

Federal Court



Cour fédérale

Date: 20190906

Docket: IMM-1090-19

Citation: 2019 FC 1141

Toronto, Ontario, September 6, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

RANDA AHMED GAM AFIFI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application judicially reviews a visa officer's decision to deny Ms. Afifi's application for permanent residence under the Provincial Nominee Class. For the reasons that follow, the refusal was valid in law and this judicial review will not be granted.

II. Background

[2] Ms. Afifi is a citizen of Egypt who applied to the British Columbia Provincial Nominee Program [BC PNP] for a nomination through the 'Entrepreneur' category on May 28, 2012.

[3] She signed a Performance Agreement with British Columbia on October 20, 2013. Ms. Afifi arrived in Canada in September 2014 accompanied by her husband and their three children. While Ms. Afifi's original business location was meant to be Whistler, she applied to the province requesting relocation to Chilliwack. As such, she signed another Performance Agreement reflecting this new location on September 26, 2015, in which she agreed to hold 100% ownership in her business, Book a Look Beauty Inc., and be involved in its day-to-day management and affairs [2015 Agreement].

[4] On April 13, 2017, the Ms. Afifi was nominated under the Entrepreneur Immigration Stream of the BC PNP based on her documented intention and ability to establish and operate a business, namely Book a Look Beauty Inc. In the confirmation letter, she was advised that:

Your nomination is based on the expectation of your long-term intentions of continuing to operate your business in British Columbia. The BC PNP and/or Citizenship and Immigration (CIC) may verify that your business is active at any time until a decision is made on your permanent residency application.

[5] Immigration, Refugees and Citizenship Canada [IRCC] sent Ms. Afifi a letter dated June 21, 2017, containing instructions that all documents and information were to be provided within 30 days. Ms. Afifi ultimately applied for permanent residence in August 2017. In December 2017, she sold her business due to unforeseen health and related events.

[6] On October 24, 2018, an IRCC officer at the Inland Processing Unit [Officer] contacted Ms. Afifi after being advised that she had sold her business. During the telephone conversation, Ms. Afifi indicated that she had started the business but due to challenges in hiring and keeping employees, she had sold her business and started working as an employee at another salon. The Officer told Ms. Afifi that she would be advising the BC PNP to update the program, and advised Ms. Afifi to do the same.

[7] On January 9, 2019, Ms. Afifi was invited by an Acting Director of the BC PNP for an interview to provide an update on her business. By way of follow-up letter dated January 24, Ms. Afifi was advised that she no longer qualified for nomination under the Entrepreneur Immigration Stream since she was no longer attached to her business. As a result, the BC PNP withdrew her nomination.

[8] Ms. Afifi contends that on January 29, 2019, her immigration representative requested humanitarian and compassionate [H&C] consideration by IRCC through written submissions. An automated acknowledgement of receipt arrived from IRCC on the same day, which stated that “the turnaround time for a response is 10 business days”.

[9] On February 4, 2019, the Officer determined that Ms. Afifi did not meet paragraph 87(2)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], and as a result, could not issue a permanent resident visa under paragraph 70(1)(d) of the Regulations due to the province’s withdrawal of Ms. Afifi’s nomination. The refusal letter

was sent the following day (the referenced Regulations are reproduced in Annex A to these Reasons).

[10] As noted in the Global Case Management System [GCMS] notes, on March 1, 2019, following the Officer's decision refusing Ms. Afifi's permanent residence application [Decision], IRCC received correspondence from Ms. Afifi's representative requesting consideration on H&C grounds.

[11] Ms. Afifi has also applied to the BC PNP office for review of its January 24, 2019 withdrawal of the nomination.

III. Issues and Standard of Review

[12] The issues are whether the Officer's decision to refuse Ms. Afifi's permanent residence application on the basis of the withdrawn BC PNP nomination was reasonable and procedurally fair. A visa officer's decision relating to an application for permanent residence under a PNP is reviewed on standard of reasonableness (*Haider v Canada (Citizenship and Immigration)*, 2018 FC 686 at para 12 [*Haider*]). While the standard of review for issues of procedural fairness is that of correctness, the duty of procedural fairness owed by a visa officer to a person applying for permanent residence is at the lower end of the spectrum (*Haider* at para 18).

IV. Analysis

1. *Withdrawal of Ms. Afifi's Nomination Certificate*

[13] Ms. Afifi argues that the Officer erred by relying on the BC PNP's withdrawal of her nomination and that she had a legitimate expectation that her BC PNP application would be assessed pursuant to the terms and conditions of her Performance Agreement. She further argues that the Performance Agreement with the BC PNP does not support a withdrawal of her nomination for failure to have an active on-going business. She states in her memorandum that the "federal government is rendering a decision on Applicant's application of permanent residency and the decision is unreasonable as it could not rely on the withdrawal of nomination which was not valid under the applicable provincial law and/or contract that government [sic] the Applicant's relationship with the Province".

[14] The Minister counters that he does not have jurisdiction over the BC PNP and any arguments raised with respect to the province's withdrawal of the nomination should be dealt with before the appropriate review body in the appropriate forum.

[15] I agree with the Minister. The Officer was required to consider the province's nomination – and subsequent withdrawal – in assessing Ms. Afifi's eligibility under the Provincial Nominee Class. Paragraph 70(1)(d) of the Regulations states that an officer "shall issue a permanent resident visa to a foreign national if, following an examination, it is established that ... the foreign national meets the selection criteria and other requirements applicable to that class".

[16] In the Decision, the Officer states as follows:

After a review of your file, it has been determined that you do not meet the requirements to be considered a member of the Provincial Nominee Class pursuant to 87(2)(a) of the Immigration and Refugee Protection Regulations.

[...]

In your case, the Province of British Columbia has advised our office on 24 January 2019 that they have withdrawn the nomination for you as you no longer meet the conditions under which you were nominated by the BC PNP.

[...]

Since you no longer meet the requirement of your class under 87(2)(a), a Permanent Resident Visa cannot be issued under paragraph 70(1)(d), your application for permanent residence under the Provincial nominee Class is therefore refused.

[17] As noted above, that Decision is dated February 4, 2019, which is after the certificate's withdrawal. Paragraph 87(2)(a) of the Regulations clearly stipulates that a foreign national is a member of the provincial nominee class only if (i) named in a nomination certificate (ii) which is issued by that province's PNP. In light of the fact that Ms. Afifi was not named in a nomination certificate when the Officer made her decision, she no longer met the requirement of paragraph 70(1)(d) of the Regulations, and a permanent resident visa could not be issued.

[18] The federal visa officer had a right to contact the BC PNP, upon learning that Ms. Afifi did not appear to be fulfilling the terms of her nomination, and to ask Ms. Afifi to do the same. There was nothing unreasonable about the Officer basing a refusal on the fact that Ms. Afifi no longer had an active and ongoing business, in light of her Performance Agreement with the

province. And when the province ultimately withdrew Ms. Afifi's certificate, the Officer had every right to refuse the immigrant visa application, given that it was made under the PNP class.

[19] Nor do I agree with Ms. Afifi that there has been any breach of procedural fairness in the procedures followed. Ms. Afifi's BC PNP application was assessed pursuant to the legislative framework set out by the Regulations, and the duty of procedural fairness owed by a visa officer to a person applying for permanent residence is at the lower end of the spectrum. Ms. Afifi knew there was an issue when the Officer interviewed her in October 2018. She also knew that her nomination had been withdrawn approximately two weeks before the Decision was made by the Officer.

[20] Ultimately, British Columbia's withdrawal of the PNP nomination certificate is not the decision under review in this case, and Ms. Afifi is certainly not precluded from continuing to challenge the province's decision. Ms. Afifi indicated at the hearing that her challenge was still underway in the Supreme Court of British Columbia. I agree that is the correct venue to challenge the certificate's withdrawal.

[21] There is also merit to the Minister's argument that Ms. Afifi is – at least with respect to her argument before this Court that the BC PNP had no authority to withdraw her nomination – attempting a collateral attack on the province's decision to revoke in this judicial review, and its policies regarding the program and category under which she applied. The same is true of her stated "legitimate expectation" that her immigrant visa would ensue once she had obtained her

original nomination. Those are issues which she has properly appealed before, and which will be decided by the courts in British Columbia.

2. *Officer's Failure to Consider H&C Relief*

[22] Ms. Afifi argues that the Officer failed to consider H&C grounds for relief applicable to the case. Ms. Afifi argues that two instances should have triggered consideration under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. She argues that first, the Officer should have proactively considered H&C due to the nature of the issues she raised in their October 2018 telephone discussion about why she sold her business – namely medical conditions, hardship her family experienced in making her business successful, and the forward-looking best interests of her three children.

[23] Second, she submits that the January 29, 2019 letter filed electronically by her immigration consultant asked for H&C consideration. She points to the acknowledgement of receipt provided on that date from IRCC.

[24] Finally, Ms. Afifi contends that having disclosed these facts on the phone to the Officer, she had a legitimate expectation that H&C grounds would be considered by the Officer whether or not notice of the written submissions had been received by the February 4 Decision date.

[25] The Minister counters that it was Ms. Afifi's obligation to squarely and clearly raise any H&C request. Ms. Afifi, according to her Affidavit (as there was nothing contained in the Officer's GCMS notes regarding H&C), obliquely mentioned some issues in her phone call, but

made no specific request for H&C relief. Certainly, no legitimate expectation was created.

Ms. Afifi states the following in her Affidavit at paragraphs 31-32:

To the best of my recollection, I advised the officer that my husband had suffered a heart attack, and I underwent hysterectomy and that our medical conditions did not allow us to take the stress of actively managing a business causing us to sell the business. It is in this context I likely explained that if our health condition is not permissive, I could not rely on employees to keep the business going as it has always been a challenge to hire or to keep employees long term in my line of business without one's own active involvement. I also mentioned about the struggles we faced in establishing the business over the past 3 years, how we completely uprooted our base from our home country, and how the future of our three children is at stake.

I noted that the officer did not appear concerned about the reasons but her focus was on the fact that I no longer was running the business. The call was too quick to the extent that my husband was sitting beside me and I wanted to let the officer know that he will be better suited to explain everything in details but the officer did not give me the chance to say so.

[26] Responding to Ms. Afifi's second H&C argument, regarding the January 29, 2019 letter, the Minister points to the Officer's GCMS March 1, 2019 notes, which state:

Correspondence dated 29 Jan 2019 received from the representative with 2 attachments today, includes a letter to the province requesting to reconsider the decision to withdraw their nomination and a letter to IRCC to consider H&C when assessing this application. Note: this case was decided by me on 04 Feb 2019.

The correspondence received from PA's representative stating that Province of BC has withdrawn applicant's nomination and withdrawal is subject to an appeal process that is underway.

[27] I agree with the Minister that no specific request to consider H&C factors was made during the phone call, based on the evidence in the record, including Ms. Afifi's Affidavit.

Certainly, the Affidavit's version of the phone call did not create any legitimate expectation, let alone what is contained in the GCMS notes, nor does any other evidence on the record. In any event, the doctrine of legitimate expectations relates only to process and not to substance (*Stagg v Canada (Attorney General)*, 2019 FC 630 at para 88).

[28] Finally, three short observations about the consultant's letter of January 29 are warranted. First, the IRCC advised Ms. Afifi in June that she had 30 days to submit all relevant information in support of her permanent residency application. The consultant's letter was sent over six months after this 30-day period. June was over six months after she had sold her business. She neither said anything about selling her business in that permanent residency application, nor made any reference to H&C relief.

[29] Second, the Minister points out that the GCMS notes indicate that the Officer received Ms. Afifi's request for H&C relief on March 1, 2019, nearly one month after her February 4 Decision was rendered and sent to Ms. Afifi.

[30] Third, in the letter dated January 29, 2019, Ms. Afifi's immigration consultant wrote "[w]hen assessing this application we request, if necessary, that you also consider Humanitarian and Compassionate considerations as mentioned in the attached documentation". The "attached documentation" is simply a copy of the submissions made to the Province of British Columbia which requested that the withdrawal of the nomination certificate be reviewed and reconsidered. It certainly contains no standalone H&C request, or reasons why H&C relief is merited.

V. Conclusion

[31] As the Officer made no reviewable error, the application is dismissed. Neither party raised a question for certification. I agree that none arise.

JUDGMENT in IMM-1090-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No questions for certification were argued, and I agree none arise.
3. There is no award as to costs.

"Alan S. Diner"

Judge

ANNEX A

Subsections 87(1) and (2) of the Regulations provide as follows:

<p>87 (1) For the purposes of subsection 12(2) of the Act, the provincial nominee class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada.</p>	<p>87 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des candidats des provinces est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada.</p>
<p>(2) A foreign national is a member of the provincial nominee class if</p>	<p>(2) Fait partie de la catégorie des candidats des provinces l'étranger qui satisfait aux critères suivants :</p>
<p>(a) subject to subsection (5), <u>they are named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister;</u> and</p>	<p>a) sous réserve du paragraphe (5), <u>il est visé par un certificat de désignation délivré par le gouvernement provincial concerné conformément à l'accord concernant les candidats des provinces que la province en cause a conclu avec le ministre;</u></p>
<p>(b) they intend to reside in the province that has nominated them.</p>	<p>b) il cherche à s'établir dans la province qui a délivré le certificat de désignation.</p>
<p>[Emphasis added.]</p>	<p>[Je souligne.]</p>

Subsection 70(1) of the Regulations state as follows:

70 (1) An officer shall issue a permanent resident visa to a foreign national if, following an examination, it is established that	70 (1) L'agent délivre un visa de résident permanent à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) the foreign national has applied in accordance with these Regulations for a permanent resident visa as a member of a class referred to in subsection (2);	a) l'étranger en a fait, conformément au présent règlement, la demande au titre d'une des catégories prévues au paragraphe (2);
(b) the foreign national is coming to Canada to establish permanent residence;	b) il vient au Canada pour s'y établir en permanence;
(c) the foreign national is a member of that class;	c) il appartient à la catégorie au titre de laquelle il a fait la demande;
(d) the foreign national meets the selection criteria and other requirements applicable to that class; and	d) il se conforme aux critères de sélection et autres exigences applicables à cette catégorie;
(e) the foreign national and their family members, whether accompanying or not, are not inadmissible.	e) ni lui ni les membres de sa famille, qu'ils l'accompagnent ou non, ne sont interdits de territoire.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1090-19

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