Cour fédérale  Federal Court

Date: 20110210

Docket: IMM-4452-10

Citation: 2011 FC 157

Ottawa, Ontario, February 10, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

AHMAD MOUMIVAND

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ahmad Moumivand, the Applicant, seeks judicial review of a decision dated April 25, 2010 by which an Immigration Officer in Damascus, Syria, refused the application for permanent residence under the Provincial Nominee class for the Applicant and his family, and refused to re-examine this application. Leave was granted by Justice Mosley on November 5, 2010. At issue here is the scope of the duty of procedural fairness of the Officer when assessing an application deemed

incomplete. More precisely, the Applicant seeks review of the Officer's decision to not re-open the file after a decision had been rendered.

The facts

[2] The Applicant was nominated by the Province of Prince Edward Island as a Provincial Nominee on August 27, 2008, contingent to the fulfillment of visa and investment requirements. He made the necessary investments: $200,000 in a Canadian business; $25,000 as a good faith deposit to the province; as well as $20,000 as a good faith deposit ensuring he would advance his language skills. Once the certificate of nomination was received, the Applicant's immigration consultant, Hamid Naimi ("Mr. Naimi"), applied for permanent resident status on behalf of the Applicant and his family.

[3] As the Officer responsible for assessing the permanent residence application proceeded, it became apparent that more information was required to address discrepancies and omissions in the application. To address these concerns, the Officer sent a letter to Mr. Naimi on February 3, 2010. In this letter, about 10 documents or follow-ups were requested, among which were Iranian and Indian police certificates regarding the Applicant's son. The letter also stated the following: "Please gather all requirements and submit **ALL** requested documents at the same time, **in a single package**. Do not submit documents one by one" (emphasis in original). The letter also stated that the request should be complied with within 60 days, or the application would be assessed on its merits without the required documentation.

[4] On April 25, 2010, some 21 days after the passage of the 60-day deadline to submit the documentation, the Officer did not receive any follow-up on the request for information. The application for permanent residence was refused on its merits.

[5] On May 24, 2010, Mr. Naimi sent a letter to the Officer requesting that the file be re-opened. It was noted that most of the documentation had been collected, except for the requested police certificates. The request for the certificates was said to have been made "immediately following" the request by the Officer, but that these documents had not been received as of yet. The Applicant sought to have 30 to 60-day extension to receive these certificates. Mr. Naimi also noted that, as all the documents needed to be sent in the same package, nothing had been sent.

[6] The letter seeking to re-open the file was received by the Visa Officer on June 8, 2010. On June 9, 2010, the Visa Officer replied by way of a letter stating that the delays for submitting the documentation had lapsed and that the application had been considered and refused on its merits. It was noted that another application could be submitted if additional or different information was required.

[7] The decision not to re-open the file was followed by a letter dated July 12, 2010. In this letter, Mr. Naimi asked again that the file be re-opened, citing a breach of procedural fairness and citing previous experiences in which files were re-opened.

[8] In sum, the Officer decided on the merits of the application 81 days after the letter asking for supplementary information was sent. The Applicant, through his immigration consultant,

responded close to a month after the decision was rendered, if we follow the date of the letter. It stated that the documents were ready, except for the Police certificates. This was close to four (4) months after the request for information, and almost a month after the decision was rendered. This response also asked for a further 30 to 60-day extension. Should this request have been granted, the documents would have come to the attention of the Officer some five (5) months after the original request, at best.

Arguments of the parties

[9] The Applicant's immigration consultant readily conceded his mistakes in his affidavit. He claims that the delays and unheeded 60-day deadline was of his own fault and that he had not advised his client, who should not be penalized for his omissions. It is argued that the Officer had a duty to re-open the case, as it was in the interest of justice to do so. Also, in the case that the Court makes a finding that there was no duty to re-open the case, it is said that the omission to ask an extension of time was made by the Applicant's immigration consultant, and that the Applicant should not suffer from counsel's mistake. Mr. Naimi wrongly assumed that the 60-day deadline was a "soft deadline". He alleges that in his experience, this delay was rarely enforced and that this was the premise on which he based his decision. This, however, was not brought before the Officer. Summarily, it is said that the issues in this case are of procedural fairness.

[10] The Respondent argues that the decision to re-open is discretionary and that the reviewing Court should not interfere in this decision. Also, it is said that the Applicant was required by law to bring forward all the relevant documents, but failed to do so. The Applicant did not make a request for an extension of time and did not indicate that his consultant assumed the deadline would not be

enforced. The Officer's decision not to re-open the file was reasonable and the Applicant is bound by his counsel's mistake. There was no duty to re-open the case or to grant an extension of time. Also, the Respondent argues that the request to re-open the file was not made in a timely manner.

Question to address and applicable standard of review

[11] The question at issue is the following: was the exercise of the Visa Officer's discretion not to re-open the case reasonable? This question may be seen to be at the heart of the Officer's mandate and his discretion, and so the question could be reviewed on the reasonableness standard (*Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230). As is indicated in *Kheiri v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15933, at para 8: the "Visa Officer may re-open a Visa Hearing to extend the date of its effectiveness if it is felt to be in the interest of justice to do in unusual circumstances".

[12] However, in the interests of judicial comity, similar questions have been framed, albeit in other immigration proceedings, as questions of procedural fairness to be reviewed on the correctness standard (*Sharma v Canada (Citizenship and Immigration)*, 2009 FC 786; *Khan v Canada (Citizenship and Immigration)*, 2009 FC 1312; *Malik c Canada (Citoyenneté et Immigration)*, 2009 CF 1283). Hence, the decision to reopen the case will be assessed on the grounds of correctness, to which no deference is owed.

Analysis

[13] The Visa Officer's decision was correct and reasonable in the circumstance in which the Officer decided.

[14] As conceded by the Applicant, the Applicant's immigration consultant omitted to mention the 60-day deadline to submit documents. Counsel for the Applicant submitted that the consultant was under the mistaken belief that the 60-day deadline was a "soft" deadline, although this was not put forth in the letter to reopen the case. In any event, the timeline shows that 21 days had lapsed after the 60-day deadline, indicating that the Officer did indeed have some leeway. As no response from the Applicant was received, the Visa Officer proceeded to analyze the case on its merits, as request for supplementary information had indicated. It should also be noted that while requesting to reopen the file, the Applicant did not submit any documentation. Moreover, he asked another extension for the documentation he allegedly did not have in his possession at that time.

[15] Firstly, it is important to note that the Applicant is bound by his counsel's mistake (*Chen v Canada (Citizenship and Immigration)*, 2009 FC 379). Also, the Court notes that this is not a case of nonfeasance, but one of malfeasance: the consultant did act, he simply failed to diligently highlight the delays in which the documentation had to be gathered. Also, one cannot state that but for his counsel's mistake to notify of the 60-day delay, the application would succeed. Indeed, the Applicant did not submit any supplementary documentation, even in support of his petition to have the file reopened. Not only was it not submitted, an extension of the deadline was asked. In light of these facts, the Court notes the following comments from *Radji v Canada (Citizenship and Immigration)*, 2007 FC 100, at para 32:

> The test for incompetent counsel is very high. It must be shown that there is a reasonable probability that, if not for the counsel's unprofessional errors, the result of the proceeding would be different.

[16] In light of these circumstance, as ample opportunity was given to the Applicant and his consultant to remedy their omission (i.e. 21 days had lapsed after the deadline and documentation in support of the petition to reopen could have been submitted), the threshold for the Applicant to be absolved of his counsel's mistake has not been met. Thus, this ground to reverse the Visa Officer's decision cannot succeed.

[17] The case law is clear on the case to be met for the reopening of a file: *Kheiri v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15933, at para 8: the "Visa Officer may re-open a Visa Hearing to extend the date of its effectiveness if it is felt to be in the interest of justice to do in unusual circumstances". In this case, it seems as though the Visa Officer did not deem it to be in the interest of justice, nor that the case involved unusual circumstances. It is clear that the Visa Officer was not fazed by the Applicant's explanations and delays in submitting the information. In this case, the Visa Officer's discretion was exercised. There was no breach of procedural fairness, as the negative decision to reopen should not come as a surprise, especially when the Applicant did not submit the other documentation he did have in his possession. Rather, further extension of time was asked. In light of this, it was correct for the Officer to refer the Applicant to a new application process: he had failed in meeting section 16(1) of the IRPA's requirements, namely, to bring forward all relevant documentation.

[18] Public policy considerations and the effects of sending a matter back for redetermination may have played a part in some cases (see for example, *Sharma v Canada (Citizenship and Immigration)*, 2009 FC 786, at para 7). In this case, public policy concerns are of another nature: the expediency and reliability of the statutory scheme of the IRPA. Surely, procedural fairness has its

limits, as seen in this case. The Visa Officer's duty to address deficient applications is limited, and was clearly met in this case (see, *inter alia*, *Lam v Canada (Citizenship and Immigration)*, (1998) 152 FTR 316; *Malik v Canada (Citizenship and Immigration)*, 2009 CF 1283; *Trivedi v Canada (Citizenship and Immigration)*, 2010 FC 422). As the petition to reopen the case did not even adjoin the necessary documentation and asked for an extension of time, the decision not to reopen the case and defer to another application was correct. The necessary corollary of the Applicant's efforts to invest in immigrating to Canada is one that all documentation is brought before the Visa Officer, as section 16(1) of the IRPA recognizes.

[19] The application for judicial review is denied.

[20] The Applicant has submitted the following question for certification: is there a procedural fairness to reopen and reconsider a permanent resident application that has been refused if it is in the interests of justice to reopen and reconsider the application? The Respondent opposes the certification of this question.

[21] The Court will not certify this question. Appellate guidance has been provided recently in *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230. Also, the Court's analysis of the question at bar shows that case law has recognized the existence of an officer's discretion and has described its application in several cases. Also, the determination of the correct exercise of an officer's discretion to reopen is one that is fact-driven and specific to every case. As such, it is not a question that requires appellate guidance to determine the case at bar.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is denied. No question is certified.

"Simon Noël"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	AHMAD MOUMIVAND v MINISTER OF CITIZENSHIP AND IMMIGRATION
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