Federal Court Cour fédérale

Date: 20110315

Docket: IMM-3586-10

Citation: 2011 FC 308

Ottawa, Ontario, March 15, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

MOHAMMAD ANIS NOOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of David Manicom, Immigration Program Manager (Manager), of the Canadian High Commission, pursuant to s 72(1) of the *Immigration and Refugee Protection Act,* SC 2001 c 27 (Act) by Mohammad Anis Noor (Applicant). Mr. Manicom refused the Applicant's request to reconsider the negative decision on his application for permanent residency under the Federal Skilled Workers Class. Leave for this file was granted on November 10, 2010 by Justice Near.

I. The Facts

[2] The Applicant is a citizen of India, born in Mumbai on January 3, 1956. His application for permanent residency in Canada also included his wife, Noorjehan Noor, and their three (3) sons (born in 1985, 1988 and 1989). The Applicant applied for the Federal Skilled Workers Class as a financial manager. The Applicant's sister, Nadira Gopalani, is a Canadian citizen and has resided in Canada since 2002.

[3] The Applicant alleges that while preparing his application in March 2009, he printed the New Delhi-specific visa application kit, dated 08-2008, from the internet. The 08-2008 kit, under the "Adaptability" criteria relating to points awarded for the presence of a relative in Canada, contained the following documentation requirements:

> (a) Proof of relationship to your close relative in Canada, such as birth, marriage or adoption certificates;
>
> (b) If your close relative is a permanent resident of Canada: photocopy of his or her Record of Landing (IMM 1000), Confirmation of Permanent Residence or Permanent Resident Card;
>
> (c) If your close relative is a Canadian citizen: proof of Canadian citizenship, such as a photocopy of pages of a Canadian passport or Canadian citizenship card.

[4] On an unspecified date in April 2009, a new Visa Office-Specific Instructions package for New Delhi (04-2009) was posted on the internet. The new requirements for proving that a close

relative was residing in Canada now included the following, in addition to the previous requirements:

> Documents submitted as proof of residency in Canada must be less than six (6) months old. Example of documents:
>
> (a) income tax assessment (Canada Revenue Agency) for the relative,
>
> (b) telephone bills,
>
> (c) credit card invoices,
>
> (d) employment document, and/or
>
> (e) bank statements.

[5] The Applicant took several months to prepare the main forms for his family's application, and then submitted them to the Centralized Intake Office in Sydney, Nova Scotia on June 10, 2009. In an email sent on July 28, 2009, the CIO informed the Applicant that his application was eligible, and requested the full application with further documentation. The email directed the Applicant to the Visa Office-Specific Instructions on Citizenship and Immigration Canada's website for more information on the required documentation.

[6] The Applicant alleges that as he had previously prepared all of the documents needed for his application (i.e. when he originally printed out the old instructions in March), he simply gathered together those documents and submitted them on September 11, 2009. He included a copy of the checklist from the 08-2008 kit.

[7] On November 19, 2009, a negative decision was issued to the Applicant. The Designated Immigration Officer informed the Applicant that he did not meet the requirements for permanent residence as a skilled worker. The Applicant had received the following point totals: Age: 2 points; Education: 25 points; Official language proficiency: 16 points; Experience: 21 points; Arranged employment: 0 points; Adaptability: 0 points, for a total of 64 points. The Officer noted that this fell below the minimum requirement of 67 points. The Officer also noted that the Applicant was awarded 0 points for adaptability, because no documents had been submitted as evidence that his sister was currently residing in Canada, though the Applicant had been asked on July 28 for all further documentation.

[8] On December 21, 2009, the Applicant submitted a request for reconsideration of this decision. He had become aware of the changes to the documentation requirements, and attached additional proof of his sister's residency, including pay stubs showing her Toronto employer, as well as utility and phone bills for her Toronto residence.

[9] When he did not receive a reply, the Applicant submitted an application for judicial review in this Court (IMM-236-10). He was later informed that his reconsideration would not be dealt with while the judicial review was pending. He withdrew the application for judicial review. Due to some confusion, CIC was not aware of this until Applicant's counsel informed them on April 30, 2010. The reconsideration decision was therefore issued on May 6, 2010.

II. <u>The Decision under Review</u>

[10] The reconsideration decision is found on pages 5 and 6 of the Computer-Assisted Immigration Processing System (CAIPS) notes. Mr. Manicom notes that he verified with the CIC webmaster that the 04-2009 kit was available online in April 2009.

[11] Mr. Manicom notes in the portion of the decision sent to the Applicant (also included in the CAIPS notes) that the Applicant had attached the 08-2008 kit in his application, but that the 04-2009 kit had been available online some months prior to the original submission of his application to the Sydney CIO office, and five months prior to the submission of his full application in September 2009. It was reasonably expected that the Applicant would refer to the 04-2009 kit, which specified the need for documentation in support of his sister's residency in Canada in order to obtain the five (5) points. The documentation noted on file included copies of her citizenship card and passport, her Landing Record from 2001, and her Indian birth certificate. There was therefore no error in the original decision.

[12] No mention was made of the new documents submitted by the Applicant.

III. The Relevant Legislation

[13] The relevant portions of the Act are as follows:

Act includes regulations	Terminologie
2. (2) Unless otherwise indicated, references in this Act to "this Act" include regulations made under it.	2. (2) Sauf disposition contraire de la présente loi, toute mention de celle-ci vaut également mention des règlements pris sous son régime.
Application before entering Canada	Visa et documents

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Economic immigration	Immigration économique
12. (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	12. (2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

The following sections of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, are also relevant:

Class	Catégorie
75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.
Selection criteria	Critères de sélection
76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed	76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

on the basis of the following criteria:	
(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,	a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :
(i) education, in accordance with section 78,	(i) les études, aux termes de l'article 78,
(ii) proficiency in the official languages of Canada, in accordance with section 79,	(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,
(iii) experience, in accordance with section 80,	(iii) l'expérience, aux termes de l'article 80,
(iv) age, in accordance with section 81,	(iv) l'âge, aux termes de l'article 81,
(v) arranged employment, in accordance with section 82, and	(v) l'exercice d'un emploi réservé, aux termes de l'article 82,
(vi) adaptability, in accordance with section 83;	(vi) la capacité d'adaptation, aux termes de l'article 83;
<u>Adaptability (10 points)</u>	<u>Capacité d'adaptation (10 points)</u>
83. (1) A maximum of 10 points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:	83. (1) Un maximum de 10 points d'appréciation sont attribués au travailleur qualifié au titre de la capacité d'adaptation pour toute combinaison des éléments ci-après, selon le nombre indiqué :
[…]	[…]
(d) for being related to a person living in Canada who is described in subsection (5), 5 points; and	d) pour la présence au Canada de l'une ou l'autre des personnes visées au paragraphe (5), 5 points;
[…]	[…]

Family relationships in Canada	Parenté au Canada
83. (5) For the purposes of paragraph (1)(d), a skilled worker shall be awarded 5 points if	83. (5) Pour l'application de l'alinéa (1)d), le travailleur qualifié obtient 5 points dans les cas suivants :
(a) the skilled worker or the skilled worker's accompanying spouse or accompanying common-law partner is related by blood, marriage, common-law partnership or adoption to a person who is a Canadian citizen or permanent resident living in Canada and who is	a) l'une des personnes ci-après qui est un citoyen canadien ou un résident permanent et qui vit au Canada lui est unie par les liens du sang ou de l'adoption ou par mariage ou union de fait ou, dans le cas où il l'accompagne, est ainsi unie à son époux ou conjoint de fait :
(i) their father or mother,	(i) l'un de leurs parents,
(ii) the father or mother of their father or mother,	(ii) l'un des parents de leurs parents,
(iii) their child,	(iii) leur enfant,
(iv) a child of their child,	(iv) un enfant de leur enfant,
(v) a child of their father or mother,	(v) un enfant de l'un de leurs parents,
(vi) a child of the father or mother of their father or mother, other than their father or mother, or	(vi) un enfant de l'un des parents de l'un de leurs parents, autre que l'un de leurs parents,
(vii) a child of the child of their father or mother; or	(vii) un enfant de l'enfant de l'un de leurs parents;
(b) the skilled worker has a spouse or common-law partner who is not accompanying the skilled worker and is a Canadian citizen or permanent resident living in Canada.	b) son époux ou conjoint de fait ne l'accompagne pas et est citoyen canadien ou un résident permanent qui vit au Canada.

IV. Issues and Standard of Review

[14] This application for judicial review raises the following issues:

A. *Did the Immigration Program Manager fetter his discretion by failing to consider the Applicant's evidence of his sister's residency in Canada, and by upholding the Immigration Officer's decision to refuse his application for permanent residency without considering this evidence?*

B. *In the unique circumstances of this case, were the Applicant's rights to procedural fairness breached in that he was not given an opportunity to provide evidence of his sister's residency in Canada, given that the Visa Office had recently modified its requirement in this regard?*

[15] The parties agree that the first issue is subject to a standard of review of reasonableness, following *Dunsmuir v New Brunswick*, 2008 SCC 9, para 47. The Applicant notes that s18.1(4)(d) of the *Federal Courts Act* allows for the Court's intervention where the decision-maker has made a finding of fact without regard to the evidence before it, and cites *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, paras 17 and 27, and *Risco-Flores v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1412, para. 6.

[16] The second issue, being one of procedural fairness, is subject to the standard of correctness. The Applicant cites in support *Lak v Canada (MCI)*, 2007 FC 350, and *Jonas v Canada (MCI)*, 2006 FC 398, para 9, for the proposition that a breach of procedural fairness must, in and of itself, quash a decision even if the outcome may have been the same without the breach.

V. <u>Analysis</u>

A. *Did the Immigration Program Manager unreasonably fetter his discretion?*

[17] The Applicant notes firstly that the Act, the *Immigration and Refugee Protection Regulations*, and the CIC Overseas Processing Manual, *OP6: Federal Skilled Workers* and its instruction guide, *Application for Permanent Residence, Federal Skilled Workers Class*, are all silent on what evidence is required to prove that a close relation resides in Canada. The only place where the documentation requirements are set out is in the online Visa Office-Specific Instructions for New Delhi.

[18] The Applicant notes that if he had been able to prove that his sister resides in Canada, he would have received five (5) points in the Adaptability category. This would have brought his total to 69 points, and he would have been eligible to receive permanent residence. The documents regarding his sister's residency were therefore very important to his case, and should have been considered upon the reconsideration of the application. The Applicant notes that in his reconsideration request, he explained why he had not been aware of the changes in the documentation requirements (i.e. the recent nature of the changes and the lack of publicity of the change), and included new documents that, according to the 04-2009 Kit, should have been sufficient to prove his sister's residency.

[19] The Applicant submits that the Immigration Program Manager had the jurisdiction to consider this new 'evidence', and that he failed to exercise his jurisdiction in ignoring the evidence. The Applicant cites the decision, which states "[the] documents on the file, which I have examined, include nothing to demonstrate residency in Canada". While this did not rise to the level of *functus officio*, as the Manager did reconsider the file, he therefore either refused to consider the new evidence, or erred by failing to consider it. The Applicant submits that the officer had the

jurisdiction to consider the new evidence, and cites *Chan v Canada (MCI)*, [1996] 3 FC 349 (TD), para 28, where Justice Cullen wrote:

> I think that the Visa Officer has jurisdiction to reconsider his decision, particularly when new information comes to light. […] If the new information was persuasive, I have little doubt that the Visa Officer would have jurisdiction to issue a new decision, granting a visa.

[20] Justice Reed held in *Nouranidoust v Canada (Minister of Citizenship and Immigration),* [2000] 1 FC 123, at para 24: "It is clear that Immigration Officers and Visa Officers, as a matter of practice, often reconsider their decisions on the basis of new evidence". The Applicant further relies on *Kurukkal v Canada (MCI)*, 2009 FC 695, in which an Immigration Officer had refused to reconsider a negative decision following an applicant's submission of a death certificate for his late wife, after receiving a negative decision based on the failure to provide this document when asked to do so by the Officer. At paragraph 71 of the decision, after canvassing the jurisprudence, Madam Justice Mactavish held:

> It does not, however, follow from this that an officer can never consider additional information provided by an applicant after the initial H&C decision has been made. Rather, these cases simply stand for the proposition that there is no obligation on an Immigration Officer…to go back to an applicant in an effort to ferret out additional information supporting the application, when that information has not been provided by the applicant him- or herself.

[21] The Applicant argues that the reasoning in *Kurukkal* was adopted in the Federal Skilled Workers permanent residence context in *Malik v Canada (MCI)*, 2009 FC 1283, at para 41. The Applicant argues that the Manager therefore not only had the jurisdiction to consider the new evidence, but the duty to do so, as a serious issue was at stake. The Applicant cites *Cepeda-Gutierrez*, above, at para 17:

> [The] more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'.

[22] In the Applicant's further memorandum, he addresses the Federal Court of Appeal's conclusions on *Kurukkal*, 2010 FCA 230, where it was held that Visa Officers do in fact have the discretion to reconsider a decision, and *functus officio* does not apply. The Applicant reiterates that the Manager failed to exercise this discretion by refusing to consider the new evidence, and was therefore not responsive to the actual reconsideration request. The Applicant notes that the request clearly explained the Applicant's situation and included the new documentation, and notes that the Manager considered only the file as it existed at the time of the original submissions, which was an exercise in futility as the Applicant stated outright in his request that the documents had not been submitted before.

[23] The Applicant notes that Mr. Manicom stated in cross-examination that the changes to the instruction kit were not publicized in any manner (transcript p 15). He also stated that he felt that his jurisdiction was confined to reviewing the original materials (pp 7-8), and found that there was "no reason to consider new documents" as the "case was completed" (pp 12-13). He explicitly foreclosed the possibility of considering documents submitted after a decision had been rendered, on the basis of his estimation that the "visa processing system overseas would no longer be functional" if late documents were accepted (p 13). The Applicant argues that the Manager's discretion was rendered meaningless, as he was of the opinion that new documents should not be considered in the context of a reconsideration request (p 9). The Applicant reiterates the decisions of *Chan, Nouranidoust, Kurukkal* (TD), and *Malik*. The Applicant cites paragraph 23 of *Nouranidoust*:

> The Immigration Officer undertook a reconsideration of the applicant's application for landing but, for whatever reason, ignored the new evidence that had been presented as the basis for the reconsideration request. As such, the decision should

> be set aside unless the Immigration Office had no authority to undertake the reconsideration.

[24] The Respondent counters that the Manager did not fail to exercise his discretion to reconsider, and that he did in fact reconsider the file, but found no breach of procedural fairness in arriving at the original decision to deny the application, and therefore refused to reopen the original file. The Respondent also cites *Kurukkal* (FCA) and *Malik*.

[25] The Respondent cites paragraph 5 of the Federal Court of Appeal's decision in *Kurukkal*, and argues that the decision-maker's obligation is to consider, in all relevant circumstances, whether to exercise the discretion to reconsider. The Respondent argues that this was done in this case, and that the Manager decided that the case did not warrant reopening the file. It was the Applicant's responsibility to include the required documents, and he failed to do so. His remedy would therefore be to make a new application for permanent residence.

[26] In *Kurukkal,* Madam Justice Layden-Stevenson held at para. 5:

> The judge directed the immigration officer to consider the new evidence and to decide what, if any, weight should be attributed to it. In our view, that direction was improper. While the judge correctly concluded that the principle of functus officio does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider.

[27] A close reading of the cases cited by the Applicant (*Malik, Kurukkal, Nouranidoust*) reveals that the issue raised was to determine whether once the original decision had been made, the reviewing officer was *functus officio* and could not accept any new evidence or even reconsider the decision at all. The cases all held that the reviewing officer was not *functus officio*, this Court does not agree with the Applicant's proposition, especially in light of the above-cited paragraph from Madam Justice Layden-Stevenson's judgment, that the Manager was under a legal obligation to do anything other than exercise his discretion whether to reopen the case or not. Since the Manager did in fact consider this, found that there was no error caused by the Visa Office (as the Applicant had used an older kit though the new one had been online for five (5) months before his full application was submitted) and decided not to reopen the file he exercised his discretion. *Kurukkal* holds that there is no a duty on the reviewing Officer to consider any new evidence, as long as the Officer does in fact make a discretionary decision on whether to reopen the case or not.

[28] The *Malik* case was similar to the present one, where an applicant had submitted inadequate documentation to prove a relative's Canadian residency. In *Malik*, the letter sent to the applicant was more explicit regarding the documents required (a list was provided, rather than a direction to a website). Justice Mainville found that there was no evidence that the applicant had submitted new documentation along with his request for reconsideration, but left open the possibility that if this had occurred, the reviewing Officer should have considered the new documents (para 45). He also

encouraged, though he could not order, the respondent to reconsider the application again following the judgment, as the applicant had submitted the documents in the judicial review proceeding (para 49). He explicitly made his conclusions subject to the (at the time) forthcoming Court of Appeal decision in *Kurukkal*.

[29] It is therefore our conclusion that the Officer did not actually fetter his discretion, as he did make the decision not to reopen the file, after finding that no error had been made by the original Officer. This Court cannot find any legal obligation on him to consider evidence submitted after the decision, as per *Kurukkal*. While the Court agrees that he had the jurisdiction to consider the new evidence, it also finds that there was no duty to do so.

B. *Was there a breach of procedural fairness?*

[30] The Applicant notes that his own failure to submit the correct documents on his original application resulted from the very recent changes to the Visa Office-Specific Instructions posted online. He notes that this was a dramatic and important change, not widely publicized but rather buried in an otherwise unmodified instruction kit. He further points out that the Visa Officer was clearly aware that he was using the old kit, as he attached a copy of its checklist with his application, but that rather than give him the opportunity to correct his application, his application was rejected. The Applicant acknowledges that the Visa Officer may not always be under an obligation to inform an applicant of the deficiencies of his application, but argues that in the unique circumstances of this case, procedural fairness required that he be given some kind of opportunity to provide the missing documents, in view of the recent modification, which was only ascertainable by reading the extra bullet point. The Applicant notes the Officer’s explanation that the refusal to rectify his file came

about because of the "reasonable expectation" that he check the new instructions, but argues that this was in fact unreasonable in the circumstances of this case.

[31] The Applicant notes that there is no duty of fairness case that is directly on point. However, he cites from *Athar v Canada (MCI)*, 2007 FC 177, which canvassed jurisprudence on cases involving permanent residence applicants facing credibility concerns at hearings, and whether they should be informed of the deficiencies of their applications. At para. 17 of *Athar*:

> [There] may still be a duty on the part of a Visa Officer, in certain situations, to provide an applicant with the opportunity to respond to his or her concerns, in accordance with the rules of procedural fairness.

[32] *Athar* also cites *Hassani v Canada (MCI)*, 2006 FC 1283, where Justice Mosley wrote:

> [It] is clear that where a concern arises directly from the requirements of the legislation or related regulations, a Visa Office will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise.

[33] The Applicant argues that the requirements in this case did not arise from the Act or the regulations, which do not lay out any documentation requirements, but rather from a change in a specific policy. It would have been easy to give the Applicant the opportunity to rectify his application, especially as the Visa Officer was aware that he used the incorrect kit, and this would have satisfied the duty of fairness in the unique circumstances of this case.

[34] The Respondent counters that in the Visa Officer decisions, the content of the duty of fairness when determining visa applications has been held to be towards the lower end of the range, as per *Patel v Canada (MCI)*, 2002 FCA 55, para 10, and *Malik*, para 29. Given that the Applicant must establish certain criteria to succeed in his application, the Respondent argues that the

Applicant should assume that the Visa Officer's concerns will arise directly from the Act and the regulations, and the onus remains on him to provide the correct documentation. Here, the Applicant was asked to submit a full application, including the documents listed in the Visa Office-Specific Instructions. The Respondent argues that the Applicant was specifically directed to use the 04-2009 Kit, and that this was available five (5) months prior to the submission of his full application.

[35] The Applicant is correct in pointing out that the documentation requirements are not set out in the Act or the regulations, but only in the online instruction kit. While this Court did not find that *Malik* and *Nouranidoust* could support the Applicant's first issue, the comments made by the judges in those cases (advising that new documentation ought to be allowed in certain cases) is persuasive in the context of the duty of fairness owed to someone in the Applicant's distinct situation. It was clear to the Visa Officer that the Applicant was using the older kit, which had recently been changed, yet he was afforded no opportunity to rectify this simple error. Furthermore, the Respondent is incorrect in stating that the Applicant was specifically advised to use the 04-2009 Kit. The letter sent to the Applicant on July 28 (found as Exhibit B to the Applicant's affidavit, Applicant's Record p 31) simply directs him to the CIC website for "Visa office-specific forms and a list of supporting documents require by the Visa office". There is no specific indication at all that these requirements would have changed.

[36] The Applicant clearly stated in his request for reconsideration that he had used the old instruction kit. The Court finds that this should have been clear to the Officer making the initial decision, as a copy of the kit's checklist was attached. Even with a low duty of fairness, in the

specific circumstances of this case, that duty required the Visa Officer to consider the new documents.

JUDGMENT

THIS COURT'S JUDGMENT is that the Application for judicial review is allowed and the matter is remitted to an immigration officer for reconsideration. There is no general question to certify.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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