Date: 20090318

Docket: IMM-3074-08

Citation: 2009 FC 276

Ottawa, Ontario, this 18th day of March 2009

Present: The Honourable Orville Frenette

BETWEEN:

MARWAN PHARAON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of the decision of an immigration officer (the "officer") at the High Commission of Canada in London, England, dated May 7, 2008, rejecting the applicant's application for a permanent resident visa as a member of the Quebec economic skilled worker class.

The facts

[2] The applicant is a 65-year-old citizen of Saudi Arabia who resides in Riyadh with his wife and two sons.

[3] In 1971, he graduated from Riyadh University, obtaining a bachelor's degree in engineering and political science. For more than 30 years he co-owned and managed a company, Saif International Corporation, in Saudi Arabia.

[4] In 2002, the applicant applied for selection as a member of the Quebec Entrepreneur Class. He was accepted and was given a Quebec selection certificate ("QSC").

[5] In August 2005, he submitted an application for permanent residence to the High Commission of Canada in London, England, for himself, his wife and younger son. His elder son, Rafiq, had been issued his own separate QSC. The applicant was then represented by an immigration consultant whose address in Pierrefonds, Quebec, was supplied as the applicant's mailing address.

[6] Between 2005 and May 14, 2008 a long series of exchanges took place between the applicant or his representative and the Canadian immigration authorities.

[7] On February 28, 2007, the applicant wrote to the Canadian High Commission advising it that he had a new representative and asking to change his mailing address as indicated in the letter.

[8] On April 26, May 17, June 18, July 25, August 10, and September 8, 2007, the applicant or his representative sent letters to the Canadian High Commission in London but got no reply.

[9] On October 10, 2007, the applicant noticed that his mailing address was incorrectly listed on the Client Application Status website. He wrote to the Canadian High Commission about the error and asked that any future correspondence be mailed to the address of his representative in Pierrefonds, Quebec.

[10] On October 24, 2007, the applicant's representative received medical reports to be completed by the applicant and his family, and instructions to undergo medical examinations and to pay the Right of Permanent Residence Fee ("RPRF") for his sons.

[11] On February 21, 2008, the Canadian High Commission responded to the applicant's e-mail of February 14 inquiring about the status of the file. The response requested a number of outstanding items and documents required to complete the file.

[12] On March 11, 2008, the applicant's representative received a letter, dated March 3, requesting the same items listed in the letter of October 24, 2007 and giving the applicant a 60-day deadline to submit this material. A letter was enclosed enabling initiation of the process to obtain a police certificate from the Saudi Arabian police.

[13] On March 12, 2008, the applicant's representative e-mailed the Canadian High Commission advising that 60 days was insufficient to obtain the police certificate and requesting an extension of time.

[14] On April 22, 2008, the extension of time was refused and the applicant was informed that his file would be reviewed on May 6, 2008.

[15] On May 3, 2008, the applicant submitted some items but the police certificate was not included. A handwritten note on the letter by the applicant advised that the certificate would be sent by courier within ten days.

[16] In a letter dated May 7, 2008 the officer informed the applicant that he did not meet the requirements for immigration to Canada.

[17] On May 14, 2008, the applicant received an e-mail from the officer advising him that his additional documents were received by the High Commission on May 7, 2008 and that, even though his application had already been refused and a letter had been sent advising him of the decision, the new documents had been reviewed by the officer. However, the information provided was still incomplete and insufficient to justify re-opening the file.

The decision under review

[18] In his letter of May 7, 2008 informing the applicant that he did not meet the requirements for immigration to Canada, the immigration officer noted that a letter had been sent to the applicant on

October 22, 2007 asking him to produce the following evidence within 60 days, or his application would be assessed based on the information already before the officer:

- updated IMM0008 and all relevant Schedules
- Immigrant Summary forms
- RPRF for Rafiq
- Proof that Fahad still meets the definition of a dependent
- Updated KSA police certificates

[19] The officer further noted that, although a second letter was sent to the applicant on March 3, 2008 reminding him to provide the requested information within the specified period, the requested information was never received.

[20] In the Computer Assisted Immigration Processing System notes, an entry by the officer also dated May 7th reads as follows:

> REVIEW.
> CSQs NOW EXPIRED.
> DESPITE MULTIPLE RQSTs GOING BACK OVER 1 YR,
> UPDATED INFO STILL NOT PROVIDED.
> APPL'N REFUSED.

Relevant legislation

[21] The following provisions of the Act are relevant to the present review:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. […]	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi. […]

16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

(2) In the case of a foreign national,

(*a*) the relevant evidence referred to in subsection (1) includes photographic and fingerprint evidence; and

(*b*) the foreign national must submit to a medical examination on request.

[…]

16. (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

(2) S'agissant de l'étranger, les éléments de preuve pertinents visent notamment la photographie et la dactyloscopie et il est tenu de se soumettre, sur demande, à une visite médicale.

[…]

[22] The following provision of the *Federal Court Immigration and Refugee Protection Rules*, SOR/2002-232, is also pertinent:

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

22. Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

The issues

[23] The applicant raises the following issues:

1. Did the officer make erroneous findings of fact with respect to the application that were patently unreasonable? Specifically, did the officer mistakenly determine that since April 2007 the Canadian High Commission had sent multiple requests for required information / documentation to the applicant?

2. Did the officer breach the principles of natural justice by providing the applicant with less than 60 days to obtain the Saudi Arabian

police clearance certificates when the officer knew or ought to have known that this was an insufficient amount of time?

3. Are there special reasons for the awarding of costs in favour of the applicant?

The standard of review

[24] Since the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of review for questions of fact or mixed fact and law is reasonableness *simpliciter*. For questions of law, the standard of review is correctness.

[25] Breaches of the rules of natural justice or procedural fairness are also subject to the standard of review of correctness (*Juste v. Minister of Citizenship and Immigration*, 2008 FC 670, at paragraphs 23 and 24; *Bielecki v. Minister of Citizenship and Immigration*, 2008 FC 442, at paragraph 28; *Hasan v. Minister of Citizenship and Immigration*, 2008 FC 1069, at paragraph 8).

[26] Decisions of a visa officer are subject to a standard of review of reasonableness (*Oladipo v. Minister of Citizenship and Immigration*, 2008 FC 366, at paragraph 23).

Analysis

1. Did the officer make erroneous findings of fact with respect to the application that were patently unreasonable? Specifically, did the officer mistakenly determine that since April 2007 the Canadian High Commission had sent multiple requests for required information / documentation to the applicant?

[27] The applicant claims that the Canadian High Commission committed errors as to his mailing address and prevented effective communication with that office until February 14, 2008, when he enquired about the status of his file.

[28] In its response, the Canadian High Commission pointed out the outstanding documents, including the Saudi Arabian police certificate.

[29] There is no debate on this point. It is only when the applicant's representative received the Canadian High Commission's letter dated March 3 on March 11, 2008, giving him a 60-day deadline to provide the materials, that a problem arose.

[30] The applicant's representative advised the Canadian High Commission that 60 days were insufficient to obtain the police clearance certificates with the translations, and requested an extension of time.

[31] A second extension of time request was sent on April 9 but it was only on April 22, 2008 that the extension of time was refused and it was indicated that the file would be reviewed on May 6, 2008.

[32] The applicant argues that it is clear from both the refusal letter of May 7, 2008 and the e-mail of May 14, 2008, that the officer, in rendering his decision, believed the applicant had ample time to submit all the required documents. The respondent claims the applicant had enough time (60 days) from March 3, 2008 to provide the materials.

[33] Evidently, this is a mistake of fact since the applicant only received the letter on March 11, 2008, which would have given the applicant until May 11, 2008 (60 days) to produce the materials. However, by then the negative decision had already been rendered on May 7, 2008.

[34] This mistake of fact was caused by the officer who mistakenly believed that the applicant had failed to respond to repeated demands and gave him less than the 60 days to comply before the decision was rendered. This mistake of fact was crucial in the officer's decision.

[35] This mistake was the origin of an unreasonable conclusion which cannot fall within the range of acceptable outcomes from the facts as elaborated in *Dunsmuir*, *supra*. It clearly constitutes a reviewable error.

2. Did the officer breach the principles of natural justice by providing the applicant with less than 60 days to obtain the Saudi Arabian police clearance certificates when the officer knew or ought to have known that this was an insufficient amount of time?

[36] The applicant submits that the 60-day deadline to obtain the police clearance certificate was not only insufficient to obtain, translate and submit the materials but was also in effect, less than 60 days as pointed out previously.

[37] The respondent answers that no evidence was adduced to show the time really required to produce the documents which were the applicant's responsibility to produce.

[38] The granting of an extension of time is discretionary and the seekers must give reasons justifying the delay required. Some cases have interpreted this condition stricly: *Tantash v. Canada (M.C.I.)*, [2008] F.C.J. No. 729 (QL). Other cases have adopted a less restrictive interpretation, explaining that a visa officer must be flexible and understanding on a request for an extension of time: *Gakar v. Canada (M.C.I.)*, [2000] F.C.J. No. 661 (QL), 189 F.T.R. 306; *Ching-Chu v. Canada (M.C.I.)*, [2007] F.C.J. No. 1117 (QL).

[39] The applicant claims that the officer was not only too rigid in deciding the request, but his decision to grant only 60 days had not expired when he rendered his decision on May 7. In my view, this constitutes a reviewable error.

3. Are there special reasons for the awarding of costs in favour of the applicant?

[40] The applicant seeks costs against the respondent in this case, alleging that the respondent's negligence and error in registering an erroneous mailing address caused him unnecessary time and expense. The respondent contests this demand arguing that pursuant to rule 22 of the *Federal Courts Immigration and Refugee Protection Rules* no costs shall be awarded unless the Court is satisfied there are special reasons to do so.

[41] Rule 22 sets out an exceptional provision which must be strictly interpreted unless special reasons are established and the costs are related to the litigation before the Court (*Ratnasingam v. Minister of Public Security and Emergency Preparedness*, 2007 FC 1096, at paragraph 34).

[42] In the present case, the applicant has not established special reasons to award costs since the officer's registered information was erroneous and his refusal of extension of time was not made with malicious intent. Therefore, no costs will be awarded.

Conclusion

[43] The application for judicial review will be granted.

JUDGMENT

THE COURT ORDERS:

The application for judicial review is granted.

The decision rendered by an immigration officer at the High Commission of Canada in London, England, dated May 7, 2008, rejecting the applicant's application for a permanent resident visa as a member of the Quebec economic skilled worker class, is quashed and the matter is sent back to a different immigration officer for a new determination.

No costs will be awarded.

There are no questions for certification.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Mr. Dan Miller	FOR THE APPLICANT
Ms. Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dan Miller Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT