Federal Court  Cour fédérale

Date: 20180108

Docket: IMM-2331-17

Citation: 2018 FC 9

Montréal, Quebec, January 8, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

WEN XU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant, Wen Xu, applies for judicial review of a decision by an Immigration Program Manager (IPM) refusing to reconsider an earlier decision which denied an application for permanent residence. The earlier decision denying permanent residence is referred to hereinafter as the "PR Refusal Decision", and the later decision denying reconsideration is referred to hereinafter as the "Reconsideration Decision".

II. Facts

[2] The applicant is a 49-year-old citizen of China. He applied for permanent residence on July 18, 2014, after being selected under the Quebec Immigrant Investor Program for which he applied in August 2010. The applicant satisfied all substantive requirements of the process, but failed to provide passports and photos of himself and accompanying family members as requested by Citizenship and Immigration Canada (CIC) on December 22, 2016, and on February 21, 2017 (the "E-mail Requests"). As a result, an Immigration Officer issued the PR Refusal Decision on April 26, 2017.

[3] Immediately after receiving the PR Refusal Decision, the applicant hired a new legal representative, Me Mélanie Boivin, who submitted a request for reconsideration to the Consulate on May 4, 2017. That request was accompanied by a statement from the applicant stating that he had never received either of the E-mail Requests and requesting, in view of the efforts he and his family had made over seven years to come this far with the application, that CIC reconsider his application. At that time, neither the applicant nor his counsel provided any explanation concerning the breakdown in communication between CIC and the applicant. On May 12, 2017, Me Boivin re-sent the request for consideration. Shortly after submitting his request for reconsideration, the applicant submitted the documents that had been requested in the E-mail Requests.

[4] The applicant later submitted an affidavit dated June 28, 2017, that provided some detail on the breakdown in communication between the applicant's representative and the applicant. He

explained that a company had been retained to pass on such communications, but that the individual at that company who was responsible for this task had resigned shortly before the first of the E-mail Requests. He indicated that he had learned of this "[a]t the beginning of May 2017". It should be noted that, by the time this affidavit was submitted, the Reconsideration Decision had already been made. Accordingly, the parties are agreed that the additional information provided therein cannot be considered in the present judicial review application.

III. Impugned Decision

[5] Reasons in support of the Reconsideration Decision are found in notes in the Global Case Management System (the "GCMS Notes") dated May 15, 2017. The IPM noted the applicant's failure to explain why he had not received the E-mail Requests. The IPM concluded, correctly it seems, that the E-mail Requests were properly sent by CIC and were received by the applicant's then-representative. The IPM indicated that she found no error in the PR Refusal Decision. She also stated that she had considered the CIC's caseload.

[6] The IPM concluded that, without some more compelling information, the PR Refusal Decision would stand.

IV. Issue

[7] The key issue is whether the Reconsideration Decision was reasonable.

V. Analysis

[8] The applicant asserts two main arguments in support of his position that the Reconsideration Decision was unreasonable:

1. That it was improper to consider CIC's caseload and further that, having considered CIC's caseload, it was unreasonable not to recognize that the more expedient and efficient approach was to reopen the matter in light of the fact that the missing documents had by then been submitted and the applicant's application for permanent residence was near its end.
2. That, in light of the Federal Court decision in *Caglayan v Canada (Citizenship and Immigration)*, 2012 FC 485 [*Caglayan*], it was unreasonable to conclude that the submissions provided in support of the applicant's request to reopen the matter were insufficient.

A. *Law Applicable to Reconsideration*

[9] A decision denying an application for permanent residence may be reconsidered in appropriate circumstances (*i.e.*, the doctrine of *functus officio* does not apply) but, except in circumstances of bad faith, there is no obligation to so reconsider: *Malik v Canada (Citizenship and Immigration)*, 2009 FC 1283 at para 44. Upon receiving a request to reconsider such a decision, the immigration officer's obligation is to consider, taking into account all relevant circumstances, whether to exercise the discretion to do so: *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 5.

B. *CIC's Caseload as a Consideration*

[10] The applicant cites no authority in support of his argument that CIC's caseload is irrelevant to his request to reconsider. In fact, the applicant's counsel did not raise this argument in her oral submissions. In the absence of authority to the contrary, it is my view that CIC's caseload is a relevant factor in assessing a request for consideration. CIC has limited resources and its ability to set and enforce deadlines is important to the efficient use of those resources. It follows that the degree to which those resources are strained (*e.g.*, by missed deadlines and repeated communications) is a proper consideration in deciding whether to reopen a matter, especially in the absence of an adequate explanation for having strained said resources.

[11] I should note at this point that I disagree with the respondent's assertion that the IPM's reference to caseload concerns the applicant's representative's caseload rather than CIC's caseload. The GCMS Notes mention caseload twice. The first may indeed be a reference to the applicant's representative's caseload. The second mention comes in the IPM's statement that "I have taken the liberty to look more closely at our caseload and how Mr. Xu's case was [*sic*] transpired." In my view, this statement clearly refers to CIC's caseload.

[12] I am more receptive to the second aspect of the applicant's argument under this heading: that it was unreasonable to conclude that refusing the request for reconsideration was a more efficient use of CIC's resources than granting the request. It does indeed seem that refusing reconsideration, and thus forcing the applicant to restart the process of seeking permanent residence in Canada (as he has indicated he intends to do), is not only extremely inconvenient to

the applicant but may also employ CIC resources inefficiently by requiring it to repeat some steps that it has already taken. This is especially true in view of the fact that the applicant was near the end of the permanent residence application process and the missing documents had been provided at the time of the Reconsideration Decision.

[13] However, I am mindful that it is not for me to assess the applicant's request for reconsideration. Rather, I must assess whether the IPM's assessment was reasonable. In doing so, I note that the applicant was asked on two occasions for the missing documents, that the applicant provided no explanation for not receiving either of these requests, and that the IPM considered this failure to be important. It appears that the IPM was concerned about the potential inefficiencies within CIC caused by the applicant's failure to file the requested documents on time. This concern was reasonable.

[14] Though the Reconsideration Decision did not explicitly acknowledge that the applicant's permanent residence application was almost complete, I am not prepared to conclude that the IPM was unaware of this fact or failed to consider it.

[15] I am not convinced that the Reconsideration Decision is inconsistent with the objectives of the *Immigration and Refugee Protection Act*, SC 2001, c 27, as argued by the applicant.

[16] In my view, the decision in *Marr v Canada (Citizenship and Immigration)*, 2011 FC 367, is distinguishable from the facts of the present case in that, there, the immigration officer had concluded that s/he had no discretion to reopen the matter in question and thus fettered his/her

discretion. In the present case, the IMP did consider whether to exercise her discretion, and decided not to.

C. *Sufficiency of the Applicant's Submissions on Request for Reconsideration*

[17] In my view, the decision in *Caglayan*, which is relied upon by the applicant for this argument, is distinguishable from the facts of the present case in that, there, neither the applicant nor his representative had received CIC's communication in question. In the present case, as stated above, it appears that the applicant's representative received the E-mail Requests, and we are left with no explanation as to why they were not passed along, or how the applicant's communication with his representative broke down. This distinction is a reasonable basis for treating the applicant less favourably.

[18] The applicant has not convinced me that the Reconsideration Decision is unreasonable in any way.

[19] Though it is not strictly relevant to the reasonableness of the Reconsideration Decision, it is interesting to note that the applicant could have explained the breakdown in communication with his representative when Me Boivin repeated the request for reconsideration on May 12, 2017. However, he chose not to. In her oral submissions, the applicant's counsel at the hearing placed the blame for this omission on Me Boivin. I decline to accept this argument for two reasons. First, it was not made in the applicant's written submissions. Second, there is no indication on the record that the failure to provide the explanation was not deliberate.

VI. Conclusion

[20] The present application should be dismissed. The parties are agreed that there is no serious question of general importance to be certified.

JUDGMENT in IMM-2331-17

THIS COURT'S JUDGMENT is that:

1. The present application is dismissed.

2. No serious question of general importance is certified.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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