Federal Court  Cour fédérale

Date: 20190925

Docket: IMM-1253-19

Citation: 2019 FC 1230

Ottawa, Ontario, September 25, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ELIA BTEICH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Delivered from the bench at Montréal, Quebec, on September 18, 2019)

I. Overview

[1] The *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] explicitly provides for the possibility of having a dual intent:

> **22** (2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary

> resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.

[2] In this case at hand, the Applicant has strong ties in Canada with well-established and legally established members of his family. This Court agrees with the Applicant's submissions as summarized below at paragraphs 12 to 15: the Officer should not have drawn negative inferences from the Applicant's family ties in Canada. If anything, the Officer should have considered the financial support the Applicant's family provides as a positive factor. At the very least, the Officer should have justified his/her reasoning: it is unreasonable to infer that Applicant will remain in the country illegally simply because he has strong family ties in Canada.

[3] As Justice Yvan Roy stated in *Demyati v Canada (Citizenship and Immigration)*, 2018 FC 701 [*Demyati*]:

> [16] A visa officer is certainly entitled to rely on common sense and rationality. As I have said before, we do not check common sense at the door when entering a courtroom. What is not allowed is to make a decision based on intuition or a hunch; if a decision is not sufficiently articulated, it will lack transparency and intelligibility required to meet the test of reasonableness. That, I am afraid, is what we are confronted with here.
>
> [17] Our law is very much concerned with arbitrariness, which is the antithesis of reasonableness. Indeed, the prohibition against arbitrariness is one of the principles of fundamental justice which is at the heart of section 7 of the *Canadian Charter of Rights and Freedoms* (*Ewert v Canada*, 2018 SCC 30, para 171). In the case at bar, it remains unclear why the visa officer concluded that an 18-year-old student, who benefits from a scholarship award from a recognized university, would not be a bona fide student who would stay in this country beyond the expiration of the study permit. Furthermore, there is no reason that is articulated to suggest that this applicant would run afoul of section 220.1 (1) of the Regulations:

Conditions — study permit holder	**Conditions — titulaire du permis d'études**
220.1 (1) The holder of a study permit in Canada is subject to the following conditions:	**220.1** (1) Le titulaire d'un permis d'études au Canada est assujetti aux conditions suivantes :
(a) they shall enroll at a designated learning institution and remain enrolled at a designated learning institution until they complete their studies; and	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) they shall actively pursue their course or program of study.	b) il suit activement un cours ou son programme d'études.

I have not found any justification on this record for such a conclusion. If there is a justification, and there may well be, it has to be articulated for the decision to be reasonable.

II. Nature of the Matter

[4] This is a judicial review of a decision of a Visa Officer [Officer] at the Canadian Embassy in Lebanon, dated January 22, 2019, denying the Applicant's Temporary Resident Visa for a Study Permit.

III. Background

[5] The Applicant is Elia Bteich, a 19-year-old citizen of Lebanon. The Applicant currently resides in Lebanon, but has immediate family in Canada. The Applicant's parents both have valid work permits and his three sisters are currently pursuing their education in Quebec, Canada.

[6] The Applicant's mother is presently working in Canada, however, there are no clear indications in the record as to whether the father is also present in Canada or if he simply holds a valid work permit (Affidavit of Elia Bteich, dated March 26, 2019, at paras 3-4).

[7] On November 7, 2018, the Applicant was admitted to the University of Montréal as an independent student ("étudiant libre"). On that basis, he was granted a Certificate of Acceptance to Quebec on January 4, 2019.

[8] On January 22, 2019, his application for a Study Permit was denied by a Canadian Visa Officer.

IV. Decision under Review

[9] The Officer was not satisfied that the Applicant would leave the country at the end of his stay. This finding was based on the Applicant's family ties in Canada and Lebanon, and on the purpose of his visit.

[10] The Officer therefore denied the Study Permit based on the following reasons:

- The Applicant did not offer any explanation as to his choice of studies in Canada;
- The Applicant did not provide any proof of his enrollment in the University of Kaslik;
- The Applicant has strong family ties in Canada, and the Officer has concerns that the Applicant will be coming to Canada for reasons other than those stated in the application; and

- The Officer is not satisfied that the Applicant has *bona fide* intentions and would leave upon the expiry of his Study Permit.

V. Issues

[11] This application raises the following issues:

1) Was it unreasonable for the Officer to draw a negative inference from the evidence at his or her disposition?
2) Did the Officer violate the principles of natural justice?

VI. Submissions of the Parties

A. *Position of the Applicant*

(1) Negative inferences from the parents' legal status

[12] The Applicant submits that it was unreasonable for the Officer to consider the parents' lawful status in Canada as a negative factor. In support of this submission, the Applicant refers to the Minister's Operational Instructions and Guidelines (OP-11 Guidelines, at page 13) which suggest a favourable consideration of family members with lawful status and stable employment in Canada.

[13] The Applicant further argues that the Officer made an arbitrary decision based on unintelligible reasons when he failed to justify how the legal presence of the Applicant's parents in Canada warranted a negative consideration.

[14] The Applicant also submits that the Officer failed to consider that the presence of the parents with valid work permits would likely ensure that the Applicant has sufficient financial support (*Girn v Canada (Citizenship and Immigration)*, 2015 FC 1222 at para 32; *Tavakoli Dinani v Canada (Citizenship and Immigration)*, 2012 FC 1063 at para 27; *Demyati*, above, at para 11).

[15] In drawing a negative inference from the parents' status in Canada, the Officer also failed to consider that the Applicant may have a legitimate dual intent, as permitted by the IRPA at subsection 22(2).

> (2) The Officer acted without regard to the evidence of the Applicant's current studies

[16] The Applicant states that, to his knowledge, the Immigration consultant submitted evidence of his current studies at the University of Kaslik in Lebanon along with his application. Such evidence is currently contained in Exhibit "K" of the Applicant's Affidavit. Exhibit "K" contains the Applicant's Study Permit application, in which he lists the University of Kaslik as his current educational institution. The confirmation of enrollment at the University of Kaslik is found in Exhbit "H" of the Applicant's affidavit, however, there is no clear indication in the records that this was provided to the Officer who made the decision.

[17] Having provided such proof, the Applicant submits that the Officer acted without regard to this evidence in assessing his application.

(3) Negative inferences from the lack of explanation for choice of studies in Canada

[18] The Applicant submits that the application form required that he states the name of the institution to which he was admitted, but there was no request for an explanation for the choice of studies. According to the Applicant, therefore, the Officer's negative inference pertaining to the absence of an explanation for the Applicant's choice of studies is perverse.

(4) The Officer failed to provide an opportunity to respond to the Officer's concerns

[19] The Applicant submits that it is stated in the Minister's guidelines that "if an officer has concerns or doubts about the applicant's intentions, the applicant must be made aware of these concerns and given an opportunity to respond to them…"

[20] In his submissions, the Applicant asserts that the Officer failed to comply with the procedural requirements of the Respondent Minister's own guidelines. This amounts to a violation of the principles of fairness and natural justice.

[21] In support of his genuine intentions to leave Canada at the end of his studies, the Applicant states that he has sufficient funds to support himself and that his family has always respected the laws of all countries, particularly the immigration laws in Canada (Applicant's Affidavit, dated March 26, 2019, at para 14).

[22] Moreover, the Applicant asserts that he has no interest in living in Canada without legal status. He states that he would leave at the end of his stay and would not remain illegally in Canada (Applicant's Affidavit, dated March 26, 2019, at para 14).

[23] In light of the above, the Applicant requests that the Court remit the matter to a different Officer for reconsideration.

B. *Position of the Respondent*

(1) The Officer's decision is reasonable

[24] The Respondent states that the Officer's decision is an administrative one, made in the exercise of his discretionary power, thus the decision is entitled to considerable deference in view of the Officer's special expertise. He further submits that this may give rise to a number of possible and reasonable conclusions, and as such, when the decision falls within the spectrum, the Court should not interfere (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]).

[25] The Respondent asserts that the conclusion reached by the Officer was based on the presence of the Applicant's parents in Canada and the lack of submitted documentation. Given the evidence before him, that conclusion was open to the Officer to make.

(2) The Officer acted upon the evidence available concerning the Applicant's current studies

[26] The Respondent argues that the Applicant did not send proof with his application that he is currently enrolled at the University of Kaslik since September 2018. As stated by the Applicant, in his opinion, the immigration consultant sent his University transcripts, however, he does not rebut the Officer's findings to the opposite.

[27] The Respondent relies on the Immigration, Refugees and Citizenship Canada [IRCC] instructions on Study Permits for the Beirut Visa office, which require the Applicant to provide the last diploma obtained or the latest grades certified by the Ministry of education.

(3) Lack of documentation in support of choice of studies

[28] The IRCC's website recommends that the Applicant submits a letter of explanation to help the Visa Officer understand the Applicant's goal. The Respondent concedes that such letter is not mandatory, but argues that nonetheless, the Applicant bears the onus to convince the Officer of the genuineness of the purpose of his visit to Canada, and that he will leave at the end of his stay.

[29] The Respondent argues that the Officer could legitimately question the Applicant's plans as a student since there is no connection between the studies the Applicant was planning to undertake in Canada and the ones he had completed in his country.

[30] In light of the above, the Respondent submits that the Applicant failed to demonstrate that the decision-maker erred in law, made perverse findings of fact without regard to the evidence, or breached procedural fairness.

VII. Analysis

[31] Under *Dunsmuir*, above, the standard of review to be applied by this Court is reasonableness, since the Officer can be considered within his jurisdiction as a specialist, interpreting a home statute within a specialized area of expertise.

[32] The Officer's decision was based on the Applicant's family ties and the lack of justification for the Applicant's educational choice, which, combined, lead the Officer to doubt the Applicant's *bona fide* intentions to leave the country at the end of his visa. In this regard, this Court finds these conclusions in respect to fact to be unreasonable.

[33] The IRPA explicitly provides for the possibility of having a dual intent:

> **22** (2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.

[34] In this case at hand, the Applicant has strong ties in Canada with well-established and legally established members of his family. This Court agrees with the Applicant's submissions as summarized above at paragraphs 12 to 15: the Officer should not have drawn negative inferences from the Applicant's family ties in Canada. If anything, the Officer should have considered the financial support the Applicant's family provides as a positive factor. At the very least, the

Officer should have justified his/her reasoning: it is unreasonable to infer that Applicant will remain in the country illegally simply because he has strong family ties in Canada.

[35] As Justice Yvan Roy stated in *Demyati*, above:

> [16] A visa officer is certainly entitled to rely on common sense and rationality. As I have said before, we do not check common sense at the door when entering a courtroom. What is not allowed is to make a decision based on intuition or a hunch; if a decision is not sufficiently articulated, it will lack transparency and intelligibility required to meet the test of reasonableness. That, I am afraid, is what we are confronted with here.
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(b) they shall actively pursue their course or program of study.	b) il suit activement un cours ou son programme d'études.

> I have not found any justification on this record for such a conclusion. If there is a justification, and there may well be, it has to be articulated for the decision to be reasonable.

[36] Indeed, the Officer considered this factor in light of the lack of justification for the Applicant's educational choices; however, these factors in the Officer's analysis should have warranted questions instead of conclusions. As such, the Officer failed to provide an opportunity to respond to these concerns. This simple step would have resolved two out of the four issues of the Officer: the Applicant may very well have justifications for his choice, if only he were allowed to provide them.

[37] Given the Court's conclusion on the unreasonableness of the Officer's decision, this Court does not have to deal with the procedural fairness issue raised by the Applicant.

VIII. Conclusion

[38] Due to the failure to provide an opportunity to respond to the Officer's concerns; the application for judicial review is granted and the matter returned for a decision anew by a different Officer to ensure that the eventual decision will allow for additional representations and will reflect adequate consideration for the Applicant's family ties. The Applicant's possible dual intent is legitimate and legal; it is necessary that it be considered in such light for the eventual decision to be reasonable.

[39] The Court grants the application for judicial review and remits the file for consideration anew by a different Officer.

JUDGMENT in IMM-1253-19

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the matter be considered anew. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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