Federal Court Cour fédérale

Date: 20230320

Docket: IMM-84-22

Citation: 2023 FC 379

Ottawa, Ontario, March 20, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

DAJANA BABIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Dajana Babic, is a citizen and resident of Bosnia and Herzegovina. She is married to a Canadian permanent resident. She applied for a temporary resident visa for a duration of two years. The visa officer refused her application because he was not satisfied that the Applicant would leave Canada at the end of the period of her authorized stay. The Applicant seeks judicial review of that decision.

[2] For the following reasons, the application for judicial review is dismissed.

II. Factual Background

[3] The Applicant, Ms. Babic, is 23 years old and a citizen and resident of Bosnia and Herzegovina [BAH]. She is married to Mr. Nenad Resanovic since January 18, 2021. At the time of application, Ms. Babic's spouse was a permanent resident of Canada.

[4] On September 1, 2021, Ms. Babic applied for a temporary resident visa [TRV]. In it, she indicated that her stay would be from September 19, 2021 to September 19, 2023. She also indicated that, at the time of the application, she was employed in BAH as a "Commercial Officer" at "Oriental Trade."

[5] The application also indicated that Ms. Babic had previously applied for a TRV in December 2020 and that her application was denied.

[6] On November 10, 2021, an officer from the Embassy of Canada [Officer] issued a decision refusing the application for TRV [Decision]. In it, the Officer determined that Ms. Babic did not meet the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. As grounds of denial, the Officer doubted that Ms. Babic would leave Canada at the end of her stay on the basis of her family ties and her employment situation. Specifically, the Decision stated:

> I am not satisfied that you will leave Canada at the end of your stay as a temporary resident, as stipulated in paragraph 179(b) of the

> IRPR, based on your family ties in Canada and in your country of residence.
>
> I am not satisfied that you will leave Canada at the end of your stay as a temporary resident, as stipulated in paragraph 179(b) of the IRPR, based on your current employment situation.

[7] Notes from the Global Case Management System [GCMS] recorded on November 26, 2021 outline the Officer's reasoning as follows:

> I have reviewed the application. I am not satisfied that the applicant would leave Canada at the end of their stay as a temporary resident, I note that: - Applicant married with host since JAN20. Important age difference. Host's second marriage and has child for another prior relationship. No sponsorship in system. No explanation as too why. - She is mobile, not well established and has no dependents. Applicant has recent employment with monthly low salary: 613. (average monthly salary in BiH is about 1550 (www.tradingeconomics.com)).Taking the applicant's current employment situation into consideration, the employment does not demonstrate that the applicant is sufficiently well established that the applicant would leave Canada at the end of the period of authorized stay. Weighing the factors in this application. I am not satisfied that the applicant will depart Canada at the end of the period authorized for their stay. For the reasons above, I have refused this application.

III. Issues and Standard of Review

[8] The sole issue in this judicial review is whether the Officer's decision is reasonable.

[9] The applicable standard of review is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

Reasonableness review requires a deferential approach to the decision maker and the reviewing court must read the reasons holistically and contextually (at para 97). The Court must consider the outcome of the decision and its rationale in order to ensure that the decision as a whole is transparent, intelligible and justified (*Vavilov* at paras 15, 95, 136). Judicial review is not a "line-by-line treasure hunt for error" (at para 102). The decision maker does not have to respond to each argument nor refer to all the evidence – indeed, the decision maker is presumed to have considered all of the evidence and the arguments in the record (at paras 127-128).

[10] It is the Applicant, Ms. Babic, who bears the onus of demonstrating that the Officer's Decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[11] As held by this Court in *Chhetri v Canada (Citizenship and Immigration)*, 2011 FC 872 (at para 10):

> Foreign nationals are entitled to the minimum degree of procedural fairness. There is no obligation on the visa officer to advise the applicant of concerns about, or deficiencies in, their application or to offer an interview. Nor, as Rothstein J.A. (*ex officio*) said in *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815, does the onus shift to the visa officer to take any additional steps to address or satisfy outstanding concerns. The foreign national has no right or interest at play. It is for these reasons that it is often difficult to set aside, on judicial review, a visa officer's decision.

IV. Analysis

A. *The Officer Applied to Appropriate Test for Temporary Resident Visa Applications*

[12] The Applicant relies on *Murai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 186 [*Murai*] and submits that the Officer applied the wrong test. In her view, the proper question that the Officer ought to have considered is whether she will stay in Canada illegally. The Applicant relies on the following passage of *Murai*:

> [11] How does one ascertain that intention? The Live-in Caregiver manual, found at page 51 of the Applicant's Book of Authorities, sets it out quite succinctly:
>
> > Insofar as possible, given the difficulty of establishing future intentions, officers should satisfy themselves that an applicant for the live-in caregiver program has the intention of leaving Canada should the Application for permanent residence be refused. The question is not so much whether the applicant will seek permanent residence but whether the person will stay in Canada illegally.
>
> [12] What better evidence is there to ascertain such an intention than previous immigration encounters, if such are available? In this case they are available. It was shown that on the Applicant's previous immigration encounter, although she exhausted every possible means of staying in Canada, she left as required by law once she had exhausted all her legal options. She did not go underground or try to stay in Canada by illegal means. She obeyed her removal notice, appeared at the airport voluntarily, and departed. This is quite clear from the confirmation of departure contained in the Respondent's FOSS record.
>
> [13] I might also point out that when the Applicant's H & C application was denied, the FOSS record has the following remark: "ability to become established does not preclude the Applicant from applying from overseas in the normal manner".
>
> [14] It strikes me that the Officer came to an unreasonable decision. The record reveals that the Applicant is a law abiding citizen, who after exhausting her remedies returned to her home

> country and subsequently applied under the Live-in Caregiver Program. The program is designed to bring people with her skills to Canada.
>
> [15] The fact that she previously complied with Immigration Rules supports her contention that she is:
>
> a) law abiding; and
>
> b) will continue to comply with these riles in the future.
>
> [16] The Officer in question asked himself the wrong question. Rather than asking himself "will she leave Canada once given ingress?" as he did, (see affidavit of Gregory Chubak para 4) he should have followed the Live-in Caregiver's manual and asked himself "will this person stay illegally in Canada if not successful under the program?" Based on the Applicant's past performance, any reasonable person would say "no, she will not stay in Canada illegally".
>
> [17] Accordingly, this application will succeed.

[13] Relying on this passage, Ms. Babic argues that the Officer erred by not asking, as *Murai* purportedly commands, whether she would stay in Canada illegally. Instead, the Officer asked whether he was satisfied that Ms. Babic would depart Canada at the end of the period authorized for her stay.

[14] On this point, the Applicant argued that the Officer's failure to apply the correct test is relevant insofar as they failed to consider the Applicant's potential dual intent to become a permanent resident pursuant to subsection 22(2) of the *IRPA*. Specifically, Ms. Babic argues that it was open to her to eventually apply for permanent residence through a spousal sponsorship program, during her temporary residence. In other words, were she to exercise that option during her period of authorized stay, she would in effect not be "staying illegally in Canada" past that

period. Through this lens, Ms. Babic suggests that the Officer's misapplication of the test materially affected the outcome of the Decision.

[15] The Respondent argues that the Officer did not err. The Respondent submits that *Murai* is distinguishable on its facts and does not assist Ms. Babic. Further, *Murai* stands for the principle that where prior immigration history suggests that an applicant will indeed comply with the *IRPA* and leave Canada at the end of their legal stay, then that evidence is relevant in considering future requests for entry. In the Respondent's view, as the Applicant has no such "prior history" in this case, *Murai* does not apply and the Officer applied the correct test. The Respondent also submits that even if the Officer had applied the question proposed by Ms. Babic, the outcome of the Decision would not have changed.

[16] In my view, and as submitted by the Respondent, the *Murai* case cannot help the Applicant. In *Murai*, the facts involved an applicant who had previously entered Canada as a visitor and who unsuccessfully applied for refugee status, and then for a deferral of removal, followed by a pre-removal risk assessment, and by an application on humanitarian and compassionate grounds. When all of her legal recourses failed, she left voluntarily to Hungary. The applicant in *Murai* then submitted another unsuccessful application for a work permit as a live-in caregiver. Plainly, the applicant in *Murai* had extensive Canadian immigration history that demonstrated compliance with the *IRPA*.

[17] In *Murai*, the Court set aside the underlying decision because the officer had misapprehended the applicant's immigration history. Specifically, the applicant's prior history of

total compliance did not support the officer's unfavourable finding. On that basis, the Respondent argues, and I agree, that *Murai* "stands for the proposition that a good indicator of an applicant's likelihood of overstaying their status in Canada is whether or not they have overstayed in the past." In support of this argument, the Respondent cites this Court's previous decision in *Calaunan v Canada (MCI)*, 2011 FC 1494 [*Calaunan*] (at para 28) which confirmed that *Murai* "is of no assistance" in cases where the Applicant has no prior immigration history in Canada.

[18] By contrast, the Applicant has never been to Canada, and her only other interaction was her previous unsuccessful TRV application in 2020. Overall, I find the factual differences between *Murai* and the present case significant.

[19] Indeed, there is no evidence that Ms. Babic has visited, studied or worked in Canada before. At the hearing, Ms. Babic argued that, on the contrary, her prior 5-month travel to Switzerland and subsequent departure demonstrates her compliance with applicable laws. In my view, the Applicant cannot prevail on these submissions alone. First, as noted by the Respondent at the hearing, the record does not clarify the circumstances in which Ms. Babic left Switzerland. Put simply, the vagueness of the record makes it impossible to ascertain whether the Applicant had in fact left Switzerland voluntarily.

[20] Further, while this Court has suggested that an applicant's immigration history with a non-Canadian immigration agency may be considered as evidence of "past" history of compliance, it is not automatically evidence of compliance with immigration laws in Canada. In

addition, the evidence in those cases considered by this Court reflected lengthy periods of stay and histories of compliance with local immigration laws. Otherwise, a very short stay in a foreign country may be a neutral factor as to whether or not the applicant will leave Canada at the end of the authorized period (*Momi v Canada (Citizenship and Immigration)*, 2013 FC 162 at paras 20 and 21; *Safdar v. Canada (Citizenship and Immigration)*, 2022 FC 189 at para 26).

[21] Lastly, the Applicant failed to discharge her burden to persuade the Officer by putting her best case forward—namely by clearly establishing before the Officer, and not this Court, how the circumstances of her departure from Switzerland prove that she would leave Canada at the end of her authorized stay. It is well-established that a judicial review is not an opportunity for an applicant to get a "second kick at the can." Indeed, asking this Court to determine the probative value of her stay in Switzerland is an improper invitation to reweigh the evidence that was before the Officer.

[22] In my view, the Respondent correctly argues that contrary to Ms. Babic's claim, the Officer applied the correct test: will the foreign national leave Canada by the end of their authorized stay? At the hearing, the Respondent argued that both the *IRPA* (under subsection 22(2)) and *IRPR* (under section 179) expressly indicate that the test is whether an applicant would leave at the end of their stay. In support, the Respondent cites, among other decisions, *Watts v Canada (MCI)*, 2020 FC 158 [*Watts*], *Singh v Canada (MCI)*, 2020 FC 840 [*Singh*], and *Puida v Canada (MCI)*, 2014 FC 781 [*Puida*]. In *Watts*, Justice Brown refers to *Rahman v Canada (Citizenship and Immigration)*, 2016 FC 793 (at para 16) as the "leading case regarding TRVs." In that case, Justice Strickland found the test to be whether "the foreign national will

leave Canada at the end of the period authorized for his or her stay", pursuant to section 179 of the *IRPR*. Likewise, in *Singh*, a case concerning a work permit application, the Court considered *Murai* and maintained that the test is the one set out in the legislation. Lastly, in *Puida*, the Court rejected the applicant's submission that the officer had "asked himself the wrong question," finding instead that the officer had in fact properly considered whether the Applicant would leave Canada.

B. *Dual Intent*

[23] I disagree with Ms. Babic's claim that the Officer has failed to consider her potential intent to apply for permanent residence through an inland spousal sponsorship.

[24] The GCMS notes demonstrate that the Officer was alert to a potential dual intent. The Notes specifically indicate that the Officer noted "No sponsorship in system. No explanation as too why…" Clearly, the Officer was alert to the possibility that, being married, Ms. Babic may wish to stay in Canada. The Officer inquired as to that possibility and as to why there had been no sponsorship application. Yet, in her application, Ms. Babic did not provide a reasonable explanation. She could have mentioned that, under the *IRPA*, remedies and procedures existed if she were to choose to remain and seek permanent residence—thereby confirming a potential dual intent—but she did not do so. This understandably left the Officer with nothing to guide their assessment. Under these circumstances, I am not persuaded that the Officer's assessment was unreasonable.

[25] The *IRPA* provision governing dual intent is subsection 22(2), which reads:

> (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.

[26] The jurisprudence of this provision disfavours the Applicant's argument that dual intent was the most important ground, yet ignored by the Officer. In *Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 [*Solopova*], the applicant had made a nearly identical submission as Ms. Babic's. In that decision, Justice Gascon found that the question of whether an applicant would leave at the end of their authorized stay is a precondition of dual intent (para 29). In other words, when an applicant fails to convince an officer that they would leave by the end of their authorized stay, dual intent does not become a relevant factor to consider for the officer (para 30). This precedent contradicts Ms. Babic's oral argument that the Officer had a positive obligation, by operation of the statute, to not only consider her potential dual intent proactively, but to *presume* it. In light of her failure to advance any authority supporting this position, I am not persuaded that the Officer's treatment of the question of dual intent amounted to a reviewable error.

[27] Moreover, it is well-established that in visa applications, applicants are presumed to be immigrants and bear the burden of convincing the officer otherwise (*Obeng v Canada (Citizenship and Immigration*), 2008 FC 754 at para 20).

[28] Finally, the Applicant's case law, which was raised for the first time in her book of authorities filed only four days prior to the hearing, is either dated or does not apply to the

present case. For instance, the Applicant cites *Rebmann v Canada (Solicitor General)*, 2005 FC 310 for the proposition that it is not a violation of the *IRPA* to enter Canada with dual intent. That is not the question in this case: the Officer's refusal was not *based* on a suspected dual intent. Rather, the refusal is justified because the Officer was not satisfied that the Applicant would leave Canada at the end of her authorized stay, a conclusion validly grounded on 1) her establishment in BAH including her employment situation; and 2) her family ties in Canada and in BAH.

[29] Similarly, the Applicant cites *Bteich v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1230 (at para 2) for the proposition that dual intent is legitimate, and that it is unreasonable to infer that an applicant will remain in Canada illegally simply because of their family ties. Again, this authority is unhelpful to the Applicant because it concerned not a TRV, but a study permit, which is governed by a different regime of the *IRPR* (section 216) and in which different considerations are weighed differently such as the financial means to pay for tuition. For instance, in a study permit application, and not necessarily in a TRV, family ties in Canada can weigh positively. By comparison, the factors relating to family ties considered by the Officer in Ms. Babic's case (a spouse in Canada, and the unexplained absence of a sponsorship application) are of a different nature, and therefore not immediately comparable.

[30] In any event, the Officer rejected the application not based on a suspected dual intent, but based on factual inconsistencies in the application that Ms. Babic simply failed to address. While I note that there is some inconsistency in the jurisprudence on this question, there was no obligation for the Officer to proactively invite the Applicant to address their concerns through a

procedural fairness letter or otherwise (*Watts* at paras 35-36; *Bautista v Canada (Citizenship and Immigration)*, 2018 FC 669 at para 17; *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 10). Moreover, as correctly noted by the Respondent, the consequences of the rejection are mild: Ms. Babic can simply reapply with updated documentation. Overall, I am not convinced that the Decision was unreasonable on the basis of Ms. Babic's potential dual intent.

V. Conclusion

[31] Besides arguing the Decision's inconsistency with *Murai*, Ms. Babic has not made any substantive submissions on the reasonableness of the Decision. For example, she did not argue that the Officer's considerations of her lack of establishment in BAH and family ties was unreasonable.

[32] The reasonableness standard of review is rooted in the principle of judicial deference. As set out in *Vavilov*, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. In the case of visa applications, the reasons offered for decision do not require the same degree of formalism or use of judicial techniques as that employed by a judge or a member of a court of justice. As such, visa officers are not held to the same standard of reasoning and justification as that applying to a member of a court.

[33] In this case, the reasons offered were generally sufficiently intelligible to allow Ms. Babic to understand the Decision. For instance, the Officer noted that Ms. Babic's employment was "recent" and paid less than half of the average salary in BAH, a clear indication of the

Officer's lack of confidence in Ms. Babic's degree of establishment. Perhaps most importantly, Ms. Babic has failed to advance any specific argument challenging the Decision. At the hearing, she was unable to explain the incongruity between the fact that her employment was "recent", yet she was applying for a two-year temporary residence in Canada (instead of, for example, three months), and how this incongruity might have contributed to the Officer's finding that she was insufficiently established. Yet, without a doubt, the burden is hers to demonstrate the unreasonableness of the Decision.

[34] In these circumstances, Ms. Babic has not satisfied me that the Decision is unreasonable.

[35] This application for judicial review is dismissed.

[36] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-84-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-84-22
STYLE OF CAUSE:	DAJANA BABIC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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