Federal Court  Cour fédérale

Date: 20110608

Docket: IMM-5443-10

Citation: 2011 FC 658

Ottawa, Ontario, June 8, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ROBERT KIKESHIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Robert Kikeshian challenging a decision by a visa officer dated July 19, 2010 by which his application for a permanent resident visa as a member of the Entrepreneur Class was refused. Mr. Kikeshian asserts that the visa officer breached the duty of fairness by failing to adequately consult with the Province of Saskatchewan under ss 87(3) of the Immigration and Refugee Protection Regulations, SOR/2002-227 (IRPA Regulations) before rejecting his application. I have annexed the relevant regulatory provisions to the end of these reasons.

Background

[2] Mr. Kikeshian is a 77 year old citizen of Iran. Interested in investing his money in Canada where his remaining extended family now resides, Mr. Kikeshian visited Canada on a number of occasions to investigate possible opportunities. In 2008 he invested $500,000.00 in Saskatchewan grain and pulse exporting company, Diefenbaker Seed Processing Ltd. In return he received 14% of the common shares of Diefenbaker and was appointed the company's Acting Manager, Overseas Sales.

[3] On October 7, 2008 Mr. Kikeshian was nominated by the Province of Saskatchewan under the Saskatchewan Immigrant Nominee Program. A Certificate of Nomination was issued and forwarded to the Canadian embassy in Damascus, Syria for consideration along with Mr. Kikeshian's application for permanent resident status. The Province advised the embassy that Mr. Kikeshian had been nominated under the Entrepreneur Category on the basis that he would contribute an economic benefit to one of the key sections of the Saskatchewan economy. The Province also indicated that it would assist Mr. Kikeshian to successfully establish residency in Saskatchewan.

[4] On June 14, 2010 a visa officer in Damascus wrote to Mr. Kikeshian expressing a concern about his intention to reside in Saskatchewan. The letter framed the issue as follows:

> This refers to your application for permanent resident visas to Canada.
>
> Section 87(2)(b) of the Immigration and Refugee Protection Regulations stipulate:

> 87(2) a foreign national is a member of the provincial nominee class if:
>
> (b) They intend to reside in the province that has nominated them.
>
> I have carefully reviewed your application and the evidence on file and I am not satisfied that you intend to reside in the province that nominated you, namely Saskatchewan. I have come to that conclusion based on the following:
>
> - You have been in Canada since 2008 and have not yet resided in Saskatchewan. You stated in a letter dated May 31, 2010 that upon your arrival in Canada in May 2008 you have been living with your niece at Skymark Drive in Toronto, Ontario
> - Your remaining family members live in Ontario. You stated in a letter dated May 31, 2010 that all of your family members are in Canada, namely your niece Janet Frendian and your sister Rosa Kikeshian. Your niece and sister currently live in the province of Ontario.
> - MP Gurbax Singh has made several inquiries into your immigration file. I find it irregular that an Ontario MP would be interested in your immigration to the province of Saskatchewan. [1]
>
> [Emphasis added]

[5] Mr. Kikeshian responded through his counsel to the visa officer by a letter dated July 12, 2010. Included with that response was an affidavit sworn by Mr. Kikeshian which answered the visa officer's residency concern in the following way:

> 4. My intention has always been to relocate to Saskatchewan once my permanent residency has been issued. As will be seen from the Affidavit filed by Ms. Frendian at the early stages of my application, a copy of which should be included with the application forwarded to you by the SINP (please advise if you do not have a copy), my plan to settle in Saskatchewan has always been depended on Ms. Frendian

[1] The same concern is set out in the visa officer's computer notes which state: "I have concerns with R87(2)(b), PA's intention to reside in the Province that nominated him. PF letter to be sent".

> accompanying me to Saskatchewan. Indeed, the premise of our application to the SINP, Entrepreneur Category was that Ms. Frendian would assist me in fulfilling my duties as overseas sales manager for Diefenbaker Seed Processors Ltd., due to my limited English ability. I could not function effectively without her, due to my limited communication skills in English at present — although I have been learning some English.
>
> …
>
> 6. While I did finally obtain a work permit in the spring of 2009, I was restricted in my ability to relocate to Saskatchewan due to my dependence on Ms. Frendian's assistance. Ms. Frendian has a good job working for an MP, Mr. Gurbax Malhi, whose riding is located in the Toronto area. For Ms. Frendian to give up her job in order to relocate to Saskatchewan, particularly in light of the reasonable warnings given by the Province of Saskatchewan, after having been cautioned by the Province of Saskatchewan not to make any firm commitments before obtaining permanent residency status, would have been very risky. The timing of my decision-making regarding relocation to Saskatchewan has therefore depended on the issuance of the permanent residency status.

[6] The record indicates that while the visa officer did not directly inform the Province of Saskatchewan of his concerns, Mr. Kikeshian passed along the visa officer's fairness letter of June 14, 2010. On July 12, 2010 Ms. Roberta Cross wrote to the visa officer on behalf of the Province expressing its continued support for Mr. Kikeshian's application in the following way:

> I am are [sic] writing in response to your letter dated June 14, 2010 to Mr. Robert Kikeshian which he shared with us in a follow-up interview he attended at our offices on July 8, 2010.
>
> We are very disappointed that the issue of intent would be raised at this juncture for an applicant that has complied with all our application procedures, was nominated by us, has invested significant capital in a successful Saskatchewan company and assumed an active management role in that firm since receiving a TWP. A copy of recent corporate minutes attesting to his business activities are attached for your reference. We are led to believe that

he has also met all other federal statutory requirements. I wish to comment on the specific issues you raised in your letter to the applicant.

At the time of his application to our SINP Entrepreneur & Farm Category, we concluded that given his limited English skills. Mr. Kikeshian would be dependent upon the assistance of his niece, Ms. Janet Frendian to implement his business plans. It was for this reason that we requested and received a sworn affidavit from her that she would also assume residence in our province, following issuance of a PR visa for the applicant. Copy is attached. In light of the very lengthy processing times they have endured, it is understandable that she has not vacated her employment in Ontario to date.

You may also be aware that our program requires successful applicants to make a $75,000 deposit into a trust account which is only returned if permanent residence is assumed and an active business established in Saskatchewan. Mr. Kikeshian made his deposit on Sept. 25, 2008.

We explain to all our applicants at time of interview that we are strongly committed to program integrity and they can expect fair and consistent consideration of their application without having to rely on immigration representatives (their choice) or interventions by elected officials. The fact that Ms. Frendian has chosen to seek assistance from Mr. Gurbax Singh is solely attributable to her employment at his office and not related to intended residence. I attach for your reference a letter of support we received from the Hon. Ralph Goodale, M.P. Wascana. Similar support has also been expressed by the Regina Regional Economic Authority. For your information, our Minister for immigration, the Honourable Rob Norris received an information request from the Honourable Jason Kenney's Chief of Staff on March 22, 2010 regarding Mr. Kikeshian's file. Mr. Kenney's Chief of Staff was informed that the decision on this file rested with your office.

We have concluded on the basis of the above and our ongoing contact with this applicant spanning three years, that on the strong balance of probabilities, Mr. Kikeshian's intentions on successfully establishing himself in Saskatchewan are genuine and in fairness ought not be questioned. I am requesting that you and your colleagues reconsider the above and urge you to arrive at the same conclusion. I also trust that this will serve as a satisfactory reply to your June 14, 2010 request to the applicant as our perspective on this may better allow you bring this case to final disposition.

[7] It is apparent from the visa officer's computer notes that Mr. Kikeshian's response gave rise to a new concern about his ability to become economically established in Canada. The visa officer expressed this issue in the following way:

> It appears the applicant's nomination was issued on a condition that the applicant's niece accompany him to Saskatchewan and actively manage his affairs as he is dependent on her. Section 5.3.1 of his shareholder agreement even names Janet Frendian that she may assist in the discharge of his responsibilities.
>
> Mr. Kikeshian, Ms. Frendian, SINP, an Diefenbaker Seeds have all expressed in writing the different levels of dependency that Mr. Kikeshian relies on Ms. Frendian for. The applicant's niece is a Can Cit and has been active in many aspects of the applicant's file including visits to Saskatchewan, negotiations with Diefenbaker, and actively performing the applicant's responsibilities for the company. It is clear that he is dependent on Ms. Frendian in many aspects of his life.
>
> Based on the information on file including the latest submissions, I am not satisfied that the applicant will be able to become economically established in Canada.
>
> [Emphasis added]

The above conclusion was subsequently confirmed by the Deputy Program Manager who added to the computer notes that "[w]e cannot make a positive selection decision based on the good will and intent of a third party."

[8] The visa officer's decision was communicated to Mr. Kikeshian by letter on July 19, 2010. That letter provided the following rationale for refusing a visa to Mr. Kikeshian:

> I have now completed the assessment of your application for a permanent resident visa as a member of the provincial nominee class.

> I have determined that you do not meet the requirements for immigration to Canada in this class.
>
> Subsection 87(3) of the Immigration and Refugee Protection Regulations states that if the fact that the foreign national is named in a certificate referred to in paragraph (2)(a) is not a sufficient indicator of whether they may become economically established in Canada, the officer may substitute for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.
>
> I am not satisfied that the fact that you are named in a certificate issued by Saskatchewan is a sufficient indicator that you are likely to become economically established in Canada. I have reached this conclusion because you; your niece Ms. Frendian; Roberta Cross, Director from the Saskatchewan Immigrant Nominee Program; and Lionel Ector, President of Diefenbaker Seed Processors Ltd. have all expressed in writing your dependency on your niece to become economically established in Canada. From the submissions received in response to my letter of June 14, 2010, I have reason to believe that your success to become economically established in the province of Saskatchewan depends on a third party; your niece. The government of Saskatchewan is aware of your potential refusal. My concerns which were mostly related to your intention to reside were presented to you in my letter of June 14, 2010. The information that you, your niece, the province of Saskatchewan, and Diefenbaker Seed Processors Ltd provided in response addressed both your intention to reside and your ability to become economically established.
>
> From the information on file, I am not satisfied that you are able to become economically established in Canada. A second officer has concurred in this evaluation.
>
> [Emphasis added]

[9] It is apparent from the record before me that the visa officer did not contact officials from Saskatchewan or Mr. Kikeshian to express any concern about Mr. Kikeshian's ability to become economically established before making the decision to reject his application.

Issue

[10] Did the decision-maker err by refusing to approve Mr. Kikeshian's application for a permanent resident visa as a member of the Entrepreneur Class and, in particular, did he satisfy the regulatory duty to consult with officials from the nominating province of Saskatchewan before rejecting the application?

Analysis

[11] The determinative issue on this application concerns the duty under ss 87(3) of the IRPA Regulations requiring a visa officer to consult with the provincial authority which has nominated a foreign national as a member of the provincial nominee class before rejecting an application for a permanent resident visa. It is not open to a decision-maker to ignore a statutory consultation obligation and any such failure is a breach of the duty to fairness. The parties disagree about whether the consultation obligation was met in this case.

[12] I accept the point made by Ms. Gafar that in the usual case an applicant for a visa must anticipate and address all of the statutory requirements for obtaining permanent residency. She is also correct that in such cases the visa officer is not required to clarify a deficient application or to provide a running tally to the applicant at every step of the application process: see *Pan v Canada*, 2010 FC 838, 90 Imm LR (3d) 309.

[13] This case, though, is different. Under the Provincial Nominee Program, when a visa officer forms an intention to substitute his opinion for that of the province with respect to the likelihood that an applicant will be able to become economically established, there is a duty to first consult with

officials in the nominating province. This consultation obligation is set out in ss 87(3) of the IRPA Regulations:

87. (3) Substitution of evaluation — If the fact that the foreign national is named in a certificate referred to in paragraph (2)(a) is not a sufficient indicator of whether they may become economically established in Canada and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.	87. (3) Si le fait que l'étranger est visé par le certificat de désignation mentionné à l'alinéa (2)a) n'est pas un indicateur suffisant de l'aptitude à réussir son établissement économique au Canada, l'agent peut, après consultation auprès du gouvernement qui a délivré le certificat, substituer son appréciation aux critères prévus au paragraphe (2).

[Emphasis added]

[14] Although it is clear that under this program the ultimate authority to determine whether the statutory admissibility criteria have been met rests with the visa officer, the importance of provincial participation in that exercise is recognized throughout. Indeed, the Department's Operational Manual OP7(b) recognizes that a provincial nomination (as evidenced by the issuance of a certificate of nomination) creates a presumption that the applicant will be able to become economically established. Article 7.8 instructs that an officer must consult with provincial authorities if reasons exist to believe that a visa applicant does not intend to live in the nominating province or that he is unlikely to be able to become economically established in Canada. That same provision states that the visa officer must obtain a concurring decision from another officer before rejecting the application on establishment grounds. The cautionary nature of this process is further

reflected in Article 7.6 which states: "Officers should request additional documentation or clarification from the applicant or the nominating province if they are not satisfied that all criteria will be met by the applicant". The above provisions are mirrored and, to an extent, further detailed in Articles 4.9 and 4.10 of the Canada-Saskatchewan Immigration Agreement of 2005 which respectively state:

> 4.9 Canada shall consider a nomination certificate issued by Saskatchewan as initial evidence that admission is of significant benefit to the economic development of Saskatchewan and that the nominee has the ability to become economically established in Canada.
>
> 4.10 When a refusal of a nominee is likely, Canada will notify and advise Saskatchewan of the reasons for possible refusal prior to the refusal notice being issued to the provincial nominee.

[15] In oral argument, counsel for the Respondent questioned whether the program requirement for inter-governmental consultation inures to the benefit of Mr. Kikeshian. If the sole basis for imposing a duty upon the visa officer to consult with provincial authorities arose out of an inter-governmental agreement, I would have more sympathy with that argument. But the consultation duty is expressly imposed by ss 87(3) of the IPRA Regulations in the context of a scheme which recognizes a provincial nomination as *prima facie* evidence of an applicant's ability to become economically established in Canada. An applicant would have a reasonable expectation that, after convincing provincial authorities on this issue, a visa officer would not make a contrary decision without fulfilling the stipulated duty to consult with provincial authorities on any matters of concern.

[16] The Respondent also argues that the visa officer effectively consulted Saskatchewan authorities when he received and considered Ms. Cross' letter of July 12, 2010 in support of Mr. Kikeshian's application. While it may be true that the visa officer was made aware of the views of Saskatchewan officials on the issue of Mr. Kikeshian's intention to reside in Saskatchewan, it is also true that provincial representatives were not consulted when the visa officer's concern shifted to Mr. Kikeshian's dependency on his niece and the related question of his ability to become economically established.

[17] Although the issue of a person's intention to reside in the nominating province may be co-terminus with one's ability to become economically established in Canada, the two are not equivalent. Indeed the visa officer understood the distinction by stating that the initial concern about Mr. Kikeshian's intention to reside in Saskatchewan arose under ss 87(2)(b) of the Regulations whereas the final decision was based on ss 87(3) dealing with economic establishment in Canada. What happened, of course, is that when Mr. Kikeshian successfully answered the visa officer's doubts about residency, the evidence he provided triggered a new concern about Mr. Kikeshian's dependency on his niece. Because this was a different concern, the visa office had a fresh obligation to consult with provincial officials before a final decision was taken, but no such consultation took place. It may well be that provincial authorities and Mr. Kikeshian could have satisfactorily answered the visa officer's doubts about economic establishment in the same way that they had dealt with the residency concern, but they were never afforded that opportunity. This failure by the visa officer to comply with his statutory obligation to consult with provincial authorities before rejecting Mr. Kikeshian's visa application is fatal to the decision and this application is accordingly allowed. In the result, this is a situation where Mr. Kikeshian's

application must be reconsidered on the merits by different decision-makers and, if concerns remain, in consultation with officials from the Province of Saskatchewan.

[18] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed with the matter to be redetermined on the merits by different decision-makers and in accordance with these reasons.

"R.L. Barnes"

Judge

ANNEX A

87. (1) For the purposes of subsection 12(2) of the Act, the provincial nominee class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada.

Member of the class

(2) A foreign national is a member of the provincial nominee class if

(a) subject to subsection (5), they are named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister; and

(b) they intend to reside in the province that has nominated them.

Substitution of evaluation

(3) If the fact that the foreign national is named in a certificate referred to in paragraph (2)(a) is not a sufficient indicator of whether they may become economically established in Canada and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.

87. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des candidats des provinces est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada.

Qualité

(2) Fait partie de la catégorie des candidats des provinces l'étranger qui satisfait aux critères suivants :

a) sous réserve du paragraphe (5), il est visé par un certificat de désignation délivré par le gouvernement provincial concerné conformément à l'accord concernant les candidats des provinces que la province en cause a conclu avec le ministre;

b) il cherche à s'établir dans la province qui a délivré le certificat de désignation.

Substitution d'appréciation

(3) Si le fait que l'étranger est visé par le certificat de désignation mentionné à l'alinéa (2)a) n'est pas un indicateur suffisant de l'aptitude à réussir son établissement économique au Canada, l'agent peut, après consultation auprès du gouvernement qui a délivré le certificat, substituer son appréciation aux critères prévus au paragraphe (2).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5443-10
STYLE OF CAUSE:	KIKESHIAN v MCI
PLACE OF HEARING:	TORONTO, ON
DATE OF HEARING:	April 28, 2011
REASONS FOR JUDGMENT:	BARNES J.
DATED:	June 8, 2011

APPEARANCES:

Stephen Green Hilete Stein	FOR THE APPLICANT
Asha Gafar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel Barristers and Solicitors Toronto, ON	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, ON	FOR THE RESPONDENT