Federal Court  Cour fédérale

Date: 20150525

Docket: IMM-4941-13

Citation: 2015 FC 674

Ottawa, Ontario, May 25, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

AMRITPAL KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant's application for permanent residence under the federal skilled worker class was refused and her request for reconsideration was also refused. The applicant now seeks judicial review of the decision for reconsideration pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant seeks an order setting aside the negative decision, returning the matter to a different officer for redetermination and compelling the respondent to grant her application for permanent residence.

I. Background

[3] On March 24, 2011, the applicant submitted an application for permanent residence in the federal skilled worker class, under the National Occupation Classification Code 4142, elementary school and kindergarten teachers.

[4] She submitted an arranged employment opinion confirming her offer of employment from Royal Crest Academy. For this position, a provincial teaching certificate is required.

[5] On January 27, 2011, the applicant scored an overall 5.5 on her International English Language Testing System [IELTS] test. She submitted this result to the officer.

[6] On May 4, 2011, the application was accepted for processing by the Central Intake Office in Sydney, Nova Scotia.

[7] In a letter dated November 15, 2011, the officer informed the applicant that she needed a provincial teaching certificate for her position with the arranged employment and gave the applicant thirty days to respond. On December 13, 2011, the applicant responded that the Ontario College of Teachers would not issue a provincial teaching certificate until she lands in Canada

and produces a social insurance number. In support, she attached the Ontario College of Teachers Registration Guide.

[8] In a letter dated December 6, 2012, the officer informed the applicant of concerns about her IELTS score and her ability to become economically established in Canada as a teacher and gave her thirty days to respond. On December 18, 2012, the applicant responded by a request for an extension of time to retake the IELTS test, which was granted on February 19, 2013.

[9] On February 14, 2013, the applicant took a second IELTS test with the result of an overall score of 6.0, composed of: 6.0 in listening, 5.0 in reading, 6.5 in writing and 6.5 in speaking.

II. Original Decision

[10] On May 7, 2013, the officer refused the application pursuant to subsection 76(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], because the officer was not satisfied that the applicant could economically establish herself despite meeting the minimum requirement of points. The officer stated the number of points awarded is not a sufficient indicator of whether the applicant may become economically established in Canada.

[11] The officer provided the following reasons: i) the applicant does not have a provincial teaching certificate as required by the arranged employment opinion; ii) the applicant lacks proficiency level in English as demonstrated on her IELTS scores; and iii) the information provided by the applicant to address these concerns was not satisfactory.

III. Decision on Reconsideration

[12] On June 7, 2013, the applicant made submissions requesting the officer to reconsider the refusal, asserting that i) she could not obtain an Ontario College of Teaching certificate until she arrives in Canada; and ii) her last IELT test results satisfy the requirement of the Labour Market Opinion [LMO].

[13] On July 5, 2013, an officer reviewed the request for reconsideration. The officer decided there was no error in the refusal and declined to reconsider the application for permanent residence.

> Request for reconsideration received at the IPM's office. File reviewed. There is no error in the decision.

IV. Issues

[14] The applicant raises two issues for my consideration:

1. The officer erred in law in not considering the submissions.

2. The officer erred in failing to provide reasons.

[15] The respondent raises one issue in response: the applicant has failed to demonstrate an arguable issue of law upon which the proposed application for judicial review might succeed.

[16] In my view, there are two issues:

A. What is the standard of review?

B. Did the officer err in refusing to reconsider?

V. Applicant's Written Submissions

[17] First, the applicant submits the doctrine of *functus officio* does not apply to informal, non-adjudicative processes; therefore, the officer erred in refusing to consider the submissions. (see *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230, [2010] FCJ No 1159 [*Kurukkal*]). She then quotes paragraphs 15 to 22 of *Choi v Canada (Citizenship and Immigration)*, 2008 FC 577, [2008] FCJ No 734.

[18] The applicant argues the officer erred in giving insufficient weight to the applicant's net worth and the employment letter. She further submits the officer made an unreasonable finding in not being satisfied by the explanations offered by the applicant.

VI. Respondent's Written Submissions

[19] The respondent submits a decision by a visa officer to exercise the discretion to conduct a substituted evaluation is reviewable on the standard of reasonableness (see *Rahman v Canada (Minister of Citizenship and Immigration)*, 2013 FC 835 at paragraph 16, [2013] FCJ No 884 [*Rahman*]; and *Gharialia v Canada (Minister of Citizenship and Immigration)*, 2013 FC 745 at paragraph 12, [2013] FCJ No 781 [*Gharialia*]). It further submits a decision by an officer on reconsidering an application for permanent residence is also reviewable on the standard of reasonableness (see *Rashed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 175 at

paragraph 44, [2013] FCJ No 177 [*Rashed*]; and *Dong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1108 at paragraph 14, [2011] FCJ No 1370).

[20] As a preliminary issue, the respondent submits in order to provide a thorough analysis, both the decision to refuse the application for permanent residence and the decision to refuse the request for reconsideration need to be examined. It argues both decisions are reasonable and defensible.

[21] First, the respondent submits the use of substituted evaluation for refusal of the applicant's permanent residence was reasonable. It submits according to the Ontario College of Teachers 2011 Registration Guide, an overall score of at least 7, with scores of at least 6.5 in reading and listening and 7 in writing and speaking are required. Here, neither test submitted by the applicant satisfies this requirement. In the officer's affidavit, it is noted that both the officer and concurring senior officer referred to the requirement of the Ontario College of Teachers when comparing IELTS scores and that the score indicated the applicant would not qualify for a teaching certificate. The respondent argues this conclusion is reasonable.

[22] Subsection 76(3) of the Regulations allows an officer to substitute his own evaluation of an applicant's likelihood to become economically established in Canada in appropriate circumstances. These assessments deserve deference to the officer's knowledge and expertise (see *Roohi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1408 at paragraph 13, [2008] FCJ No 1834). Here, the officer was reasonable to determine that the points awarded did not accurately reflect the applicant's ability to become economically established in Canada. The

respondent also argues, as evidenced in the officer's affidavit, that the officer considered the proof of the applicant's funds and concluded that the negative substituted evaluation was recommended.

[23] The respondent submits IELTS results are conclusive evidence of an applicant's proficiency in English (see *Esguerra v Canada (Minister of Citizenship and Immigration)*, 2008 FC 413 at paragraph 14, [2008] FCJ No 549). It is the officer's responsibility to assess if the applicant's language proficiency would allow her to carry out the duties of the job (see *Bilgütay v Canada (Minister of Citizenship and Immigration)*, 2013 FC 625 at paragraphs 14 to 16, [2013] FCJ No 696). The respondent argues the present case is similar to *Debnath v Canada (Minister of Citizenship and Immigration)*, 2010 FC 904, [2010] FCJ No 1110, where this Court found a refusal was reasonable based on insufficient evidence to establish that the applicant would upgrade and qualify as a doctor despite his own subjective evaluation.

[24] Second, the respondent submits the officer's refusal to reopen the application was reasonable. It argues the officer's reasons disclose a rational basis for declining to exercise the discretion to reopen. In *Kurukkal*, the Court of Appeal determined that the officer's obligation is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider (*Kurukkal* at paragraph 5). However, the officer is not obligated to reconsider an application for permanent residence. Here, the applicant in her request for reconsideration submitted no new information or evidence as to trigger "fairness and common sense" for an officer to reconsider (see *Begum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 265 at paragraph 34, [2013] FCJ No 285). It is reasonable to deny an applicant's request for

reconsideration where the underlying decision was reasonable and there was no breach of procedural fairness (*Rashed* at paragraph 50).

[25] The respondent cites the following cases in further support of its position: *Veryamani v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1268, [2010] FCJ No 1668; *Ndegwa v Canada (Minister of Citizenship and Immigration)*, 2013 FC 249, [2013] FCJ No 256; *Sithamparanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 679, [2013] FCJ No 712; and *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283, [2009] FCJ No 1643.

[26] Here, the applicant had an opportunity to make her case for her request for reconsideration, but she failed to submit any new evidence that could have altered the officer's initial decision. Therefore, her request was reasonably denied and the officer's decision is reasonable.

VII. Applicant's Further Submissions

[27] The applicant submits that she only challenges the decision of reconsideration, not the original decision. The notes now provided and offered as "reasons" are not in regard to the second decision, but rather for the first decision.

[28] Also, the applicant submits that the situation in this case is unique and distinguishable from the cases relied on by the respondent. In the present case, she in fact did receive more than

enough points to qualify for immigration to Canada, but the officer used negative discretion to refuse her. She argues a higher duty ought to be held because the applicant was qualified in law.

[29] In the applicant's further memorandum, she brings up a second issue, arguing the officer did not give reasons for the decision not to reconsider. She argues the reasons dated May 7, 2013 pertain to the original decision, not the decision for reconsideration; and they are procedurally improper. The original decision and the decision for reconsideration are related, but they are distinct decisions (see *Villanueva v Canada (Minister of Citizenship and Immigration)*, 2014 FC 585, 242 ACWS (3d) 922). Here, the officer only made a statement of conclusion and this is not sufficient for any decision (see *Velazquez Sanchez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1009, [2012] FCJ No 1097; and *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, [2013] FCJ No 449).

VIII. Respondent's Further Submissions

[30] In the respondent's further memorandum, it argues it was reasonable for the officer to review the initial refusal and the reconsideration submissions and determine there was insufficient reason to reconsider the decision. In response to the applicant's argument that there is no reason provided for the decision not to reconsider, it submits the Global Case Management System [GCMS] notes indicate that after the reconsideration request was received, the officer reviewed the applicant's file and concluded "[t]here is no error in the decision."

[31] Since the applicant did not provide new evidence, there was little for the officer to comment on in rendering the reconsideration decision. There was no need for the officer to reiterate the reasons already provided for the initial refusal.

IX. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[32] Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 57, [2008] 1 SCR 190 [*Dunsmuir*]). Here, I agree with Mr. Justice Michel Shore's determination in *Rashed* that the standard of reasonableness should be adopted when reviewing a decision for reconsideration:

> 44 Whether denying the Applicant's request for reconsideration constitutes a decision is a question of law determinable on the standard of correctness (*Dong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1108). Responding to a request for reconsideration of an application for permanent residence involves an exercise of discretion that is reviewable on a standard of reasonableness (*Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422).
>
> 45 As for the underlying decision, the parties agree that decisions on eligibility for permanent residence as a member of the federal skilled worker class are exercises of discretion that attract the standard of reasonableness (*Ismaili v Canada (Minister of Citizenship and Immigration)*, 2012 FC 351) and questions of procedural fairness are reviewable on the standard of correctness (*Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25).
>
> [Emphasis added]

[33] As for a decision by a visa officer to exercise the discretion to conduct a substituted evaluation, previous jurisprudence has determined it is reviewable on the standard of reasonableness (*Rahman* at paragraph 16; and *Gharialia* at paragraph 12).

[34] The standard of reasonableness means that I should not intervene if the officer's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir*). Here, I will set aside the officer's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the officer err in refusing to reconsider?*

[35] The applicant argues only the decision of reconsideration is in front of this Court for judicial review and I should not consider the reasons provided by the respondent with respect to the original decision. I disagree.

[36] Here, I agree with the respondent that a judicial review for a decision of reconsideration cannot be thoroughly conducted without looking at the original decision.

(1) Original Decision

[37] Under subsection 76(3) of the Regulations, an officer may substitute his or her evaluation for the criteria set out for meeting the federal skilled worker category:

76.(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.	76.(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — n'est pas un indicateur suffisant de l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

[38] Here, I am satisfied that it was reasonable for the officer to issue a refusal in the original decision. The respondent correctly points out that the applicant failed to meet the English proficiency requirement in obtaining a teacher's certificate. According to the Ontario College of Teachers 2011 Registration Guide, "an overall score of at least 7 on the IELTS (academic test only), with scores of at least 6.5 in reading and listening and 7 in writing and speaking" are required. Here, neither test submitted by the applicant satisfies this requirement. Although the applicant performed better on her second test, her overall score was 6.0, composed of: 6.0 in listening, 5.0 in reading, 6.5 in writing and 6.5 in speaking. This did not meet the criteria under the Ontario College of Teachers 2011 Registration Guide.

[39] Although the applicant's IELTS score satisfies the LMO, her score did not meet the requirement to obtain an Ontario College of Teaching Certificate as under the Ontario College of Teachers 2011 Registration Guide. Since she seeks assessment for her permanent residence application under the National Occupation Classification Code 4142, elementary school and kindergarten teachers, her IELTS score effectively undermines her from meeting the requirement on her permanent residence application. This would therefore prevent the applicant from getting a teaching job and in turn, creating difficulty in her establishment in Canada. Therefore, I find the officer was reasonable to decide that the applicant may not become economically established despite meeting the minimum requirement of points.

[40] Further, I do not agree with the applicant's argument that an officer owes a higher duty to her because she was qualified in law by satisfying the points. Also, I do not agree with the applicant's distinction of positive and negative discretion. The Regulations authorize an officer to exercise discretion under subsection 76(3), but it does not make a distinction between the exercise of positive discretion and the exercise of negative discretion. Although the officer used negative discretion to refuse her in this case, I can understand the reasons of the officer's refusal and find them reasonable.

[41] Therefore, I am satisfied the underlying decision on which the decision for reconsideration is based is reasonable.

(2) Decision to Not Reconsider

[42] In *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422, [2010] FCJ No 486, Chief Justice Paul Crampton held that "[t]here is no general duty to reconsider an application for permanent residence upon the receipt of new information and there is no general duty to provide detailed reasons for deciding not to do so" (at paragraph 30).

[43] Nevertheless, the Federal Court of Appeal in *Kurukkal* has held that "the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision" (*Kurukkal* at paragraph 3). According to *Kurukkal*, a decision-maker's obligation at the reconsideration stage is "to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider" (*Kurukkal* at paragraph 5).

[44] In the case at bar, I find it was reasonable to refuse the applicant's request for reconsideration. Here, the underlying decision was reasonable and there was no allegation of breach of procedural fairness. Further, I agree with the respondent that the applicant did not submit new evidence at the stage of reconsideration. The applicant's submissions for reconsideration are similar in content to the explanation provided in her corresponding letter to the officer's requests for information on November 15, 2011 and December 6, 2012. Further, in *Rashed*, this Court found if an underlying decision was reasonable and there was no breach of procedural fairness, it is dispositive of an application under a decision for reconsideration (*Rashed* at paragraph 50).

[45] Insofar as the sufficiency of the reasons is concerned, I agree with the respondent that the reason provided by the officer at the reconsideration stage is sufficient. Although the officer only provided one line that "[t]here is no error in the decision", there was little for the officer to comment on in rendering the reconsideration decision since the applicant did not provide new evidence. I see no need for the officer to reiterate the reasons already provided for the initial refusal.

[46] Therefore, I find the officer's decision for reconsideration reasonable.

[47] For the reasons above, I would deny this application.

[48] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

76.(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.	76.(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — n'est pas un indicateur suffisant de l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Simon Patrick Wennie Lee	FOR THE APPLICANT
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Barristers and Solicitors North York, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT