Federal Court Cour fédérale

Date: 20130207

Docket: IMM-1294-12

Citation: 2013 FC 135

Ottawa, Ontario, February 7, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DORKA SOLOGUREN AGAMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant was denied a permanent resident visa under the Skilled Workers Class because her application fell outside the annual "cap" imposed by policy on this class. This is the judicial review of that decision.

II. FACTS

[2] In the *Ministerial Instructions*, Canada Gazette, Vol 145, No 26 [Ministerial Instructions] of June 25, 2011, a maximum of 10,000 Federal Skilled Worker applications, without offers of employment, would be considered in the year.

[3] Within the 10,000 new Federal Skilled Worker applications, a maximum of 500 applications per National Occupation Classification [NOC] would be considered for processing in each year.

[4] In calculating the cap, applications would be considered in the order in which they were received.

The year for purposes of the cap would begin July 1, 2011 and end June 30, 2012.

[5] The Applicant, a citizen of Peru, submitted an application for permanent residence under NOC 0631 Food and Restaurant Manager.

[6] On the Respondent's website, there would be a regular announcement of the number of applications received by NOC category.

The Respondent posted the following information on NOC 0631 applications:

- September 28, 2011 – 209 applications
- October 10, 2011 – 229 applications
- November 3, 2011 – 330 applications
- November 8, 2011 – 335 applications

[7] The Applicant filed her application on November 14, 2011. On December 1, 2011, the website reported that the cap stood at 458.

[8] On January 13, 2012, the Applicant was informed that her application was rejected because the cap of 500 applications for NOC 0631 had been reached.

[9] The Respondent's evidence is that there is a normal lag time between the time an application is received, reviewed for completeness and the update on applications is posted to the website. The Respondent says that it is not possible to give real-time results and that the website says that the figures provided are a guide only.

[10] The maximum 500 applications for NOC 0631 were reached September 19, 2011.

[11] The Applicant's position is that there has been a breach of the principles of fairness in failing to announce when the cap was reached, by leading the Applicant to believe that the cap had not been reached, by creating a legitimate expectation that the cap was not reached and in failing to effectively implement the Ministerial Instructions.

[12] The central issue in this judicial review is whether there was a breach of procedural fairness.

III. ANALYSIS

[13] The standard of review of questions of procedural fairness is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

[14] The legitimate expectation that the Applicant had was that if her application fell within the first 500 applications, she would be considered for permanent residence.

[15] The evidence does not establish that the Applicant had a legitimate expectation that the number of applications received by any specific date would be absolutely accurate as of that date.

[16] There is no evidence that the cap was not reached on September 19, 2011, at which time the Applicant had not yet filed her application. There is no suggestion that the Applicant held off filing her application in reliance on the understanding that the cap would not be reached for some considerable period.

[17] Once the cap was met and the Applicant had not filed her application in advance, any legitimate expectation had been met.

[18] There is nothing to suggest that the number of applications posted on the website was true, accurate and complete such as to create a legitimate expectation in the accuracy of the number.

[19] By way of comment, the Court is concerned that it is not absolutely clear that the date on which an application is considered received for purposes of the cap is the date the application is considered "complete" not merely "received". In other words, are incomplete applications given a priority date as "received" or is it only completed applications which achieve that time status?

While this case does not turn on nor is it impacted by this possible confusion, there must be clarity brought to this situation.

[20] In applying the fairness principle, it is relevant in this case to look at the impact of the Applicant's position vis-à-vis others. All those persons who filed after September 19, 2011 but before the Applicant would have just as legitimate complaint as the Applicant. Since they were prior in filing time, their applications would have priority over the Applicant.

[21] Even if there was some basis for the Applicant's position, it would not be equitable to grant relief without addressing the situation of these other applicants.

IV. CONCLUSION

[22] Therefore, this application for mandamus must be dismissed.

[23] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for mandamus is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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