

Federal Court



Cour fédérale

Date: 20160420

Docket: IMM-3768-15

Citation: 2016 FC 429

Ottawa, Ontario, April 20, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

RAMIL FERNANDEZ DORON

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This application seeks judicial review of a decision of an immigration officer [the Officer] dated July 2, 2015, rejecting the Applicant's application for permanent residence. For the reasons that follow, this application is allowed.

I. Background

[2] The Applicant is a citizen of the Philippines. He entered Canada on a work permit on April 3, 2009 and subsequently applied for a permanent resident visa as a skilled worker in the category NOC-7321 (Automobile Mechanic) through the Express Entry program administered by Citizenship and Immigration Canada [CIC].

[3] CIC advised the Applicant by letter dated February 6, 2015 that he had been accepted into the Express Entry pool of candidates, that candidates would be ranked and that, if he was invited to apply for permanent residence, he would receive a personalized document checklist. CIC then advised the Applicant by letter dated February 7, 2015 that he had been invited to apply and that he must submit a complete application within 60 days, i.e. before April 8, 2015. The letter noted that, to apply for permanent residence, the Applicant needed to submit documents identified on a checklist made available to him through his online account with CIC. The letter also noted that some supporting documents required for the application, such as police certificates, may take time to acquire and encouraged the Applicant to begin gathering those documents now.

[4] On March 4, 2015, the Applicant wrote to CIC, stating that he was facing technical difficulty in submitting his online application and supporting documents. His letter also stated that he had uploaded a police clearance from the Philippines issued November 21, 2014 and referred to difficulties obtaining police clearances from Saudi Arabia and the United Arab

Emirates. The police certificate from the Philippines was issued by the National Police Commission [NPC], not the National Bureau of Investigations [NBI] as required by CIC.

[5] On April 8, 2015, the Applicant received a letter from CIC confirming that his application for permanent residence was received, was being checked to determine whether it met the requirements of a complete application under section 10 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the IRPR], and would be rejected as incomplete if it did not meet the requirements of this section.

[6] On May 14, 2015, CIC sent the Applicant another letter requesting certain information and documents including passports, birth certificates, and medical information related to members of his family.

[7] On July 2, 2015, the Officer issued the decision rejecting the application.

I. The Officer's Decision

[8] The Officer's decision determined that the Applicant's application did not meet the requirements of a complete application as described in sections 10 and 12.01 of the IRPR and was rejected for being incomplete. Specifically, the decision stated that the application did not include acceptable police certificates from the Philippines, noting "Not NBI Issued" and referencing a document entitled "How to Obtain a Police Certificate - Philippines". The decision stated that a full review of the application was not performed and that other elements not identified may also be missing or incomplete.

[9] The letter conveying the Officer's decision explained that, if the Applicant still wanted to come to Canada as a skilled immigrant, he must submit a new Express Entry profile.

II. Issues and Standard of Review

[10] The Applicant articulates the issues raised by his application for judicial review as follows:

- A. Did the Officer err in assessing the evidence in concluding that the Applicant did not submit the police clearance certificate?
- B. Did the Officer fail to observe the principles of natural justice and procedural fairness by failing to provide adequate opportunity to the Applicant to submit a fresh police certificate?
- C. What is the standard of review?
- D. Were the Officer's reasons adequate?
- E. Did the Officer make a reviewable error by denying the Applicant's application for a permanent resident visa?

[11] The Respondent submits the only issue is whether the Officer made a reviewable error on the statutory grounds in section 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7.

[12] Following review of the parties' arguments, as described below, I consider the issue for the Court's consideration to be whether the Officer's decision was made in breach of obligations

of procedural fairness. Both parties submit, and I agree, that the standard of review applicable to this issue is correctness (see *Wu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 594 [*Wu*]).

III. Submissions of the Parties

A. *The Applicant's Position*

[13] The Applicant submits that it is well established that visa officers owe a duty of fairness towards applicants and that, if the Officer had given him notice of his decision and an opportunity to respond, the Respondent would not have been prejudiced. He refers to system limitations that did not allow him to upload his documents, unless the Respondent unlocked his profile and permitted such uploads. He also states in an affidavit filed in support of this application for judicial review that he understood that the police certificate issued by the NPC, which he did successfully submit, was issued by a competent authority and that he did not understand that a certificate from the NBI was required.

[14] The Applicant also argues that he had a legitimate expectation that he would be given an opportunity to update his application by submitting a new police certificate. His expectation of an opportunity to update his documents arises from the fact that such an opportunity has been given to other applicants where a document is missing or an immigration officer has a concern regarding documents already submitted. In support of this argument, the Applicant has submitted copies of correspondence from CIC to other applicants for permanent residence.

[15] The Applicant also takes the position that the Respondent breached procedural fairness by failing to follow CIC's regular practice of first assessing the eligibility of an applicant for permanent residence, based on factors including education and work experience, and only then reviewing admissibility based on factors such as police clearance.

[16] Finally, the Applicant submits that the Respondent did not provide any reasons for the decision not to allow him to submit his documents, and he emphasizes the decision's significant impact upon him.

B. *The Respondent's Position*

[17] In supporting the Officer's decision, the Respondent argues that the Global Case Management System [GCMS] demonstrates that there was a proper and thorough consideration of the entirety of the application and submitted materials. The Respondent relies on *Wu* as authority that the onus rests upon an applicant to submit a complete application containing adequate supporting documentation and that the visa officer is not required to give the applicant a second opportunity to satisfy the officer on necessary points that the applicant may have overlooked.

[18] The Respondent submits that CIC's letter to the Applicant dated February 6, 2015 referred him to a website link for more information about the documents he would need to submit if he was invited to apply for permanent residence. The Applicant was then advised in CIC's letter dated February 7, 2015 that he was required to submit a complete application prior to April 8, 2015. This letter referred to his obligation to submit all documents noted on the

checklist made available to him through his online account and highlighted that the Applicant should begin the process to obtain the required police certificates.

[19] The Respondent notes that the Applicant has included in his Application Record a copy of CIC's instructions for obtaining a police certificate from the Philippines, which identifies the required document as a NBI Police Clearance.

[20] Referring to the Applicant's letter dated March 4, 2015 the Respondent notes that there is nothing in the letter to indicate that the Applicant had obtained the required NBI Police Clearance or that this was one of the supporting documents that he was unable to upload. There is no evidence from the Applicant that he had made any attempt to obtain the NBI Police Clearance at that time.

[21] The Respondent relies on *Bar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 317, as authority that, where an application is insufficient, there is no duty to contact the applicant for the purposes of having the applicant bolster his application. Similarly, in *Obeta v Canada (Minister of Citizenship and Immigration)*, 2012 FC 154, the Court stated that the burden of providing sufficient information rests on the applicant, and where an officer's concerns arise directly from the requirements of the legislation, there is no duty on the officer to raise doubts or concerns with the applicant.

[22] With respect to the legitimate expectations arguments, the Respondent states that the Applicant is comparing his situation to that of other applicants without providing context. There

is no evidence as to the circumstances surrounding the Respondent's requests for more information from those applicants. In relation to CIC's letter dated May 14, 2015, requesting certain information and documents related to members of the Applicant's family, the Respondent argues that it can be inferred that these were documents not referred to in the checklist previously made available to the Applicant and that there was no duty on the immigration officer to repeat a request for documents that had originally been requested in the checklist.

IV. Analysis

[23] My decision to allow this application turns on a finding that, in the particular circumstances of this case, the Applicant was not afforded the procedural fairness required to sustain the Officer's decision.

[24] The Respondent has expressed the position that there was no duty on the Officer to repeat a request for documents that had originally been requested in the checklist. I agree with the Respondent's general proposition that, where an application is insufficient, there is no obligation to alert an applicant as to what is required to complete the application. As noted by the Respondent, this Court has recently expressed this principle as follows at paragraph 23 of *Wu*:

23 The onus rests upon the Applicant to submit a complete application containing adequate supporting documentation, and it is "not for the visa officer to wait and offer the applicant a second, or several opportunities to satisfy the visa officer on necessary points which the applicant may have overlooked" (Prassad above).

[25] In other words, there is no obligation that visa officers engage in a form of dialogue as to the completeness or adequacy of materials filed. The exception is when there are concerns about

the credibility, accuracy or genuineness of the information submitted (*Nabin v Canada (Minister of Citizenship & Immigration)* 2008 FC 200 at paras 7 and 8), which is not a situation that applies in the present case.

[26] Similarly, I am not prepared to find a breach of procedural fairness based on the evidence submitted by the Applicant that other applicants received correspondence from immigration officers identifying a requirement for provision of a police certificate in order to continue processing their applications. As argued by the Respondent, the Court does not have enough context surrounding those other applications to assess whether these letters represent a practice of which the Applicant did not receive the benefit.

[27] However, I do find the Applicant to have been deprived of procedural fairness in this case, in that I am not satisfied that he was ever advised by the Respondent of the requirement that he submit a police certificate specifically issued by the NBI. The Respondent's initial Memorandum of Argument filed on this application relied on the fact that CIC's letter dated February 7, 2016 advised the Applicant that he had an obligation to submit all the documents noted on a checklist made available to him through his online account with CIC. At the hearing of this application, the Court noted that both the February 6 and 7, 2015 letters to the Applicant refer to this checklist and inquired whether it was part of the record before the Court. The Respondent explained that, in this case, such a checklist was not provided to the Applicant.

[28] The Respondent, therefore, relies on a website link, identified in the February 6, 2015 letter to the Applicant, for the position that the Applicant was made aware of the requirement to

provide a police certificate issued by the NBI. In support of this position, the Further Memorandum of Argument of the Respondent refers to and attaches copies of a series of webpage screenshots, with the explanation that by navigating through these webpages through a series of links, a foreign national would be taken to the page that identifies how to obtain a police certificate from the Philippines and that such certificate must come from the NBI. These webpage copies were not introduced into evidence through an affidavit.

[29] The Applicant's evidence is that he submitted a police certificate from the NPC and that he did not understand that he was required to submit one specifically from the NBI. This raises the question whether CIC advised him that its requirement was for an NBI certificate. While it appears that CIC's practice is to provide applicants with a checklist that identifies the required documents, which might have explained this requirement, this practice was not followed in the present case. Particularly given that departure from practice, the Court is not prepared to rely on the series of website screenshots, attached to written submission but not proven through an affidavit, to reach the conclusion that CIC had advised the Applicant of the requirement that the police certificate be obtained from the NBI.

[30] The Respondent does correctly point out that, in the Applicant's affidavit filed in support of this application, he attaches as an exhibit a copy of the CIC webpage identifying the need to obtain an NBI police certificate. It appears from the affidavit that the Applicant's intention in attaching this exhibit was to highlight the statement on the webpage that CIC will not accept police certificates sent by mail. However, this webpage screenshot is dated October 7, 2015, after the July 2, 2015 decision of the Officer that is under review and, therefore, does not contradict

the evidence of the Applicant that he was not aware of the requirement for an NBI certificate, which I take to mean that he was not aware at the relevant time when he was submitting documents to the CIC within the 60 day period expiring on April 8, 2015.

[31] The Respondent also noted in oral argument that, in the Applicant's own oral argument at the hearing of this application, he stated that he realized in May of 2015 that he required a police certificate from the NBI and then commenced the process to obtain it. The Applicant also explained that he learned of this requirement through friends who were also applying for permanent residence. None of this information is in evidence, other than that the Applicant's affidavit does demonstrate that he did ultimately obtain an NBI certificate, which bears a date in September 2015. I refer to this information only to say that none of it, even if it had been introduced as evidence, would contradict the Applicant's evidence that he was not aware of the requirement for an NBI certificate at the relevant time.

[32] It is accordingly the conclusion of the Court that, in the circumstances of his particular case, CIC did not give the Applicant the initial notice of the requirement he was obliged to meet necessary to discharge the obligation of procedural fairness. The Officer's decision based on the Applicant's failure to meet this requirement must accordingly be set aside.

[33] Neither party proposed any question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is referred back to another immigration officer for re-determination after the Applicant is provided an opportunity to submit the required police certificate.
3. No question of general importance is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3768-15

STYLE OF CAUSE: RAMIL FERNANDEZ DORON V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: APRIL 12, 2016

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