Federal Court  Cour fédérale

Date: 20190911

Docket: IMM-1712-18

Citation: 2019 FC 1162

Ottawa, Ontario, September 11, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

YANG QUI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Yang Qui (the Principal Applicant, or PA) and her husband, Dinan Fei, applied for permanent residence under the Ontario Immigrant Nominee Program, and were initially approved by the province. However, the PA's application was turned down by, the Immigration Officer who analyzed her file, because she did not provide the required background information that had been requested by the Officer.

[2] The PA now seeks judicial review, claiming that she was denied procedural fairness because her immigration consultant could not access the follow-up letter from the Respondent

asking for further information on the on-line portal that the Respondent uses to communicate with applicants. The PA also claims that the officer's decision is unreasonable.

[3] For the following reasons, I am denying this application for judicial review.

[4] There are two issues raised in this case: (i) was the Principal Applicant denied procedural fairness? (ii) was the Officer's decision reasonable?

[5] The first issue is to be determined by applying a standard that most closely aligns with "correctness" review: see *Canada* (*Citizenship and Immigration*) *v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43, and *Canadian Pacific Railway Company v Canada* (*Attorney General*), 2018 FCA 69, [2019] 1 FCR 121, [*Canadian Pacific*]. In *Canadian Pacific*, Justice Rennie described the approach, under which a reviewing court is simply to ask "whether the procedure was fair having regard to all of the circumstances" (at para 54).

[6] The second issue is to be considered applying the reasonableness standard, since it involves a question of mixed fact and law and the exercise of discretion: *Haider v Canada* (*Citizenship and Immigration*), 2018 FC 686, at para 12; *Afifi v. Canada* (*Citizenship and Immigration*), 2019 FC 1141, at para 12.

[7] One preliminary issue arises, in regard to an affidavit the PA filed in support of her application for judicial review. This is an affidavit sworn by a legal assistant, to which is attached an affidavit from the PA's legal representative outlining her efforts on behalf of the PA, and attaching certain email correspondence relating to this case. The problem arises because this

manner of proceeding can have the effect of shielding the affidavit sworn by the person with actual personal knowledge of what happened from cross-examination, and this has been found to be improper by this Court: see *59872 Ontario Inc. v Canada*, [1992] FCJ No. 253 (T.D.); *Parshottam v Canada* (*Citizenship and Immigration*), 2008 FC 51, at para 24. There was no explanation as to why the affidavit from the legal representative was not filed on its own, and in the circumstances I give the affidavit filed by the legal assistant little weight. In addition, even if the affidavit was accepted without question, for the reasons explained below I find that it is not conclusive evidence on the point in issue.

[8] The procedural fairness claim rests on an apparent breakdown in the online computer portal that the Respondent used to communicate with the PA's immigration consultant. The history of the matter will explain why I am not persuaded that this amounted to a breach of procedural fairness.

[9] The PA submitted her application for permanent residence on September 15, 2017. On November 16, 2017, the Respondent sent an email to the PA requesting additional documents and, in particular, requesting an updated "Schedule A" personal background information providing information from the time the PA was eighteen (18) years old, not just for the past ten (10) years. The PA acknowledges receiving this email.

[10] On December 1, 2017 the PA and her representative sent further documents pursuant to the November request, but the updated Schedule A form did not include information going back to when the PA was eighteen years of age; instead, it only provided information for the prior ten years.

[11] On December 29, 2017 a further request for more complete background information was sent to the PA's representative. An email was sent by the Respondent, requesting that the representative consult the online portal for the details of the request. When the consultant accessed the portal, there was no request to be reviewed. The PA claims the consultant telephoned the Respondent's call centre, and was advised that they were experiencing technical difficulties with the portal. The PA claims that the consultant thought that this information would be conveyed to the Hong Kong processing centre, and simply waited for a follow-up by the Respondent. It appears that the information about the difficulties with the portal was not, in fact, relayed to the Hong Kong office.

[12] The Respondent refused the PA's application on April 9, 2018, on the basis that the requested information had not been provided and therefore the PA had not satisfied the Immigration Officer that she met the requirements for the issuance of a permanent residence visa.

[13] The PA claims that this was a denial of procedural fairness. The PA acknowledges receiving the November request, but argues that once the Respondent decided to take the step of issuing a further request for further information on December 29, 2017, the failure to communicate that effectively to the PA cannot be undone or ignored. It is unfair to deny an application for permanent residence for failure to comply with a request for further documentation that the PA never received. The Respondent must take responsibility for the operation of the online portal (or lack thereof), since they chose to use that method to communicate with applicants.

[14] In addition, the PA argues that she had a reasonable expectation that the problem reported about the online portal would be sufficient to halt any further processing of her application until the problem was resolved. Instead, there was no further communication from the Respondent until she received the denial letter.

[15] The Respondent contends that the PA's legal representative did not follow the clear instructions that were provided as to how to address the problem with the portal, and about the steps to take if the matter remained unresolved. It is not reasonable for the PA to have simply waited for further information, because the Respondent did not advise her that more information would be coming; rather, she was informed about how to resolve the issue with the online portal and what to do if that did not resolve her problem. The PA had no reasonable expectation that further information would be forthcoming from the Respondent.

[16] Once the PA was alerted that further information was requested, which occurred in November, the onus was on the PA to meet those requirements. There is no onus that shifts to the Respondent in this process.

[17] I am required to analyze this issue considering all of the circumstances, including the five non-exhaustive factors listed in *Baker v. Canada* (*Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 at 837–841, 174 D.L.R. (4th) 193. I would adopt the guidance of Rennie J.A. in *Canadian Pacific* at para 54, under which my task is simply to ask "whether the procedure was fair having regard to all of the circumstances". The case law is clear that the requirements of procedural fairness in the context of the processing of this sort of application falls on the lower end of the spectrum, in part because the applicant can re-apply without

penalty: *Zeeshan v Canada* (*Citizenship and Immigration*) 2013 FC 248, at para 32; *Malikaimu v Canada* (*Immigration, Refugees and Citizenship*) 2017 FC 1026, at para 44.

[18] I am unable to conclude that there has been a denial of procedural fairness, considering all of the circumstances of this case. In particular, I would note that the November request for further information was clear and explicit about what was required, and the PA acknowledges receiving this request. There is no dispute that the response provided by the PA in December failed to respond to this request. At that point, the Respondent could have dismissed the application and the procedure would have been fair. I am not persuaded that the fact that the PA had difficulty getting access to a subsequent request for the very same information can render the entire process unfair.

[19] In addition, I would note that as of the November request, the PA knew that the documentation she had submitted in support of her request had been found to be lacking in some important details. The onus is on the applicant to satisfy the immigration officer that she meets the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c.27, as well as the *Immigration and Refugee Protection Regulations*, SOR/2002-227. As of the November request, the PA was aware that her documentation was incomplete. The PA bore the onus of providing the requested information, and failed to do so. The fact that the Respondent decided to give the PA one more opportunity to meet the requirements cannot be viewed as unfair, in all of the circumstances. Neither was it reasonable for the PA to fail to take further steps to ascertain the status of the portal, or to follow the steps set out by the Respondent in its online material.

[20] Finally, I note that the claim of a denial of procedural fairness rests on the claim that the PA's legal representative called the Respondent's call centre to report the difficulty, and she then received an email outlining what she should do to address the problem. The PA claims that her representative replied to this email but did not receive a response. The difficulty with this is that the email the PA's representative received from the call centre stated clearly "Do not reply to this email". It can hardly be unfair for the Respondent to fail to follow up on any email sent in the face of that instruction, when the Respondent had provided clear instructions as to how to go about addressing the matter through an online form. The record also shows that in early January 2018, the Respondent sent a further response to the PA's representative, with instructions as to how to address the problem with the online portal, and an explanation of what steps she should take if that did not resolve the problem.

[21] The requirements of procedural fairness must be assessed pragmatically, with regard to the sheer volume of applications a visa officer must assess: see *Khan v Canada* (*Minister of Citizenship and Immigration*), 2001 FCA 345, at para 32, cited with approval in *Yuzer v. Canada* (*Citizenship and Immigration*), 2019 FC 781, at para 15. Jurisprudence establishes that where the Respondent has no indication that a communication has failed or has not been received by the applicant, the risk of non-delivery rests with the applicant: see *Khan v Canada* (*Citizenship and Immigration*), 2015 FC 503, at para 13. The rationale for this approach is explained by the reality that any other approach would place a considerable burden on the Respondent and make it difficult to process applications expeditiously. By analogy, I find that once the Respondent provides instructions as to how to address problems with online communications, it cannot be held responsible for a party's failure to follow these instructions.

[22] Furthermore, it must also be recalled that in this case, the Applicant had the onus to provide the required information, and the November request from the Respondent stated clearly what was missing, and this request was received by the applicant. I find that nothing more was required, in the circumstances.

[23] For these reasons, I do not accept the PA's argument that she was denied procedural fairness.

[24] I find that the Officer's decision is reasonable, in the circumstances. This is a decision involving the exercise of discretion by an officer, considering a range of factors and applying a specialized expertise to the matter. The decision is supported in the evidence and is in accordance with the legal requirements. The reasons explain how the Officer reached the conclusion she did. Nothing further is required by a reviewing court applying the reasonableness standard.

[25] For these reasons, I am dismissing this application for judicial review. Neither party proposed any question of general importance for certification and I find that none arises.

JUDGMENT in IMM-1712-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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