Federal Court  Cour fédérale

Date: 20140711

Docket: IMM-4808-13

Citation: 2014 FC 685

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 11, 2014

Present: The Honourable Madam Justice Gagné

BETWEEN:

ELEFTHERIOS FILIPPIADIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Eleftherios Filippiadis applied for judicial review of the decision—the term is used in its generic sense—of an immigration officer from the Sydney Case Processing Centre, dated July 3, 2013, considering his application for a visa under the Federal Skilled Worker category as incomplete and returning it to him without processing, for the reason that it does not satisfy the requirements provided in the instructions issued by the Minister of Citizenship and Immigration

in accordance with subsection 87.3(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act).

[2] Therefore, the issue is whether the return of the applicant's claim before it was processed may properly be considered to be a decision subject to the power of judicial review of the Court provided by subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

[3] For the reasons stated below, I am of the view that the application should be dismissed since the letter of July 3, 2013, received by the applicant does not contain a decision likely to be reviewed by this Court.

Factual background

[4] The applicant is a Greek citizen who obtained on May 18, 2012, his doctoral degree in Economics from the University of Concordia in Montréal.

[5] On April 18, 2013, he filed a permanent residence application in Canada as part of the Federal Skilled Worker Program with the Centralized Intake Office (CIO) in Sydney of Citizenship and Immigration Canada (CIC).

[6] The fact that the applicant obtained his doctoral degree within the 12 months preceding the date that CIC received his application made him eligible for the Federal Skilled Worker category, under the PhD eligibility stream.

[7] When his application was filed, the applicant included various documents describing his full-time work experience in Canada. In addition, he included Schedule 3, Economic Classes – Federal Skilled Workers (Schedule 3), in the version that existed at that time.

[8] On April 23, 2013, the CIO sent a letter to the applicant (and returned his file and his payment) indicating that he had not produced his birth certificate in support of his application.

[9] On May 4, 2013, the CIC Ministerial Instructions, known as "IM8", were published in the *Canada Gazette*. These instructions apply to applications received at the CIO as of that date and they require in particular that applications be filled in accordance with the application kit requirements in place at the time of application receipt by the CIO. This kit includes a new version of Schedule 3, now of three pages, compared to the previous one that had two pages.

[10] On May 14, 2013, the applicant returned to the CIO his application for permanent residence in Canada, including his birth certificate and its translation. He returned all the documentation that he had sent on April 18, 2013, including the previous Schedule 3. The CIO received the application on May 15, 2013.

[11] On July 3, 2013, the CIO again returned to the applicant his application for permanent residence in Canada and his payment. According to Appendix C of the letter of the CIO sent to the applicant, the application was returned since it was not accompanied by one of the documents requested in the application kit applicable to this category, i.e. the most recent version of

Schedule 3 (page 7 of the Certified Tribunal Record). It was this last correspondence of the CIC that is the subject of this application for judicial review.

[12] On July 22, 2013, the applicant wrote to the CIO so as to request that the decision of July 3, 2013, be reviewed and that the applicant's file be reassessed. He still has not received a reply to this application.

Issue

[13] In his original memorandum, the applicant is clearly under the impression that his visa application was dismissed for failing to providing sufficient evidence that he allegedly performed the duties of professor described in the *National Occupational Classification*. He got this impression from the form letter received from the CIO, which ends on this general note:

> **NOTE: Work Experience:** It is important you provide us documentation supplying evidence to show that within the 10 years before the date on which your application was made, you have accumulated, over a continuous period, **at least one year of full-time work experience, or the equivalent in part-time work,** in the occupation you identified as your primary occupation, that is listed in Skill Type 0 or Skill Level A or B of the National Occupational Classification (NOC). **Your letter of employment must clearly give evidence showing that you have performed the actions described in the lead statement** and **that you have performed a substantial number of main duties** of the occupation as set out in the occupational descriptions of the NOC, **including all the essential duties**, for that period of employment. If your letter(s) does not provide us with of (Sic) this information, you will not meet Regulation 10 of IRPA.

[14] However, the reason given for returning the file was instead found on a checklist (Appendix C) in which the box indicating that the new Schedule 3 is missing was checked. The letter of July 3, 2013, explained this (at the paragraph before that quoted above):

> A review of your application indicates that you do not meet the requirements of Regulation 10 of IRPA. The application is being returned to you for this reason. Your application fee was not processed and is also being returned to you.
>
> Please see the highlighted items on the enclosed checklist(s) and/or the enclosed Appendix(es). [Emphasis added.]

[15] The CIO never processed the applicant's file nor made a decision against him, since at sorting, it was considered non-compliant with the IM8.

[16] The issue that this application for judicial review raises is whether the applicant's application for permanent residence was set aside before it was processed, may be the subject of the application for judicial review before this Court.

Relevant provisions

[17] An application for judicial review must dispute a decision or order subject to the power of judicial review of the Federal Court under paragraph 18.1(2) of the *Federal Courts Act*.

[18] Subsection 87.3(3) of the Act allows the Minister to provide instructions on applications for permanent residence. Subsection 87.3(4) specifies that the officer is required to comply with the instructions before and during the processing of the application. Subsection 87.3(5) provides an important clarification that retaining or returning an application, or otherwise disposed of,

does not constitute "a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made" (according to the French version, "decision" is translated by "refus").

[19] Finally, it is section 75 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) that defines skilled workers and sets out the criteria that they must meet so that their visa application in this category is accepted.

Analysis

[20] As indicated above, the applicant's original memorandum deals almost exclusively with the unreasonableness of the "decision" made by the CIC officer, in that he would not have considered the applicant's various professional credentials, which clearly showed that he fulfilled the applicable criteria for his application under subsection 75(2) of the Regulations. In particular, the applicant worked as a professor at the University of Concordia and taught at the Vanier CEGEP and was paid for these two jobs.

[21] The respondent argued that the letter of July 3, 2013, cannot be considered to be a decision or an order. Rather, he proposes drawing an analogy with the notice to appear regarding the removal of a foreigner, which, according to well-established case law, is not a decision subject to judicial review (*Daniel v Canada (Minister of Citizenship and Immigration)*, 2007 FC 392 at para 12). The respondent also quoted *Alaa v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 14, where Justice Blais issued the following comment:

> [15] If every purely administrative order issued by an officer of a department, whether it be Citizenship and Immigration or any other government agency, were subject to an application for judicial review, the complete administration of federal entities could be compromised, thereby rendering them totally ineffective.
>
> [16] Far from concluding that federal administrative decisions are not subject to judicial review by the Federal Court, my comment, which is also to be considered as an approval of the decision rendered by de Montigny J. in *Tran, supra*, simply specifies that only a decision or an order is subject to judicial review under subsection 18.1(2) of the *Federal Courts Act*.

[22] In his reply brief, and particularly during the hearing before the Court, the applicant instead argued that the fact of returning his visa application without processing it because it was missing the latest version of a form is a decision subject to judicial review in that the applicant's rights are compromised by it. He also applied to the Court to certify this issue.

[23] Moreover, the Act clearly states that an application that does not comply with the requirements of the Ministerial Instructions may be returned to the applicant and that it is not a refusal to issue the requested permanent residence visa.

[24] In *Liang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 758 at para 43, the Court makes an important distinction between the processed and not processed application:

> However, section 87.3 does not eliminate the Minister's duty to process applications in a reasonably timely manner, at least those applications that are accepted for processing. There is no language in section 87.3 or any other amendment to the Act that extinguishes the longstanding, well-accepted duty to process applications in a reasonable time frame. The Minister can set instructions that permit him to return some applications without processing them at all, and thus obviously there is no further duty in respect of those applications. However, for those that are determined eligible for processing, the duty to do so in a reasonably timely manner remains,

> absent clear legislative language extinguishing that duty. The Ministerial Instructions inform the assessment of whether that duty is discharged in a reasonable period of time. [Emphasis added]

[25] In this case, the applicant's application was non-compliant; he provided an old version of Schedule 3 although he was required to use the new version. The IM8 applied to his application of May 14, 2013, which was a new application.

[26] In his affidavit, the immigration officer recalls that the CIO received 9,590 applications in the Federal Skilled Worker Program between May 4, 2013, the date that the IM8 was published, and September 26, 2013. In such a context, it is essential that applicants assume responsibility for ensuring that all documents required are provided.

[27] The file shows that the applicant waited until April 2013 to file his application, when he only had one month left before 12 months after receiving his doctoral degree expired. He also showed that this application of April 18, 2013, was not the first visa application returned to the applicant for failing to attach his birth certificate. His application of March 15, 2013, in the Quebec Skilled Workers class, was no exception. It is true that this application is not covered in these proceedings, but it shows that the applicant knew the importance of attaching his birth certificate to his visa application.

[28] The administration and effectiveness of the program may be compromised if each time an officer decides that an application is incomplete, this decision may be the subject of an application for judicial review before this Court. The time and effort involved in a more in-depth

investigation for all applications filed would be intolerable (*Navjot Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 956 (*Navjot Singh*)).

[29] During the hearing, the applicant emphasized the fact that Schedule 3 is not a document that is determinative in the assessment of the application since the information contained in it is found in various documents produced in support of his application. According to him, the officer did not have to search outside of the file to obtain the specific information that was not included in the applicant's file and in Schedule 3. The applicant argued that his situation is different from *Navjot Singh* where the visa officer would have had to search in another file of the applicant's family to obtain information relating to the family relationship between two people. The applicant also put a great deal of emphasis on the fact that, in his opinion, the new version of Schedule 3 only contains superficial changes in relation to the previous version.

[30] He added that if he had to follow the respondent's reasoning, all the permanent residence claimants in Canada would have no recourse before a capricious decision of a visa officer who could dismiss or return their application simply because a form was incomplete, although the information sought is already in the file.

[31] To that, the respondent replied that the content of Schedule 3 is not relevant since the IM8 clearly states that the new version must be used as of May 4, 2013. The respondent added that there are some differences that are not superficial, for example the obligation in the new form to indicate the main category in which the applicant has accumulated his work experiences.

[32] I concede to the applicant that the changes made to Schedule 3 are rather superficial and that while he now has to indicate the main category in which the applicant claims to have relevant work experience, although there is nowhere to provide this information in the old version of Schedule 3, the immigration officer can deduce it from his reading of the other sections of the old Schedule 3, by adding the applicant's months of experience in each category.

[33] However, this does not change the fact that the applicant's visa application was not in compliance with IM8 and that the officer had the responsibility of sorting and accepting or not accepting a visa application for processing. Neither does it change the fact that the Act clearly provides that the return of an unprocessed application is not a refusal to issue a visa (a "refus" in the French version).

[34] The applicant proposes to the Court the following question for certification:

> [TRANSLATION]
>
> "Is the fact that Citizenship and Immigration Canada returned to the applicant his application for permanent residence file because it was missing the latest version of a form where the non-essential changes were made by CIC a reviewable decision under section 18 of the *Federal Courts Act*, when the rights of the applicant are thereby compromised?"

[35] The applicable test for certification is set out at paragraph 74(*d*) of the Act and at subsection 18(1) of the *Federal Courts Immigration and Refugee Protection Rules* SOR/93-22. So that a question may be certified, the following question must be asked: "Is there a serious question of general importance which would be dispositive of an appeal?" (*Canada (Minister of*

Citizenship and Immigration) v Zazai, 2004 FCA 89, at para 11, citing *Bath v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1207 at para 15).

[36] A "serious question of general importance" is a question that transcends the particular factual context in which it arose and that lends itself to a generic approach leading to an answer of general application (*Boni v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68 at para 4-6).

[37] In this case, the Act itself deals with the question raised by the applicant, except that he claims that its specific facts would justify a different conclusion. Therefore the question does not transcend the applicant's particular factual context.

[38] Therefore, this question will not be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The applicant's application for judicial review is dismissed; and

2. No question of general importance is certified.

"Jocelyne Gagné"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jacques Beauchemin	FOR THE APPLICANT
Andrea Shanin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Beauchemin Brisson Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT