

Federal Court



Cour fédérale

Date: 20171123

Docket: IMM-22-17

Citation: 2017 FC 1065

Ottawa, Ontario, November 23, 2017

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DUY KHANH DO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Duy Khanh Do (“the Applicant”) pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). The Applicant applied from out of country for a permanent residence visa and an exemption to his criminal inadmissibility on Humanitarian and Compassionate grounds under subsection 25(1) of *IRPA* (“the H&C Application”). The Applicant also applied for a Temporary Residence Permit (“TRP”) during this process and was told at his interview he would instead need to apply for the

TRP separately once the decision was issued. This was confirmed in the written reasons for the H&C Application decision. The refusal to consider the TRP application forms the basis for this proceeding.

[2] The Applicant and Respondent have both agreed this application should be returned for redetermination by a different Officer.

[3] In the case of the TRP no express decision was provided, only the H&C Application Decision, dated November 18, 2016, in which the Immigration Officer (“the Officer”) confirms the Applicant was told, during his interview, to apply separately after a final decision on the H&C Application had been made.

[4] Prior to leave being granted the Respondent brought a motion requesting the judicial review be granted and this matter be sent back for redetermination before a new decision maker, with costs awarded against the Applicant as he refused to discontinue the matter and consent to a redetermination. This motion was dismissed on June 19, 2017 by Justice Heneghan (2017 FC 609, unreported) with no order as to costs. Justice Heneghan dismissed the Respondent’s motion because the Respondent had not stated how the Officer erred in his decision.

I. Facts

[5] The factual background of this case is the same as in 2017 FC 1064. For this reason and for the sake of brevity, the facts will not be repeated in this judgement. I shall only highlight the facts relevant to the TRP issue.

[6] In July 2013, the Applicant submitted a spousal sponsorship application for permanent residency from outside Canada requesting that, based on H&C grounds, he be granted an exemption to his criminal inadmissibility or that he be issued a TRP to allow him to return to Canada in the interim while waiting to apply for rehabilitation to remove his inadmissibility.

[7] As part of the July 2013 H&C and TRP Applications, there was numerous correspondence between the Applicant's counsel and the Singapore visa office, for which the main contact was Thomas Richter, the Deputy Program Manager ("Mr. Richter").

[8] In this correspondence Mr. Richter explains they will need to interview the Applicant as part of these applications and they must do so in person after the Applicant has been deported to Vietnam. Mr. Richter also stated in October 2014 that "[s]hould Mr. Do wish to apply for a TRP he may do so, but any decision would be made only once an interview has been conducted."

[9] Subsequent to this, counsel for the Applicant, in September 2015, confirmed a TRP had been requested and further elaborated on why a TRP should be granted.

[10] The Applicant was then interviewed by the Officer in Vietnam on May 30, 2016 and it appears from the Decision he was told at this time he would need to apply for a TRP separately and only after the H&C determination is made.

II. Issues

[11] There are two issues in this matter:

- A. Whether the Officer erred in refusing to consider the TRP and stating the Applicant needed to apply separately for the TRP after the H&C determination?
- B. Whether costs should be awarded against the Respondent for the Officer's conduct?

A. *Standard of Review – Correctness*

[12] The Applicant states the standard of review is correctness for determining whether there was a failure to consider a TRP when one was requested, as this is an error of law where no deference is owed. The Applicant relies on both *Shah v Canada (Citizenship and Immigration)*, 2011 FC 1269, 3 Imm LR (4th) 269 [*Shah*]; *Dhandal v Canada (Citizenship and Immigration)*, 2009 FC 865, 82 Imm LR (3d) 214 [*Dhandal*].

[13] The correctness standard of review was applied in *Shah* as a failure to consider a TRP request had been characterised in past jurisprudence as either “an error in law or an error in due process” (at para 36). The Respondent made no submissions as to the standard of review. Given the jurisprudence as cited I shall adopt the correctness standard of review.

III. Analysis

[14] In accordance with *Dhandal* at paragraph 15, “[a] new application is not necessary if the applicant is found to be inadmissible for permanent residence. A simple letter is sufficient to trigger the request for [a TRP] based upon the existing application”. The Applicant argues such a request had clearly been made, received, and not considered, even though Mr. Richter stated that

if the Applicant applied for a TRP, a decision would be made, however only after the interview occurred.

[15] *Shah* at paragraph 77 confirms that if a TRP is requested an officer must indicate the request is considered even if there was no basis for its issuance, and a failure to consider a TRP when requested is an error. To remedy this error the Applicant requests the matter be redetermined before “a different Officer to assess the TRP in good faith, with regard to the evidence before him or her and on an expedited basis.”

[16] The Respondent consents the Officer erred in failing to consider the TRP and particularises this error by stating the Officer was not permitted to refuse consideration of the TRP unless the Officer had found they had discretion to not consider the TRP under subsection 24(7) of *IRPA*. “The Respondent agrees with the Applicant that [this] Court should remit the TRP request to a new officer for reconsideration.” The Respondent also agreed that this redetermination should be dealt with as soon as possible.

[17] Given the Applicant clearly requested a TRP, and it was not considered when the Officer stated the Applicant needed to apply separately, the Officer erred based on the existing jurisprudence and the matter should be sent for redetermination by a new officer just as both parties have requested. Based on the jurisprudence, and correspondence cited, it is obvious this was not only an error but amounted to disregard for the evidence before him and requires the matter be sent for redetermination.

B. Should Costs be Awarded Against the Respondent for the Conduct of the Officer

[18] As discussed in my other judgment in relation to the Applicant's H&C Application rule 22 of the Federal Courts Citizenship, Immigration and Protection Rules, SOR/93-22, provides that costs should not be awarded unless the Court finds "special reasons."

[19] The Applicant requested costs in this matter stating bad faith is not required and what occurred was "unfair and improper conduct" which meets the special reasons threshold for costs in immigration matters. Further, the Applicant argued the Officer's failure to consider the TRP was contrary to jurisprudence already raised with the Respondent's representatives prior to the Decision and was contrary to statements made by Mr. Richter.

[20] The Respondent was proactive in attempting to remedy the situation by offering a redetermination to the Applicant and, when this offer was refused, attempted on motion to have the judicial review allowed. These efforts show an award of costs against the Respondent seems inappropriate unless this Court finds the conduct of the Officer and the circumstances of the Applicant rise to such a high level that they completely outweigh the Respondent's attempts to remedy the situation.

[21] The Respondent submits that although the Officer erred in failing to consider the TRP this did not amount to a circumstance where special reasons exists, such as bad faith, abuse or oppression, and the onus is on the Applicant to demonstrate special reasons exist with the conduct cited by the Applicant not rising to this level.

[22] Although the Officer failed to meet the minimum standards required in the discharge of his duties, after considering all the evidence before me and both counsels' arguments, I am not persuaded that the Applicant has met the threshold required to show that special reasons exist to warrant awarding costs against the Respondent.

IV. Certification

[23] Counsel for both parties were asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

JUDGMENT in IMM-22-17

THIS COURT'S JUDGMENT is that

1. For the reasons stated above I allow the judicial review on grounds that the Officer failed to consider the TRP when they were required to either consider the TRP or provide a reason justifying a refusal to consider the TRP under the discretion provided by s. 24(7) of *IRPA*.
2. No costs are awarded.
3. I order the following direction:
 - a. This redetermination will be made by a different officer no later than 60 days from the date of this Order.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-22-17

STYLE OF CAUSE: DUY KHANH DO v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: NOVEMBER 8, 2017

JUDGMENT AND REASONS: AHMED J.

DATED: NOVEMBER 23, 2017

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