Federal Court  Cour fédérale

Date: 20120509

Docket: IMM-5977-11

Citation: 2012 FC 560

Ottawa, Ontario, May 9, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

ERMINA AMOR PASCO PLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought forth under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], seeking to set aside a June 13, 2011 decision of visa officer Raymond Gabin [the officer] of the Case Processing Pilot in Ottawa. The officer concluded that the applicant did not meet the requirement for a permanent resident visa under the skilled worker class set out in subparagraph 76(1)(*b*)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], a provision that required the applicant to "have in the form of transferable and available funds, unencumbered by debts or other obligations, an

amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members."

I. Background and Decision under Review

[2] Ms. Ermina Amor Pasco Pla [the applicant], a citizen of the Philippines, filed an application for permanent residence under the federal skilled worker class on September 11, 2007.

[3] In her application, where she was asked to provide her e-mail address and it was written that "[b]y indicating your e-mail address, you are hereby authorizing Citizenship and Immigration Canada to transmit your file and personal information to this specific e-mail address," Ms. Pla provided the e-mail of her representative, Premiers Management Consultancy (Applicant's Amended Record [AAR] at 24).

[4] On November 10, 2011, the officer noted in the Global Case Management System [GCMS] that the applicant provided proof of $14,000 in available funds for herself and her husband, which met the required amount for a family of two as required under subparagraph 76(1)(*b*)(i) of the IRPR (AAR at 10).

[5] However, on October 18, 2010, as her application continued to be processed, the applicant gave birth to a baby daughter. The addition was noted in the GCMS on February 9, 2011 after the applicant sent CIC an updated application with copies of the baby's birth certificate and passport (AAR at 10). As a result, the officer sent an e-mail to the applicant's representative on April 7, 2011 in which he now requested proof of at least $17,000 in available funds for the applicant, her husband, and her daughter, as required by the IRPR. The e-mail also indicated that "[t]he above information/documents must be received in our office within 60 days from the date of this message

[emphasis in original]" (Respondent's Memorandum of Argument and Affidavit [RMAA], Affidavit of Martin Barry, Exhibit A).

[6] An entry in the GCMS dated May 12, 2011 indicates that no response had been received up to that date and so a second e-mail was sent reiterating the request and providing 30 days to comply (AAR at 10). The e-mail, also dated May 12, 2011, informed the applicant of the following (RMAA, Affidavit of Martin Barry, Exhibit B):

> On April 7, 2011, you were asked to produce the following to enable us to continue the processing of your application:
>
> Proof of funds equivalent to at least $17,000 Canadian dollars
>
> We are unable to continue the processing of your application without the above. All information must be received in one package along with this letter within 30 days from the date of this message. Please submit all requested information immediately. If you fail to provide the requested information, your application may be assessed on the basis of the information that we have and I may refuse your application [emphasis in original].

[7] Finally on June 13, 2011, an entry in the GCMS indicates that the officer had still not received a response. The officer concluded that the applicant did not have the minimum funds to be eligible for selection as a skilled worker as required by subparagraph 76(1)(*b*)(i) and therefore refused the application (AAR at 10). An e-mail notifying the applicant of this decision was received by her representative at 8:11 p.m. on June 13, 2011 (AAR at 143). The e-mail included the attached decision informing the applicant of the following (AAR at 144):

> The file only shows evidence of about $14,000 Canadian dollar worth of funds, whereas $16,967 Canadian is required for a family of three. On April 7, 2011, you were asked to produce evidence of at least $17,000 Canadian equivalent in funds. I received no response from you.

> On May 12th, I sent you another e-mail asking you for the proof of funds, giving you 30 days to comply. The e-mail also stated that, should you not respond within 30 days, your application could be refused. To date you have failed to provide any response.

II. Parties' Positions

[8] The applicant argues that by rendering his decision on June 13, 2011, within the 30-day delay provided on May 12, 2011, the officer breached his duty of procedural fairness. The applicant is also of the view the officer's reasoning was deficient in that he failed to consider a substitute evaluation by which he could have taken into account the fact the applicant had provided proof of funds for an amount of $14,000 less than 10 months earlier and that there was proof the applicant earned a monthly salary of more than $4,000. Since the proof of funds required was $16,967, it is argued the officer could have easily used this substitute evaluation to establish that the applicant met the requirement.

[9] The minister responds that procedural fairness was not breached, that the applicant was asked to provide the required evidence on two occasions, that she was given a total of 67 days to comply, and that she simply failed to file the information on time, "namely by no later than June 13, 2011" (RMAA at para 2). The minister also points out that the applicant acknowledges that she only submitted the documents to her representative on June 14, 2011 (Affidavit of applicant at para 20 and AAR at 150). The minister contends the officer's decision was therefore reasonable given the absence of documents to prove that the applicant had sufficient available funds. At the hearing, counsel for the minister admitted that the decision should have been rendered on June 14, 2011, but that granting the remedy sought and returning the file to another officer would not change the determination already made, making it an unnecessary recourse.

III. Issues

[10] This matter raises two issues:

1. Was the applicant denied procedural fairness?

2. Did the officer err in determining that the applicant did not meet the requirement set out under subparagraph 76(1)(*b*)(i) of the IRPR?

IV. Standard of Review

[11] The question of whether a visa officer has provided an applicant with a meaningful opportunity to respond to the visa officer's concerns is a question of procedural fairness for which the applicable standard of review is correctness and no deference is required (*Zare v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1024 at para 20, [2010] FCJ 1283; *Rahim v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1252 at para 12, [2006] FCJ 1577; *Kuhathasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 457 at para 18, [2008] FCJ 587).

[12] By comparison, an officer's assessment of a skilled worker application is subject to the reasonableness standard of review (*Maizel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1026 at paras 11-13, [2011] FCJ 1290 [*Maizel*]). That standard calls for deference and this Court will only intervene if the outcome does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] SCJ 12 [*Khosa*]).

V. Analysis

A. *Was the applicant denied procedural fairness?*

[13] In light of the recent birth of her daughter, the officer sent an e-mail to the applicant's representative on April 7, 2011 obliging her to provide updated proof of at least $17,000 in available funds for herself, her husband, and her daughter, as required by subparagraph 76(1)(*b*)(i) of the IRPR. The applicant was told to provide this evidence within 60 days from the date of that message, meaning she was obliged to submit the evidence by Monday, June 6, 2011. While the applicant claims her representative never received this e-mail, the message was never returned to the CIC's Inbox as a failed delivery (RMAA, Affidavit of Martin Barry at para 6).

[14] I am mindful that where the minister has shown that an e-mail was sent to an applicant, as was done here, the risk of the failed e-mail communication falls on the applicant (*Alavi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 969 at para 5, [2010] FCJ 1197; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 75 at para 14, [2010] FCJ 65). That being said, the e-mail sent by the officer on May 12, 2011 renders any concern about the first e-mail moot. In the second e-mail, the officer again asks for the required information and states that it must be provided within 30 days of that message, thereby replacing the earlier deadline of June 6, 2011 with this new one.

[15] The applicant acknowledges that the new 30-day deadline fell on June 11, 2011, but that because this was a Saturday, she argues the deadline should actually have been deferred to the first weekday which followed, in this case Monday, June 13, 2011. While the minister disputes the applicant's reliance on the *Interpretation Act*, RSC 1985, c I-21 to calculate the delay, it agrees that the applicant had until June 13, 2011 to submit the required proof of funds (RMAA at paras 2, 22 and 25). Having considered the officer's e-mail and instructions, I agree with the parties that a

reasonable interpretation of the officer's instructions leads to the conclusion that the applicant had until Monday, June 13, 2011 to submit the required evidence.

[16] In light of this, the question remains whether the officer breached the duty of procedural fairness by rendering his decision on that same day. Considering this issue, I bear in mind that the duty of fairness is limited in cases of permanent residence applications made from outside Canada, that the duty is at the relatively low end of the spectrum of what is required, and that the burden of proof of showing a breach lies on the person alleging it (*Mei v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1040 at para 16, [2009] FCJ 1281 and *Maizel*, above, at paras 32-36). In examining the Federal Court's ability to intervene where a decision-maker failed to observe procedural fairness, the Supreme Court of Canada has stated that "[r]elief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice [emphasis added]" (*Khosa*, above, at para 43). In coming to this conclusion, Justice Ian Binnie referred approvingly to *Pal v Canada (Minister of Employment and Immigration)* (1999), 70 FTR 289 at para 9, [1993] FCJ 1301 [*Pal*], where this Court stated that the decision to grant relief under section 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7 is discretionary and that the question to be answered "is whether the breach of natural justice was one which could have little or no effect on the outcome of the decision as a whole."

[17] In examining this question then, I cannot ignore the fact that the applicant failed to abide by the deadline. In addition, since the applicant confirms she was only informed of the officer's decision by her representative on August 11, 2011 (Affidavit of applicant at para 22 and AAR at 149), the fact that the officer rendered the decision on June 13, 2011 and that the applicant's representative received notice of the decision at 8:11 p.m. that night clearly had no impact on her

failure to submit the required evidence by the deadline. As she explains in her affidavit, the applicant only delivered the necessary bank statements to her representative on June 14, 2011 and it appears the representative never forwarded this evidence to the officer (Affidavit of applicant at para 20 and AAR at 150). In such circumstances, I reiterate that the fact the officer did not wait until the following day to render his decision had no impact on the outcome.

[18] While I am sympathetic to the applicant's predicament and I recognize that she finds herself in the unfortunate circumstance of having to reapply for permanent residency after waiting for nearly four years for this application to be processed, she cannot now rely on a procedural technicality to provide her with relief for her failure to provide the required evidence by the deadline. The officer acted diligently throughout this process: He initially provided the applicant with a delay of sixty days to confirm that she remained eligible for permanent residency, then provided her with a second notice in which he made explicit reference to his earlier request and incidentally extended the deadline by a further week. While the officer should have waited until June 14, 2011 to render his decision and failed to do so, in light of all of the circumstances surrounding his decision and the events that followed, I find this was not a fatal error, but rather, the type of error described in *Khosa*, above, at para 43 and *Pal*, above, at para 9.

[19] If I were to find otherwise, grant the remedy sought, and return the file to another officer, the matter would be looked at in light of its content as it existed at the time the decision was rendered on June 13, 2011.

[20] The applicant has provided no evidence (and none exists in the record) that she or her representative raised any concerns to the officer as to not having received the earlier request or that the new deadline of 30 days would be insufficient to allow her to obtain the necessary proof. In fact,

the officer's request was never acknowledged and no indication was given that evidence was forthcoming. Furthermore, the officer was never provided the bank statements allegedly submitted to the representative and no evidence has been filed confirming their existence. Had the applicant taken any of the above actions, the result may have been different, and while this may appear somewhat speculative, it bears mentioning since the onus fell on the applicant to provide adequate and sufficient information in support of her application and the onus did not shift to the officer after the application was first filed (*Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 442 at para 10, [2010] FCJ 587 and *Pan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 838, [2010] FCJ 1037). A breach of the duty of fairness has to be assessed in light of all the evidence surrounding it.

[21] In *Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co*, 2006 FCA 398 at para 24, [2006] FCJ 1837, Justice Décary wrote the following on behalf of the Court of Appeal:

> **24** […] in a given context, even though a breach of the duty of procedural fairness or of a statutory requirement has occurred, a court may hold the ultimate view that because of the inconsequential, trivial or mere technical nature of the breach, the relief sought [page116] should not be granted.

[22] In the present case, as seen above, the applicant did not forward the bank statements to the officer. The file, if returned to another officer, would be assessed without this essential information and the final outcome would therefore remain the same. In such cases, there is no viable purpose to returning the case when the end result will not change. I have provided counsel for the applicant a further delay to submit any jurisprudence that may support a different approach and, in fairness, provided the same opportunity to counsel for the respondent. I have reviewed their submissions.

[23] By relying on section 18.1(3)(*b*) of the *Federal Courts Act*, counsel for the applicant would like me to instruct an officer to request the bank statements prior to rendering his or her decision. Counsel for the respondent objects because of the circumstances previously described.

[24] By June 14, 2011, the applicant had still not filed the requested bank statements. She was by then outside the prescribed deadline of June 13, 2011. As of today, the information has still not been filed and the Court has no knowledge of its content. The applicant now wishes to be relieved of her failure to respect the established deadline, but it remains that the file must be assessed as of June 13, 2011. Even if the decision had been made on June 14, 2011, the result would therefore have been the same. As a result, I will not instruct an officer to require further information and the decision of June 13, 2011 must stand.

B. *Did the officer err in determining that the applicant did not meet the requirement set out under subparagraph 76(1)(b)(i) of the IRPR?*

[25] Although not dealt with by counsel for the applicant in her main oral argument, the applicant argues that the officer's reasoning was deficient in that he failed to take into account that less than 10 months earlier, the applicant had provided proof of funds for an amount of $14,000 and a monthly salary of more than $4,000. However, subparagraph 76(1)(*b*)(i) of the IRPR requires the applicant to "have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members." In this case, the required amount of available funds was $16,967 and it was reasonable for the officer not to make a speculative determination based on the above information and to instead require proof of the necessary amount. In light of the applicant's failure to provide updated information confirming that

she possessed this amount, the officer's decision clearly falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Khosa*, above, at para 59).

[26] The parties were asked to submit questions for the purpose of certification. None were submitted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question will be certified.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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