Federal Court  Cour fédérale

Date: 20150624

Docket: IMM-6759-14

Citation: 2015 FC 788

Ottawa, Ontario, June 24, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

ARASH NADERIKA

Applicant

And

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of an immigration officer [the Officer] refusing Mr. Naderika's application for permanent residence in Canada under the Federal Skilled Worker [FSW] class [the Decision].

II. Facts

[1] Mr. Naderika is a citizen of Iran. In January 2010, he submitted a simplified application for permanent residence in Canada under the FSW class and was thereafter instructed to submit a complete application, which he did in or around June 2010.

[2] In order to receive five extra points for adaptability for being related to a person living in Canada, he included with his application documents in respect of his wife's uncle, including the uncle's citizenship card and excerpts from this relative's utility and mobile phone bills.

[3] On December 14, 2011, his file was reviewed and a preliminary selection decision was made, indicating that Mr. Naderika would likely receive the five extra points for adaptability, if he provided updated proof that his relative was still living in Canada, and that he would receive sufficient points overall.

[4] On January 15, 2014, the Warsaw visa office sent an email to Mr. Naderika's representative requesting a number of additional documents, which were detailed in the email itself [the January 2014 request]. The documents requested included, among others, updated proof that Mr. Naderika's relative was currently residing in Canada.

[5] The consultant acting on Mr. Naderika's behalf responded to the January 2014 request in a letter dated March 11, 2014 containing a package of documents [the March 2014 letter] and stating: "[P]lease see attach of [sic] requested document [sic], forms and Right of Permanente

[sic] Residence Fee ($980).” The January 2014 request was attached to the consultant’s letter, along with the documents provided on behalf of Mr. Naderika. The Warsaw visa office received the letter and package of documents on March 14, 2014.

[6] There is conflicting information as to whether this package sent with the March 2014 letter included documentation pertaining to Mr. Naderika’s relative, his wife’s uncle. Mr. Naderika relies on the affidavit of his consultant, which states that the package included his wife’s uncle’s property assessment and tax payment notices for 2014, pay cheque from January 2014, excerpts from utility bills and bank statements showing transactions in Canada. The Respondent, on the other hand, relies on the affidavit of the Officer, which states that Mr. Naderika’s consultant did not submit documents confirming his relative’s residency with the March 2014 letter. The Global Case Management System [GCMS] notes dated April 8, 2014 and May 6, 2014 also indicate that these documents were not received by the Warsaw visa office.

III. The Impugned Decision

[7] On June 17, 2014, the Officer rejected Mr. Naderika’s application on the basis that he had obtained only 63 of the 67 points required to qualify for immigration to Canada. In his decision letter, the Officer wrote that he was not able to award Mr. Naderika any points under the adaptability factor for having a relative in Canada because Mr. Naderika had “failed to comply” with the visa office’s January 2014 request for updated proof of his or his spouse’s relative’s residency in Canada. As such, the Officer was not satisfied that he or his spouse had a relative residing in Canada.

[8] That same day, after receiving the Officer's refusal letter, Mr. Naderika's consultant sent an email to the Warsaw visa office indicating that the documents providing updated proof of the relative's residency in Canada had been submitted with the March 2014 letter, and requesting reconsideration. The consultant indicated in the correspondence that, had Mr. Naderika received the five extra points he was entitled to for having a relative in Canada, his total points would have been 68 and would have met the requirements for permanent residence. The consultant further indicated that she was re-sending the documents regarding Mr. Naderika's relative that had already been submitted in March 2014.

[9] These documents were provided to the Warsaw visa office the following day, on June 18, 2014, and included, along with the courier slip for the delivery of the March 2014 package, the following materials from Mr. Naderika's relative: his 2014 property assessment notice, an excerpt from his January 2014 utility bill, an excerpt from the relative's January-February 2014 toll bridge bill, bank records showing transactions in Canada, and a property tax payment change notice.

[10] On June 18, 2014, the Officer sent an email advising Mr. Naderika that he had decided not to exercise his discretion to re-open his case as he found there were insufficient grounds to do so. The Officer noted that no updated information regarding Mr. Naderika's relative's residency in Canada had been received prior to the June 17, 2014 decision and the application had been considered on its substantive merits based on the information in the file at the time of the decision. The Officer specified in an affidavit that he had reviewed Mr. Naderika's "request for reconsideration but found that a different decision was not warranted".

[11] After numerous unsuccessful requests to have his application reconsidered, Mr. Naderika applied to this Court for leave and judicial review, following the receipt of a final email from the Warsaw visa office, on August 18, 2014, confirming that there were insufficient grounds to reopen the case given the absence of updated information on Mr. Naderika's relative's residency in Canada.

IV. Issues

[12] This application for judicial review raises two questions:

1. Whether the Officer breached his duty of procedural fairness by failing to give Mr. Naderika an opportunity to address his concerns regarding the lack of proof of his relative's residency before making a final decision.
2. Whether the Officer erred by refusing to grant Mr. Naderika's request for reconsideration of his application.

V. Standard of Review

[13] The question of whether there was a breach of procedural fairness is reviewable on a standard of correctness and, as a result, the decision-maker is owed no deference (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 855, at para 24; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24, at para 79; *Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 at para 20 [*Talpur*]). While no deference is owed to officers on this issue, the content of the duty of procedural fairness is flexible and may differ with the context.

[14] As to the Officer's decision not to reconsider Mr. Naderika's application, there are two standards of review at play. Whether the Officer fettered his discretion is a procedural fairness issue and is reviewable on a standard of correctness (*Ali v Canada (Citizenship and Immigration)*, 2013 FC 879, at para 13 [*Ali*]; *Khosa*, at para 43). The decision itself, however, is reviewable on a standard of reasonableness (*Talpur*, at para 19; *Ali*, at para 14; *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47, 53).

VI. Analysis

A. *Did the Officer err by failing to give Mr. Naderika an opportunity to address the concerns regarding the lack of proof of his relative's residency?*

[15] The determinative issue in the present case is whether the Officer breached procedural fairness by failing to provide Mr. Naderika with an opportunity to provide the documents relating to his relative's residency in Canada once the Officer realized that these documents were missing from the package of documents provided with the March 2014 letter by Mr. Naderika's consultant.

[16] Mr. Naderika submits that the Officer erred by failing to follow up with him on the missing documents since the March 2014 letter specifically attached the January 2014 request sent by the Warsaw visa office, which itself referred to the need to produce residency documents from Mr. Naderika's relative and listed the type of documents to be provided in that respect. This was clearly evidence relevant to the assessment of Mr. Naderika's application as the Officer found that, without it, Mr. Naderika would not meet the residency requirements. In addition, Mr.

Naderika had already provided, with his initial application, evidence of such relative's residence in Canada at the time. The purpose of the January 2014 request was simply to update such information.

[17] The Respondent essentially argues that the onus is on Mr. Naderika to submit the necessary evidence in support of his application. The Officer gave Mr. Naderika an opportunity to provide a list of requested documents once, and he did not have an obligation to do so again. According to the Officer, the documents on Mr. Naderika's relative's residency in Canada were missing from the response sent by his consultant on March 11, 2014.

[18] As indicated above, there is contradictory evidence in this case with respect to the missing documents regarding Mr. Naderika's relative. Mr. Naderika and his consultant affirm that the documents were submitted to the Warsaw visa office with the March 2014 letter, while the Officer affirms that they were not.

[19] It is true that procedural fairness requires that an applicant be provided with a meaningful opportunity to present the various types of evidence relevant to his or her case and to have it fully considered (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 28). However, in the context of a visa application, the duty of fairness does not require a visa officer to inform an applicant of concerns arising directly from the requirements of the legislation or regulations and to give the applicant an opportunity to disabuse him or her of those concerns (*Talpur,* at para 21; *Prasad v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 453, at para 7, 34 Imm LR (2d) (FCTD)).

[20] The Officer's concern in this case regarding the missing documentation arose directly from paragraph 83(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 [the Regulations], which states:

> **83.** (1) A maximum of 10 points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:
>
> […]
>
> (*d*) for being related to, or for having an accompanying spouse or accompanying common-law partner who is related to, a person living in Canada who is described in subsection (5), 5 points;
> […]

[21] As the Officer's concerns arose directly from the Regulations, I am of the view that the Officer did not have an obligation to inform Mr. Naderika that he had not received these documents. I am mindful of the fact that the March 2014 letter sent by Mr. Naderika's consultant specifically attached the initial January 2014 request from the Warsaw visa office and referred to it with respect to the documents attached to the response. I believe it could indeed be reasonably inferred from the response that the consultant intended to attach the updated documentation relating to the residency in Canada of Mr. Naderika's relative. In fact, as soon as the consultant received the June 17, 2014 letter from the Officer denying Mr. Naderika's application, she was able, within a day or so, to send the missing documents to the visa office as she arguably had them in his file relating to Mr. Naderika.

[22] However, I note that the March 2014 letter did not specifically state that the package provided included the specific documentation relating to Mr. Naderika's relative, nor did it list the exact documents being provided; it only referred to the January 2014 request from the visa

office, which contained a relatively long standard list of documents to be provided by the applicant, among which were the general type of documents relating to the Canadian residency requirements for Mr. Naderika's relative.

[23] It is not a situation where, as in *Miller v Canada (Minister of Citizenship and Immigration)*, 2015 FC 371 [*Miller*], a visa officer was not alert to the fact that an applicant specifically mentioned in his letter that a particular document was attached and where, absent a notification from the officer, the applicant would have had no way of knowing that it was not. Here, the consultant did not specifically list or refer in her March 2014 letter to the actual documents being provided in relation to the relative's Canadian residency; she simply attached the January 2014 request from the visa office.

[24] While the situation is close to what was encountered in *Miller*, it is nonetheless different and it was not possible for the Officer to precisely identify which documents had not been provided by Mr. Naderika's consultant with the March 2014 letter. In the particular circumstances of this case, I do not find that the Officer breached his duty of procedural fairness.

B. *Did the Officer err by refusing to grant Mr. Naderika's request for reconsideration?*

[25] Mr. Naderika submits that the Officer fettered his discretion by failing to properly consider his application for reconsideration, including the "new" evidence on his relative's residency in Canada. Furthermore, Mr. Naderika asserts that the Officer's decision to refuse the request for reconsideration was unreasonable as the Officer failed to exercise his discretion in a practical and reasonably fair manner.

[26] The Respondent suggests that the Officer did exercise his discretion to reconsider but reasonably found that a different decision was not warranted. Given that Mr. Naderika was required to provide certain documents, that ample time was provided for him to do so, and that he has not proven that the Officer had received these documents by the time he made his decision on June 17, 2014, the Respondent claims that Mr. Naderika has failed to show any error in the Officer's refusal to give a positive decision upon reconsideration. The Respondent submits that the Officer's decision was therefore reasonable.

[27] As a preliminary matter, I note that, while Mr. Naderika filed this application for leave and judicial review in respect of the initial refusal decision of the Officer dated June 17, 2014, he has also made submissions in respect of the Officer's refusal to reconsider that decision, which refusal was confirmed by the Officer on June 18, 2014 and later in August by the Warsaw visa office. The Respondent has not objected to this or argued that Mr. Naderika should have filed a separate judicial review.

[28] In any event, I am satisfied that the interests of justice demand that the Court reviews the determination on the reconsideration request as part of the judicial review of the initial decision refusing Mr. Naderika's application for permanent residence (*Marr v Canada (Citizenship and Immigration)*, 2011 FC 367, at para 56 [*Marr*]; *Thangappan v Canada (Citizenship and Immigration)*, 2012 FC 1266, at para 3). The refusal to reconsider refers to the same decision, is part of the same immigration file and was issued before Mr. Naderika filed his application for judicial review. Further, the evidence placed before the Officer conclusively answered the concern that had led to the initial decision. As such, no useful purpose would be served by

requiring Mr. Naderika to file a separate application for judicial review and to bifurcate the proceedings, and it would be contrary to the interests of justice to do so.

[29] While there is no obligation on an immigration officer to reconsider an application for permanent residence, the case law is clear that, on the basis of fairness and common sense, a visa officer should reconsider a file if, within days of a negative decision of an application that has been outstanding for a number of years, new evidence that confirms a material fact is presented (*Marr*, at para 57; *Mansouri v Canada (Citizenship and Immigration)*, 2012 FC 1242, at para 8 [*Mansouri*]; *Ali*, at paras 21-23).

[30] In *Mansouri*, the applicant had received 63 of the required 67 points on her FSW application on the grounds that there were no documents substantiating her relative's residency in Canada. Within three days of the negative decision, her consultant submitted the necessary documents and requested reconsideration, but the visa officer refused this request on the basis that the initial decision had been made in a fair manner. Justice Phelan found that in doing so, the officer had construed her discretion too narrowly:

> **10.** [...] There may be good reason, including (but in no way limited to) fairness to more diligent applicants or efficiency and effectiveness of the system which could be relevant in deciding not to reconsider an original decision but none were stated here.
>
> **11.** A visa officer need not write a treatise on fairness to justify a refusal to re-open but here the Visa Officer viewed her discretion to be too narrow.

[31] Similarly, in *Ali*, the officer had refused to re-open the application on the grounds that the new evidence submitted with the reconsideration request was not in the file at the time the initial

decision was made. It is worth citing at length the reasoning of Justice Manson in that decision, who found the refusal to be unreasonable in the circumstances of the case:

> **21.** While the Reconsideration Officer can exercise the discretion delegated to her and choose not to reconsider the application, that discretion should be exercised with a practical and reasonably fair approach.
>
> **22.** Reason to do so has been articulated by Justice Russell Zinn in *Marr v Canada (Minister of Citizenship and Immigration)*, 2011 FC 367 at para 57:
>
> > Basic fairness and common sense suggest that if a visa officer, within days of rendering a negative decision on an application that has been outstanding for many years, receives a document confirming information already before the officer that materially affects the result of the application, then he or she should exercise his or her discretion to reconsider the decision. Nothing is served by requiring an applicant to start the process over and again wait years for a result when the application and the evidence is fresh in the officer's mind and where the applicant is not attempting to adduce new facts that had not been previously disclosed.
>
> **23.** Justice Michael L. Phelan endorsed this approach in *Mansouri*, above, at para 8.
>
> **24.** The Respondent argues there is no general duty to reconsider an application based on new information and that the PA's "duty to put his best foot forward" in the initial application should prevail. While I agree with the Respondent's position that it is within a visa officer's discretion to reconsider an application for permanent residency, and that such a decision should generally be accorded deference, there is in this case no apparent reasonable justification for the PA's request to be refused.
>
> **25.** The documentation now provided by the PA appears to allow him to reach a score of 67 on his skilled worker score. It would be unreasonable to require him to start the process anew. While efficiency of the immigration process is a reasonable justification for refusing a reconsideration request, efficiency is not served by refusing this request.

> **26.** As a result, this decision lacked common sense, practicality, and basic fairness, extrinsic criteria which have been found to be components of reasonableness in the immigration context in both *Mansouri* and *Marr*.

[32] The facts in the present case are even more patent that in the *Marr*, *Mansouri* and *Ali* cases. In this case, as soon as Mr. Naderika's application was refused, his consultant immediately sent an email to the Officer, on the very same day, and provided the Officer the following day with a copy of the documents that answered the concerns on the updated evidence needed with respect to the residency in Canada of Mr. Naderika's relative. This response included numerous documents relating to the relative's residency which were evidently in the consultant's possession given how quickly they were provided to the visa office. The documentation provided appears to allow Mr. Naderika to reach the score needed to meet the requirements under his FSW class application.

[33] This is not a case where, as in *Mansouri*, "it was a close call" due to the fact that the applicant had taken varying positions vis-à-vis the visa office. Furthermore, this is a case where Mr. Naderika had already provided proof of his relative's residency in Canada in his initial application, where the needed evidence was an update, and where the required documentation was provided within one day of the June 17, 2014 decision following what appears to be a misunderstanding on the contents of the documents received by the Warsaw visa office in March 2014 following the January 2014 request.

[34] The updated evidence on Mr. Naderika's relative, even if it was considered as new evidence that was not before the Officer at the time the initial decision was made, conclusively

answered the concern that had led to the June 17, 2014 decision to deny Mr. Naderika's application. To echo what Justice Manson found in *Ali*, I see no apparent reasonable justification in this case for the refusal of Mr. Naderika's request for reconsideration. The documentation provided appears to be sufficient to allow Mr. Naderika to reach the required number of points, and neither efficiency nor practicality would be served by requiring Mr. Naderika to restart the process at that point, more than four years after he submitted his initial application.

[35] For all these reasons, and in the circumstances of this case, I find that the decision of the Officer not to reconsider Mr. Naderika's application does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and is unreasonable (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47, 53). As in *Ali*, the decision lacked common sense, practicality, and basic fairness, all of which have been found to be components of reasonableness.

[36] Given my conclusion that the Officer's decision was unreasonable, it is unnecessary for me to decide the issue of whether the Officer fettered his discretion by failing to consider Mr. Naderika's application for reconsideration. However, even if I had looked at this matter as a fettering by the Officer of his discretion to properly consider Mr. Naderika's application, I would have reached a similar conclusion and found that the Officer had the ability to consider the "new" evidence provided by Mr. Naderika's consultant on June 18, 2014 (*Marr*, at para 54). A decision that is the result of fettered discretion is per se unreasonable (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, at paras 20-24, 341 DLR (4th) 710)).

VII. Conclusion

[37] For these reasons, I find that the Officer's decision to refuse the request for reconsideration was unreasonable in the circumstances. The Officer viewed his discretion too narrowly by refusing the request on the sole basis that Mr. Naderika's application had been considered on its substantive merits based on the information in the file at the time of the June 17, 2014 decision.

[38] Neither party has proposed a serious question of general importance for certification, and I agree there is none (*Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, at para 4).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Officer's decision refusing Mr. Naderika's application for a permanent resident visa as a member of the Federal Skilled Worker class and Mr. Naderika's request to reconsider his application is set aside.

3. Mr. Naderika's application is to be remitted for re-determination by another visa officer, who is to accept the original points awarded and is to consider the evidence of Mr. Naderika's wife's uncle's residence in Canada submitted on his behalf on June 18, 2014 in assessing the final points to be awarded.

4. This re-determination shall be completed no later than six months from the date of this Judgment.

5. No question is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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