Federal Court  Cour fédérale

Date: 20181129

Docket: IMM-1636-18

Citation: 2018 FC 1202

Toronto, Ontario, November 29, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

KHURRUM SHAHBAZ GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] When a government application fails, one available recourse may be to request reconsideration. This option is open in many types of administrative proceedings, including immigration applications. The procedure for reconsideration may be set out in policy, guidelines, regulations, or other rules. Not surprisingly, reconsideration is both highly discretionary, and inherently restrictive. A reversal or reopening of a decision as a result of reconsideration is a rare outcome. It is easy to understand why, when one of the key roles of

administrative regimes is the promotion of efficient and final decision-making. Reconsideration is the exception rather than the rule. However, this does not mean that reconsideration requests should be interpreted so narrowly that the door closes on them entirely, lest they become illusory.

[2] This application judicially reviews a rejected reconsideration request submitted to the Canadian High Commission in Singapore. It was made in response to a refusal of an application for permanent residence under the Convention refugee abroad class. For the reasons that follow, I find that the reconsideration refusal was unreasonable.

I. Background

[3] This case concerns a Christian family consisting of the principal Applicant [Applicant], his spouse, and four children [collectively, the Applicants]. All are citizens of Pakistan. I will briefly summarize their story, but make no determinations as to the truth of its contents.

[4] The Applicants are at risk from an individual I will refer to as AAK, as well as AAK's agents. They are members of the Muttahida Quami Movement [MQM] in Pakistan. They threatened to kill the Applicant and his family because he would not disclose information about his brother-in-law, who had been issued a fatwa for allegedly having mistreated Muslims and committing blasphemy. The Applicant was harassed and physically assaulted. Further punishment and blasphemy charges leading to the death penalty were threatened if the family refused to accept Islam.

[5] The Applicant then sought assistance from a Christian organization in Karachi, Pakistan. Its General Secretary advised that his organization could not protect the family. Instead, he recommended that they leave Pakistan. As a result, the Applicants left Pakistan in 2014. They became illegal migrants in Thailand after the expiration of their Thai visas, and were unable to extend them due to financial difficulties.

[6] In 2016, the family applied for refugee resettlement in Canada under the Private Sponsorship of Refugees Program, sponsored by the Roman Catholic Archdiocese of Vancouver. After attending an interview with the Canadian immigration officer at the Embassy of Canada in Thailand in March 2017, the Applicant's application for permanent residence was denied. The Applicant subsequently submitted a reconsideration request. This included new evidence which he argues demonstrated that there was a fatwa directed against him.

[7] In November 2017, the Applicant received a procedural fairness email from the officer raising several concerns with respect to the genuineness of the fatwa. In response, the Applicant submitted further supporting documents, including an explanation of why he was not previously aware of the fatwa. The reconsideration refusal followed. It is that decision that the Applicants have come to this Court seeking to overturn.

II. Analysis

[8] The sole issue in this judicial review is whether the reconsideration refusal was reasonable. Both parties agree, and I concur, that a request for reconsideration is a discretionary

decision to be reviewed on the standard of reasonableness (*Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 [*Hussein*] at paras 32–33).

[9] The Applicant argues that the officer reconsidered but maintained the refusal, and unreasonably failed to take into account "all relevant circumstances" (*Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 5), and that the officer overlooked circumstances described in the new documents that included (i) a certified translation of the fatwa against the Applicant's brother-in-law; (ii) detailed explanations, and supporting evidence, explaining why the fatwa was not available prior to the initial refusal; and (ii) country condition evidence demonstrating that blasphemy is often prosecuted in religious courts which operate with impunity, and the lack of state protection for individuals subjected to fatwas, as well as their families.

[10] The Respondent counters that the officer indeed considered all the relevant circumstances and documentation, but declined to exercise discretion to reconsider the application.

[11] I begin my analysis by reproducing the officer's three key decision documents, each containing extracts that anchor my reasons, underlining particularly relevant passages:

> **(i) The officer's procedural fairness email:**
>
> Before I make a decision on <u>whether to exercise my discretion to reconsider the file</u> of Khurrum Shabaz GILL … I would like to inform you of my concerns regarding the information and documents you provided in your request for reconsideration[.]
>
> …
>
> For these reasons, I am concerned that the Fatwa is not genuine. You have thirty (30) days from the date of this email to reply to my

> above concerns, following which I will make a decision on whether I will exercise my discretion to reconsider the application.
>
> **(ii) The officer's computer notes:**
>
> Reply to my questions related to the reconsideration request and supporting documents received and reviewed. I turned my attention to the new information submitted by the applicant and this new information, the fatwa against the applicant, is not sufficient to change the decision previously made on 03 July 2017 and to reopen this application. This fatwa is a self-serving document submitted after the application was refused. I have weighed the reasons why the applicant couldn't provide the fatwa at the interview against the refusal decision and I'm not satisfied that it is sufficient to change the previous decision. This fatwa does not address all the reasons raised by the officer in his refusal decision. For these reasons, the refusal decision stands and the file won't be reopened. No reconsideration letter prepared.
>
> **(iii) The officer's reconsideration refusal:**
>
> Your application for permanent residence was considered on its substantive merits and a final decision was made based on the information and evidence you had submitted. You failed to meet the requirements of the Immigration and Refugee Protection Act and/or Regulations. We have reviewed the documents provided and our decision remains the same.

[12] The law regarding the reconsideration of immigration applications made to visa officers is well established. The assessment of an application for reconsideration consists of two steps: first, whether to open the door to a reconsideration – or whether to "reopen" as officers sometimes say; and second, the actual reconsideration once that door has been opened. Justice Kane recently summarized the law in *Hussein*:

> [55] The first step in the two step approach is for the Minister's Delegate to determine whether to proceed to reconsider the previous decision. The second step – an actual reconsideration of the earlier decision – would not proceed unless the Minister's Delegate decides to exercise his or her discretion to reconsider the earlier decision. The decision in this case, which did not proceed past the first step, reveals that the Minister's Delegate was very

> aware of the circumstances, and that she exercised her discretion appropriately.

[13] Based on the officer's statements, the Respondent contends that the officer stopped at the first step and refused to reconsider or reopen the application; the officer did not get to the second step, and actually reconsider the application.

[14] I do not accept this interpretation of what the officer did. I find that by considering the evidence and then asking for clarification in the procedural fairness email, the officer engaged with the evidence. In doing so, s/he entered into the the second, reconsideration step. As Justice Kane further described the process in *Hussein*:

> [57] There is no general obligation to grant the reconsideration request where "new" evidence is submitted. An applicant must show that this is warranted in the interests of justice, or given the unusual circumstances (*Ghaddar* at para 19). The Minister's Delegate did not err by failing to analyze the three birth certificates. The consideration of such evidence would arise at the second step −i.e., the actual reconsideration, if the Minister's Delegate had exercised her discretion to reconsider.
>
> [Emphasis added]

[15] In this case, after reviewing the three key documents extracted above – namely the procedural fairness email, computer notes and reconsideration refusal – and in light of the two step approach, I find that the officer's statements are internally inconsistent in describing which stage s/he reached. On the one hand, the officer indicates that the new information is insufficient to "reopen the application". On the other, s/he indicates having "weighed the reasons" as to why the Applicant couldn't provide the fatwa at the interview, noting that the fatwa does not address all the concerns raised. So, although the officer states that the reconsideration application was

not reopened, other statements clearly demonstrate that the officer entered into the arena of reconsideration, namely the substantive, second step of that application.

[16] Simply put, the officer's statements demonstrate that a reconsideration analysis was indeed conducted on the merits. As I see the process, s/he looked at the sufficiency of the new evidence submitted with the request to reconsider the application. Unsure about certain aspects of the new evidence and having grappled with it, the officer then sent a procedural fairness email. After receiving counsel's response, including further supporting documents from the Applicant and third parties, the officer weighed the explanations and documentation provided as to why the Applicant could not provide the fatwa at the interview.

[17] Given that I find the officer proceeded to the second step of the process (the actual reconsideration), I find the reasons provided in the refusal to be inadequate: they neither demonstrate that the officer undertook the necessary analysis required for reconsideration, nor why the initial refusal should remain unchanged.

[18] In any event, even if I am wrong in finding that the officer proceeded to the second step, as the Respondent argues, I would still find the decision unreasonable, due to the fact that the officer's procedural fairness email invited a reply with respect to the genuineness of the fatwa. That email triggered a heightened duty for the officer to explain – even if briefly – why the information the Applicant sent in response to the procedural fairness email did not merit reconsideration, or in the officer's words, the "reopening" of the file. Specifically, in the computer notes, the officer only addresses the fatwa, but not the other supporting sets of

documents presented in response to the procedural fairness email, including explanations from the Applicant and third parties as to why the Applicant was not previously aware of the fatwa, and evidence that the Applicant's family had moved out of the area and were equally unaware of the fatwa.

[19] To counter, the Respondent relies on several cases, the most recent being *Hussein, Pierre Paul v Canada (Citizenship and Immigration)*, 2018 FC 523 and *Borovic v Canada (Citizenship and Immigration)*, 2016 FC 939, to demonstrate that reconsideration was not warranted in the instant case, given that there is neither a general duty to reconsider an application upon the receipt of new information, nor to provide detailed reasons for deciding not to reopen.

[20] In my view, these cases, as well as other, earlier jurisprudence relied upon by the Respondent, are distinguishable in that none of the cases indicate that a further communication akin to the procedural fairness email inviting a response was sent by the officer. As a result, I am persuaded by the Applicant's arguments. While it is not a reviewable error simply because the officer failed to reopen or provide detailed reasons for that decision, it is a reviewable error for the officer to send a procedural fairness email inviting a response without then addressing either why the information received did not result in a positive reconsideration, or at minimum, why the responding evidence did not propel the Applicant into the reconsideration arena.

III. Conclusion

[21] The decision lacks transparency and is thus unreasonable. The application for judicial review is accordingly granted. The reconsideration refusal will be set aside and remitted back to

a different officer for reconsideration. No questions for certification were argued, and I agree that none arise.

JUDGMENT in IMM-1636-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The reconsideration refusal is set aside, and the matter remitted for reconsideration by a different officer.
2. No questions for certification were argued, and none arise.
3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1636-18
STYLE OF CAUSE:	KHURRUM SHAHBAZ GILL V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 20, 2018
JUDGMENT AND REASONS:	DINER J.
DATED:	NOVEMBER 29, 2018

APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
David Joseph	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT