Federal Court Cour fédérale

Date: 20240604

Docket: IMM-3035-23

Citation: 2024 FC 839

Ottawa, Ontario, June 4, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

YIN XU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Yin Xu [Applicant], is bringing an application for judicial review of a decision by a visa officer [Officer], dated January 13, 2023, denying his August 29, 2022 request to reopen his permanent residence [PR] application.

[2] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, I find that the Applicant has discharged his burden to demonstrate that the Officer's decision is unreasonable. For the reasons that follow, this application for judicial review is granted.

II. Facts

[3] The Applicant is a citizen of Hong Kong. He applied to the Ministry of Immigration, Francization, and Integration of Québec for a Québec Selection Certificate [CSQ] in the investor category. His application included his wife and daughter, and he was represented by Canadian counsel.

[4] Their application was approved in March 2016 and the Applicant and his family received their CSQs in June 2016. They subsequently applied for a PR visa, which was approved in October 2020.

[5] On December 9, 2020, the Applicant and his family were issued their Confirmation of Permanent Residence [COPR] and immigrant visas, which were valid until April 14, 2021. However, due to the travel restrictions instated in response to the COVID-19 pandemic, the Applicant and his family were not able to enter Canada and "land" as PR before the expiry of their immigrant visa.

[6] On August 10, 2021, the Respondent sent an outreach email to the Applicant's counsel asking him to confirm, within seven days, the Applicant's intention to immigrate to Canada.

[7] The Global Case Management System [GCMS] entry dated August 12, 2021, indicates that this email was not delivered to the Applicant's counsel as it was sent to an inactive email address. The GCMS entry indicates the following:

> ***Expired CoPR Outreach (COVID-19)*** Push Notification email returned as Undelivered.
>
> A standardized e-mail notification was sent to the Primary Applicant as part of bulk outreach on 2021/08/10 and was subsequently returned as undelivered.

[8] On August 22, 2021, the Applicant's file was closed because he did not confirm his interest to immigrate to Canada within seven days, as required by the outreach email.

[9] The Applicant eventually noticed that some of his friends had received further instructions on their visa application and on April 2nd, 2022, using his personal email address, directly inquired with Immigration, Refugees and Citizenship Canada [IRCC] on the status of their application and the expired COPRs. On April 26, 2022, IRCC confirmed that their application was still in process, and that they were experiencing delays due to COVID-19. This communication from the IRCC appears to be inaccurate in light of the GCMS entries and the Respondent's position, which indicate that the application was deemed to be closed on August 22, 2021.

[10] On June 14, 2022, the Applicant's counsel emailed IRCC to confirm the Applicant's interest in immigrating to Canada and to request a reopening and reassessment of the PR application. This request was denied on the following day. The GCMS entry from June 15, 2022 states the following:

> Applicants were contacted via an Outreach message and asked to indicate if they were still interested in immigrating to Canada. No

> response received. Application remains closed. Applicants will need to re-apply should they wish to immigrate to Canada.

[11] On June 23, 2022, a Member of Parliament [MP] contacted IRCC on the Applicant's behalf to request a reconsideration of the decision to close the PR application. IRCC denied this request on June 29, 2022. IRCC's reasons for denial in the GCMS notes acknowledge that the August 10, 2021 outreach email was undelivered, and they are unsure if it was sent to a different email address.

[12] On July 26, 2022, the MP contacted IRCC again to request the reopening of the Applicant's PR application. IRCC denied this request on the same day.

[13] On August 9, 2022, the MP once again contacted IRCC requesting a reconsideration of the PR application. IRCC denied this request on the following day.

[14] On August 23, 2022, the Applicant's counsel contacted IRCC to request the issuance of new medical examination letters for the Applicant and his family. This request was denied on the following day.

[15] On August 29, 2022, the Applicant's counsel submitted a letter as a formal reconsideration request to IRCC. This request was denied on the same day.

[16] On September 2, 2022, the Applicant's counsel resubmitted the formal request for reconsideration letter to IRCC. On January 13, 2023, IRCC held that the previous decision would not be changed, and denied the request for reconsideration.

III. Issue and standard of review

[17] The sole question before this Court is whether the Officer reasonably denied the Applicant's request for reconsideration of IRCC's decision to close his PR application.

[18] The standard of review in this case is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 39–44 [*Mason*]). To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99; *Mason* at para 59). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125–126; *Mason* at para 73). Reasonableness review is not a "rubber-stamping" exercise, it is a robust form of review (*Vavilov* at para 13; *Mason* at para 63). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

IV. Analysis

A. *Legal principles applicable to reconsiderations of administrative decisions*

[19] A non-adjudicative administrative decision maker retains discretion to reconsider an administrative decision, and is not barred to do so by the principle of *functus officio* (*Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at paras 3–4 [*Kurukkal*]). The exercise of their discretion is done according to the two following steps: "first, the [decision maker] must decide whether to 'open the door to a reconsideration'; and if the [decision maker] decides to re-

open the case, the second stage involves an actual reconsideration of the decision on its merits" (*AB v Canada (Citizenship and Immigration)*, 2021 FC 1206 at para 21 [*AB*], citing *Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 at para 55 [*Hussein*], *Gill v Canada (Citizenship and Immigration)*, 2018 FC 1202 at para 12).

[20] There is no general obligation to reconsider an administrative decision. The onus is on the Applicant to demonstrate that the circumstances warrant the exercise of discretion to reopen the decision, because it is in the "interest of justice" to do so or because of the "unusual circumstances" of the case (*Azizi v Canada (Citizenship and Immigration)*, 2022 FC 751 at para 25; *Ghaddar v Canada (Citizenship and Immigration)*, 2014 FC 727 at para 19; see also *AB* at para 22, citing *Hussein* at para 57). In assessing whether the exercise of discretion to reopen a decision is appropriate, the decision maker must take into account all relevant circumstances of the matter (*Hussein* at para 54, citing *Kurukkal* at para 5).

[21] It is also important to note that the assessment of the reasonableness of a request for reconsideration cannot be done in the abstract, without also looking at the original decision underlying the reconsideration request (*Ali v Canada (Citizenship and Immigration)*, 2022 FC 1638 at para 17, citing *Kaur v Canada (Citizenship and Immigration)*, 2015 FC 674 at para 36 [*Kaur*]).

B. *The Officer's refusal to reconsider the decision is unreasonable*

[22] The Respondent submits that the Officer did not commit an error by refusing to reconsider the refusal to reopen the Applicant's PR application, because the Officer had no obligation to do

so. The Officer has the duty to use their discretion in deciding to reopen a decision. In this case, the Officer assessed the entire file and because no new information was provided in the latest request for reconsideration, the Officer decided not to exercise their discretion to reopen the PR application.

[23] The Respondent also submits that the Officer's decision to not reopen the Applicant's PR application was reasonable because the Applicant had received all communications sent to the email on file without any issues until the finalization of the PR application in December 2020. Moreover, the Respondent submits that the error lies with the Applicant, who had a duty to submit a new "IMM-5476 – Use of Representative" form to inform IRCC that their representative's contact information had changed, and failed to do so.

[24] In my view, the Officer erred in their evaluation on whether to exercise their discretion, because they failed to take into account all the relevant circumstances before them, as they were obligated to do (*Kurukkal* at para 5; *Kaur* at para 43). The Officer simply noted that no new evidence was provided in the reconsideration request, and therefore dismissed it.

[25] However, to bear the hallmarks of reasonableness, the decision refusing to exercise the Officer's discretion to reopen the Applicant's PR application should have considered all the relevant circumstances in the case, most notably the following:

A. The fact that the Applicant's PR application was already granted, and the Applicant and his family would have already landed in Canada had it not been for the COVID-19 restrictions;

B. Given that a positive decision was already reached in their application, all that was needed from them upon reconsideration was a new medical assessment;

C. The evidence, including the Respondent's GCMS entries dated August 12, 2021 and June 29, 2022, and the IRCC Officer's affidavit, clearly and unequivocally indicate that the letter inquiring on the Applicant's ongoing interest in immigrating to Canada was not delivered to the Applicant's counsel;

D. The Officer, being aware that the Applicant's counsel did not receive the letter of ongoing interest, should also have been aware that the Applicant's home and email addresses, as well as his telephone number were on file, and that at no time IRCC attempted to communicate with the Applicant directly;

E. The Respondent bears the risk involved in a failure of communication, and in this matter, the evidence demonstrates that, on balance, the Respondent knew that communication had failed (*Patel v Canada (Citizenship and Immigration)*, 2014 FC 856 at para 16; *Abboud v Canada (Citizenship and Immigration)*, 2010 FC 876 at para 15 [*Abboud*]); and

F. The severe consequences on the Applicant and his family mean that the Officer's decision must reflect those stakes and be sufficiently reasoned (*Mason* at para 76, citing *Vavilov* at paras 133–135; *Abboud* at para 19).

[26] None of these important circumstances were carefully considered by the Officer in the most recent refusal, or anywhere in the GCMS entries. It was not sufficient for the Officer to state that

the file had been reviewed and that the refusals to reconsider stood; the Officer's decision to not exercise their discretion must actually grapple with the circumstances of the case (*Kurukkal* at para 5; *Mason* at para 74).

[27] The Respondent also maintains that IRCC did not commit an error by solely reaching out to the Applicant's representative. I agree in part. It is not disputed that the Respondent was entitled to email only the Applicant's representative. However, upon finding out that the email was not delivered, IRCC ought to have reached out to the Applicant directly considering that IRCC had his contact information. In any event, this argument does not justify the fact that the Respondent had clear evidence that the letter did not reach the Applicant's counsel, yet took no steps to rectify this communication issue, and subsequently refused every request for reconsideration without properly assessing the Applicant's file (*Abboud* at paras 16–19).

[28] In addition, the Respondent submits that the Applicant is inappropriately challenging the reasonableness of IRCC's decision to close his PR application, rather than the January 13, 2023, refusal to reopen the PR application, which is the decision that is subject to judicial review in this matter. I cannot agree. In my view, the Applicant is properly challenging the Officer's decision to refuse to exercise their discretion to reopen the PR application, which, as analyzed above, was unreasonable because the Officer did not consider all the circumstances in the file when assessing whether the exercise of discretion was warranted.

[29] Furthermore, the Respondent argues that the Applicant ought to have sought judicial review of the decision to close his PR application or the initial refusal to reconsider the decision,

and should not have submitted multiple requests for reconsideration. I do not share this view. The Applicant took the measures he thought necessary to avoid bringing this matter before this Court. In considering the facts of this case, it would be inappropriate to penalize the Applicant for trying to reach a reasonable settlement before pursuing the option of bringing an application for judicial review. In fact, those multiple requests for reconsideration should have alerted the Respondent to the clear communication issue. The requests effectively gave the Respondent ample opportunity to meaningfully review the record and inevitably realize that the record had not been thoroughly assessed.

[30] A reviewing Court must take a "reasons first" approach in conducting a reasonableness review; this approach requires particular attention to the decision maker's justification in their reasons (*Mason* at para 8, citing *Vavilov* at paras 84–85). In this case, the Officer completely omitted to analyze the Applicant's key evidence in response to their failure to respond to IRCC's letter signalling interest to immigrate in the prescribed time. In assessing whether to exercise their discretion to reconsider the Applicant's refusal decision, it was incumbent on the Officer to assess the entirety of the evidence and circumstances. Absent such analysis by the Officer, the Court cannot "substitute its own reasons in order to buttress the administrative decision" (*Vavilov* at para 96). This omission from the Officer's analysis causes this court to lose confidence in the administrative decision-making process, and for this reason, the Decision is unreasonable and must be sent back for redetermination.

V. Costs

[31] The Applicant seeks costs in this matter. Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, states that this Court can only award costs to a party for "special reasons." The threshold to establish "special reasons" is high, and is typically met when a party acts "in a manner that may be characterized as unfair, oppressive, improper or actuated in bad faith" (*Diakité v Canada (Immigration, Refugees and Citizenship)*, 2024 FC 170 at para 58; *Dhaliwal v Canada (Citizenship and Immigration)*, 2011 FC 201 at para 31; *Ibrahim v Canada (Citizenship and Immigration)*, 2007 FC 1342 at para 8).

[32] I am not persuaded that the Respondent's actions in this matter have satisfied this high threshold. While the officer failed to properly exercise their discretion, that error does not constitute improper conduct. Moreover, the evidence in this case demonstrates that the Applicant, and his counsel, also failed to ensure that counsel's email address was properly updated with IRCC through the filing of the "IMM-5476 – Use of Representative" form. Consequently, no basis has been established to award such costs.

VI. Conclusion

[33] The Officer's decision does not bear the hallmarks of a reasonableness. It is not transparent, intelligible and justified in light of the relevant legal and factual constraints (*Vavilov* at para 99; *Mason* at para 59).

[34] The Applicant’s application for judicial review is granted and the matter remitted for re-determination by a different officer in accordance with these reasons.

[35] The parties have not proposed any question for certification and I agree that none arise in the circumstances.

JUDGMENT in IMM-3035-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, the Decision is set aside and the matter is remitted to a different officer for redetermination in accordance with the Court's reasons.
2. There is no question for certification.
3. No costs are awarded.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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