Federal Court Cour fédérale

Date: 20130819

Docket: IMM-8351-12

Citation: 2013 FC 879

Ottawa, Ontario, August 19, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

MUHAMMAD USMAN ALI
NABILA USMAN
WALEED USMAN
RAFIA USMAN
TALHIA USMAN

Applicants

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 a First Secretary (Immigration) at the Embassy of Canada in Warsaw, Poland [the Reconsideration Officer], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Reconsideration Officer refused to re-consider the Principal Applicant's [PA] claim for Permanent Residence in Canada as a Federal Skilled Worker.

[2] The PA also makes claims relating to the initial decision made by an initial visa officer [the Initial Officer].

I. Background

[3] The PA is a Pakistani citizen. He applied for permanent residence in Canada as a federal skilled worker in May, 2010.

[4] In support of his application, the PA submitted his high school diploma, college transcripts, bachelor of commerce diploma, and chartered accountant diplomas, which he alleged to represent 18 years of full-time education and the equivalent of a masters degree as support for the "Education" component of the Federal Skilled Worker scoring table.

[5] He further submitted the passport of Asmi Nadeem, a permanent resident of Canada, whom he claims is his spouse's sister for the purpose of supporting the "Adaptability" component of his application.

[6] On March 20, 2012, the Initial Officer rejected the PA's application on the basis that the PA did not meet the required points threshold of 67 to meet the criteria in 76(1) of the Act Regulations and qualify for Permanent Residency. The PA was assigned a score of 63, which included a score of 20 for "Education" and zero for "Adaptability."

[7] The rejection letter noted that the PA had provided some evidence in his application of having a sister-in-law in Canada, but not of the kind requested in the application guide.

[8] On May 23, 2012, the PA wrote to the Program Manager of the Initial Officer and requested that the decision be reconsidered. The grounds for reconsideration were twofold. First, the PA suggested he was entitled to an allotment of 25 points under the "Education" category, given his masters degree. In support of this ground, the PA attached a letter from the Higher Education Commission of Pakistan, dated April 20, 2012, which stated that the PA's educational attainment was equivalent to a masters degree.

[9] The second ground for the request for reconsideration was related to the PA's sister-in-law. The PA provided additional documents, including a marriage certificate, passport, notice of assessment, property assessment, driver's licence, and a recent phone bill to establish her residency.

[10] On June 19, 2012, the Reconsideration Officer wrote to the PA in response to his request for reconsideration. The Reconsideration Officer refused to re-open the Application, noting that the additional evidence of his sister-in-law's relationship was not filed at the time of his Application. No mention was made of the additional evidence regarding the masters degree.

II. Issues

[11] The issues raised are:

A. Did the Initial Officer and the Reconsideration Officer provide insufficient reasons in their decisions?

B. Was the Reconsideration Officer unreasonable in refusing to consider the new evidence submitted by the PA?

III. Standard of Review

[12] A review of the sufficiency of reasons is not a standalone basis for quashing a decision and any challenge is to be read within the reasonableness analysis (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62).

[13] Fettering of discretion is a procedural fairness issue. The standard of review is correctness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43).

[14] The standard of review for a visa officer's general decision is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 53).

IV. Analysis

A. *Did the Initial Officer and Reconsideration Officer Provide Insufficient Reasons in their Decisions?*

[15] The PA argues that both Officers, by failing to explain why the PA was only awarded 20 out of 25 points under "Education," did not provide reasons sufficiently clear, precise and intelligible so that the PA knew why his Application was rejected (*Ogunfowara v Canada (Minister of Citizenship and Immigration)*, 2007 FC 471 at para 58 [*Ogunfowara*]). The PA notes that no documentation in the Tribunal Record provides reasons for this decision.

[16] Firstly, I agree with the Respondent that the reasonableness of the decision of the Initial Officer amounts to a collateral attack as per (*Chamchuk v Canada (Attorney General)*, 2011 FCA 93 at para 6) and should not be considered in this application.

[17] While the PA rightly asserts that reasons ought not to be supplemented by an after-the-fact affidavit, the reasons provided by the Officers were sufficiently clear, precise and intelligible, as per *Ogunfowara*, above, so that the claimant knew why his claim failed.

[18] More complete reasons would be optimal, as the Officers could have more explicitly noted why the PA received 20 out of 25 on the "Education" scoring table. However, the PA had access to information which described the appropriate documentation needed and the PA was provided with the completed scoring sheet in the Initial Officer's reasons, which showed a breakdown of his score. From these facts, and considering that the PA's request for reconsideration came on May 23, 2012 with additional documentation for the education component, there is support for the position that the reasons were adequate.

B. *Was the Reconsideration Officer Unreasonable in Refusing to Consider the New Evidence Submitted by the Principal PA?*

[19] The PA submits that the Reconsideration Officer fettered her discretion by refusing to reconsider the application on the grounds that the new evidence was not before the Initial Officer at the time the decision was made. In support, the PA cites *Mansouri v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1242 at paras 6-9 [*Mansouri*]. This case states that an officer's discretion cannot be fettered or construed too narrowly.

[20] This argument by the Plaintiff relies on one line in the Reconsideration Officer's decision, which states "I am not prepared to re-open your application as this evidence was not on file at the time of assessment."

[21] While the Reconsideration Officer can exercise the discretion delegated to her and choose not to reconsider the application, that discretion should be exercised with a practical and reasonably fair approach.

[22] Reason to do so has been articulated by Justice Russell Zinn in *Marr v Canada (Minister of Citizenship and Immigration)*, 2011 FC 367 at para 57:

> Basic fairness and common sense suggest that if a visa officer, within days of rendering a negative decision on an application that has been outstanding for many years, receives a document confirming information already before the officer that materially affects the result of the application, then he or she should exercise his or her discretion to reconsider the decision. Nothing is served by requiring an applicant to start the process over and again wait years for a result when the application and the evidence is fresh in the officer's mind and where the applicant is not attempting to adduce new facts that had not been previously disclosed.

[23] Justice Michael L. Phelan endorsed this approach in *Mansouri*, above, at para 8.

[24] The Respondent argues there is no general duty to reconsider an application based on new information and that the PA's "duty to put his best foot forward" in the initial application should prevail. While I agree with the Respondent's position that it is within a visa officer's discretion to reconsider an application for permanent residency, and that such a decision should generally be accorded deference, there is in this case no apparent reasonable justification for the PA's request to be refused.

[25] The documentation now provided by the PA appears to allow him to reach a score of 67 on his skilled worker score. It would be unreasonable to require him to start the process anew. While efficiency of the immigration process is a reasonable justification for refusing a reconsideration request, efficiency is not served by refusing this request.

[26] As a result, this decision lacked common sense, practicality, and basic fairness, extrinsic criteria which have been found to be components of reasonableness in the immigration context in both *Mansouri* and *Marr*.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The decision of the reconsideration officer refusing the Principal Applicant's request to reconsider his application for a permanent resident visa as a member of the Federal Skilled Worker class is set aside;
2. The application of the Principal Applicant, including the materials submitted by him on May 23, 2012, is to be remitted for a determination by another visa officer, and this determination shall be completed no later than six months from the date of this Judgment; and
3. No question is certified.

"Michael D. Manson"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	Ali et al. v. MCI
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