Federal Court  Cour fédérale

Date: 20160923

Docket: IMM-5819-15

Citation: 2016 FC 1073

Ottawa, Ontario, September 23, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MUHAMMAD NAEEM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Muhammed Naeem, is a citizen of Pakistan with a lengthy Canadian immigration history, summarized in greater detail later in these Reasons. Most recently, he has been pursuing an application for permanent residence in Canada and an application for ministerial relief against inadmissibility to Canada that was available under the former s. 34(2) of the *Immigration and Refugee Protection Act* SC 2001 c 27 [IRPA]. His application for

ministerial relief was denied and, after he applied for judicial review of that decision, he requested that no decision on his application for permanent residence be made until after the judicial review had been determined.

[2] An immigration officer nevertheless decided and refused Mr. Naeem's application for permanent residence. He now seeks judicial review of that decision.

[3] As explained in greater detail below, this application is allowed, because the officer failed to consider Mr. Naeem's request that his application for permanent residence be held in abeyance until after the Federal Court had decided his application for judicial review of the refusal to grant ministerial relief.

II. Background

[4] When Mr. Naeem was a student in the National College in Karachi in 1988, he became a member of the All Pakistan Mohajir Student Organization [APMSO]. The APMSO is the student wing of the Mohajir Quami Movement [MQM-A]. Mr. Naeem served as joint secretary of the APMSO in the college from 1988 to 1990 and then attended the University of Karachi from 1990 to 1993, where he was an ordinary member of the APMSO and attended general MQM-A meetings.

[5] Mr. Naeem describes a military crackdown on the MQM-A in 1992, when he went into hiding. From that time until the he left Pakistan in 1999, he says that he did not do any work for the APMSO or the MQM-A. In 1999 he came to Canada and made a claim for refugee

protection, which was accepted in February 2001. He then applied for permanent residence status. Several times his applications have been denied based on inadmissibility, pursuant to s. 34(1)(f) of IRPA for his membership in the APMSO and the MQM-A, and challenged by judicial review. Those denials have twice been set aside by the Federal Court and, most recently, upheld in a decision of Justice O'Keefe in *Naeem v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1069 [*Naeem*].

[6] Mr. Naeem has also submitted applications for ministerial relief under what was, at the applicable time, s. 34(2) of the IRPA. These requests were refused, Mr. Naeem successfully challenged the refusal on judicial review, and the case was remitted for redetermination.

[7] Mr. Naeem's most recent applications for permanent residence and ministerial relief were both refused in November 2011. He then filed two applications for judicial review in December 2011:

A. IMM-9385-11: challenging the refusal of his application for permanent residence; and

B. IMM-9386-11: challenging the refusal of ministerial relief.

[8] Mr. Naeem discontinued the application in IMM-9385-11 in March 2012 pursuant to an agreement with Citizenship and Immigration Canada [CIC] that his application for permanent residence would be held in abeyance pending the outcome of IMM-9386-11. On December 12, 2013, the Federal Court granted the application IMM-9386-11, on consent, and ordered that Mr. Naeem's request for relief be re-determined and considered under the provisions of the former

subsection 34(2) of the IRPA, taking into consideration the guidance of the Supreme Court of Canada in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36.

[9] Upon that re-determination in October 2015, the Minister refused to grant relief, and on October 30, 2015, Mr. Naeem filed an application for leave and judicial review of that decision (IMM-4887-15). The Federal Court granted leave on January 28, 2016, the matter was heard on April 19, 2016, and a decision is pending.

[10] In the meantime, Mr. Naeem received a letter from an immigration officer dated November 5, 2015, advising him that his application for permanent residence had been transferred to the Vancouver office of Immigration, Refugee, and Citizenship Canada [IRCC] (the former CIC) for re-determination and giving him an opportunity to provide updated submissions.

[11] In a letter dated November 20, 2015, Mr. Naeem advised the officer of the history of his case and requested that the application for permanent residence be held in abeyance until the Federal Court decided the application for leave and for judicial review of the refusal to grant ministerial relief.

III. Impugned Decision

[12] In a letter dated December 15, 2015, the officer found Mr. Naeem to be inadmissible to Canada pursuant to s. 34(1)(f) of the IRPA and refused his application for permanent residence. This decision is the subject of the present application for leave and judicial review.

[13] The officer's decision relied heavily on the decision of Justice O'Keefe in *Naeem* in finding Mr. Naeem to be a member of the MQM-A, an organization which the officer states there are reasonable grounds to believe engages, has engaged, or will engage in acts of terrorism. However, the officer's analysis in reaching these conclusions is not particularly germane to this judicial review, as Mr. Naeem does not argue that the inadmissibility finding is not well founded. Rather, the issues raised by Mr. Naeem before the Court relate to the officer not considering or acceding to his request that the application for permanent residence be held in abeyance.

IV. Issues and Standard of Review

[14] The sole issue raised by Mr. Naeem is whether the officer breached the duty of fairness by failing to hold the application for permanent residence in abeyance until the Federal Court decided the application for leave and for judicial review of the refusal to grant ministerial relief.

[15] The parties agree, and I concur, that this issue, because it deals with a matter of procedural fairness, is reviewable on a standard of correctness.

V. Analysis

[16] Mr. Naeem's principal argument is based on the doctrine of legitimate expectations. He submits that, based on past practice in the Respondent's treatment of his permanent residence and ministerial relief applications, as well as the agreement that was reached with CIC in March 2012, he had a legitimate expectation that his permanent residence application would not be decided until the latest judicial review of his ministerial relief application had been determined.

[17] I find little merit to this argument. The sequence of events surrounding past applications for ministerial relief, permanent residence, and judicial review do not demonstrate a past practice of holding a decision on one application in abeyance pending the outcome of judicial review of a negative decision on another. Nor does the agreement with CIC in March 2012 state that the CIC will reopen Mr.Naeem's application for permanent residence pending not only redetermination of his request for ministerial relief but also pending the outcome of any judicial review of such redetermination. Certainly, this agreement does not contain a statement to that effect in the clear, unambiguous and unqualified terms that would be necessary to invoke the doctrine of legitimate expectations (see *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68).

[18] However, my decision to allow this judicial review turns on Mr. Naeem's additional submission that, in making the decision refusing his permanent residence application, the officer failed to consider his written request that such application be held in abeyance.

[19] Mr. Naeem refers to this Court's decision in *NK v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1040 [*NK*], which he submits involves a fact pattern similar to his. In that case, Justice Diner addressed an application for judicial review of an officer's refusal of a permanent residence application without awaiting the outcome of an application for ministerial relief. Among other grounds of review, the applicant argued that the officer fettered his discretion in relying on an internal CIC policy directive to decide the permanent residence application before the application for ministerial relief had been decided. Justice Diner dismissed the application, holding that, according to the relevant policy directive, officers have the discretion to decide permanent residence cases when they wish and that the officer properly exercised his discretion.

[20] Mr. Naeem contrasts the officer's decision in *NK* with that in the case at hand. At paragraph 33, Justice Diner held that the officer clearly considered the facts that were before him in deciding not to delay his decision on the PR application pending the final outcome of the relief application. Justice Diner noted that the officer articulated why he concluded that the consequence of making a permanent residence decision before the relief outcome would be neither unreasonable nor prejudicial. In contrast, Mr. Naeem submits that the decision by the officer in the present case is entirely silent on his request to delay determination of the permanent residence application. There is no indication in the decision that the request was considered or, if it was considered, why it was refused.

[21] Mr. Naeem refers to the policy directive which is the subject of the decision in *NK* as affording the officer discretion whether to delay determination of the permanent residence

application, but he submits that the officer was obliged at least to consider and make a decision on Mr. Naeem's request that it be delayed. He argues that he was denied procedural fairness by the officer's failure to do so.

[22] The Respondent argues that there was no obligation upon the officer to make an express decision on Mr. Naeem's request to hold the permanent residence application in abeyance. The Respondent submits that the fact the officer proceeded to make a decision on the permanent residence application represents an implicit decision not to accede to Mr. Naeem's request. The Respondent also points out that the officer's decision noted that Mr. Naeem's counsel had submitted a letter indicating that he was relying on previously filed submissions for consideration on his application. The Respondent argues that this demonstrates the officer was aware of Mr. Naeem's request to hold the permanent residence application in abeyance, because that request was contained in the same letter.

[23] I find Mr. Naeem's position on this issue to be more compelling than that of the Respondent. In *Eze v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 92 [*Eze*], Justice Near addressed an argument that an applicant had been denied procedural fairness because a citizenship judge failed to grant a request for an extension of time for him to file materials related to his criminality. While *Eze* involved an administrative context different than the case at hand, the respondent in that case argued that the fact the request was not granted did not mean that it had not been considered. However, Justice Near held at paragraph 18 that the applicant was entitled to have his request considered and that it was a breach of procedural fairness for the Judge not to have considered the request.

[24] The officer's decision refusing Mr. Naeem's permanent residence application makes no mention whatsoever of his request that the decision be deferred. The officer's reference to the letter from Mr. Naeem's counsel mentions only Mr. Naeem's intention to rely on previous submissions in support of the merits of his application and makes no mention of the deferral request. The officer gives no reasons for rejecting the request. It is therefore impossible to infer from the record that the officer considered and made a decision on the request or to identify the reasons why any such decision may have been made. Both the policy directive that was cited in *NK* and the case law cited by the Respondent establish that the officer had no obligation to await the outcome of the ministerial relief application before deciding the application for permanent residence (see *Azeem v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 402, at paras 15-17; *NK*, at paras 9-30). However, the officer is afforded discretion whether to do so, and Mr. Naeem was entitled to a decision in the exercise of that discretion. The officer's failure to make a decision represents a denial of procedural fairness, which requires that this application for judicial review be allowed.

[25] Neither party proposed any question of general importance for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and the matter is referred back to be considered by a different officer. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Naseem Mithoowani	FOR THE APPLICANT
Ian Hicks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Naseem Mithoowani Barrister & Solicitor Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT