Federal Court  Cour fédérale

Date: 20160301

Docket: IMM-3486-15

Citation: 2016 FC 264

Ottawa, Ontario, March 1, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ABDUL MURSALIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision dated June 7, 2015 of an officer [the Officer] of the High Commission of Canada – Singapore Office, in which the Officer refused the Applicant's application for a permanent resident visa on the basis that the Applicant did not meet the definition of a dependent child in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] made under the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Applicant's mother was recognized as a Convention Refugee. After obtaining her status, she filed an application for permanent residence and included the Applicant, who is living in Bangladesh, as her overseas dependent.

[4] On September 30, 2014, the Officer sent a letter to the Applicant, informing him that his application for a permanent resident visa was refused because he did not meet the definition of dependent child under Section 2 of the Regulations. The Officer's letter stated that the Applicant, who is more than 22 years old, had not provided conclusive evidence that he had been continuously enrolled in and attending a post-secondary institution and had been actively pursuing a course of academic, professional or vocational training on a full-time basis. The Applicant filed a request for reconsideration of the Officer's decision and, after several additional communications and submissions, the Officer issued the decision that is the subject of this application for judicial review on June 7, 2015.

II. Impugned Decision

[5] The Officer's decision advised that he had reviewed the submitted documents for the Applicant but that the decision to refuse the application had been maintained. He remained unsatisfied that the Applicant met the definition of dependent child in that he was not actively pursuing a course of academic, professional or vocational training on a full-time basis. The

Officer referred to documents which suggested that the Applicant has a learning disability, Attention Deficit Hyperactivity Disorder [ADHD]. However, given the timing of the documents and the fact that this condition was never previously raised, the Officer did not give these documents any significant weight.

[6] In reaching this decision, the Officer noted that there was no mention of ADHD in the Applicant's original application, which had expressly indicated he did not have any mental disorder, and that there was no mention of any non-normal finding on his Immigration Medical Examination dated July 15, 2014. He found the timing of the ADHD diagnosis to be questionable, especially considering the Applicant had failed academically in the years 2011 and 2013, as well as failing at a secondary school level in 2005 and 2006.

III. Issues and Standard of Review

[7] The Applicant submits the following issues for the Court's consideration:

A. Did the Officer fetter his discretion and make his decision in a perverse or capricious manner or without regard to the material before him by:

i. Failing to consider the Applicant's supporting documents and submissions; and

ii. Making unreasonable implicit credibility findings?

B. Did the Officer breach the Applicant's procedural fairness rights or fetter his discretion and fail to show the existence of justification, transparency and intelligibility within the decision making process by:

i. Failing to consider or refer to the Applicant's request for an interview;

ii. Failing to provide the Applicant with an opportunity to respond to the Officer's implicit credibility concerns; and

iii. Failing to consider and refer to the Applicant's request for a possible exemption based on humanitarian and compassionate [H&C] grounds?

[8] The Applicant submits that the standard of correctness applies to its allegations of procedural unfairness and the standard of reasonableness to its other arguments. The Respondent argues that the Officer's decision deals with questions of fact and discretion and is subject to a standard of reasonableness.

[9] I agree with the Applicant's position on the applicable standards of review. Issues of procedural farness are reviewable on a standard of correctness (see *Weng v Canada (MCI)*, 2014 FC 778), but otherwise the Officer's decision is reviewable on a standard of reasonableness (see *Donovan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 359).

IV. Submissions of the Parties

A. *Applicant's Position*

[10] The Applicant raises several arguments in his submissions on procedural fairness. He argues the Officer failed to consider his request for an interview, noting that one can be a *bona*

fide student and still have a poor academic record and that in such cases visa officers should satisfy themselves that the student has made a genuine effort (*Sandhu v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 79). He also argues that he was not provided with an opportunity to respond to the Officer's implicit credibility concerns. Finally, he submits that the Officer failed to consider or even refer to his request for a possible exemption based on H&C grounds.

[11] On the reasonableness of the decision, the Applicant argues that the Officer failed to consider his supporting documents and submissions surrounding his learning disability, as the decision does not mention the contents of the documents that were submitted to address the specific new concern the Officer had raised. He also submits that the Officer made a reviewable error by discounting these documents without making any finding that they were fraudulent.

[12] The Applicant's position is that the Officer made an unreasonable implicit credibility finding about the Applicant. He notes that it was only through the last communication from the Officer on January 13, 2015 that the Applicant became aware of the concern about failing and repeating two years. His new evidence was in response to that concern. The Applicant submits that it is clear from his psychologist's report that, while the Applicant has had academic difficulties since high school, his doctor started to assess him only on August 17, 2014, leading to a diagnosis on October 28, 2014. This explains why the diagnosis was not in his original application or the Immigration Medical Examination.

B. *Respondent's Position*

[13] The Respondent submits that the Applicant has no guaranteed right to an interview in an application for permanent residence and that an officer does not breach principles of procedural fairness in deciding not to interview an applicant to allow the applicant to clarify any ambiguity or concern in his or her application. The Respondent also argues that the Applicant was provided with three opportunities to address the Officer's concerns and that the onus is on the Applicant to put his best case forward. On the H&C argument, the Respondent notes that this request was first raised on January 30, 2015 and that the Applicant already had an opportunity to provide four sets of submissions over the course of two years. He also did not set out the factors to be considered.

[14] On the reasonableness of the decision, the Respondent argues that the Officer clearly considered all of the documents, as he referred to many of them in the decision. The Respondent's position is that the Applicant is merely disagreeing with the weight given to these documents. With respect to the diagnosis of ADHD, the Officer does not take issue with an inconsistency but rather notes the timing of the diagnosis, after all of the other forms were completed and the Applicant had already been refused, which raises concerns about the legitimacy of the diagnosis.

V. Analysis

[15] I am allowing this application for judicial review, because I do not consider the Officer to have met the procedural fairness obligation to advise the Applicant of his concerns about the legitimacy of his alleged learning disability, so as to afford the Applicant an opportunity to

respond to those concerns before the Officer made the decision not to give any significant weight to the evidence of that disability.

[16] The Applicant cites *Kuhathasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 457 [*Kuhathasan*] as authority for the obligation of a visa officer to make concerns known to an applicant, and to provide an opportunity to respond, where those concerns relate to the credibility, accuracy or genuine nature of information submitted by the applicant, including concerns about the veracity of documentary evidence. At paragraph 37 of *Kuhathasan*, Justice Russell explained the applicable principles as follows:

> [37] There is a considerable body of case law emanating from this Court indicating that there is no duty on a visa officer to try and bolster an incomplete application. A visa officer may make inquiries, when warranted, but is not obliged to inform an applicant of the weaknesses of his or her case and provide an opportunity to strengthen the application. The usual exception is where an officer has concerns about the veracity of an applicant's documents. In *Olorunshola v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1056, Justice Tremblay-Lamer provided the following summary at paragraphs 32-34:
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> > **32.** In *Yu v.* Canada *(Minister of Employment and Immigration)*, [1990] F.C.J. No. 704 (Q.L.), MacKay J. held that visa officers are not required to stress all concerns which arise directly from the act and regulations, given that these instruments are available to all applicants who bear the burden of establishing that they meet the pertinent selection criteria.
> >
> > **33.** However, this Court has also indicated that where concerns arise which are not directly related to the act and regulations, visa offers may be required to make these concerns known to the applicant. As stated by Mosley J., this is "often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in

> support of their application" is at issue (*Hassani, supra*, at para. 24).
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> **34.** Accordingly, where concerns arise with respect to the veracity of documentary evidence, visa officers should make further inquiries (see *Huyen v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 904, [2001] F.C.J. No. 1267(QL), at paras. 2 and 5; *Kojouri v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389, [2003] F.C.J. No. 1779 (QL), at paras. 18 and 19; *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877, [2007 F.C.J. No. 1142] (QL), at paras. 12 to 18).

[17] The Respondent does not take issue with the existence of this duty of fairness. While taking the position that there is no requirement that such a duty be afforded by way of an interview, the Respondent acknowledges that when there are credibility issues, the duty of fairness will generally require that an Applicant be afforded an opportunity to address the concerns in a meaningful way. However, the Respondent disputes the Applicant's characterization of the Officer's decision as involving a credibility finding and argues that, regardless, the Applicant was afforded a number of opportunities to address the Officer's concerns.

[18] The Respondent notes that the Officer's decision is expressed as a decision not to give significant weight to the documents suggesting the Applicant has a learning disability, because of the timing of the documents. With respect, my view is that it is clear that this does represent a finding as to the credibility, veracity or genuineness of this documentation, particularly the report from the Applicant's psychologist containing the ADHD diagnosis. The Officer finds the timing of the diagnosis "questionable at best", which can only be characterized as expressing a basis for

a concern about the genuineness of the diagnosis. Indeed, even the Respondent's written submissions described the Officer as noting that the timing of the diagnosis raises concerns about the "legitimacy" of the diagnosis. I find that it is clear the Officer's concerns were of the sort that engaged the duty of procedural fairness, requiring that the Applicant be afforded an opportunity to address those concerns.

[19] I also cannot accept the Respondent's position that this duty was met though the previous opportunities that were given to the Applicant to submit information to the Officer and respond to concerns that were expressed. The sequence of relevant events described by the Respondent is as follows:

A. The Applicant's application was initially refused on September 30, 2014;

B. The Applicant requested that the decision be reconsidered and that he be given an opportunity to provide documents in response to the Officer's initial finding;

C. The Officer agreed and the Applicant provided additional documents and submissions on December 9, 2014;

D. On December 28, 2014, the Officer emailed the Applicant's representative and advised him of specific concerns, providing the Applicant another opportunity to provide documents, which the Applicant did on January 13, 2015;

E. On January 13, 2015, the Officer advised the Applicant that he still had concerns and allowed the Applicant another opportunity to provide

documents, which the Applicant did on January 30, 2015. It was these documents that contained the information related to the alleged learning disability;

F. On June 7, 2015, the Officer made the decision that is the subject of this judicial review.

[20] There was considerable communication between the Officer and the Applicant. The question is whether, looking at the details of these communications, any of them placed the Applicant on notice that he should address concerns about the legitimacy of the alleged learning disability. The initial decision of September 30, 2014 simply communicated that the Applicant had not provided conclusive evidence that he had been continuously enrolled in and attending a post-secondary institution and had been actively pursuing a course of academic, professional or vocational training on a full-time basis. The December 28, 2014 communication from the Officer requested academic transcripts and noted that the Applicant was listed as a second year student after at least four years of studies.

[21] On January 13, 2015, the Applicant responded with the requested documents and submitted that the transcript showed that, because he was enrolled in December 2009, the first year of studies was 2010. He passed his first year of studies but did not pass the second year in 2011 and had to repeat that year in 2012. The transcript also showed that the Applicant did not pass his third year of studies in 2013 and had to repeat that year in 2014. The Officer then informed the Applicant that he was concerned with his status as a student as he had failed two years and therefore was not actively pursuing his course of studies. The Officer was prepared to

consider any further submissions received up to January 31, 2015. It was in response to this communication that the Applicant provided the submissions and eleven pages of supporting documents which described the Applicant having a learning disability.

[22] While the Officer's communications with the Applicant in December 2014 and the first half of January 2015 identified the Officer's concerns that the Applicant's academic history did not demonstrate that he was actively pursuing his studies, they raised no concerns about the legitimacy of his ADHD diagnosis . Of course, this precise concern could not have been raised in those communications, as this explanation for the number of years the Applicant had been studying was presented to the Officer only on January 30, 2015. However, I also cannot conclude that the Officer having previously raised the more general concern about the Applicant's active pursuit of his studies was in some way sufficient to put him on notice that, once information as to the learning disability diagnosis was provided, the Officer would have concerns about the genuineness of that diagnosis.

[23] Despite the Respondent's argument that applying the duty of procedural fairness in the manner argued by the Applicant can result in an ongoing series of submissions, resulting credibility concerns, and requests for further submissions, my conclusion is that this duty does require such a result when a decision-make develops a fresh concern about credibility, accuracy, veracity or genuineness that an applicant has not previously had an opportunity to address.

[24] The potential for this is evident in the Court's recent decision in *Rani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1414, in which Justice Strickland was considering a

decision on a permanent resident application that turned on the genuineness of a job offer. The job offer was submitted by the applicant following receipt of a procedural fairness letter raising concerns about the applicant's language skills being sufficient to enable her to become economically established. While this point was not the subject of any express commentary in the Court's decision, the fact that a procedural fairness letter had previously been sent did not represent an impediment to the Court concluding that the officer's subsequent concerns about the genuineness of the offer gave rise to an obligation to raise this credibility concern with the applicant.

[25] The Applicant raises a number of arguments as to why the Officer's decision, in addition to being procedurally unfair, is unreasonable. For instance, he argues that the Officer overlooked the fact that the Applicant's consultation with and diagnosis by his psychiatrist were subsequent to the submission of his original application for permanent residence. He therefore submits it was not reasonable for the Officer to make negative findings as to the credibility or probative value of the documents speaking to the diagnosis, based on the fact the disability was not identified on the application. However, as I have reached the conclusion that the obligation of procedural fairness has not been met, which requires that this application for judicial review be allowed and the Officer's decision be re-determined by another officer, I decline to reach any conclusions on the reasonableness of the decision. The Applicant can make submissions as to the legitimacy of the diagnosis when this matter is being re-determined, and those submissions can be assessed by the officer conducting the re-determination.

[26] Neither party proposed a question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the Applicant's application for permanent residence is referred to a different officer for re-determination in accordance with these reasons. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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