Federal Court  Cour fédérale

Date: 20090730

Docket: IMM-19-09

Citation: 2009 FC 786

Ottawa, Ontario, July 30, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

Vivek Kumar SHARMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Vivek Kumar Sharma and his family, citizens of India, wish to come to Canada as permanent residents. They applied under the skilled worker category. In a letter decision dated September 30, 2008, the Second Secretary, Immigration (the Visa Officer) advised Mr. Sharma that their application was rejected on the basis that Mr. Sharma and his wife had been assessed insufficient points to qualify for permanent residence. They received 65 points; 67 points were needed. Of particular relevance to this application for judicial review, the Visa Officer did not

award points for Ms. Sharma's education because she "did not provide satisfactory evidence that she had been awarded a Bachelor's degree". Such evidence, it appears, would have resulted in additional points that would be enough for a successful application.

[2] Mr. Sharma did not seek judicial review of that decision.

[3] Subsequently, by letter dated October 16, 2008 (and a further letter dated November 12, 2008, Mr. Sharma's immigration consultant requested that the Immigration Officer reconsider his decision on the grounds that Ms. Sharma did indeed hold a degree and that the Officer breached the rules of procedural fairness by not bringing the insufficiency in the application to the attention of the Applicants to give him an opportunity to supplement the inadequate record. In a letter dated October 29, 2008, the Immigration Officer advised as follows:

> Your application for permanent residence in Canada was considered on its substantive merits and was refused. You were provided with the decision containing the reasons for refusal by letter addressed to you dated 30 September 2008, thereby fully concluding your application.
>
> Should you have different or additional information you would like us to consider, you may wish to submit a new application for permanent residence in Canada.

[4] The Applicant seeks judicial review of the decision dated October 29, 2008.

[5] In the recent decision, *Kurukkal v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 695, Justice Anne Mactavish allowed a judicial review of a decision of an immigration officer in circumstances similar to those before me. The officer had refused to consider new evidence in the context of an application for permanent residence from within Canada made on humanitarian and

compassionate (H&C) grounds. The officer declined to consider the new evidence on the basis that he was *functus officio* once his decision on the H&C application had been made. Justice Mactavish concluded (at paragraph 75) that:

> [T]he doctrine of *functus officio* does not apply to the informal, non-adjudicative decision-making process involved in the determination of H&C applications. As a consequence, I find that the immigration officer erred in refusing to consider the death certificate provided by Mr. Kurukkal in this case, and the application for judicial review is allowed.

[6] Justice Mactavish considered the issue important enough to certify a question. Thus, if an appeal is filed, there may be a Court of Appeal view on this question of *functus officio* in the context of permanent resident applications, whether made under s. 25 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) or otherwise. However, for now, the law is as stated by Justice Mactavish and as a matter of judicial comity, I will follow her ruling. Accordingly, it appears that there are grounds to overturn the decision of the Visa Officer in the case before me.

[7] Nevertheless, I ask myself whether there is any practical purpose served in sending this particular matter back to this or another visa officer. I think that the answer to this question is “no”. If I quash the October 29, 2008 decision, I will return the matter to a different visa officer for the sole purpose of determining whether there was a breach of natural justice by the failure of the Visa Officer to disclose the lack of documentation to the Applicant and give him an opportunity to provide further evidence. In the context of this application for judicial review and on this particular record, the question of whether a breach of natural justice is one that can be addressed by the Court.

[8] Turning my mind to this question of a breach of procedural fairness, I note that the onus rests on the Applicant to provide adequate and sufficient evidence to support his application. A visa officer is under no duty to clarify a deficient application (see, for example, *Fernandez v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 994 (QL); *Lam v. Canada (Minister of Citizenship and Immigration)* (1998), 152 F.T.R. 316 (F.C.T.D.) at para. 4). The imposition of such a requirement would be akin to requiring the visa officer to give advance notice of a negative decision, an obligation that Justice Rothstein (as he then was) expressly rejected in *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940 (QL).

[9] With the original application, submitted in 2002, the Applicant stated that his wife had 14 years of education and a B.A. degree. In an e-mail dated April 11, 2008, the Applicant was advised that further documentation was required to continue the assessment of his application. Under the heading “Spouse/Common-law Partner”, the Applicant was told that “you must provide certified documents to support your spouse’s education, work or study”. This passage of the e-mail was bolded, presumably for emphasis. No further documents related to his wife’s education were provided.

[10] In the notes prepared prior to the decision, the Visa Officer noted the following:

> Spouse/Partner education: 0 points. PA states that his spouse has a B.A., but has not provided proof of this on the application. Marks cards for B.A. 1 and B.A. 2 are provided; no B.A. 3 nor copy of a provisional or final degree certificate. On her Schedule 1, spouse indicates that she has completed matriculation, higher secondary, and then 2 years of a B.A. program. I am not satisfied that she has been awarded a B.A. degree, and I therefore award no points for adaptability.

[11] On this record, it is my view that the April 11 communication provided adequate notice that further documentation on his wife's education was required. The letter provided an additional opportunity for the Applicant to meet his burden. There was no further obligation on the Visa Officer to direct the Applicant on exactly what would provide the necessary evidence of his wife's education. In short, the officer was not in breach of his duty of procedural fairness.

[12] The Applicant notes that he received a fairness letter from an immigration officer related to his employment history. The Applicant asserts that the officer should similarly have advised him of the insufficiency of the evidence of his wife's education. The two situations are markedly different. With respect to the Applicant's employment history, the official had a concern that the Applicant may have misrepresented his employment history. The purpose of the letter was to direct the Applicant's attention to the possible misrepresentation that could have led to inadmissibility under s. 40(2)(a) of IRPA. There is an obligation on a visa officer, in such a case, to inform the Applicant of the possible breach of s. 40(2)(a) of IRPA and to give him an opportunity to respond to the concerns. This obligation does not extend to a duty on a visa officer to advise an applicant of every concern or shortcoming in an application.

[13] On the facts of this case, I conclude that there was no breach of procedural fairness by the Visa Officer in assessing the Applicant's application for permanent residence. Thus, sending this matter back to a visa officer to determine whether there was a breach of procedural fairness is unnecessary. The decision of the Visa Officer, dated October 29, 2008 will stand.

[14] The determinative finding in this case is that there was no breach of procedural fairness by the Visa Officer. My decision does not turn on the error of the Visa Officer not to consider the late-filed documents. Accordingly, there is no need to certify the same question as was certified by Justice Mactavish in *Kurukkal*.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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