Federal Court Cour fédérale

Date: 20140121

Docket: IMM-8671-11

Citation: 2014 FC 70

Vancouver, British Columbia, January 21, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**ANJU JOSEPH MANNIL,
BENCY SUSAN THOMAS,
DEBBIE OSIFO, EDUARDO RACOMA,
MISAN RAGHEB ABURMAILEH,
JOCELYN MAE SALAS,
ROSELINE JACOB,
JOFFREY CACANANTA,
KHALED AL QAWASMEH,
TAMARA AHMAD MOHAMAD SHAKER,
FRANK LESTER ENCISCO,
JANET ALAIR ARABIA, AND
MARIA CANDIDA MANAHAN ALCARAZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Visa applicants do not have the right to have their applications processed, particularly, if not received within the timelines set according to Ministerial Instructions [MI] (*Lukaj v Canada (Minister of Citizenship and Immigration)*, 2013 FC 8, 424 FTR 243 at para 41-42).

II. Introduction

[2] The Applicants seek judicial review of the refusal of a Service Delivery Agent [Agent] to process their applications for permanent residence under the federal skilled worker class [PR application] because they fell outside of their annual National Occupation Classifications cap [annual cap] imposed by the MI-2 issued pursuant to section 87.3 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

III. Background

[3] Mr. Anju Joseph Mannil, the Principal Applicant, and eight other Applicants, all of whom were represented by the same immigration consultant, prepared PR applications under the National Occupations Classifications [NOC] codes 3152 (nurse) and 3131 (pharmacist).

[4] On June 26, 2011, the Applicants explained that the immigration consultant brought the completed applications to FedEx and provided special instructions to hold the package for delivery until July 4, 2011.

[5] On June 30, 2011, the PR applications were received by Citizenship and Immigration Canada [CIC].

[6] On the same day, the annual caps under the MI-2 ended. The new Ministerial Instruction 3 [MI-3] took effect on July 1, 2011. This new instruction re-opened the application process for all categories under the federal skilled workers class.

[7] On July 18, 2011, the Agent reviewed the Applicants' PR applications and refused to process them on the basis that they were received after the annual caps for the relevant NOC codes under the MI-2 had already been reached.

[8] On July 19, 2011, CIC mailed the PR applications and decision letters to the immigration consultant at her mailing address in Dubai.

[9] On September 6, 2011, the immigration consultant contacted CIC by email to inquire about the status of several PR applications. In her email, she noted that FedEx had delivered the packages on June 30, 2011, although she had provided specific instruction to FedEx to hold delivery until July 4, 2011. At this time, the annual caps under MI-3 for NOC code 3152 (nurses) and NOC code 3131 (pharmacist) had already been reached.

[10] On September 19, 2011, the Agent responded to the immigration consultant indicating that he could not provide a response to her "bulk" inquiry for privacy reasons, as it concerned several applications; however, the Agent noted that if the PR applications were received on June 30, 2011, they would have been reviewed under the MI-2, and as a result, would be returned as the annual cap under the MI-2 had been reached by that date.

[11] On October 29, 2011, and November 3, 2011, the immigration consultant sent another two emails regarding the status of several applications.

[12] On November 15, 2011, the Agent responded to the immigration consultant's further inquiry by sending a separate email for each of the Applicants individually, explaining the decision made with regard to their PR application on July 18, 2011. These emails are the subject matter of the present judicial review.

[13] On November 28, 2011, nine of the Applicants in this matter filed an application for leave and for judicial review of the Agent's decision. On January 23, 2012, four other Applicants filed similar applications.

[14] These 13 applications have been consolidated by the Court and handled as a specially-managed hearing.

IV. Decision under Review

[15] In each of the nine emails, dated November 15, 2011, the Agent explained that the PR applications had been received after the annual caps for NOC code 3152 (nurses) and/or NOC code 3131 (pharmacist) under MI-2 had already been reached, and as a result, the applications could not be processed as they exceeded the cap limits.

[16] The Agent explained that each Applicant's PR application had been returned unprocessed (Decision letter, Certified Tribunal Record at p 4).

V. Issue

[17] Did the Agent breach the rules of procedural fairness by failing to advise the Applicants in a timely manner that their applications would not be considered for processing?

VI. Relevant Legislative Provisions

[18] Section 87.3 of the *IRPA* is relevant:

87.3 (1) This section applies to applications for visas or other documents made under subsection 11(1), other than those made by persons referred to in subsection 99(2), sponsorship applications made by persons referred to in subsection 13(1), applications for permanent resident status under subsection 21(1) or temporary resident status under subsection 22(1) made by foreign nationals in Canada and to requests under subsection 25(1) made by foreign nationals outside Canada.	87.3 (1) Le présent article s'applique aux demandes de visa et autres documents visées au paragraphe 11(1), sauf celle faite par la personne visée au paragraphe 99(2), aux demandes de parrainage faites par une personne visée au paragraphe 13(1), aux demandes de statut de résident permanent visées au paragraphe 21(1) ou de résident temporaire visées au paragraphe 22(1) faites par un étranger se trouvant au Canada ainsi qu'aux demandes prévues au paragraphe 25(1) faites par un étranger se trouvant hors du Canada.
Attainment of immigration goals	Atteinte des objectifs d'immigration
(2) The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.	(2) Le traitement des demandes se fait de la manière qui, selon le ministre, est la plus susceptible d'aider l'atteinte des objectifs fixés pour l'immigration par le gouvernement fédéral.

Instructions	Instructions
(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions	(3) Pour l'application du paragraphe (2), le ministre peut donner des instructions sur le traitement des demandes, notamment en précisant l'un ou l'autre des points suivants :
(*a*) establishing categories of applications or requests to which the instructions apply;	*a*) les catégories de demandes à l'égard desquelles s'appliquent les instructions;
(*b*) establishing an order, by category or otherwise, for the processing of applications or requests;	*b*) l'ordre de traitement des demandes, notamment par catégorie;
(*c*) setting the number of applications or requests, by category or otherwise, to be processed in any year; and	*c*) le nombre de demandes à traiter par an, notamment par catégorie;
(*d*) providing for the disposition of applications and requests, including those made subsequent to the first application or request.	*d*) la disposition des demandes dont celles faites de nouveau.

[19] Section 87.3, first introduced in the *IRPA* in February 2008, authorized the Minister of Citizenship and Immigration Canada to issue Ministerial Instructions regarding the priority in which applications would be processed, and removed the obligation to process every application received. These Ministerial Instructions provided for a triage of applications according to revised eligibility criteria.

[20] In the present case, MI-2 is the applicable set of ministerial instructions. As explained in *Liang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 758, 413 FTR 145:

> [7] … The first set of Ministerial Instructions was published on November 29, 2008 (MI1). They applied to applications received on or after February 27, 2008. Pursuant to the MI1, applications would only be eligible to be processed if the applicant: had experience in one of 38 listed occupations; an arranged offer of employment (AEO); or was legally residing in Canada as a temporary foreign worker or international student.
>
> [8] The MI1 were ultimately unsuccessful in restraining the growth of applications. The backlog diminished at first, but eventually application levels increased beyond the levels before Bill C-50. Thus, on June 26, 2010, the second set of Ministerial Instructions was published (MI2). They applied to applications received on or after that date. The MI2 directed that applications would only be eligible to be processed if the applicant had an AEO or the applicant had experience in one of 29, as opposed to 38, listed occupations. The MI2 introduced a global cap on FSW applications: a maximum of 20,000 applications (excluding those with an AEO) were to be placed into processing each year. Within that cap, a maximum of 1,000 applications per occupational category were to be processed each year. Applications exceeding that cap would be returned unprocessed.

VII. Standard of Review

[21] The issue of undue delay in issuing a decision is one of procedural fairness and has been recognized as reviewable on the standard of correctness (*Snieder v Canada (Attorney General)*, 2013 FC 218 at para 20).

VIII. Analysis

[22] The Applicants present one central argument – the Agent erred in failing to inform them of his decision in a timely manner. The Applicants do not contest the decision or any of its content; in

fact, they concede that the decision was the appropriate one to make (Applicant's Memorandum of Fact and Law at para 21).

[23] The Applicants also reiterate, in great length, the circumstances involving FedEx's early delivery of the PR applications, which they assert led to the Agent's refusal to process the applications. The Applicants request that the Court consider these special circumstances, which were beyond their control, in determining whether there was a breach of procedural fairness.

[24] The Court is of the view that the Applicants have not established a breach of procedural fairness due to an unreasonable delay.

[25] There are three requirements that must be met if a delay is to be considered unreasonable:

1) The delay in question has been longer than the nature of the process required, *prima facie*;
2) The applicant and his counsel are not responsible for the delay; and
3) The authority responsible for the delay has not provided satisfactory justification.

(*Liang*, above, at para 26; reference is also made to *Snieder*, above)

[26] In the present case, the Agent rendered his decision 18 days after having received the PR applications; despite having received 1,500 applications in the first week of July 2011. He then mailed the decision letters and unprocessed PR applications on July 19, 2011, one day later.

[27] As submitted by the Respondent, and with which the Court agrees, the Agent assessed and provided notice of the negative decision to the Applicants in a timely manner.

[28] Although neither party presented any evidence as to what would normally consist of a reasonable delay in the PR application process for the federal skilled worker class, in *Liang*, above (at para 29), this Court found that 6 to 12 months was a reasonable delay within which such applicants could expect to receive a decision from CIC under MI-1. The Agent's decision falls well within this range. The Court therefore finds that the first part of the test set out in *Liang* has not been established; the delay in question was not longer than the nature of the process required. (The Court recognizes that the delays set out in *Liang* were in regard to cases processed under MI-1; however, it finds that a similar characterization of "reasonable delay" would be found under MI-2; notably in light of its objective to further restrain the growth of applications and allow CIC to clear its backlog).

[29] The Court further finds that the second part of the test was not met, as it would appear the Applicants' immigration consultant was responsible for the delay.

[30] It is well-established that a decision-maker has a duty to prove that notice of a negative decision was actually sent or "went on its way" to an applicant; however, once the respondent proves, on a balance of probabilities, that the communication was sent, it is the applicant who bears the risk involved in a potential failure to receive the communication (*Caglayan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 485, 408 FTR 192 at para 13; reference is also made to

Zare v Canada (Minister of Citizenship and Immigration), 2010 FC 1024, [2012] 2 FCR 48 and *Yang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 124).

[31] In the present case, the Applicants claim that their immigration consultant never received the decision letters sent by the Agent on July 18, 2011; however, they provided no evidence to establish that the letters were not sent or had been sent in an unreliable manner to their immigration consultant.

[32] The Global Case Management System (GCMS) notes recorded by the Agent, on July 18, 2011, make explicit reference to the PR applications being returned to the Applicants by regular mail, which is standard CIC practice. There is also no dispute as to whether the immigration consultant's address on file was correct. Moreover, the evidence on the record indicates that the decision letters were successfully delivered to the immigration consultant's address in Dubai; however, they were all returned to CIC by the Dubai postal service as "unclaimed" by the addressee in January 2012 (see Exhibits EE-QQ, Affidavit of Catherine F. Brown).

[33] In the absence of any evidence to rebut the presumption that the letters were properly delivered to the immigration consultant, thereby demonstrating that she was not responsible for the delay, the Court does not see a need to turn to the question of whether there was a reasonable justification for the delay.

[34] Accordingly, as the tripartite test for an unreasonable delay set out in *Liang*, above, was not met, the Court does not find that there are sufficient grounds to justify its intervention. The delay was reasonable.

[35] While it is quite clear that the Applicants are dismayed about the early delivery of their PR applications leading to their rejection, it was not for CIC to remedy the issue. The Agent applied the law and the Ministerial Instructions as he was required; he was not open to give the Applicants special consideration and waive the annual caps. The Applicants' remedy for the early delivery of their mail lies solely with FedEx as an aggrieved client.

IX. Conclusion

[36] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be dismissed with no question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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