Federal Court  Cour fédérale

Date: 20130731

Docket: IMM-11198-12

Citation: 2013 FC 836

Ottawa, Ontario, July 31, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MOHAMMED SAMIULLAH

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside an August 27, 2012 decision of a Citizenship and Immigration Canada (CIC) service delivery agent to return his application for permanent residence as a Federal Skilled Worker in Canada without processing. For the reasons that follow, the application is dismissed.

Background

[2] In 2004, the applicant applied for permanent residence in Canada as a Federal Skilled Worker (FSW). The Canadian visa office in Buffalo, New York issued him a permanent resident visa on July 5, 2006. At the time he was unmarried. Before entering Canada the applicant married his wife in India. He was denied landing at Toronto in February of 2007 due to the change in his marital status. He was allowed to enter Canada as a visitor only.

[3] On June 21, 2007, the Buffalo visa office sent the applicant a letter stating his visa was cancelled and his file had been closed. The letter advised him to re-apply for immigration.

[4] The applicant was subsequently found inadmissible under section 41(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). An exclusion order was issued in April 2009 based on his failure to report his marriage prior to landing, which was a violation of one of the conditions of his visa. He successfully appealed to the Immigration Appeal Division (IAD) based on humanitarian and compassionate (H&C) considerations. The IAD rendered its decision on May 11, 2010, setting aside the exclusion order. By this time the applicant was living in India.

[5] The applicant received conflicting information from CIC as to whether a new application was required, as opposed to updated application materials. In an email dated September 1, 2011, the Canadian High Commission in New Delhi advised him to submit a new application. In a letter dated May 17, 2012, the Canadian High Commission advised him to apply to the Centralized Intake Unit in Nova Scotia.

[6] The applicant submitted a new visa application. Two days before it was received Ministerial Instruction 5 (MI-5) came into effect, which put a temporary pause on the acceptance of new FSW applications, other than those with an arranged employment offer or in the Doctor of Philosophy academic stream. The operation and legal effect of the Ministerial Instructions has been considered in previous decisions of this Court in *Liang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 758 and *Tabingo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 377.

Framing the Issue

[7] On August 27, 2012, a CIC agent decided that the application could not be accepted in accordance with MI-5. The respondent says that this is the only decision under review.

[8] The applicant characterizes the matter differently. He contends that the IAD appeal was an interruption or detour away from the landing interview, which was in process on February 27, 2007. Put otherwise, the landing process was effectively adjourned pending the appeal from the inadmissibly decision. In order for the IAD decision to have any effect or purpose, the remedy is for this Court to remit the matter back to the Immigration Officer to continue with the landing interview and to grant permanent residence.

[9] The applicant undertook several measures to re-start the landing process. He engaged counsel. Letters were written. He also sought leave to commence judicial review for an order setting aside the decision dated June 21, 2007, advising him that his visa was cancelled, and

mandamus to compel the continued processing of his application for permanent residence. That application for leave to commence judicial review was dismissed on December 2, 2008.

[10] The applicant also wrote to the IAD seeking a variation of the order so as to remit the matter to the Visa Officer for continued processing consistent with the IAD decision. In a letter dated December 30, 2011, the IAD acknowledges that the exclusion order was set aside. However, in response to the applicant's request that the processing of his application for permanent residence be resumed, he was advised that "The jurisdiction of the Division does not extend further."

[11] Section 67 of the *IRPA* grants the IAD a general power to remit matters for redetermination. Counsel pointed to several IAD decisions where the Division directed that the file be remitted to an officer for redetermination or reconsideration in light of the IAD decision: see for example, *Ivanov v Canada (Citizenship and Immigration)*, 2006 CanLII 52285 (IRB). I do note, however, that the authority of officers to continue processing is contingent on the existence of an extant application. In *Ivanov*, the Member stated that the applicant's visa had expired, and that it was "not clear" how, in the absence of a new application, the applicant could get back to Canada.

[12] This is the very question posed by this application. The applicant contends that his first FSW application, which was accepted, remains extant and is a foundation on which a remedial order could be predicated.

Analysis

[13] In my view, the expiry date of the applicant's visa was not suspended or altered by the successful appeal to the IAD. The applicant had no vested right to permanent resident status; the applicant's entitlement was contingent on compliance with all the terms and conditions of his visa. Should non-compliance with the conditions become an issue, as here, the pursuit of their resolution does not suspend the ticking of the clock. Were this not the case, the legal regime applicable to the applicant would also be frozen as of the date that the exclusion order was issued.

[14] The applicant further submits that the effect of the IAD decision was that his 2006 visa did not become invalid due to his marriage. That is incorrect. The IAD allowed the appeal from his exclusion order on H&C grounds. Its decision did nothing to alter or extend the longevity of the visa. The visa was time limited, expiring on March 3, 2007, three years before his successful appeal. This chronology further indicates that a new application was necessary.

[15] In consequence, the only decision before this Court is the decision to return his second visa application without processing, in accordance with MI-5. There is no reviewable error in the application of the Ministerial Instructions to the applicant.

[16] The Minister's authority to issue Ministerial Instructions stems from section 87.3 of the *IRPA*. MI-5 was published in the Canada Gazette, Vol. 146, No 26 on June 30, 2012 and came into effect July 1, 2012.

[17] As the Minister predicated one of his two main arguments on the refusal of the Court to grant leave to commence judicial review from the June 21, 2007 decision, the hearing was adjourned to allow the parties to review the record of proceeding in respect of that judicial review and to provide this Court with the decision letter and supporting reasons.

[18] The Minister has now provided those documents.

[19] The June 21, 2007 letter states:

> Please be advised that your visa is now cancelled. Your application at this office is now closed. You will need to re-apply for immigration to Canada and meet the requirements which are in effect at the time you apply.

[20] On July 8, 2008, a judge of this Court ordered that the Canadian Consulate General in New York issue written reasons for that decision.

[21] CIC responded in a letter dated July 21, 2008, stating that the June 21, 2007 letter did not "cancel" the applicant's visa as the file had already been closed well before the letter was sent. CIC also included the Computer Assisted Immigration Processing System (CAIPS) notes relating to the applicant. The CAIPS notes confirm that on February 22, 2007 the New York visa office provided its position that, "We are unable to add his wife to his immigrant file as his case was concluded with the issuance of a permanent resident visa. He will have to submit a new application and processing fees for himself and his wife to the appropriate office."

[22] As previously mentioned, the application for leave to seek judicial review of this decision was dismissed by this Court on December 2, 2008. The applicant may not challenge this decision again in the present judicial review.

[23] As the applicant's file was closed, and his visa expired, he was required to submit a new application. MI-5 explicitly applies to pause the acceptance of any new applications, with two exceptions inapplicable to the applicant. Accordingly, I see no error in the decision to return his application without processing.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11198-12
STYLE OF CAUSE:	**MOHAMMED SAMIULLAH v MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Edmonton, Alberta
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