Federal Court Cour fédérale

Date: 20210622

Docket: IMM-3971-19

Citation: 2021 FC 641

Ottawa, Ontario, June 22, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

NABEEL KHIZAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Nabeel Khizar, is a citizen of Pakistan working in the United Arab Emirates. He seeks judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a Border Service Officer's decision rejecting his application for a work permit dated June 24, 2019 [the refusal decision]. He alleges the officer

erred in rejecting the application and seeks to have the impugned decision quashed and returned for redetermination.

[2] Subsequent to the Applicant's filing of the Application for Leave and for Judicial Review [ALJR], the Respondent acknowledged that the officer had erred and that the errors rendered the decision unreasonable. The Respondent cancelled the refusal decision on March 10, 2020 [the cancellation decision].

[3] The Applicant argues that the cancellation decision was both unlawful and unreasonable. However, the Applicant has not sought judicial review of the cancellation decision. The Respondent takes the position that this Application, seeking judicial review of the refusal decision, is moot and the Application should be dismissed on that basis.

[4] I agree with the Respondent. The decision that is the subject of this Application for Judicial Review is moot. While there is an ongoing dispute between the parties, that dispute relates to the Respondent's cancellation decision. That decision is not before the Court on this Application. The Application is dismissed for the reasons that follow.

II. Preliminary Matter: Extension of Time

[5] On May 13, 2021, the Respondent filed a motion seeking an extension of time to serve and file a supplementary memorandum pursuant to Rule 21(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Immigration Rules*]. The Applicant

opposes the motion, arguing the Respondent has failed to satisfy any of the four requirements for an extension of time.

[6] The Respondent's motion was addressed at the outset of the hearing of this matter. After hearing brief oral submissions from the parties, I granted the extension of time.

[7] The factors to be considered where an extension of time is sought were summarized by Justice Sean Harrington in *Pham v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1251, at paragraph 27:

> [27] There is a wealth of jurisprudence dealing with extensions of time under *IRPA*, or under the *Federal Courts Act* and *Rules*. The underlying premise is that justice should be done. The Federal Court of Appeal has held, time and time again, that an extension of time is discretionary and should take into account the following four criteria:
>
> a. Did the moving party have a continuing intention to pursue the judicial review application?
>
> b. Is there some potential merit to the application?
>
> c. Does the moving party have a reasonable explanation for the delay?
>
> d. Is there prejudice to the other party arising from the delay?
>
> It is not necessary that all four criteria be satisfied *(Canada (Attorney General) v Hennelly*, 1999 FCJ 846; *Canada (Attorney General) v Larkman*, 2012 FCA 204 and just recently *Thompson v Attorney General of Canada et al*, 2018 FCA 212).

[8] In considering the four criteria to be assessed, the evidence demonstrates the Respondent's continuing engagement in response to the Application. I am also satisfied that there is merit to the arguments raised in response to the Applicant's position in this matter.

[9] In considering the explanation for the delay, I agree with the Applicant's submissions to the effect that the Respondent's lack of detail in explaining the reasons for delay undermine the reasonableness of the explanation. I also accept that the extension of time is prejudicial to the Applicant, but only to the extent that the Applicant has been required to respond to the motion.

[10] Although I am not satisfied with the explanation for delay, it is important to remember that a moving party need not satisfy all four of the criteria to be successful on a motion for an extension of time. The overriding consideration is ensuring justice be done in the circumstances.

[11] In this instance, the Respondent's further submissions do not raise new issues but instead respond to the Applicant's submissions. In addition, the limited prejudice to the Applicant arising out of the motion has crystallized. I am also mindful that the further submissions may be of value to the Court in assessing the issues raised in the Application. I am therefore of the opinion that justice is best served in this circumstance by granting the Respondent's motion.

[12] In granting the motion, I also deem service to have occurred on the basis that the Respondent's supplementary memorandum was attached to the Respondent's motion, and the motion duly served on the Applicant.

III. Background

[13] The Applicant submitted an in person application for a work permit at the Stanstead, Quebec Port of Entry on June 5, 2019, under the International Mobility Program on the basis that he was an intra-company transferee. The intra-company category permits the temporary transfer

by international companies of qualified employees to Canada for the purpose of improving management effectiveness, expanding Canadian exports, and enhancing competitiveness in overseas markets (Operational Bulletin R205(a), April 5, 2018, "C-12 – International Mobility Program: Canadian interests – Significant benefit – Intra-company transferees").

[14] The June 5, 2019 application was the second refusal in a series of three separate attempts by the Applicant to obtain a work permit under the International Mobility Program between January and June 2019. The first application was rejected for incompleteness. In refusing the second application on June 24, 2019, the officer cited a series of deficiencies in the application. The third application, initiated on June 27, 2019 after the filing of the ALJR in this matter, was again denied. In refusing the third application, the officer noted a number of discrepancies relating to the identified Canadian employer.

[15] After the third refusal, the Applicant departed Canada. The date of departure is not disclosed in the record before me.

[16] Subsequent to the filing of the ALJR, it appears there was discussion between the parties aimed at resolving the issues in dispute. Those efforts were not successful. Nonetheless, the Respondent cancelled the June 24, 2019 decision on March 10, 2020. The Global Case Management System [GCMS] notes record that decision with the following entry:

> Following discussions with Justice Canada and based on instructions from Litigation Management Unit in the context of the management of an application for leave and judicial review initiated by the Applicant (IMM-3971-19), the decision rendered by the Stanstead POE on 2019-06-05 and further elaborated on 2019-06-24 is cancelled. The errors in the reasons for decision

> include incorrectly assuming that the company was based in Pakistan instead of the United Arab Emirates, and requesting tax reports or notices of tax assessments from Pakistan. As such, it was impossible for the Applicant to provide the requested documents. The error in the location of the company and the request for Pakistani documents rendered the decision unreasonable.

[17] As I note above, the Applicant has not sought judicial review of the March 10, 2020 cancellation decision.

IV. Analysis

A. *The Application for Judicial Review is moot: the cancellation decision was not unlawful*

[18] In this instance, the Applicant challenges the June 24, 2019 decision to refuse his work visa. That decision has since been cancelled and the Respondent submits the cancellation removes the controversy between the parties that is before the Court on this Application.

[19] The Applicant disagrees, arguing that a dispute remains. Specifically, the Applicant argues that having rendered the final refusal decision, and in the absence of any express statutory authority to revisit that final decision, the Respondent was *functus officio*. He submits the Respondent had no authority to cancel the refusal decision. He further submits that the cancellation decision itself was unreasonable, as it did not re-determine his application for a work permit.

[20] The doctrine of mootness holds that the Court may decline to determine a matter where doing so will neither resolve the controversy between the parties nor practically impact the

parties' rights. A controversy must exist not only at the time the proceeding is commenced but also at the time the Court is asked to determine the matter. As such, where events occur after a proceeding is initiated, that resolve or remove the live controversy, the matter will be moot (*Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at para 353).

[21] In this instance, the controversy between the parties as identified in the ALJR has been resolved. The Respondent has concluded that the refusal decision was unreasonable.

[22] I accept, as the Applicant argues, that there are issues that remain in dispute as between the Applicant and the Respondent but those issues arise from, and relate to, the cancellation decision not the refusal decision.

[23] While it is not in doubt that the refusal decision and the cancellation decisions are linked, they are separate and distinct decisions. The Applicant has not argued, and the circumstances do not suggest, that the two decisions are to be considered as part of the same course of conduct allowing them to be treated as one (see e.g. *Conseil des Innus de Ekuanitshit c Canada (Ministre des Pêches et des Océans)*, 2015 FC 1298 and Rule 302 of the *Federal Courts Rules*, SOR/98-106). Instead, the cancellation decision was taken separately and raises issues and considerations that differ from those raised in this Application. It is also important to recognize that the full record in respect of the cancellation decision is not before the Court.

[24] There is no existing controversy or live issue as between the parties that arises from the refusal decision. The Application is moot.

[25] Having concluded there is no live issue between the parties in respect of the refusal decision, I must ask whether the merits of this matter should nonetheless, be addressed (*Borowski* at 353). In doing so, I am to consider: (1) whether an adversarial relationship prevails as between the parties; (2) whether the circumstances of the case warrant the application of scarce judicial resources; and (3) the proper law-making function of the Court (*Borowski* at 358-362).

[26] While there remains an ongoing adversarial relationship, that relationship arises from a separate decision. The Applicant has not challenged that decision. Even if it were appropriate to engage in a review of the cancellation decision the Court is not in a position to do so in the absence of a full record.

[27] The Applicant relies on the *functus officio* doctrine to argue, in accordance with that doctrine, that the cancellation was taken without authority and is therefore a nullity.

[28] The *functus officio* doctrine does hold, as a general rule, that a tribunal having reached a final decision in respect of a matter cannot revisit that decision because an error is later discovered, unless the error is minor (*Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 861 [*Chandler*]). However, the *functus officio* doctrine has been found not to strictly apply in non-adjudicative administrative proceedings where there is no right of appeal and the

process is informal (see *Canada (Minister of Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 where the Federal Court of Appeal held the doctrine not to apply in the context of a humanitarian and compassionate decision rendered pursuant to section 25 of the IRPA and *Williams v Canada (Minister of Citizenship and Immigration)*, 2017 FC 707 at para 51 where the doctrine was held to not prevent the revisiting of a spousal sponsorship decision).

[29] In determining whether the doctrine applies in a given circumstance, the unfairness to an individual in reopening a final decision is weighed against the harm that might result if the administrative decision maker were prevented from fulfilling its mandate. This practical approach to the application of the doctrine is described by Brown and Evans in *Judicial Review of Administrative Action in Canada*, (Toronto: Thomson Reuters, 2013) (loose-leaf updated 2021, release 1) at 12:56:

> such analysis should include a weighing of any unfairness to the individual that might arise as a result of reopening, against the public harm that might be caused by preventing the agency from discharging its statutory mandate if it could not reopen. As well, it should include consideration of any statutory mandate, the breadth of the discretion conferred on the decision-maker, and the availability of other relief such as a right of appeal. In other words, the application of the doctrine would be limited to those situations where the benefits of finality and certainty in decision-making outweigh those of responsiveness to changing circumstances, new information and second thoughts.

[30] Adopting the practical approach, I find no unfairness accrues to the Applicant from the revisiting of the refusal decision.

[31] The Applicant does allege that the Officer engaged in conduct contrary to the IRPA in rendering the decision and that the cancellation decision covers up this conduct. I do not agree.

The conduct complained of is reflected in the record. The cancellation decision does not erase the record or prevent the Applicant from initiating a complaint in respect of the alleged misconduct.

[32] To strictly apply the *functus officio* doctrine in this context would mean that decisions that are clearly unreasonable, and acknowledged as such by the Respondent, would nonetheless have to come before a court before the Respondent might address an admittedly unreasonable decision rendered in a non-adjudicative process. In my view, such an approach, would be inconsistent with the informal nature of the process engaged where a work permit is sought under the International Mobility Program. In this context, decision makers are acting in a non-adjudicative role and exercising a broad discretion similar to a humanitarian and compassionate application.

[33] The continuing adversarial relationship would not be resolved through the consideration of the merits of this Application. Further, the use of judicial resources to consider the merits of this Application, where the Respondent does not dispute the Applicant's position, is simply not warranted. Finally, the Applicant's concerns with respect to the conduct of the officer rendering the refusal decision are not sufficient reasons for the Court to exercise discretion and consider the matter.

[34] Having concluded this matter is moot and that there are no reasons to exercise my discretion to consider the moot Application on its merits, the Application is dismissed.

V. Costs

[35] Both parties seek costs. As the Respondent has succeeded on the Application, I have only considered the Respondent's cost submissions.

[36] Rule 22 of the *Immigration Rules* provides that "No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders."

[37] The jurisprudence establishes that the threshold for establishing the existence of special reasons is high and the issue must be assessed based on the particular circumstances of each case (*Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 201 at paras 29-30 [*Dhaliwal*]).

[38] The Respondent submits that the Applicant's conduct has unnecessarily prolonged the proceeding warranting an award of costs. The Respondent further submits that the Applicant's failure to fully and candidly disclose all facts relevant to a consideration of the Application—the Applicant's record and memorandum on leave made no mention of reapplying after filing the ALJR—also justifies a costs award.

[39] A party's conduct that unreasonably and unnecessarily prolongs proceedings has previously been found to amount to special reasons (*Dhaliwal* at para 32). However, a party's desire to vigorously pursue an application for judicial review does not give rise to special reasons

for costs. In this instance, the Applicant has relied on the doctrine of *functus officio* in vigorously pursuing the Application. I have not been convinced by the Applicant's position in this regard, but the mere fact that the argument was unsuccessful does not amount to special reasons warranting an award of costs.

[40] Similarly, while disclosure of all circumstances surrounding the decision in dispute would have been preferable, I am not convinced that the Applicant withheld facts that he believed to be material. Therefore, I am not prepared to find the alleged lack of candour warrants an award of costs in this particular circumstance.

VI. Conclusion

[41] The application is dismissed. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-3971-19

THIS COURT'S JUDGMENT is that:

1. The Respondent's motion for an extension of time to serve and file its supplementary memorandum is granted. Service is deemed to have been effected and the Respondent's supplementary memorandum is deemed to be filed;
2. The Application is dismissed;
3. No question is certified;
4. No costs are awarded.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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