Federal Court Cour fédérale

Date: 20150506

Docket: IMM-5936-14

Citation: 2015 FC 594

Toronto, Ontario, May 6, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JIANMIN WU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Judgment rendered on the bench)

I. Overview

[1] The onus rests upon an Applicant to submit a complete application containing adequate supporting documentation, and it is "not for the visa officer to wait and to offer the applicant a second, or several opportunities to satisfy the visa officer on necessary points which the

applicant may have overlooked" (*Prasad v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ 453 at para 7).

[2] The Court notes that the Applicant provides the Court with explanations and evidence in support of his original request to the visa officer for an extension of time; however, this evidence was not put before the visa officer and cannot be considered for the purpose of judicial review of the officer's decision.

II. Introduction

[3] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a visa officer's decision dated June 4, 2014, denying the Applicant's permanent residence application.

III. Factual Background

[4] The Applicant is a citizen of China who is the independent director of Migao Corporation Group Co., Ltd., the Chief Operating Officer and Director of Meize Energy Industries Holding Limited, and General Manager and Legal Representative of Shenyang Yutao Investment Consulting Co., Ltd.

[5] The Applicant holds a Bachelor's degree in Applied Computer Science and a Master's in Electrical Engineering from the University of Technology of Dalian, China.

[6] Seeking to immigrate to Canada with his family and with plans to establish a company in Prince Edward Island [PEI] in the area of facilitating the creation of wind farms, the Applicant was successfully nominated by the province of PEI for the Provincial Nominee Program under the Business Impact category 100% ownership stream, on May 28, 2013.

[7] On August 20, 2013, the Applicant submitted an application for permanent residence at the federal level, with the help of an immigration consulting firm in China and through a qualified agent in PEI.

[8] On March 17, 2014, the Hong Kong Consulate General requested that the Applicant submit his passport and the Right to Permanent Residence fee by May 16, 2014. This request was received by the Applicant's immigration consultant at its Canadian office, who then forwarded to the Beijing office; however, this request was initially missed by staff in Beijing and only noticed approximately one week after the deadline.

[9] A request for an extension of time for submitting the requested documents was submitted by the Applicant's agent on May 26, 2014, via email. In the request, the agent explained that the Applicant "has been traveling extensively and has not been able to surrender the passport to date. They require an extension to July 17, 2014 in order to complete current travels" (Email from Chris Somers to the Immigration Section in Hong Kong, Applicant's Record, at p 45).

[10] The Applicant's request for an extension of time was denied by a visa officer on June 2, 2014 and on June 4, 2014, a visa officer of the Canadian Consulate in Hong Kong advised the

Applicant that his application for permanent residence was denied for failing to provide the requested documents, and therefore for failing to comply with subsection 50(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] and subsection 16(1) of the IRPA.

[11] The Applicant's requested passport was received by the Hong Kong consulate after the date of the officer's decision, on June 6, 2014.

[12] The provisions relied upon by the visa officer read as follow:

Immigration and Refugee Protection Regulations, SOR/2002-227	**Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227**
Documents – Permanent residents	**Documents : résidents permanents**
50. (1) In addition to the permanent resident visa required of a foreign national who is a member of a class referred to in subsection 70(2), a foreign national seeking to become a permanent resident must hold	**50**. (1) En plus du visa de résident permanent que doit détenir l'étranger membre d'une catégorie prévue au paragraphe 70(2), l'étranger qui entend devenir résident permanent doit détenir l'un des documents suivants :
(*a*) a passport, other than a diplomatic, official or similar passport, that was issued by the country of which the foreign national is a citizen or national;	*a*) un passeport — autre qu'un passeport diplomatique, officiel ou de même nature — qui lui a été délivré par le pays dont il est citoyen ou ressortissant;
Immigration and Refugee Protection Act, SC 2001, c 27	**Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27**
Obligation – answer truthfully	**Obligation du demandeur**
16. (1) A person who makes an application must answer	**16**. (1) L'auteur d'une demande au titre de la présente

truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

IV. Issues

[13] The central issues raised by the application are the following:

a) Did the visa officer breach its duty of procedural fairness?

b) Is the visa officer's decision reasonable?

V. Standard of Review

[14] Issues of procedural fairness are questions of law which must be reviewed on the non-deferential standard of correctness, whereas the visa officer's ultimate decision to deny the Applicant's permanent residence application is reviewable on a standard of reasonableness (*Torres v Canada (Minister of Citizenship and Immigration)*, 2011 FC 818 at para 26; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53; *Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 34; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 43).

VI. Analysis

[15] As held by the Supreme Court of Canada, the concept of procedural fairness is contextual and varies in accordance with the particular facts of each case (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paras 77 and 79 [*Dunsmuir*]).

[16] The factors relevant to determine the content of the duty of fairness include: (1) the nature of the decision to be made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

[17] The Applicant submits that the importance of the decision to the individual, the legitimate expectations and the choice of procedures of the visa officer favour a higher degree of procedural fairness; on the other hand, the Respondent argues that the duty of fairness in this case, involving an administrative decision-maker, is more limited than on one involving a quasi-judicial tribunal where the obligation to confront an Applicant may be more stringent.

[18] The Court is of the view that the threshold of the duty of procedural fairness in the decision-making process under review is on the lower end of the spectrum. Such as stated by

Justice Michael L. Phelan in *Nabin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 200 at paras 7 and 8:

> [7] The case law in this Court is consistent; the burden of establishing entitlement to a visa rests on an applicant. This burden includes the responsibility to produce all relevant information which may assist the application. There is no general requirement that visa officers engage in a form of dialogue as to the completeness or adequacy of materials filed.
>
> [8] The exception to the absence of any obligation on a visa officer to give notice of concerns about filed materials is where there are concerns about the credibility, accuracy or genuineness of the information submitted or extrinsic evidence arises with respect to that information (see *Olorunshola v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1383, 2007 FC 1056, paras. 30-37).
>
> [My emphasis.]

[19] The Applicant further submits that the visa officer erred in fettering its discretion in refusing to allow the requested extension of time.

[20] In the decision *Ching-Chu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 855 at para 24 [*Ching-Chu*], relied upon by the Applicant, Justice Michael A. Kelen found that a visa officer has a duty to consider a request for an extension before refusing it and that an outright categorical denial of such a request amounts to a fettering of discretion:

> [25] The visa officer fettered his discretion by categorically stating he never grants extensions of time to file additional information. If the officer had considered the request for an extension, exercised his discretion, and then concluded that no extension will be granted for the following reason, then this decision would be legal. But by fettering his discretion, the visa officer is refusing to consider exercising his discretion, which is illegal. See *Yhap v. Canada (Minister of Employment and Immigration)*, [1990] 1 F.C. 722 (T.D.) per Jerome A.C.J. at 739: [Emphasis added.]

> The importance of flexibility in the adoption of policy or guidelines as a means of structuring discretion is highlighted by D.P. Jones and A.S. de Villars in *Principles of Administrative Law*, where the difference between "general" and "inflexible" policy is described at page 137:
>
> > ... the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his discretion in a particular way may illegally limit the ambit of his power. A delegate who thus fetters his discretion commits a jurisdictional error which is capable of judicial review.... [Emphasis in original.]

[21] In the case at bar, in contrast to the situation in *Ching-Chu*, above, there is no indication that the officer refused to exercise his discretion or that he failed to contemplate the particular merits of the Applicant's application. Rather, the visa officer's reasons, as they appear in the notes contained in the Global Case Management System [GCMS], indicate that the officer considered the Applicant's explanation supporting his request (that he had been traveling extensively) and found that a two-month extension was not justified in the circumstances. Notably, the officer noted the absence of explanation as to why the Applicant was unable to request an extension of time within the time limit of 60 days, as well as the absence of evidence supporting the Applicant's request, such as evidence of travels (Officer's GCMS Notes, Certified Tribunal Record, at p 6). These findings led the visa officer to conclude that the Applicant failed to meet the requirements of the IRPA and its Regulations.

[22] The Court notes that the Applicant provides the Court with explanations and evidence in support of his original request to the visa officer for an extension of time; however, this evidence was not put before the visa officer and cannot be considered for the purpose of judicial review of the officer's decision.

[23] The onus rests upon the Applicant to submit a complete application containing adequate supporting documentation, and it is "not for the visa officer to wait and to offer the applicant a second, or several opportunities to satisfy the visa officer on necessary points which the applicant may have overlooked" (*Prasad* above).

[24] The Court finds that the visa officer's decision falls within the range of reasonable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14).

VII. Conclusion

[25] In light of the foregoing, the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. There is no serious question of general importance to be certified.

OBITER

Recognizing the federal-provincial partnerships, in such matters as implicated in this case, appear to promote projects to enhance Canadian provinces and also, Canada, in general; it would appear that of its own volition, the federal government may want to allow some flexibility to allow the facilitation of immigration requirements to further policies which have been put in place by Federal-Provincial cooperative partnerships.

It is noted the pertinent PEI authorities have approved a project by which it has accepted to grant the Applicant a nomination certificate under the Business Impact category 100% ownership stream. Although the Court's judgment agrees with the reasonableness of the officer's decision – a decision based on facts which demonstrate a missed deadline – due to the application of the letter of the law - may lend itself to a desire to adhere, not only the letter of the law, but the spirit of the law. This, for cooperative arrangements which bear on both the provincial and federal legislation to allow for an opening by which to give an opportunity for facilitation by the federal authorities to quickly consider documents of this applicant so as to process the matter in an expedited manner.

It would appear that energy enhancement through wind farms would be favourable for purposes recognized within Canada's energy policy; and, therefore, the recognition of such may avail

itself of an exception as a result of a potential outcome, if the admissibility of the applicant is not in doubt.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5936-14
STYLE OF CAUSE:	JIANMIN WU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 6, 2015
JUDGMENT AND REASONS:	SHORE J.
DATED:	MAY 6, 2015

APPEARANCES:

Nancy Myles Elliott	FOR THE APPLICANT
Margherita Braccio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elliott Law Firm Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT