuse the applications other than his or her belief that the Principal Applicant did not intend to pursue her studies in Canada and that all of the Applicants intended to remain in Canada as immigrants. The Applicants argue that this is nothing more than a veiled credibility finding.

[23] The Respondent's position is that the Applicants did not provide sufficient evidence to convince the Officer that they met all of the requirements necessary for the issuance of the requested study permit and TRVs. The Respondent emphasizes that the Applicants bore the onus of rebutting the presumption that they were not immigrants. They failed to do so and the rationale of the Officer is clear on the face of the GCMS notes.

[24] The Officer's findings with respect to the Principal Applicant's request for a study permit can be summarized as follows:

- The Principal Applicant had not provided sufficient proof of her previous education (transcripts, degree) and official language proficiency. In addition, she was unemployed.
- The Applicants had sufficient financial support and the Principal Applicant had property in Lebanon; nevertheless, her establishment was relatively weak when considering the social and economic benefits of staying in Canada. Her ties outside of Canada were insufficient to motivate her to depart at the end of her authorized stay.
- It was not reasonable for the Principal Applicant to pursue the chosen program as it would not greatly improve her academic credentials or her employment prospects. The Officer was not satisfied that the proposed studies were reasonable.
- The Officer was not satisfied that the Principal Applicant's primary purpose would be to actively pursue the intended program.
- The Officer was not satisfied that the Principal Applicant was a *bona fide* student who would leave Canada at the end of her studies.

[25] The Officer made no separate GCMS notes regarding the TRV requests. The Officer concluded on the same evidence that the other Applicants may not be *bona fide* visitors to Canada.

[26] It is clear from the GCMS notes that the Officer was concerned that the Applicants wished to access Canada's social and health care benefits and that they would not return to Qatar or Lebanon after the completion of the Principal Applicant's studies. It is difficult to understand how these concerns arose directly from the requirements of the IRPRs.

[27] The Applicants provided evidence addressing each of the statutory and regulatory requirements necessary for the issuance of the Principal Applicant's study permit and the TRVs. The Principal Applicant provided proof of her acceptance to the Collège LaSalle and her Certificat d'acceptation du Québec. She also provided a study plan and details of her prior education and employment. Transcripts from the Principal Applicant's education and proof of official language proficiency are not items required by the IRPRs. The Officer discounted the Principal Applicant's proposed course of study as unreasonable as it would not improve her academic credentials and her likely employment prospects but these statements were not supported by any evidence and were speculative.

[28] The Applicants' financial position and ownership of properties in Lebanon were unquestioned. Other than stating that the Applicants' establishment in Lebanon and Qatar was relatively weak, the Officer gave no reasons why he or she discounted the Applicants' strong evidence of establishment in their home country – the long-term, stable employment of Mr. El Danaf, the ownership of properties in Lebanon and the presence of extended family.

[29] Although the burden rests with the Applicants to establish that they have met the requirements of the IRPA and IRPRs for the issuance of a study permit and TRVs, the Officer's determination must be based on the evidence. In my view, the Decisions were not based on deficiencies in the Applicants' evidence. The Officer simply did not believe the Applicants and made veiled credibility findings. The repetition in each Decision that the Applicants were not *bona fide* students or visitors, as applicable, reflects a general concern with the credibility of the Applicants' stated intentions.

[30] Accordingly, I find that the Officer was required to provide the Applicants an opportunity to address the concerns that the Principal Applicant was not a *bona fide* student, that the other Applicants were not *bona fide* visitors, and that the family intended to remain in Canada as unauthorized immigrants. The failure to do so breached the Applicants' right to procedural fairness.

VII. Conclusion

[31] The Applications will be allowed.

[32] No question for certification was proposed by the parties and none arises in this case.

**JUDGMENT in IMM-4176-18, IMM-4177-18, IMM-4172-18, IMM-4173-18
AND IMM-4178-18**

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in Court files IMM-4176-18, IMM-4177-18, IMM-4172-18, IMM-4173-18 and IMM-4178-18 are allowed.
2. The decisions of the visa officer in the above noted Court files are set aside and the matters remitted for redetermination by a different officer.
3. A copy of this Judgment and Reasons will be placed on each of the following Court files: IMM-4176-18, IMM-4177-18, IMM-4172-18, IMM-4173-18 and IMM-4178-18.
4. No question of general importance is certified.

"Elizabeth Walker"

Judge

ANNEX A*Immigration and Refugee Protection Act, SC 2001, c 27***Obligation on entry**

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,

[...]

(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 period authorized for their stay.

[...]

Work and study in Canada

30(1) A foreign national may not work or study in Canada unless authorized to do so under this Act.

Authorization

(1.1) An officer may, on application, authorize a foreign national to work or study in Canada if the foreign national meets the conditions set out in the regulations.

[...]

Obligation à l'entrée au Canada

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) 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 période de séjour autorisée.

[...]

Études et emploi

30(1) L'étranger ne peut exercer un emploi au Canada ou y étudier que sous le régime de la présente loi.

Autorisation

(1.1) L'agent peut, sur demande, autoriser l'étranger qui satisfait aux conditions réglementaires à exercer un emploi au Canada ou à y étudier.

[...]

*Immigration and Refugee Protection Regulations, SOR/2002-227***Temporary Resident Visa
Marginal note:****Visa de résident temporaire****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;

(c) holds a passport or other document that they may use to enter the country that issued it or another country;

c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;

(d) meets the requirements applicable to that class;

d) il se conforme aux exigences applicables à cette catégorie;

(e) is not inadmissible;

e) il n'est pas interdit de territoire;

(f) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and

f) s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);

(g) is not the subject of a declaration made under subsection 22.1(1) of the Act.

g) il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

[...]

[...]

Class

Catégorie

210 The student class is prescribed as a class of persons who may become temporary residents.

210 La catégorie des étudiants est une catégorie réglementaire de personnes qui peuvent devenir résidents temporaires.

Student

Qualité

211 A foreign national is a student and a member of the student class if the foreign national has been authorized to enter and remain in Canada as a student.

211 Est un étudiant et appartient à la catégorie des étudiants l'étranger autorisé à entrer au Canada et à y séjourner à ce titre.

[...]

[...]

Application before entry

Demande avant l'entrée au Canada

213 Subject to sections 214 and 215, in order to study in Canada, a foreign national shall apply for a study permit before entering Canada.

213 Sous réserve des articles 214 et 215, l'étranger qui cherche à étudier au Canada doit, préalablement à son entrée au Canada, faire une demande de permis d'études.

[...]

[...]

Study permits

Permis d'études

216(1) Subject to subsections (2) and (3), an officer shall issue a study permit to a foreign national if, following an examination, it is established that the foreign national

216(1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis d'études à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

- | | |
|--|---|
| <p>(a) applied for it in accordance with this Part;</p> | <p>a) l'étranger a demandé un permis d'études conformément à la présente partie;</p> |
| <p>(b) will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;</p> | <p>b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;</p> |
| <p>(c) meets the requirements of this Part;</p> | <p>c) il remplit les exigences prévues à la présente partie;</p> |
| <p>(d) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and</p> | <p>d) s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);</p> |
| <p>(e) has been accepted to undertake a program of study at a designated learning institution.</p> | <p>e) il a été admis à un programme d'études par un établissement d'enseignement désigné.</p> |

[...]

[...]

Study in Quebec

Études au Québec

- | | |
|---|---|
| <p>(3) An officer shall not issue a study permit to a foreign national who intends to study in the Province of Quebec — other than under a federal assistance program for developing countries — and does not hold a Certificat d'acceptation du Québec, if the laws of that Province require that the foreign national hold a Certificat d'acceptation du Québec.</p> | <p>(3) Le permis d'études ne peut être délivré à l'étranger qui cherche à étudier dans la province de Québec — autrement que dans le cadre d'un programme fédéral d'aide aux pays en voie de développement — et qui ne détient pas le certificat d'acceptation exigé par la législation de cette province.</p> |
|---|---|

[...]

[...]

Acceptance letter

Acceptation par l'établissement

219(1) A study permit shall not be issued to a foreign national unless they have written documentation from the designated learning institution where they intend to study that states that they have been accepted to study there.

[...]

Financial resources

220 An officer shall not issue a study permit to a foreign national, other than one described in paragraph 215(1)(d) or (e), unless they have sufficient and available financial resources, without working in Canada, to

(a) pay the tuition fees for the course or program of studies that they intend to pursue;

(b) maintain themselves and any family members who are accompanying them during their proposed period of study; and

(c) pay the costs of transporting themselves and the family members referred to in paragraph (b) to and from Canada.

[...]

Conditions — study permit holder

219(1) Le permis d'études ne peut être délivré à l'étranger que si celui-ci produit une attestation écrite de son acceptation émanant de l'établissement d'enseignement désigné où il a l'intention d'étudier.

[...]

Ressources financières

220 À l'exception des personnes visées aux sous-alinéas 215(1)d) ou e), l'agent ne délivre pas de permis d'études à l'étranger à moins que celui-ci ne dispose, sans qu'il lui soit nécessaire d'exercer un emploi au Canada, de ressources financières suffisantes pour :

a) acquitter les frais de scolarité des cours qu'il a l'intention de suivre;

b) subvenir à ses propres besoins et à ceux des membres de sa famille qui l'accompagnent durant ses études;

c) acquitter les frais de transport pour lui-même et les membres de sa famille visés à l'alinéa b) pour venir au Canada et en repartir.

[...]

Conditions — titulaire du permis d'études

220.1(1) The holder of a study permit in Canada is subject to the following conditions:

(a) they shall enroll at a designated learning institution and remain enrolled at a designated learning institution until they complete their studies; and

(b) they shall actively pursue their course or program of study.

220.1 (1) Le titulaire d'un permis d'études au Canada est assujéti aux conditions suivantes :

a) il est inscrit dans un établissement d'enseignement désigné et demeure inscrit dans un tel établissement jusqu'à ce qu'il termine ses études;

b) il suit activement un cours ou son programme d'études.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4176-18

STYLE OF CAUSE: NADINE AL ARIDI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

AND DOCKET: IMM-4177-18

STYLE OF CAUSE: ANEEL EL DANAF v THE MINISTER OF
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STYLE OF CAUSE: TALAL EL DANAF v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 13, 2019

JUDGMENT AND REASONS: WALKER J.

DATED: MARCH 28, 2019

APPEARANCES:

Lior Eisenfeld

FOR THE APPLICANTS

Vanessa Wynn-Williams

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lior Eisenfeld
Ottawa, Ontario

FOR THE APPLICANTS

Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT