Federal Court  Cour fédérale

Date: 20190620

Docket: IMM-3875-18

Citation: 2019 FC 842

Ottawa, Ontario, June 20, 2019

PRESENT: Mr. Justice Gleeson

BETWEEN:

SHILPA NINAD POTDAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Potdar, is a citizen of India who applied for a provincial nomination certificate from the Nova Scotia Office of Immigration [NSOI] based on her skilled work experience. The nomination certificate was granted and she was invited by Immigration, Refugees and Citizenship Canada [IRCC] to apply for permanent residence.

[2] The Nova Scotia certificate was subsequently withdrawn, and in the absence of a valid provincial nomination certificate, her application for a permanent resident visa was denied. Ms. Potdar seeks judicial review of that decision, submitting that the IRCC Officer who denied her application unreasonably communicated inaccurate information to NSOI and breached procedural fairness.

[3] The respondent submits that the NSOI decision to withdraw the certificate was determinative of Ms. Potdar's application and that this Court does not have jurisdiction to review that decision. The respondent further submits that inaccurate information was not communicated to the NSOI and that there was no breach of procedural fairness on the part of the respondent.

[4] For the reasons that follow, the application is dismissed. As set out in greater detail below, this Court lacks jurisdiction to review the NSOI's decision and the Officer acted fairly and reasonably in communicating concerns of a misrepresentation to the NSOI.

II. Style of Cause

[5] The applicant has named the Minister of Immigration, Refugees and Citizenship Canada as the respondent in this matter. The correct respondent is the Minister of Citizenship and Immigration (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *Immigration and Refugee Protection Act*, SC 2001, c 27, s 4(1)). Accordingly, the respondent in the style of cause is amended to the Minister of Citizenship and Immigration.

III. Background

[6] Ms. Potdar received a provincial nomination certificate from NSOI in February 2018 and shortly thereafter submitted to the respondent, an application for permanent residence.

[7] In June 2018, the respondent sent a procedural fairness letter [PFL] to Ms. Potdar, requesting that she provide an explanation and supporting documents to demonstrate her intention to reside in Nova Scotia. The PFL did not raise misrepresentation concerns. She responded to the PFL.

[8] The respondent had also contacted NSOI regarding a potential misrepresentation, advising NSOI that Ms. Potdar had previously applied to immigrate under the Federal Skilled Worker Program [FSWP] and that her daughter was studying at Loyalist College in Belleville, Ontario. The respondent noted that this information was not disclosed in Ms. Potdar's application.

[9] In July 2018, NSOI advised Ms. Potdar by letter that her nomination certificate had been withdrawn due to misrepresentation. She sent several emails to NSOI to explain the alleged misrepresentation and to request additional time to respond to their concerns. That request was not granted.

[10] By letter dated July 30, 2018, IRCC refused the application for permanent residence. The Officer found that Ms. Potdar's provincial nomination certificate had been withdrawn and was

no longer valid. The withdrawal of the certificate impacted on the point score that resulted in the initial invitation to apply for permanent residence, lowering her score to a number that was below the lowest ranking person who had been invited to apply.

IV. Issues

[11] The application raises the following issues:

A. Does this Court have jurisdiction to review this matter?

B. Did IRCC act unfairly in communicating misrepresentation concerns to NSOI without notifying Ms. Potdar?

C. Was the decision to deny the permanent residence application reasonable?

V. Standard of Review

[12] The Officer's decision to deny the permanent residence application is reviewable on reasonableness, while the procedural fairness issue is reviewable on correctness (*Haider v Canada (Citizenship and Immigration)*, 2018 FC 686 at para 12).

VI. Analysis

A. *Does this Court have jurisdiction to review this matter?*

[13] The respondent argues that although Ms. Potdar has brought an application seeking review of the IRCC decision to deny her permanent residence application, she is in fact seeking a

review of the NSOI decision to withdraw her nomination certificate. The respondent submits that this Court lacks jurisdiction to review the NSOI decision and that in seeking to impugn two distinct decisions, Ms. Potdar has run afoul of Rule 302 of the of the *Federal Courts Rules*, SOR/98-106, which limits an application for judicial review to a single decision.

[14] I agree that this application essentially asks the Court to review the NSOI decision. Ms. Potdar argues in some detail that she did not misrepresent any information in her application. However, it was NSOI—not IRCC—that made the misrepresentation finding and withdrew her nomination certificate.

[15] Section 18 of the *Federal Courts Act*, RSC 1985, c F-7, provides that "the Federal Court has exclusive original jurisdiction" to issue extraordinary remedies and to hear and determine applications for relief against a "federal board, commission or other tribunal." The NSOI is not a federal board, commission, or other tribunal; it is a provincial body. Its decisions are not reviewable in this Court.

[16] The case law also makes clear that provincial superior courts have jurisdiction to review decisions of provincial bodies relating to provincial nomination certificates. The respondent points to *Xing v Nova Scotia (Immigration)*, 2017 NSSC 70, as an example. In that case, the Supreme Court of Nova Scotia—not the Federal Court—reviewed the decision of NSOI to rescind a nomination certificate. That decision notably took place after CBSA advised NSOI that it had determined Mr. Xing did not intend to live in Nova Scotia. Decisions relating to provincial nomination certificates from other provinces have also been reviewed in their respective superior

courts: see, e.g., *Bideh v Province of New Brunswick*, 2016 NBQB 192; *Chaudan v British Columbia (Ministry of Jobs, Tourism and Skills Training)*, 2016 BCSC 2142; *Jiang v Minister of Labour and Immigration*, 2013 MBQB 107; *Shen v Saskatchewan (Economy)*, 2017 SKQB 124.

[17] My conclusion that the NSOI decision is not reviewable in this Court might be sufficient to dispose of the application. However, Ms. Potdar argues that she is not seeking review of the NSOI decision. She submits that the only decision being challenged is that of the IRCC Officer refusing her application for permanent residence. She submits this decision was reached solely as a result of the inaccurate disclosure by IRCC to NSOI and NSOI's subsequent withdrawal of its nomination certificate. She further argues that even if the decisions are distinct, they constitute a continuous course of action—an exception to the rule limiting applications for judicial review to a single decision—and that on this basis, this Court should consider the NSOI decision.

[18] Rule 302 provides that "[u]nless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought." The jurisprudence has recognized an exception to this rule where an applicant challenges two or more decisions that constitute "continuing acts or a course of conduct" (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 164 [*David Suzuki Foundation*]). In *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658, Justice Douglas Campbell explained the exception as follows:

> [6] Continuing acts or decisions may be reviewed under s.18.1 of the *Federal Court Act* without offending Rule 1602(4) [now Rule 302], however the acts in question must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies *(Mahmood* v. *Canada* (1998), 1998 CanLII 8450 (FC), 154 F.T.R. 102 (F.C.T.D.);

reconsideration refused [1998] F.C.J. No. 1836). At paragraph 10, Mr. Justice Muldoon stated as follows:

> While the rule states that only one decision may be attacked, the Trial Division has also recognized that continuing "acts" or decisions may also be reviewed under s.18.1 of the *Federal Court Act* without contravening rule 1602(4) (see for example *Puccini v. Canada (Department of Agriculture)*, 1993 CanLII 2973 (FC), [1993] 3 F.C. 557). However, in those cases, the acts in question were of a continuing nature, making it difficult for the applicant to pinpoint a single decision from which relief could be sought by this Court. They did not involve, as in the facts here, two different fact situations, two different types of relief sought and two different decision-making bodies.

[19] In *David Suzuki Foundation*, Justice Catherine Kane considered the jurisprudence relating to Rule 302 and very helpfully summarized the factors to be considered in assessing whether a series of decisions arose as part of a continuing act or course of conduct for the purposes of Rule 302:

> [173] …The factors to consider in determining whether there is a continuing act or course of conduct include: whether the decisions are closely connected; whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies; whether it is difficult to pinpoint a single decision; and, based on the similarities and differences, whether separate reviews would be a waste of time and effort.
>
> [Citations omitted]

[20] In arguing that the decisions constitute a continuous course of action, Ms. Potdar notes that: (1) IRCC and Nova Scotia have a formal agreement relating to the processing of applications; (2) the decisions relate to the same factual matrix; (3) the decisions pertain to the

same subject matter and a single ground of relief is being sought; and (4) reviewing the decisions separately would be inefficient and risk leaving her without a remedy.

[21] Upon consideration of the factors set out in *David Suzuki Foundation*, I am unpersuaded by Ms. Potdar's submissions. Although the decisions may be closely connected, Ms. Potdar has sought two distinct and different forms of relief from two distinct decision makers: a nomination certificate from NSOI and permanent resident status from IRCC. The two decisions in issue are easily distinguished and considered separately. In considering the final factor—whether it would be more efficient to consider the decisions together—I am not convinced that this would be the case. The decisions are being made by different levels of government and, as such, the policy objectives and purposes of each decision may not fully align. My conclusion that this Court lacks jurisdiction to review the NSOI decision also prevents this Court from engaging in any meaningful consideration of the NSOI decision.

[22] Ms. Potdar submits that an attempt to review NSOI's decision in the Supreme Court of Nova Scotia may lead to a finding that the rightful decision maker is IRCC, leaving her without a remedy. This argument does not respond to this Court's lack of jurisdiction to review the NSOI decision, jurisdiction that the respondent notes rests with the Supreme Court of Nova Scotia. It also fails to address the body of case law in which provincial superior courts have reviewed decisions relating to provincial nomination certificates (see, for example, the cases cited in paragraph 15 of these Reasons). The suggestion that Ms. Potdar would be left without a remedy if this Court does not review the NSOI decision is unpersuasive.

[23] The NSOI and IRCC decisions do not form part of a continuing act or course of conduct; they are separate and distinct. This application is limited to a review of the IRCC decision.

B. *Did IRCC act unfairly in communicating misrepresentation concerns to NSOI without notifying Ms. Potdar?*

[24] Ms. Potdar argues the Officer had a duty to notify her of misrepresentation concerns prior to notifying NSOI and the failure to give her notice and an opportunity to respond denied her procedural fairness to address the Officer's concern.

[25] In advancing the procedural fairness argument, Ms. Potdar conflates the IRCC decision and the NSOI decision.

[26] There may well be circumstances where procedural fairness will require an agency sharing information to give notice before the sharing is undertaken. However, in this instance, I am not satisfied that any such duty arose. The level of procedural fairness owed to an applicant is at the lower end of spectrum (*Tuiran v Canada (Citizenship and Immigration)*, 2018 FC 324 at para 14; *Mei v Canada (Citizenship and Immigration)*, 2009 FC 1040 at paras 17–20). The information was directly relevant to decision making within the provincial nominee program. IRCC was not making a decision based on the information but rather providing information to the appropriate program decision maker, the NSOI. The information was shared within a formal framework between NSOI and IRCC establishing the provincial nominee program (*Canada-Nova Scotia Co-operation on Immigration*, 19 September 2007, Annex A: Provincial Nominees at paras 5.2 and 5.4).

[27] Within this context, I am unable to conclude the Officer acted unfairly in communicating misrepresentation concerns to NSOI without notifying Ms. Potdar.

[28] Ms. Potdar's submissions are largely phrased in terms of IRCC's duty to allow her to address misrepresentation concerns before advising NSOI. However, it was NSOI that ultimately found Ms. Potdar's application for a provincial nomination certificate contained misrepresentations. As discussed above, that decision is not reviewable by this Court.

C. *Did the Officer act unreasonably in denying the permanent residence application?*

[29] Ms. Potdar submits that it was unreasonable for the Officer to have advised NSOI that she had previously applied multiple times under the FSWP and that her daughter had a study permit in Belleville. She submits that while she had previously created an Express Entry profile, this did not constitute a proper permanent residence application as she had not received an Invitation to Apply from IRCC. With respect to her daughter's status, she acknowledges she incorrectly indicated that her daughter resided in India but notes that elsewhere in the application she did indicate her daughter resided in Belleville. She submits this was an oversight on her part, not a misrepresentation.

[30] Ms. Potdar is essentially asking the Court to reconsider and reweigh the evidence. Ms. Potdar's disagreement does not render the Officer's decision unreasonable. It was reasonably open to the Officer to conclude that inaccurate or incomplete information was indicative of a misrepresentation in applying for the provincial nomination certificate and to share that concern with the NSOI.

[31] In light of the NSOI decision to withdraw the provincial nomination certificate, the Officer's decision to deny the permanent residence application was not unreasonable. The Officer addressed the requirements of the program, noted that Ms. Potdar no longer met those requirements, and on this basis refused the application.

VII. Costs

[32] The respondent seeks costs in the amount of $1000 in this matter, arguing that: (1) this case should not have been brought before this Court; (2) the applicant's pleadings failed to raise key cases and issues with the result that the respondent had to do so; (3) the relief sought by the applicant has shifted over time and is not adequately supported in the pleadings; and (4) there are factual inaccuracies in the applicant's pleadings.

[33] The applicant submits this case is inappropriate for a costs award as there has been no bad faith.

[34] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR 93/22, provides that costs are not to be awarded in proceedings under the those rules unless the Court finds there are "special reasons" justifying an award of costs and so orders. The threshold to establish "special reasons" is high. Special reasons may arise where a party engages in misleading or abusive conduct, or unreasonably delays proceedings; however, each case must be addressed based on its particular circumstances (*Shekhtman v Canada (Citizenship and Immigration)*, 2018 FC 964 at paragraph 43).

[35] The respondent's concerns in this instance are not without merit. However, I am not convinced that the conduct relied upon satisfies the high threshold established in the jurisprudence to justify a costs award. No costs are awarded.

VIII. Conclusion

[36] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-3875-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No costs are awarded;

3. No question is certified; and

4. The respondent in the style of cause is amended to the Minister of Citizenship and Immigration.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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