Federal Court  Cour fédérale

Date: 20170926

Docket: IMM-643-17

Citation: 2017 FC 853

Montréal, Quebec, September 26, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOHAMMAD HANIF GHAZIPURA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicant seeks judicial review of a decision of an Immigration Officer [Officer] of Immigration, Refugees and Citizenship Canada refusing his Spouse or Common-law partner in Canada Class application [SCLPC] with humanitarian and compassionate [H&C] grounds.

II. Facts

[2] The Applicant, aged 63, is a citizen of Pakistan.

[3] In 1988, he obtained a work permit in the United States where he immigrated with his wife and three children.

[4] On December 1998, the Applicant and his family immigrated to Canada as permanent residents under the Skilled Worker program as an accountant.

[5] His wife and three children are naturalized Canadian citizens.

[6] On July 12, 2001, he was charged in the United States with arson, maliciously damaging and destroying by fire a building used in interstate and foreign commerce.

[7] On November 13, 2003, the Applicant was sentenced to a term of imprisonment of 46 months, ordered to pay a fine of $75,000 as well as restitution in the amount of $2,690,000.

[8] During his sentence, he decided to assist the U.S. authorities to arrest and convict one of the biggest money launderers in Pakistan, Mr. Yakoob Habib, suspected by the American authorities to finance terrorism. It is noted that the Applicant, himself, had been convicted for money laundering and had spent two years in prison. For that admitted conviction, the Applicant had requested rehabilitation which had been denied.

[9] After serving his sentence in the United States, the Applicant was brought back to Canada where he was arrested at the Toronto Pearson Airport and was detained from August 31 to November 18, 2004 for deportation to Pakistan.

[10] While in detention, because his life was now in danger in Pakistan after assisting the U.S. authorities, the Applicant submitted a Pre-Removal Risk Assessment [PRRA] which was refused on October 27, 2004.

[11] Multiple appeals were filed at the Federal Court concerning his PRRA applications and applications for judicial review were granted thereon. The immigration agents, however, failed to address the previous judges' orders and the Applicant claims that he has yet to receive a final response on his PRRA application.

[12] On March 26, 2008, the Applicant's wife filed a spousal sponsorship application with H&C considerations. As of today, she has not received an answer.

[13] On April 12, 2008, the Applicant filed an application for permanent residence on H&C grounds. As of today, he has not received an answer in that regard.

[14] On January 6, 2015, the Applicant filed for criminal rehabilitation regarding his conviction for arson in the United States; however, on January 25, 2017, his application for criminal rehabilitation was refused because the Applicant admits not having the funds to pay the restitution amount of $2,690,000 and fine of $75,000.

[15] On February 24, 2016, an Officer received from the Applicant an application for permanent residence in the SCLPC Class.

[16] This application was based on H&C considerations.

[17] On November 18, 2016, the Applicant's wife was approved as a sponsor.

III. Decision

[18] On January 25, 2017, the Officer decided that the Applicant's spousal sponsorship application was denied as there is a pending application for permanent residence based on H&C grounds:

> File reviewed. FC file received at CPC-M on 24Feb16; Rehabilitation file (RHB3010065) has been closed as client is not eligible for criminal rehabilitation. Client is requesting H/C consideration pursuant section A25 of IRPA as part of his SCLPC application to be exempted from the USA criminal conviction of arson. It was noted that the client also has pending H/C PZR application (H000010679). Since the SCLPC application was received after 29Jun10, as per the PDIs, it should not be examined as it would constitute concurrent H/C requests. This is also supported in OB544. File is subsequently cancelled; fee to be refunded.
>
> (Applicant's Record, p 8.)

IV. Issues

[19] This matter raises the following issues:

1) Did the Officer commit an error of law by analysing a spousal sponsorship application based on H&C application guidelines?

2) The Applicant and Respondent do not agree on the standard of review regarding the above issue.

3) Did the Officer show a lack of diligence in processing the sponsorship application by failing to meet the Applicant's legitimate expectations (as the Applicant thought appropriate in respect of the manner in which the entirety of his application (per the Applicant's request) implicated; and, was it the same as is conceived by legislation)?

[20] The Court finds the applicable standard of review under the particular circumstances of the subject matter, with regard to the above issues are treated as to resolution thereon, in the analysis portion of these reasons, below. It is important to recognize the significance of the following judgments considering the subject matter in resolving the issues above (*Abbott v Canada (Citizenship and Immigration)*, 2011 FC 344 at para 23; *Mullu v Canada (Citizenship and Immigration)*, 2014 FC 802 at para 7). The Court also finds that the applicable standard of review is with respect to which guidelines were to be considered by the Officer, as based on the legislative previsions to which these guidelines apply.

V. Relevant Provisions

[21] Section 25, especially paragraph 25(1.2)(a) of the IRPA states:

(1.2) The Minister may not examine the request if	(1.2) Le ministre ne peut étudier la demande de l'étranger faite au titre du paragraphe (1) dans les cas suivants :
(a) the foreign national has already made such a request and the request is pending;	a) l'étranger a déjà présenté une telle demande et celle-ci est toujours pendante;

[22] Section 66 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 states:

Humanitarian and Compassionate Considerations	**Circonstances d'ordre humanitaire**
Request	**Demande**
66 A request made by a foreign national under subsection 25(1) of the Act must be made as an application in writing accompanied by an application to remain in Canada as a permanent resident or, in the case of a foreign national outside Canada, an application for a permanent resident visa.	**66** La demande faite par un étranger en vertu du paragraphe 25(1) de la Loi doit être faite par écrit et accompagnée d'une demande de séjour à titre de résident permanent ou, dans le cas de l'étranger qui se trouve hors du Canada, d'une demande de visa de résident permanent.

VI. Submissions of the Parties

A. *Submissions of the Applicant*

[23] According to the Applicant, because the Officer was processing a sponsorship application, as opposed to H&C considerations, he must have used manuals and guidelines with instructions to process sponsorship applications. The Applicant finds that the Officer did not follow the right instructions because he should have read the Operational Bulletin 633 [OB 633] for instructions on how to process spousal sponsorship applications. The Applicant submits that the Officer erred in law by misinterpreting the Program Delivery Instructions and Operational Bulletin 544 [OB 544]. In fact, according to the Applicant, the guidelines of OB 544 instruct an Immigration Officer on how to process an H&C application when a spousal sponsorship application with H&C reasons was submitted prior to the H&C application.

> For H&C applications at either stage 1 or stage 2, if the applicant:
>
> - is an applicant who has an outstanding SCLPC application pending (see note);
>
> - Then the application is held in abeyance until the applicant:
>
> - obtains permanent residence status (is landed);
>
> - is refused; or
>
> - withdraws.
>
> **Note**: It is assumed in this scenario that there is no H&C requested within the SCLPC as this would make it concurrent H&C requests, which is not permitted in the case where the H&C request is received on or after June 29, 2010 (refer to OB 440-B).
>
> (Operational Bulletin 544, *How to process a Humanitarian and Compassionate application when an applicant is a protected person or is an applicant who submitted a spousal sponsorship application in Canada*, http://www.cic.gc.ca/english/resources/manuals/bulletins/2013/ob544.asp)

[24] Moreover, the Applicant argues that OB 544 instructs the Officer to "hold in abeyance" the H&C application until the Applicant who has an outstanding SCLPC application obtains permanent residence status, is refused, or withdraws the sponsorship application. For that reason, the Applicant finds that the Officer made an error by refusing to process the Applicant's sponsorship application.

[25] Taking into account that a sponsorship application is a principal application, the Applicant argues that the operational manual that should have been used to process a spousal

sponsorship application is the *Inland Processing Spouse or Common-law partner in Canada* [IP 8]. He adds that an H&C application is also a principal application and stands on its own.

[26] The Applicant further reiterates having legitimate expectations that his sponsorship application would be processed with diligence by the Officer. In fact, had the Officer informed the Applicant about his H&C application filed in 2008, the Applicant could have easily made a request to cancel said application. The Officer could have then proceeded with the Applicant's sponsorship application.

[27] The Applicant also states that the Officer has shown lack of diligence in treating the spousal sponsorship application by failing to communicate with his colleague in charge of the Applicant's H&C application.

B. *Submissions of the Respondent*

[28] The Respondent, on the other hand, mainly argues that in order to qualify under Section 25 of the IRPA, a foreign national who is inadmissible makes a request to the Minister to consider H&C grounds when applying for permanent resident status.

[29] The Respondent submits that the H&C application and the spousal sponsorship application are each considered as separate applications for a permanent resident status by different means. In fact, the Respondent claims that an H&C request is distinct from the main application for permanent residence (*Rai v Canada (Citizenship and Immigration)*, 2008 FC

1338 at paras 13-15; *Egbejule v Canada (Minister of Citizenship and Immigration)*, 2005 FC 851 at para 12).

[30] Finally, according to the Respondent, the Officer did not have the obligation to inform the Applicant about his pending H&C application. When qualifying the Applicant's wife, as a sponsor, her letter dated November 18, 2016, mentioned that assessment of SCLPC applications are made in two separate steps:

> You have met the Federal requirements for eligibility as a sponsor. The Application for Permanent Residence (APR) for your relative will be processed separately and he/she will be contacted shortly.
>
> (Applicant's Record, letter from IRCC approving the Applicant's wife as his sponsor, dated November 18, 2016, p 49.)

[31] The fate of the Applicant's first H&C application filed in 2008 should not apply in the case of his second SCLPC application. The Officer in charge of the spousal sponsorship application did not show any lack of diligence when about two months after the Applicant's wife qualified as a sponsor, he informed the Applicant he could not examine the application given the Applicant's pending H&C application.

VII. Analysis

[32] For the following reasons, the application for judicial review is dismissed.

A. *Refusing the spousal sponsorship application because of pending H&C application*

[33] For the following reasons, the Officer did not commit an error of law by analysing a spousal sponsorship application based on certain H&C application guidelines, which are relevant to a sponsorship application, in and of, themselves, as it is recognized that certain elements are in common, although both applications are separate and distinct.

[34] Whether the Officer should have processed the spousal sponsorship application under OB 544 or OB 633 is not the issue. In fact, guidelines are not legally binding and decision makers should not restrict their discretion by treating them as if they were mandatory requirements (*Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at para 66; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 20). It is most significant also to note that guidelines do not have the same significance as legislation. They are simply guidelines (*Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at para 15). Consequently, the law is clear under section 25(1.2)(a) of the IRPA: an Applicant is only allowed to have one H&C application under consideration at any time.

[35] Moreover, the Officer could not have based his decision regarding the Applicant's spousal sponsorship application on OB 633 because this operational bulletin provides instructions for processing applications to sponsor a spouse received (only) on or after December 15, 2016. The Officer received the Applicant's spousal sponsorship on February 24, 2016, thus, excluding his application from being treated with OB 633.

[36] In the case at bar, because the Applicant filed for a spousal sponsorship application with H&C considerations, the Officer did not commit an error of law by reading OB 544, rather, than OB 633. In fact, OB 633 does not mention at any place on how to make a decision when a sponsorship application is accompanied by H&C considerations.

[37] Unlike what the Applicant seems to be arguing, the Officer did not refuse the Applicant's previous H&C application by refusing to examine his spousal sponsorship application with H&C request. His previous H&C application is still "held in abeyance".

[38] Applying for H&C considerations is an exceptional measure for Applicants wishing to obtain permanent resident status in Canada. In fact, H&C applications are not freestanding and must be accompanied by an application for permanent residence pursuant to section 66 of the IRPR (*Bistayan v Canada (Citizenship and Immigration)*, 2008 FC 139 at para 14).

[39] Based on IP 8, an Officer must first verify if a sponsorship application has been submitted and approved. After qualifying, the Applicant's wife as a sponsor, the Officer is presumed to have processed the sponsorship application first and foremost. He mentions in the letter addressed to the Applicant's wife that he will then proceed with the second stage which determines if the Applicant will obtain his permanent resident status based on his H&C request, examining each one after the other in respect of qualifications, relevant to each.

[40] At this stage, the same Officer on the file notes that the Applicant now has two H&C requests. The pending application filed in 2008 and the one in this present matter. Here is where

the Court finds the Officer used OB 544 to render his final decision. At this stage, both applications are considered as H&C applications for permanent residence; as only one H&C request is permitted at a time by the Applicant, the Officer had to refuse the spousal sponsorship application as a whole since the Applicant is inadmissible and, thus, ineligible to obtain his permanent resident status in any other matter but exclusively by means of an H&C application, due to the Applicant's inadmissibility in Canada.

B. *Procedural Fairness*

[41] For the following reasons, the doctrine of legitimate expectation does not apply in the case at bar based on the distinctions and delineations specified above.

[42] The argument of legitimate expectation rests on the idea that the Officer did not give the opportunity to the Applicant to cancel his pending H&C application in order to examine his spousal sponsorship application.

[43] "When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair" (*Baco v Canada (Citizenship and Immigration)*, 2017 FC 694 at para 13; see also *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35).

[44] The Officer was in charge of the Applicant's spousal sponsorship application. It is for this matter that the Applicant seeks the intervention of this Court. The guidelines that have been

used by the Officer to examine the spousal sponsorship application "created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that that framework would be followed" (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 98). There was no legitimate expectation in this case that the Officer would contact the Applicant in order to give him the opportunity to cancel his pending H&C application. The Applicant thus failed to show that his application was not dealt according to the process outlined in the guidelines.

VIII. Conclusion

[45] The application for judicial review is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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