Date: 20070828

Docket: IMM-694-07

Citation: 2007 FC 855

Ottawa, Ontario, August 28, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

LAI CHING-CHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a visa officer's decision dated December 18, 2006 refusing the applicant's request for an extension of time to file additional information in support of his application for permanent residence. The applicant sought the extension to address the visa officer's concern that his son's health might reasonably be expected to cause excessive demand on health or social services.

FACTS

The application process

[2] The applicant, a resident of Taiwan, is the General Manager of Ally Star Technologies Inc. in Taiwan. On August 1, 2005, the applicant applied for permanent resident status for himself and his family under the Prince Edward Island Provincial Nominee Program under the Economic Class. The applicant declared that he had $2,649,533 in unencumbered transferable and available funds. In 2005, as part of the application process, the applicant traveled to Canada on a visitor visa for a mandatory interview in Prince Edward Island. On December 13, 2005, the applicant was selected as a Prince Edward Island Nominee under the Economic Class subject to being cleared by a visa officer for criminal and medical admissibility.

[3] The applicant and his family members underwent medical examinations as part of their application. An examination on March 11, 2006 found that the applicant's 17-year-old son suffered from moderate mental retardation.

[4] On August 28, 2006 Dr. K. Kennedy of the respondent's Regional Medical Office wrote a "Medical Notification" that the applicant's son had "mental retardation – moderate" and that his integration into the Canadian community would place an excessive demand on Canadian services and resources. For this reason, the applicant's son was inadmissible under paragraph 38(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

The fairness letter

[5] On September 18, 2006, the visa officer notified the applicant that the assessment of his application was nearing completion, but that it appeared the applicant "may not meet the requirements for immigration to Canada" on the basis that his son, Lai Chun-Chieh, was a person whose health may reasonably be expected to cause excessive demand on health or social services pursuant to subsection 38(1) of the IRPA. Before making a final decision, however, the visa officer invited the applicant to file additional information relating to his son's medical condition, diagnosis, or to the issue of excessive demand. The visa officer set a 68 day deadline, by November 25, 2006, for submitting this information. This letter is a procedural "fairness" letter – it provides the applicant with a fair opportunity of knowing and responding to the visa officer's concerns.

The request for an extension

[6] On December 2, 2006 the applicant's immigration consultant in Taiwan wrote to the visa office in Taiwan requesting an extension of time to respond to the September 18, 2006 letter. The consultant acknowledged the deadline of November 25, 2006, but explained that gathering this information takes time. This letter was written seven days after the deadline of November 25.

[7] Then, on December 13, 2006, 18 days after the visa officer's deadline, the applicant's lawyer in Halifax advised the visa officer that "we" are in the process of assembling materials relating to the issue of excessive demand. The lawyer stated that the applicant would be in a position to provide a written response with supporting documentation by January 22, 2007. No reasons were provided why the request was not made before the visa officer's deadline and no justification was provided why the applicant needed an additional 40 days to respond.

Decision under review

[8] On December 18, 2006, the visa officer refused the applicant's request for an extension stating:

> We do not grant extensions to the deadline in such instances. The client had over 60 days to make a submission.

On the same day, the visa officer sent the applicant notification that his application had been refused on the basis that his son was a person whose health condition might reasonably be expected to cause excessive demand on health or social services. The letter cited subsection 42(a) of the IRPA as authority for the decision, stating: "Your accompanying son is inadmissible to Canada. As a result, you are also inadmissible." Also included in the visa officer's refusal letter is the following statement:

> My letter of September 18, 2006 invited you to provide additional information or documents in response to the preliminary assessment which was included in that letter. You did not provide any information or documents in response to my letter by the deadline of November 25, 2006. Therefore, I have made my decision based on the information before me.

[9] It is the decision refusing an extension of time that is the subject of this application for judicial review.

THE LEGISLATION

[10] Sections 38 and 42 of the IRPA state:

Health grounds

38. (1) A foreign national is inadmissible on health grounds if their health condition

[…]

*(*c*)* might reasonably be expected to cause excessive demand on health or social services.

Motifs sanitaires

38. (1) Emporte, sauf pour le résident permanent, interdiction de territoire pour motifs sanitaires l'état de santé de l'étranger constituant vraisemblablement un danger pour la santé ou la sécurité publiques ou risquant d'entraîner un fardeau excessif pour les services sociaux ou de santé.

[…]

Inadmissible family member

42. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if

*(*a*)* their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or

*(*b*)* they are an accompanying family member of an inadmissible person.

Inadmissibilité familiale

42. Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :

a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;

b) accompagner, pour un membre de sa famille, un interdit de territoire.

ISSUE

[11] The issue raised on this application is whether the visa officer failed to observe the principles of procedural fairness and natural justice by refusing the applicant's request for an extension of time without any consideration of the circumstances of the case.

STANDARD OF REVIEW

[12] The issue before this Court is whether the visa officer, in rendering his decision, failed to observe principles of procedural fairness and natural justice. In situations where a court is assessing such allegations, it is not necessary to engage in a pragmatic and functional analysis of the appropriate standard of review: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539. In such instances, the court must instead "examine the specific circumstances of the case and determine whether the [decision maker] in question adhered to the rules of natural justice and procedural fairness": *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] 3 F.C.R. 168 at paragraph 15. The standard of review is correctness. In the event that a breach of natural justice or procedural fairness is found, no deference is due and the decision will be set aside: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

ANALYSIS

Issue: **Did the visa officer breach the principles of procedural fairness and natural justice by refusing the applicant's request for an extension of time?**

Excessive demand and *Hilewitz*

[13] The October 21, 2005 Supreme Court of Canada judgment in *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706 decided that a visa officer had to consider an applicant's ability and intention to pay for social services. In considering a similar provision in the former *Immigration Act*, R.S.C. 1985, c. I-2, Madam Justice Abella, writing for the majority, made the following comments at paragraphs 54-55:

> ¶ 54 Section 19(1)(*a*)(ii) calls for an assessment of whether an applicant's health would cause or might reasonably be expected to cause excessive demands on Canada's social services. The term "excessive demands" is inherently evaluative and comparative. Without consideration of an applicant's ability and intention to pay for social services, it is impossible to determine realistically what "demands" will be made on Ontario's social services. The wording of the provision shows that medical officers must assess likely *demands* on social services, not mere eligibility for them.
>
> ¶ 55 To do so, the medical officers must necessarily take into account both medical and non-medical factors, such as the availability, scarcity or cost of publicly funded services, along with the willingness and ability of the applicant or his or her family to pay for the services.
>
> [Emphasis added.]

Madam Justice Abella continued at paragraph 56, outlining that individualized assessments are necessary since it is impossible "determine the 'nature', 'severity' or probable 'duration' of health impairment without doing so in relation to a given individual."

[14] While the decision in *Hilewitz* specifically addressed the ability to pay within the context of business class immigrants, I stated in *Airapetyan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 42, [2007] F.C.J. No. 66 (QL) that one's ability or intention to pay for social services should not be restricted to applicants in business immigration categories:

> ¶ 20 While applicants in business immigration categories will more readily be able to demonstrate their ability to pay for a family member's expenses, it does not follow that applicants in other categories will be unable to do so. This is particularly so given the diverse range of health conditions which may give rise to an individual's demand on health or social services above the Canadian per capita average.

[15] In this case, the visa officer knew that the applicant has unencumbered transferable and available funds totalling $2,649,533. Madam Justice Abella held at paragraph 40 of *Hilewitz* that the visa officer and the medical officer cannot ignore the very assets that qualify the applicant for admission to Canada when determining the admissibility of his disabled son.

The duty of fairness with respect to extensions

[16] The content of the duty of fairness is a question of law and will vary depending on the facts of each case: *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195. In this case, the applicant argues that the visa officer breached the principles of procedural fairness and natural justice by categorically refusing the request for an extension of time. The applicant contends that the requested extension of five weeks was reasonable considering the research and careful assessment needed in order to make educational and vocational arrangements that would best meet his son's needs. As such, the applicant submits that, in this instance, procedural fairness requires that he be given a reasonable amount of time to respond to the

immigration officer's request for more information. Moreover, the visa officer had not made any decision or taken any action on the file before the extension was requested.

[17] In support of this position, the applicant relies on the 2000 decision of this Court in *Gakar v. Canada (Minister of Citizenship and Immigration)* (2000), 189 F.T.R. 306. In that case, Mr. Justice Teitelbaum allowed an application for judicial review on the basis that the applicant's rights to procedural fairness were breached when the visa officer refused his request for a 30-day extension to file the documents requested. In his decision, Mr. Justice Teitelbaum states at paragraphs 36 and 39:

> ¶ 36 I could well understand a refusal for an extension of time if the request was for 90 or 180 days. I cannot understand and do not understand a refusal for a 30 day extension of time when it is the first request for an extension of time and it has no adverse effect on the respondent….
>
> ¶ 39 As I have said, and I repeat, a visa officer must be understanding and flexible in deciding on a request for an extension of time. To simply say no is a breach of natural justice….

[18] What the applicant does not address, however, are the factual differences between this situation and the one arising in *Gakar*. First, in *Gakar* the applicant was only given a 30-day window to collect the requested information. In this case, the applicant was given a total of 68 days to address the visa officer's invitation for additional information.

[19] Second, in *Gakar* the applicant requested an extension within the pre-established 30-day window. In this case, the applicant's request for additional time did not come until December 2,

2006 and December 13, 2006, *i.e.*, after the visa officer's deadline and almost three months after his September 18, 2006 fairness letter inviting further submissions.

[20] Finally, in *Gakar* the applicant provided reasons as to why he was unable to satisfy the request within the pre-determined time frame. Specifically, the applicant's letter made clear that he was "unable to gather the necessary documents within the 30 day window." In this case, the applicant's counsel provided no reasons as to why the extension was sought, nor any reasons why the applicant could not satisfy the request within the original 68-day window.

[21] Mr. Justice Blanchard makes clear in *Khwaja v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 522, [2006] F.C.J. No. 703 (QL) at paragraph 17 that the duty of fairness "requires that an applicant be given notice of the particular concerns of the visa officer and be granted a reasonable opportunity to respond by way of producing evidence to refute those concerns." In my opinion, the applicant in the case at bar was given a reasonable opportunity to respond to the concerns of the visa officer. The fact that no contact was made prior to the November 25, 2005 deadline regarding the nature and reasons for the extension must fall on the shoulders of the applicant. As Mr. Justice Muldoon stated in *Prasad v. Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm. L.R. (2d) 91 (F.C.T.D.) at paragraph 7:

> ¶ 7 The onus is on the applicant to satisfy the visa officer fully of all the positive ingredients in the applicant's application. It is not for the visa officer to wait and to offer the applicant a second, or several opportunities to satisfy the visa officer on necessary points which the applicant may have overlooked.

Reasonable time frames must be respected

[22] The Court takes judicial notice of the huge volume of applications for permanent residence required to be processed by visa officers at overseas posts, and the backlog of applications waiting to be processed. In the case at bar, the visa officer gave the applicant 68 days to file further information. After hearing no response within those 68 days, the visa officer quite properly proceeded to make the decision. When the applicant's lawyer requested an extension on December 13, 2006 until January 22, 2007, this was 18 days past the 68-day deadline of November 25, 2006. The applicant gave no reason for failing to request the extension within the 68-day time frame. The proper procedure would have been to make the request for an extension before November 25, 2006 and to set out the reasons why the extension of time was necessary.

[23] The visa offices around the world cannot function in an orderly manner, with the huge volume of applications that they process, if the parties do not comply with reasonable timeframes.

Fettering of discretion

[24] From the record before the Court, it is clear that the visa officer did not consider the request for an extension made by the immigration consultant in his letter dated December 2, 2006. There is no record of this letter being received or considered in the CAIPS notes. The visa officer only considered and responded to the letter from the applicant's Halifax lawyer dated December 13, 2006. The visa officer responded:

> We do not grant extensions to the deadline in such instances. The client had over 60 days to make a submission.

This categorical statement amounts to a fettering of discretion by the visa officer. The visa officer has a duty to consider the request for the extension before refusing it. Instead, he writes that no extensions are granted. This December 18, 2006 letter is inconsistent with the visa officer's affidavit sworn for the purpose of this hearing on June 14, 2007. In that affidavit at paragraph 7 the visa officer writes:

> After reviewing the file, I decided not to grant the requested extension. In making this decision I was of the opinion that the procedural fairness requirements for medical inadmissibility refusals had been met and the policy guidelines had been followed. At that point it had been three months since September 18, 2006 letter informing the Applicant of the pending refusal of his application due to the medical inadmissibility of his son.

I find this after the fact explanation not evidenced in the CAIPS notes and self-serving.

[25] The visa officer fettered his discretion by categorically stating he never grants extensions of time to file additional information. If the officer had considered the request for an extension, exercised his discretion, and then concluded that no extension will be granted for the following reason, then this decision would be legal. But by fettering his discretion, the visa officer is refusing to consider exercising his discretion, which is illegal. See *Yhap v. Canada (Minister of Employment and Immigration)*, [1990] 1 F.C. 722 (T.D.) per Jerome A.C.J. at 739:

> The importance of flexibility in the adoption of policy or guidelines as a means of structuring discretion is highlighted by D.P. Jones and A.S. de Villars in *Principles of Administrative Law*, where the difference between "general" and "inflexible" policy is described at page 137:
>
> > . . . the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be

> looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his discretion in a particular way may illegally limit the ambit of his power. A delegate who thus fetters his discretion commits a jurisdictional error which is capable of judicial review….
>
> [Emphasis added.]

The letter requesting the extension was deficient and presumptuous

[26] The letter from the Halifax lawyer requesting the extension was disrespectful in that it did not provide an explanation for the delay in responding to the medical fairness letter dated September 18, 2006, did not indicate the information that was being gathered to respond to the concerns of the visa officer, and presumptively advised the visa officer that the Halifax lawyer would be providing the information by January 22, 2007, a deadline that the Halifax lawyer unilaterally imposed on the visa officer.

Conclusion

[27] After considering the record I find that:

1. the visa officer did not consider the request for an extension made by the immigration consultant dated December 2, 2006;

2. the visa officer categorically responded to the Halifax lawyer on December 18, 2006 that he never grants extensions to the deadline and thereby illegally fettered his discretion and breached the rules of natural justice; and

3. the letter from the Halifax lawyer dated December 13, 2006 was deficient in failing to provide an explanation for requesting the extension within the deadline, deficient in providing an explanation as to the materials being gathered in response to the concerns of the visa officer, and presumptuous in unilaterally imposing a new deadline of January 22, 2007.

[28] The applicant should not be penalized because of the deficient letters written by his immigration consultant and his Halifax lawyer. I am satisfied that, notwithstanding the Court's decision in this case, the applicant will have the right to reapply for permanent residence and to present evidence that his assets of $2.6 million means that the medical condition of his son would not reasonably be expected to cause excessive demand on Canadian health or social services. It would be unjust to delay the processing of this case. Accordingly, this application for judicial review will be allowed, the decision of the visa officer not to grant an extension to the deadline set aside, and the matter referred to another visa officer for redetermination.

CERTIFIED QUESTION

[29] The respondent proposed a question for certification with respect to whether the Supreme Court of Canada decision in *Hilewitz* applies to persons such as the applicant as a Provincial Nominee under the Economic Class. I responded that the answer to this proposed certified question is obvious in view of the Supreme Court of Canada's finding at paragraph 40 in *Hilewitz* per Madam Justice Abella:

> ¶ 40 It seems to me somewhat incongruous to interpret the legislation in such a way that the very assets that qualify investors and self-employed individuals for admission to Canada can simultaneously be ignored in determining the admissibility of their disabled children …"

This rationale applies to a person chosen by Prince Edward Island as a member of their "Economic Class." For this reason, I advised the respondent that I would not be certifying such a question.

[30] Neither party proposed any other question for certification. The Court finds that this case does not raise any question of serious importance that should be certified for an appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is allowed;
2. the visa officer's decision dated December 18, 2006 is set aside;
3. the applicant has 60 days to update and present information to the visa section in Taiwan; and
4. the matter is referred to another visa officer for redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-694-07
STYLE OF CAUSE:	**LAI CHING-CHU and THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	August 23, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Kelen J.
DATED:	August 28, 2007

APPEARANCES:

Roderick (Rory) H. Rogers	FOR APPLICANT
Patricia MacPhee	FOR RESPONDENT

SOLICITORS OF RECORD:

Stewart McKelvey Halifax, Nova Scotia	FOR APPLICANT
John Sims, Q.C. Deputy Attorney General of Canada Halifax, Nova Scotia	FOR RESPONDENT