Federal Court  Cour fédérale

Date: 20141211

Docket: IMM-5831-13

Citation: 2014 FC 1203

Ottawa, Ontario, December 11, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

VANHEANG PHAN

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In what resembles a comedy of errors which has generated a fair amount of confusion, the applicant was granted leave to challenge the decision of an Immigration Officer, on October 3, 2012, who chose to decide that she cannot reconsider a refusal to continue a sponsorship application as a member of the Family Class.

[2] The judicial review application is undertaken pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The extension of time to seek judicial review was granted by my brother Shore J. on September 4 last and it is framed as the judicial review of the "decision of Citizenship and Immigration Canada, dated October 3, 2012, refusing to re-open and reconsider the Applicant's sponsorship application of her parents and siblings". It is therefore on that basis that the matter was reviewed by the Court.

I. Facts and Proceedings

[3] There was originally an application made by Ms Phan to sponsor her two siblings and her parents with the assistance of a representative. The said application is date-stamped September 17, 2008 at Citizenship and Immigration Canada [CIC]. Accordingly, it would appear to have been received by CIC on that date. It does not appear to have been filed before that date. However, the applicant claims that the sponsorship application was made in May 2008; is not supported by any evidence, on this record, that it would have been filed at a date prior to September 17, 2008, even if the application was completed in May 2008, or some other date. As will become apparent the date of filing would have some importance.

[4] It must be understood what is before the Court and what remedy can be granted, assuming the applicant prevails in this judicial review application. The judicial review application itself is confusing because it amalgamates many issues, most of which are not relevant to the decision the Court must make. This application is with respect to the decision of October 3, 2012. That decision, in its entirety, reads as follows:

> This refers to your request to continue the processing of the Application to Sponsor a Member of the Family Class you submitted to this office on behalf of Van Kinh Phan and family (if applicable).
>
> An officer renders a decision based on the information that was provided. Your application was withdrawn as a result of your explicit instructions on the sponsorship application, which indicated that you wished to withdraw if you were found ineligible. Unfortunately, a decision cannot be reconsidered where the sponsor erred in the completion of his/her application. Once a sponsorship is withdrawn, subsequent instructions to continue the processing of the file cannot be considered. As a result, we regret to advise that we will not be able to revise the decision on your sponsorship application.

[5] The other matters raised by the applicant are for all intents and purposes red-herrings to the extent that they do not relate, directly or indirectly, to the narrow issue before the Court. At best some of the information relayed to the Court serves to establish the context around the decision of October 3, 2012.

[6] Thus the letter of May 8, 2012 of the same Immigration Officer who made the decision on October 3 states that Ms Phan is not eligible to sponsor other family members because her income for the year preceding the year in which she seeks to sponsor family members did not meet the minimum necessary income requirement. Having indicated in the sponsorship application that, if she was not eligible to sponsor, Ms Phan wished to withdraw her application, the letter of May 8, 2012 notes that "your sponsorship application has been officially withdrawn and no further action will be taken. There is no right to appeal this decision."

[7] It should be noted that there is a clear incentive to withdraw an application to sponsor if one is not eligible to sponsor. If withdrawn, the fees charged by the government are refunded

except for an amount of $75.00. In the case of this applicant, the amount of money returned was many hundreds of dollars (at the hearing it was confirmed that the amount is some $1300.00). With such an incentive, it is understandable that someone who would not be eligible to sponsor because, among possible reasons, the income threshold has not been met, as was the case here, would prefer to withdraw the application and be remitted the hundreds of dollars required to have an application that may be doomed considered further. There is obviously an incentive to withdraw if not eligible.

[8] Following the letter of May 8, 2012, the applicant sought that her sponsorship application be continued to be processed. The letter which was presumably sent asking for the application to be processed was not in the Certified Tribunal Record, and has no been produced by the applicant either.

[9] The only supplementary information comes from the Global Case Management System [GCMS]. An entry made on October 3, 2012, the same date as that on the letter advising the applicant that her request would not be reconsidered, states:

> Received letter from sponsor requesting we reconsider his application. He states that the immigration consultant submitted his application late. States he signed the applicationon [*sic*] 03 May 2008, but was not mailed out until September 2008. Says that if the immigration consultant mailed the documents after he signed them, the [*sic*] would have met LICO. Also states that the immigration consultant ticked off the box opt to w/d, says he never requested this. ***Sponsor provides a copy of a business card from Immigrant Services, amenda [*sic*] Ng, Settlement Counsellor, 926 Paisley Rd. Units 4-5, Guelph, Ontario, N1K 1X5, tel: 519-836-2222 ext. 235. It is noted that sponsor did not/not provide an IMM1283 appointing this person as his representative and the address on the 1344 was sponsor's home address. Letter sent to

> sponsor this date adving [*sic*] that we cannot reconsider his application.

Accordingly, there is evidence that the applicant sought, by letter, to have the matter of her withdrawal of the sponsorship application reconsidered.

[10] That decision of October 3, 2012, was the subject of a first application for authorization and judicial review. It was filed on October 15, 2012 in file IMM-10562-12. This application was discontinued on December 24, 2012, seemingly because was brought to the attention of the applicant's counsel by government counsel the decision in *Somodi v Canada (Citizenship and Immigration)*, 2009 FCA 268 [*Somodi*]; counsel for the applicant would have understood that a judicial review was not available because a refusal of a sponsorship application was subject to an appeal to the Immigration Appeal Division [IAD]. In view of the availability of a recourse, the judicial review route would have to wait an appeal before the IAD.

[11] Thus an appeal was launched before the IAD. By a decision rendered on August 22, 2013, the appeal was dismissed. The IAD concluded that there was no refusal to grant Ms Phan's parents and siblings permanent resident visas for the reason that she had withdrawn her sponsorship application with respect to them. The *Somodi* decision is concerned with a refusal of an application for permanent residency, not the case of a sponsor who has chosen to withdraw her sponsorship application.

[12] It cannot be said that government counsel is responsible for mistakes of law made by others. It is, in my view, first and foremost for counsel representing litigants to ascertain the state

of the law and so advise their clients. Indeed, counsel for the applicant very fairly conceded that much at the hearing. It remains that the IAD found that "[t]his is a highly unsatisfactory submission [*sic*] provided encouragement for counsel for the appellant to proceed on the wrong tact to the IAD." I share that view.

[13] From that unsuccessful sojourn to the IAD and having discontinued her application for authorization and judicial review, the applicant then turned her gaze on this Court, seeking an extension of time to launch, again, her application for authorization and judicial review. As indicated, extension of time and authorization were granted. The IAD decision is not relevant.

[14] I would however note two observations made by the IAD in its decision that relate to the question this Court has to resolve in this judicial review application. The IAD states that the parties are in agreement that the Immigration Officer has jurisdiction to reconsider her decision based upon new evidence (para 14). The IAD goes on to observe:

> [15] In the respondent's memorandum of argument filed in the Federal Court proceedings it was submitted that the immigration officer did not consider herself *functus officio* when she was asked to reinstate the appellant's withdrawn application and reconsider her decision that the appellant was not qualified to sponsor her parents and siblings. Indeed, it was further submitted she considered the request to reinstate the appellant's withdrawn application.

This is also the position advanced by respondent's counsel in this case before this Court. However, the IAD, being somewhat prescient, concludes its observation by stating:

> [16] It was not stated, however, in the respondent's memorandum of argument how it could be said that the officer considered the request of the appellant and had not asserted she was *functus officio* when, in fact, she informed the appellant in

> writing on October 3, 2012 that "Once a sponsorship is withdrawn, subsequent instructions to continue the processing of the file cannot be considered." I am mindful there is reference to an affidavit by the officer that I have not seen that was filed regarding her having considered the application to reinstate the sponsorship. It may be she changed her mind and subsequently considered the request to reopen the sponsorship on the merits.

II. The Issue

[15] That takes us back to the issue before this Court. The applicant wishes for her sponsorship application to be reconsidered. She claims that she was mistaken in withdrawing her sponsorship application; she also claims that the date to be considered for the assessment of her income is some time in May 2008, when she would have instructed a representative to make the application, as opposed to the date the said application was received by the respondent.

[16] That latter claim would appear to have its importance for this applicant. The letter of May 8, 2012 of the respondent, which prompted the applicant to withdraw her sponsorship application, concluded that the applicant did not meet the minimum income requirement, with the result that the application may in effect be doomed. The 2007 Notice of Assessment from the Canada Revenue Agency [CRA], which is to be used to ascertain the income earned for the purpose of a sponsorship application, showed income under the threshold for sponsorship of family members (by $200.00). Nevertheless, the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], provide that the last notice of assessment is not the only way to calculate income for the purpose of the so-called Low Income Cut-Off [LICO]. Pursuant to section 134 of the Regulations, it is possible to calculate the sponsor's Canadian

income by referring to the "12-month period preceding the date of filing of the sponsorship application".

[17] That period of time was used in the calculation that was done by the respondent. Using as the date of filing the date on which the sponsorship application was filed, that is September 17, 2012, the respondent concluded that the applicant fell short of LICO. For the period between September 17, 2007 and September 17, 2008, the income estimated by the Immigration Officer was well below the CRA assessment for the fiscal year 2007. As a result, either method, as applied by the respondent, produces an income that does not meet the minimum threshold. Evidently, the applicant believes that if a different time period over the taxation years 2007 and 2008 is considered, or a different method of calculation is used, she might satisfy LICO.

[18] The memorandum of facts and law offered in support of the applicant's claim seems to confuse the appeal before the IAD and the matter that she wishes to bring to this Court (para 27 to 31 and para 36). Similarly, the applicant seems to argue her case that, on an appeal before the IAD, she would prevail. In so doing, the applicant is ahead of herself and continues to confuse the issues. Her appeal before the IAD was dismissed because it did not have jurisdiction in view of the withdrawal of the sponsorship application; that decision of the IAD was not challenged. As indicated before, *stricto sensu* it is not relevant to these proceedings. The matter before this Court is much narrower than that. The only issue is whether or not the decision of October 3, 2012 to refuse to reconsider reopening the file, closed due to the apparent withdrawal of the sponsorship, is justified because the decision-maker was *functus officio*. If the matter is reopened and the decision by the respondent is not favourable, it will then be for the applicant to determine

the next steps. Until then, any reference to the IAD constitutes a distraction. First, the Court must decide if there was a refusal to allow reconsideration. Then, the Court would have to conclude whether or not the respondent was right to refuse reconsideration.

III. Analysis

[19] The letter of October 3, 2012 is not ambiguous. I have already reproduced it in its entirety. I repeat, for emphasis: "Once a sponsorship is withdrawn, subsequent instructions to continue the processing of the file cannot be considered." In other words, the decision-maker fettered her discretion, discretion she does not deny she has both in submissions before the IAD and before this Court. In technical terms, the Immigration Officer declared herself to be *functus officio*, that is "… once an adjudicator has done everything necessary to perfect the decision, they are barred from revisiting them other than to correct clerical or other minor technical errors" (Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto, On: Carswell, 2013), §12:6211).

[20] In order to counter the obvious difficulty, having already acknowledged that the discretion exists but claiming on the face of the record that it is not possible to reconsider, the respondent filed an affidavit well after the decision of October 3, 2012. A year later, the decision-maker contended that she in fact turned her mind to the applicant's explanation for why she wished to continue to sponsor her family but concluded that the explanation was insufficient. In support of her contention, she refers to the GCMS notes.

[21] The GCMS notes are of no assistance. They do not provide anything other than a recital of what the applicant is asking for, only to conclude as in the official letter "that we cannot reconsider his application." I fail to see how stating the arguments put forward, which is what was done in effect by recounting what was in the letter of the applicant asking for a reconsideration, is in any way a consideration of their merit, or lack thereof. Instead, the decision-maker states, more than once, that the application cannot be reconsidered, as opposed to being reconsidered and denied whatever the reason may be. Both the letter itself and the GCMS notes state that a revision is not possible. That, the respondent concedes, is not the state of the law (Respondent's Memorandum of Argument, para 16) and the respondent has not resiled from that position.

[22] With respect, the position taken by the decision-maker that she did not consider herself *functus officio* and that she in fact concluded the matter on its merits continues the comedy of errors in this case. There are two reasons for that conclusion.

[23] First, the record speaks for itself. Even when one considers the affidavit filed one year after the decision was made, it at best contradicts the record. Actually, the affidavit is an attempt to explain in a more fulsome manner the letter of May 8, 2012.

[24] Second, and more fundamentally, the affidavit of the decision-maker is attempting to bootstrap her decision. It is an affidavit in the proceedings before this Court well after a decision has been made. This is not permissible: a judicial review application exists for the purpose of controlling the legality of a decision made by an administrative decision-maker. The goalposts

are where they are; they cannot be moved. As discussed by the Federal Court of Appeal in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, a decision-maker may not supplement the reasons for the decision on an application for judicial review of that decision:

> [41] The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was *functus*: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *United Brotherhood of Carpenters and Joiners of America v. Bransen Construction Ltd.*, 2002 NBCA 27 at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267.

[25] In the case at bar, not only does this decision-maker seek to supplement, by providing more information about the income calculations, but she seeks to change the decision under review, from one where the Officer lacked discretion and was unable to consider the applicant's request to one where she did consider the applicant's request but merely denied it. I have found that the respondent concluded that she was *functus officio*. The affidavit submitted *ex post facto* is not admissible.

[26] As I have tried to show, this case proceeded on a comedy of errors. Most of these are not relevant to the issue, a narrow one, that is validly before this Court. Having found that the decision-maker concluded that she could not reconsider, the next question is, was the respondent right to consider herself *functus officio*? In *Kurukkal v Canada (Minister of Citizenship and*

Immigration), 2009 FC 695, a decision of this Court found that whether the *functus officio* doctrine applied called for a standard of correctness. On the other hand, a decision made to reconsider, or not, a decision would be reviewable on a standard of reasonableness (*Chopra v Canada (Attorney General)*, 2014 FCA 179, at para 44). The former is the issue before this Court and a standard of review of correctness applies. Was the decision-maker right that she could not consider reopening the case?

[27] It is problematic in this case that the decision-maker concluded that she was precluded to consider the request for reopening, yet tried later to argue that her decision was on the merits because the decision-maker came to the conclusion that discretion exists after all.

[28] Actually, there is law in the Federal Court of Appeal that there is a residual discretion in an administrative decision-maker to reconsider in the context of non-adjudicative administrative proceedings (*Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 [*Kurukkal*]).The decision of the Federal Court of Appeal is instructive because it articulates clearly the issue in this case and provides a clear answer, one that applies in this case:

> [4] In this case, the decision-maker failed to recognize the existence of any discretion. Therein lay the error. The immigration officer was not barred from reconsidering the decision on the basis of *functus officio* and was free to exercise discretion to reconsider, or refuse to reconsider, the respondent's request.

That is the defect that must be cured. Whether or not the matter is reopened is for the decision-maker, and that decision would be subject to judicial review, albeit on a different review standard.

IV. Remedy

[29] The applicant urges the Court to do more than return the case to a different decision-maker for the narrow purpose of determining if the case ought to be reopened. The Court has to decline the invitation. In *Kurukkal*, the Federal Court of Appeal wrote:

> [5] The judge directed the immigration officer to consider the new evidence and to decide what, if any, weight should be attributed to it. In our view, that direction was improper. While the judge correctly concluded that the principle of *functus officio* does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider.

[30] The applicant's invitation is that which was frowned upon by the Federal Court of Appeal. What needs to be decided first is whether the sponsorship application should be reopened, instead of concluding too quickly, as was done here, that the *functus officio* doctrine prevents a reconsideration. Both the letter of October 3, 2012 and the GCMS notes lead inexorably to the conclusion that the decision-maker concluded that she could not reconsider.

[31] As a result, the judicial review application is allowed. The matter of whether or not the sponsorship application should be reopened, following the decision of October 3, 2012 not to consider reopening the application, shall be remitted to another immigration officer for determination.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application is allowed. The matter of whether or not the sponsorship application should be reopened, following the decision of October 3, 2012 not to consider reopening the application, shall be remitted to another immigration officer for determination. There is no question of general importance that should be certified. There will be no order for costs.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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