

Federal Court



Cour fédérale

Date: 20180307

Docket: IMM-3505-17

Citation: 2018 FC 268

Ottawa, Ontario, March 7, 2018

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

SARAH OLUWATUNMININU JOSEPH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a Visa Officer's (the Officer) refusal letter, dated July 11, 2017, indicating that Sarah Oluwatunmininu Joseph's (the Applicant) application for a Permanent Resident Visa (PRV) was refused due to incompleteness. Specifically, the application did not include the police certificate from the United Kingdom (UK), where she resided cumulatively for over six months. When her application was rejected, the Applicant was advised that her application fees would be refunded, and that her on-line profile would remain

active for a period of 60 days. She filed this application for judicial review to challenge this decision.

[2] For the reasons that follow, this application for judicial review is dismissed. The application named the Minister of Immigration, Refugees and Citizenship Canada as the Respondent. The style of cause is to be amended, on consent of the parties – the proper Respondent here is the Minister of Citizenship and Immigration: *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s. 4(1); *Department of Citizenship and Immigration Act*, SC 1994, c 31, s. 2(1); *Immigration and Refugee Protection Regulations* (SOR/2002-227) [IRPR], s. 2.

I. Background

[3] The Applicant is a citizen of Nigeria, who, after creating an online Express Entry profile with Immigration, Refugees and Citizenship Canada to apply for a PRV, was accepted into the Express Entry pool by a letter dated November 26, 2016. This letter provided a link to the documents that were required to be submitted, should she be selected from within the pool and invited to apply for a PRV. It also encouraged her to begin to assemble the necessary documents as soon as possible. On March 1, 2017, she was invited to apply for a PRV as a member of the Federal Skilled Worker class and to submit her complete application by May 31, 2017. Although the Applicant submitted her application on May 28, 2017, she failed to submit a police clearance from the UK. Since she had spent more than six months in the UK, she was required to submit a police certificate, and her failure to do so meant that her application was incomplete. This was the basis for the July 11, 2017 letter, refusing her application (the decision).

II. Issues and Standard of Review

[4] The Applicant has raised the following issues:

- A. Did the Officer breach the principles of natural justice in failing to provide adequate opportunity to submit a police certificate?
- B. Did the Officer err in failing to exercise discretion?
- C. Was the Officer's decision reasonable?

III. Analysis

[5] The standard of review in regard to whether there was a breach of procedural fairness is correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705. The standard of review as to the merits of the decision is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

- A. *Did the Officer breach the principles of natural justice in failing to provide adequate opportunity to submit a police certificate?*

[6] The Applicant submits that the Officer breached the principles of natural justice by failing to provide an adequate opportunity to submit a police certificate, and by failing to follow the Respondent's usual practice of providing an indication of what was lacking in her application and then offering a further opportunity to submit necessary documents. The Applicant contends that she had a legitimate expectation that such a practice would be followed in her case, and points to a letter that the Officer sent requesting further details regarding her travel history and background information, as well as further background information regarding her husband. The

Applicant also argues that the rejection of her application had a serious impact on her and her family.

[7] The law is clear that a breach of procedural fairness will render invalid any decision taken following the breach, unless the failing has been remedied by subsequent steps prior to the final decision: *Singh Dhaliwal v Canada (Citizenship and Immigration)*, 2011 FC 201 at paras 25-26. The requirements of procedural fairness vary with the nature of the decision and its impact on the individual: *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817. Where an applicant is refused at the eligibility stage of processing, the scope of procedural fairness is at the lower end of the spectrum, in particular where, as here, the applicant can immediately re-apply: *Chadha v Canada (Citizenship and Immigration)*, 2013 FC 105 at para 38.

[8] The legal and procedural framework governing this matter is clear and simple: applications must be complete in supplying all of the information required by *IRPA* (s. 11(1)) and *IRPR* (s. 10(1)); an applicant must provide all information and any documents an officer reasonably requires to assess the application (*IRPA*, s. 16(1)); and, an incomplete application is to be returned to the applicant if the application requirements are not met (*IRPR*, s. 12). The Respondent's Operating Manual (OP 6) on Federal Skilled Workers (Inland Processing), processing e-applications received on or after January 1, 2015 (the Operating Manual), states: "Applications are assessed for completeness up front. An application found to be incomplete should be rejected as per section 10 of the Immigration and Refugee Protection Regulations, and all fees associated with the application should be refunded to the applicant."

[9] Information provided to applicants about the Express Entry stream underlines at each step several key points: (i) as reflected in the name of the program, the application will be dealt with more quickly than might be usual for other applicants applying under different programs; (ii) the onus is on the applicant to provide a complete application within the allocated timelines; and, (iii) the applicant should begin assembling their document package and updating their online profile as early as possible, in order to be able to meet the tight timelines. All of this information was conveyed to the Applicant in this case. However, it is not disputed that one essential document was not contained in her application package, and that was the basis for rejecting it.

[10] The Applicant argues that the case of *Doron v Canada (Citizenship and Immigration)*, 2016 FC 429 [*Doron*] should be a persuasive authority in support of her argument that she was denied procedural fairness. *Doron* also involved an applicant under the Express Entry program, whose application was rejected because he provided a police certificate from the National Police Commission of the Philippines, rather than one from the National Bureau of Investigation, as required by the Respondent. Justice Richard Southcott found that Mr. Doron had been denied procedural fairness when his application was rejected. The Applicant argues that I should follow this precedent in the instant case.

[11] However, I find that the decision in *Doron*, like all cases involving claims of procedural unfairness, turns on its particular facts. In that case the applicant had indicated to the Respondent that he was having difficulty uploading his documents to the online system, and he indicated that he had uploaded his police certificate from the Philippines, although he was having difficulty obtaining certificates from some other countries (para 4). The applicant was never advised that the Respondent required a police certificate from a different agency. Furthermore, the Court did

not have proper affidavit evidence before it to substantiate precisely what information Mr. Doron had been provided to guide him through the application process (paras 28-29). The Court concluded, on the basis of the record before it, that the Respondent did not give Mr. Doron “the initial notice he was obliged to meet [that was] necessary to discharge the obligation of procedural fairness” (para 32).

[12] In the case before me, the record is quite different. It is clear that the Applicant was advised early on in the process that a police certificate would be required. The Respondent filed an affidavit demonstrating that the online guidance provided to the Applicant states that it is necessary to provide a police certificate from any country she had lived in or visited for a period totalling six months or more. The Applicant does not deny that she received notice; her claim is that she did not submit the required police certificate due to inadvertence, and that it was unfair of the Officer to summarily reject her application without alerting her that she was missing that document and giving her an opportunity to provide it. This is entirely different than the situation before the Court in *Doron*.

[13] The law is clear: the onus lies on the applicant to submit a complete application, and there is no duty on the officer to remind applicants of the need to submit all of the documents required for a complete application package: *Wu v Canada (Citizenship and Immigration)*, 2015 FC 594; and *Doron* at paras 24-25.

[14] In this case, the Applicant’s acknowledged inadvertence was the basis for rejecting her application as incomplete. There is no dispute that this was the basis for rejecting her application. The Applicant was provided with adequate notice of the requirements of a complete application,

as well as with clear instructions about the need to submit a complete application package in view of the speed with which the Express Entry program applications would be processed. It was not unfair to reject her incomplete application, and there was no duty on the Officer to provide her with another opportunity to provide the missing document. I find no breach of procedural fairness in the particular circumstances of this case.

B. *Did the Officer err in failing to exercise discretion?*

[15] The Applicant argues that the Officer erred in failing to demonstrate that he or she had considered exercising the discretion provided under the guidance set out in the following passage from the Operating Manual:

Document Requirements:

...

Police certificates are required up front and are mandatory for each country (except Canada) where an individual has lived for a total of six months or more. This instruction is for the purpose of the completeness check under section R10. However, it is always at an officer's discretion to request a new or additional police certificate.

[16] The Applicant argues that the decision in *Fernandes v Canada (Citizenship and Immigration)*, 2008 FC 243 [*Fernandes*] stands for the proposition that, where an officer has a discretion available, it is an error of law for the officer to fail to indicate whether there was any consideration of whether to exercise it. The Applicant does not argue that the Officer erred in the exercise of his or her discretion in this case, but rather that the Officer erred in failing to indicate that he or she considered the question of whether it should be exercised.

[17] I find that the *Fernandes* case does not apply here because it involves a different legislative decision-making scheme. That case involved a situation where there was an express provision in the *IRPR* providing a discretion to the officer, and Deputy Judge Barry Strayer found that the decision-maker did not indicate whether or not the express statutory requirements were considered in reaching the negative decision. In *Fernandes* the application was rejected because the applicant did not have sufficient points to qualify as a skilled worker. The *IRPR* provided a discretion to the officer to consider whether the applicant would be likely to become economically established in Canada, despite not having the sufficient number of points. The provision expressly set out a discretion which had to be considered in order to reach a fair decision in the circumstances of that application. The Court found it was unfair to reject an application for failing to meet the necessary points under the program, without an indication that the officer had considered whether to exercise the discretion that the *IRPR* set out as an express part of the scheme.

[18] In this case, the application was rejected because it was incomplete – it did not include all of the police certificates required to meet the minimum requirements prescribed for the program. This is not a situation where there was any question of the Officer requesting “new or additional” police certificates, because the basic ones were missing from the application. The Officer did not commit an error of law in failing to demonstrate that he or she considered whether to exercise a discretion in relation to a matter which simply did not arise on the facts of the case.

C. *Was the Officer's decision reasonable?*

[19] The Supreme Court of Canada has stated that the reasonableness of a decision “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” (*Dunsmuir*). The decision in this case to reject the application as incomplete lies at the lower end of the spectrum in regard to the requirements of procedural fairness; it was an administrative decision taken early in the screening process, involving the application of clear requirements to a particular set of facts. The Applicant here has acknowledged that her application was incomplete. It was not unreasonable to reject it on that basis.

IV. Conclusion

[20] For these reasons, this application for judicial review is dismissed. No question for certification was proposed, and I find no serious question of general importance arises from this case.

JUDGMENT in IMM-3505-17

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no serious question of general importance to be certified.
3. The style of cause is amended to reflect the proper Respondent, The Minister of Citizenship and Immigration, with immediate effect.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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