Federal Court  Cour fédérale

Date: 20181218

Docket: IMM-2210-18

Citation: 2018 FC 1277

Ottawa, Ontario, December 18, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ADOLPH AUSTIN
GABRIELLA LENELA SAFRENA AUSTIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of an immigration officer [the Officer] at the Immigration Section of the High Commission of Canada, in Port of Spain, Trinidad and Tobago [the Immigration Section], dated October 26, 2017, denying the request of

the Applicant, Gabriella Lenela Safrena Austin, to extend the validity of her permanent residence visa [the Decision].

[2] As explained in more detail below, this application is allowed, because I have found that the Decision is the result of a fettered exercise of discretion.

II. **Background**

[3] Ms. Austin is a 24-year-old citizen and resident of Guyana. The other Applicant, Adolph Austin, is her father. Mr. Austin claimed and was granted refugee status in Canada in 2014. He had been attacked in Guyana because of his HIV status and, according to his affidavit filed in support of this application, the attack left him with mental and physical deficits. He subsequently applied for permanent residence and included Ms. Austin in the application. Her application was initially refused because, at that time, she was too old to meet the definition of a dependent child. The Applicants sought judicial review of that decision, based on a different definition applicable at the time Mr. Austin's refugee claim was submitted. The judicial review application was settled, and the matter was sent back for re-determination. Mr. Austin was granted permanent residence in July 2017, and Ms. Austin was issued a permanent residence visa in September 2017.

[4] Ms. Austin's visa had a validity period of 37 days, expiring on October 25, 2017. She initially booked an airline ticket for October 19, 2017. However, according to information in documents attached to Mr. Austin's affidavit, her car broke down on her way to the airport and

she was unable to depart as scheduled. Her departure was rescheduled for October 26, 2017, but the airline did not permit her to travel on that date because her visa had already expired.

[5] Ms. Austin emailed the Immigration Section on October 26, 2017, advised that she had been unable to travel by October 25, 2017, and asked whether she could have her visa extended or renewed. She did not provide information as to why she had been unable to travel as scheduled. On the same day, the Officer communicated to Ms. Austin by email the Decision denying her request, which stated as follows:

> An immigrant visa was issued to you with an expiry date of October 25, 2017. The onus was on you to travel prior to the expiry date of your visa or to notify this office if you were unable to travel prior to the date of expiry.
>
> Your medicals have now expired and we are unable to re-open your file.
>
> We regret to advise that your file is now closed and no further processing can be carried out.

[6] The following further reasons for the Decision are found in the Global Case Management System [GCMS] notes:

> FILE REVIEWED Rec'd the following email from applicant. PA was issued COPR valid to 25Oct2017. Satisfied PA rec'd landing docs in time for travel as she indicated she was booked to travel 19Oct2017 but did not travel. No reasonable explanation has been submitted as to why PA did not travel on 19Oct2017. In addition PA did not notify our office until today, two days after the expiry of her COPR that she was unable to travel. PA is not a landed immigrant to date and now 23yrs old so not eligible to be spr'd in the future. PA: Advise PA that onus was on her to travel prior to the expiry date of COPR or to notify this office she was unable to travel prior to expiry. File is now closed, no further processing can be carried out. Meds expired and we are unable to re-open file.

[7] While not relevant to the present application for judicial review, on March 19, 2018, Ms. Austin's counsel requested that the Decision be reconsidered and submitted new evidence in support of that request. On March 23, 2018, the Officer denied the request for reconsideration in a decision that is the subject of a separate application for judicial review in Federal Court File No. IMM-2209-18.

III. **Issues**

[8] The Applicants raise the following two issues for the Court's consideration:

A. Whether the Officer erred by failing to recognize or fettering his or her discretion by holding that a request to extend a visa or issue a new visa could only be considered if the request was made prior to the expiry date of the original visa; and

B. Whether the Officer erred by making an unreasonable determination by refusing the Applicant's request to extend her visa or to issue a new visa.

[9] The Respondent raises an additional preliminary issue, submitting that the style of cause should not include Mr. Austin, as the only matter before the Court is the decision concerning Ms. Austin's request for extension or re-issuance of her visa. The Applicants argue in reply that Mr. Austin is a proper party, pursuant to the *Federal Courts Act*, RSC 1985, c F-7, s 18.1(1), because he is directly affected by the matter in respect of which relief is sought.

[10] The parties' arguments also raise an issue surrounding the standard of review applicable to the Court's consideration of this matter. The parties agree, and I concur, that the second issue raised by the Applicants is, as contemplated by the articulation of that issue above, governed by the standard of reasonableness. However, the parties disagree on the standard of review applicable to the first issue. The Respondent argues that the reasonableness standard applies, but the Applicants submit that failure to recognize discretion or the fettering of discretion are matters of jurisdiction and are therefore reviewable on the correctness standard.

IV. **Preliminary Issue**

[11] I agree with the Respondent's position that Mr. Austin should be removed from the style of cause in this application. I appreciate the Applicants' argument that he is affected by the matter in respect of which relief is sought, in that he is Ms. Austin's father and sponsor and wishes for her to live with him in Canada. However, s. 18.1(1) of the *Federal Courts Act* permits an application for judicial review to be made by "… anyone directly affected by the matter in respect of which relief is sought" [my emphasis]. As the Respondent submits, Ms. Austin is directly affected by the Decision, because it is her visa that is the subject of the Decision. However, in my view, the effect of the Decision upon Mr. Austin is indirect, not direct.

[12] The Applicants have provided no authority to support the proposition that a family member of an individual who is the subject of an immigration decision has standing under s. 18.1(1) to challenge the decision. Nor have the Applicants provided any argument as to why it is necessary or beneficial to them to have Mr. Austin as a party to this application for judicial review.

[13] My Judgment in this matter will therefore amend the style of cause, so that it reflects Ms. Austin as the sole Applicant, and the remainder of these Reasons for Judgment are written accordingly.

V. **Standard of Review**

[14] The issue on which the parties take different positions as to the standard of review is whether the Officer erred by failing to recognize or fettering his or her discretion to extend a visa or issue a new visa. The Applicant takes the position that the standard is correctness, relying on the decisions in *Kurukkal v Canada (Minister of Citizenship & Immigration)*, 2009 FC 695 [*Kurukkal*] at para 17 (affirmed in *Canada (Minister of Citizenship & Immigration) v Kurukkal*, 2010 FCA 230) and *Bajwa v Canada (Minister of Citizenship & Immigration)*, 2012 FC 864 [*Bajwa*] at para 46. The Respondent argues that the applicable standard is reasonableness.

[15] I note that the decision of the Federal Court in *Kurukkal*, upon which the Applicant relies, did not directly address the standard of review applicable to the question whether a visa officer has discretion to extend a visa. Rather, it addressed the more general question whether an immigration officer has an ongoing power to reconsider a decision once it has been made or whether the doctrine of *functus officio* applies, and found that question, being one of jurisdiction, to be governed by the standard of correctness. However, in *Kheiri v Canada (Minister of Citizenship & Immigration)* (2000), 193 FTR 112 (Fed TD) [*Kheiri*], the Court analysed the question of a visa officer's authority to extend the time limit on an expired visa in terms of the *functus officio* doctrine. I therefore accept that this question can be properly characterized as one of jurisdiction and that it is subject to the correctness standard.

[16] As submitted by the Applicant, the Federal Court held in *Bajwa* that analysis of whether an officer has fettered his or her discretion is also reviewable on a correctness standard. I also note the explanation in *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 24 that a decision which is a product of fettered discretion is automatically unreasonable. While this articulation of the standard of review employs the language of reasonableness, it amounts to the same analysis as results from the application of the correctness standard. One can bypass the standard of review nomenclature by simply asking the question whether the decision is a product of fettered discretion and as such represents a reviewable error.

VI. **Analysis**

[17] In considering first whether the Officer erred by failing to recognize a discretion to extend or re-issue Ms. Austin's visa, I note that the Respondent accepts that such a discretion exists, at least to some extent. Both parties refer to the decision in *Kheiri* at paragraph 8, in which Justice Linden held as follows:

> [8] In my view, a 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 so in unusual circumstances. The *functus officio* principle is no bar to this. Of course, there may be imposed certain conditions in appropriate cases concerning fresh medical and/or security reports. It is unduly technical and unnecessarily formal to require an entirely fresh application to be made, given the long waiting lists that exist in many lands. If Parliament wishes otherwise, it is at liberty to amend the statute to make clear that no extension or reconsideration is permitted in cases such as these.

[18] The Respondent takes the position that there is no general discretion on the part of a visa officer to extend the effectiveness of a visa and urges caution in relying on *Kheiri*, given the age

of the decision and the fact that it was decided under predecessor legislation. The Respondent instead argues that the applicable authority is to be found in the policy guidelines in the Immigration, Refugees and Citizenship Canada [IRCC] manual entitled "OP1 – Procedures" [OP1] and specifically section 5.28, which reads as follows:

> 5.28 Extending the validity of visas
>
> The validity of a permanent resident visa may not be extended. Nor can replacement visas be issued with a new validity date. If foreign nationals do not use their visas, they must make a new application for a permanent resident visa.
>
> They must also pay a new application processing fee. If they have paid a right of permanent resident fee (RPRF), they do not need to pay it again. The RPRF may be collected only once.
>
> Sometimes, due to factors beyond their control, applicants receive visas that are valid for less than two months. If they cannot travel before their visas expire, officers should update whichever requirement (e.g., medical) was used to set the visa validity. When a new validity date has been obtained, a new visa will be issued.

[19] It will be recalled that Ms. Austin's visa was issued for a validity period of 37 days. As this was a period of less than two months, the Respondent takes the position that the third paragraph of section 5.28 applies and that the Officer therefore had the discretion, on the facts of this case, to extend the visa or issue a new one. However, the Respondent interprets that paragraph of OP1 as requiring that an applicant approach the visa officer for an extension or new visa before the original validity period of the visa expires. The Respondent argues that the Officer exercised his or her discretion in the present case but was justified in declining to provide Ms. Austin with relief, both because she did not approach the Officer until after her visa had expired and because she did not provide any reasonable explanation for failing to travel within the validity period.

[20] I find no basis to decline to follow *Kheiri* and therefore conclude that the Officer had the discretion to extend or reissue Ms. Austin's visa. While that decision was issued under predecessor immigration legislation, Justice Linden's reasoning was based on the absence of any legislative prohibition against such extension or reissuance, and the Respondent acknowledges that that there is no such prohibition in either the predecessor statute or the current one. However, little turns on this point, given that the Respondent also acknowledges that the Officer possessed a discretion in the present case, based on the OP1 contemplating a discretion when the visa validity period was less than two months.

[21] I disagree with Ms. Austin's argument that the Officer's use of the language "we are unable to re-open your file" in the Decision demonstrates that the Officer failed to recognize the availability of a discretion to extend the visa or issue a new one. In my view, the word "unable" could be interpreted either as the Officer lacking the discretion to re-open the file or as the Officer declining to do so. I prefer the latter interpretation, as I agree with the Respondent that the Officer's attention to Ms. Austin's failure to provide an explanation for not traveling within the validity period indicates that the Officer was aware that some discretion was available.

[22] However, I agree with Ms. Austin's position that the Decision demonstrates the Officer fettering that discretion, in the treatment of the fact that Ms. Austin did not approach the Officer until the day after the visa expired. I find no support in the language of OP1 for the Respondent's position that the discretion is available only in circumstances where a visa applicant requests an extension prior to expiry of the original validity. I would doubt that IRCC could create such a restriction through a policy document, as that would fetter the discretion recognized in *Kheiri*.

However, I also find that the language of OP1 does not suggest such a restriction. The Respondent relies on the words, “If they cannot travel before their visas expire” in the second last sentence of section 5.28, as the source of this restriction. I interpret those words as a reference to the inability to travel during the validity period, not as imposing a requirement that notice to the visa officer of such inability be provided prior to expiry of the validity period.

[23] I read the Decision as demonstrating that the Officer interpreted section 5.28 in the same manner as the Respondent. The GCMS notes refer both to Ms. Austin not having provided a reasonable explanation for why she did not travel when planned and also to her failure to notify the Immigration Section until after the visa expiry date. However, the October 26, 2017 email, which conveyed the Decision to Ms. Austin, emphasized the latter point in particular, stating, “The onus was on you to travel prior to the expiry date of your visa or to notify this office if you were unable to travel prior to the date of expiry.” Given that the Officer was communicating this point as an explanation for declining to reopen Ms. Austin’s file, and given that Ms. Austin did approach the Immigration Section the day after the visa’s expiry, this point must be interpreted as the Officer stating Ms. Austin had a burden to provide notice prior to expiry of the visa.

[24] As previously explained, I find no basis, either in law or in policy, for such an obligation. However, the Officer clearly considered Ms. Austin to have such an obligation. It is therefore my conclusion that the Officer’s exercise of discretion was constrained by that understanding and that the Decision is the product of a fettered exercise of discretion.

[25] The result is that this application for judicial review must be allowed, the Decision set aside, and the matter returned to a different visa officer for redetermination, with the benefit of updated submissions to be provided by Ms. Austin prior to such redetermination. Having reached this conclusion, it is unnecessary for the Court to consider the second issue raised by Ms. Austin in this application.

[26] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2210-18

THIS COURT'S JUDGMENT is that:

1. The style of cause in this matter is amended by removing the Applicant, Adolph Austin;

2. This application for judicial review is allowed, the Decision is set aside, and the matter is returned to a different visa officer for redetermination, with the benefit of updated submissions to be provided by the Applicant prior to such redetermination.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2210-18
STYLE OF CAUSE:	ADOLPH AUSTIN GABRIELLA LENELA SAFRENA AUSTIN V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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JUDGMENT AND REASONS	SOUTHCOTT, J.
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