Date: 20091014

Docket: IMM-1006-09

Citation: 2009 FC 1040

WINNIPEG, MANITOBA, OCTOBER 14, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LI FENG MEI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant is a 39 year-old citizen and resident of China. He made an application for permanent residence in Canada through the Manitoba Provincial Nominee Program. As a result of an investigation, the respondent advised the applicant that he did not comply with the provincial selection criteria. The applicant was given 30 days to address the visa officer's concerns. No response having been received after almost three months, the application for permanent residence was refused. The applicant now brings this application for judicial review of the refusal, claiming that he did send a response letter within the 30 days delay.

THE FACTS

[2] On December 20, 2007, Manitoba nominated the applicant for permanent residence status essentially because of his experience as an ethnic cook. As a result, the applicant, his spouse and his son made an application for permanent residence status with Citizenship and Immigration Canada ("CIC") on December 31, 2007.

[3] In the application, the applicant stated he had been employed as a second cook at Mingxing Seafood Restaurant since February 2007, which was corroborated by a letter from his employer.

[4] On May 20, 2008, CIC conducted a visit at Mingxing Seafood Restaurant to verify the work experience of the applicant. The agents from CIC questioned the applicant and the head cook about the applicant's employment. They found contradictions in their respective statements; they also found 9 "cheat sheets" all similar to the applicant's certificate of employment and, according to CIC, indicating that the restaurant is not adverse to confirm employment of staff that do not work for them.

[5] On July 14, 2008, CIC notified the Manitoba's Immigration department of the situation, and also sent a letter to the applicant informing him about the results of the May 20th visit and about its intention to determine him inadmissible pursuant to section 16 and 40 of the *Immigration and Refugee Protection Act* ("*the Act*"). The same letter (the "fairness letter") gave him 30 days from its receipt to make any representations in this regard, including reliable and verifiable proof of employment.

[6] According to the applicant's affidavit, he received that letter on August 1st, 2008, and sent a letter in response on August 12, 2008. That evidence is uncontradicted, and no attempt was made to

cross-examine the applicant on his affidavit. As a result, it must be taken as established, and the respondent did not question the applicant's assertion.

[7] On November 19, 2008, the Manitoba Labour and Immigration Department sent a letter to the applicant withdrawing the Certificate of Nomination for the reason that the applicant submitted false documents relevant to his selection as a Manitoba Nominee.

[8] On January 4, 2009, CIC send a letter to the applicant refusing his permanent residence visa because Manitoba withdrew his Certificate of Selection and because he misrepresented or withheld information about his employment as a cook at Mingxing Seafood Restaurant.

THE IMPUGNED DECISION

[9] The Officer first referred to section 40(1)(a) of the *Act*, according to which a foreign national is inadmissible for misrepresentation if he directly or indirectly misrepresents or withholds material facts relating to a relevant matter that induces or could induce an error in the administration of the Act. Pursuant to section 40(2)(a), the foreign national continues to be inadmissible for misrepresentation for a period of two years following a final determination of inadmissibility under subsection 40(1)(a).

[10] The Officer goes on stating that the applicant misrepresented his work experience as a cook in order to meet the work experience requirement of the provincial nominees program. He explicitly stated that the applicant had an opportunity to address his concerns but did not reply. He found, therefore, that the applicant is inadmissible pursuant to paragraph 40(1)(a) of the *Act.*.

[11] The Officer then referred to subsections 15(1) and (2) of the *Act*, according to which an officer is authorized to proceed with an examination where a person makes an application, that

examination being conducted solely on the basis of documents delivered by the province. The Officer was also satisfied that the applicant did not meet the requirement of subsection 15(2) of the *Act* because the Province of Manitoba having withdrawn the nomination certificate issued under the Manitoba provincial Nominee Program.

[12] For these two reasons, the Officer refused the application, and declared the applicant inadmissible for a period of two years from the date of his letter.

THE ISSUE

[13] Both parties agree it is impossible to say the decision would have been the same had the visa officer received and considered the response of the applicant. The only issue to be determined on this application for judicial review is therefore limited: should the response letter sent by the applicant be deemed to have been received by the visa officer, and therefore was the decision made without consideration of that letter a breach of procedural fairness?

ANALYSIS

[14] There is no dispute that questions of procedural fairness must be reviewed against a standard of correctness: *Ha* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49; *Chrétien* v. *Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, 2008 FC 802; *Sketchley*, v. *Canada (Attorney General)*, 2005 FCA 404.

[15] It is also well established since the decision of the Supreme Court in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, that a duty of procedural fairness applies to the decisions of administrative decision-makers, whether their decision affects the rights,

privileges or interests of an individual; however, as the Court was prompt to add, the content and the requirements of that duty will vary according to the circumstances.

[16] Several factors have been recognized as relevant in determining the procedures required by the common law duty of procedural fairness in any given set of circumstances. They include the nature of the decision being made and the process followed, the nature of the statutory scheme, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and finally the choice of procedure made by the agency itself. Applying these factors, it has been decided that the duty of fairness is limited in cases of permanent residence applications made from outside Canada. Illustrative of that jurisprudence is the following quote from the decision of Justice Yvon Pinard in *Fargoodarzi* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 90, at para.12:

> Although all administrative decision-makers have a duty of fairness toward those who are directly affected by their decisions, the content of this duty will vary depending on the context of the decision (*Knight* v. *Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.)). If the Court finds that this duty has been breached, the decision must be quashed and the issue sent back to a new decision-maker (*Li* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1109, [2006] F.C.J. No. 1409 (F.C.)). In this case, the decision in question is a visa officer's decision on an application for permanent residence, and the duty of fairness has been determined to be at the relatively low end of the spectrum in this context, due to the absence of a legal right to permanent residence, the fact that the burden is on the applicant to establish her eligibility, the less serious impact on the applicant that the decision typically has, compared with the removal of a benefit, and the public interest in containing administrative costs (*Khan* v. *Canada (Minister of Citizenship and Immigration)* (2001), [2002] 2 F.C. 413 (Fed. C.A.)).

[17] In the case at bar, a number of factors tend to limit the requirements of the duty of fairness. First of all, the nature of the decision made by the visa officer was clearly of an administrative nature. The applicant tried to argue that the possibility to respond to the Officer's concern made the decision more formal; but the fairness letter does not fundamentally alter the nature of the decision made, which is administrative, not judicial.

[18] The second factor to be considered is the nature of the statutory scheme. It is true that there is no appeal procedure, although there is always the possibility of bringing an application for leave and judicial review before this Court. Moreover, the decision does not bar the applicant from submitting a new application. Counsel for the applicant contended that a second application would be quickly dismissed, as it could be argued that the applicant already had the opportunity to have his case assessed, but this is pure speculation. Indeed, the applicant could explain in his second application why his first application was rejected and provide his response to the first visa Officer's concerns as part of his second application.

[19] As to the importance of the decision to the individual, I would venture the following comments. While a decision on a refugee or an H&C application will normally have a greater impact on an applicant's life than an overseas application for permanent residence, I agree with the applicant that the inland-overseas distinction should not always be determinative. Each case must be considered on its merits, and the decision to emigrate and to seek permanent residence in another country may be of momentous importance to an individual. In the case at bar, however, there is no evidence before the Court suggesting that being granted permanent resident status was of such crucial importance to the applicant or his family. On this basis, this case is distinguishable from the decisions of this Court dealing with refugee and H&C applications.

[20] I am prepared to accept that the determination made pursuant to s. 40(1)(a) of the *Act* to the effect that the applicant is inadmissible for two years makes the decision somewhat more significant, but, as the respondent emphasized, this finding cuts both ways. If the consequences of being held to have misrepresented material facts were so important to the applicant, he should have taken steps to ensure that his response was effectively received by the visa officer. Yet, the applicant never contacted the consulate or attempted to follow up on his response letter to make sure it had been received. In addition to this, the decision was not made immediately after the expiry of the 30 day period he was given to respond, but more than three months after the fairness letter was sent to the applicant.

[21] Counsel for the applicant submitted that the respondent could have specified the manner of transmission in the fairness letter. It could have stated, for example, that there must be receipt within thirty days, not just a response within thirty days. It could have imposed an obligation on the applicant to follow-up and make sure that the information was in fact received. The fact that the respondent chose not to do any of this therefore created a legitimate expectation that regular mail was acceptable.

[22] The fact that no particular procedure is set out as to the proper way to communicate with a visa office is certainly an indication that regular mail is considered an acceptable means to send documents, but it doesn't detract from the general rule that the burden is on the applicant to satisfy a visa officer that he complies with all the requirements of the *Act* and its Regulations. Non-citizens and non-permanent residents have no right to enter Canada. It was incumbent on the applicant, having been told by the visa Officer that there were reasonable grounds to believe that he had misrepresented his employment and having been invited to respond to these concerns, to make sure

his response was received by the visa officer within the set time period of 30 days from his receipt of the fairness letter.

[23] Counsel for the applicant submitted that it is practically impossible for an applicant to verify if a letter sent has been received by the visa post or the visa officer, and that forcing an applicant to follow up on communications sent would add a further step to an already complicated process. There are three possible answers to the applicant's argument. First, there is no evidence before me substantiating such a claim. Second, in a world of modern telecommunications, there are various and inexpensive means to minimize the risks of non delivery and to ensure that documents have effectively been received by their addressee and to track them. Third, the respondent always has the option to provide that a document sent is deemed to have been received after a specified period of time, as is the case for documents sent by the Refugee Protection Division, the Immigration Division and the Immigration Appeal Division: see *Refugee Protection Division Rules*, SOR/2002-228, rule 35(1); *Immigration Division Rules*, SOR/2002-229, rule 31; *Immigration Appeal Division Rules*, SOR/2002-230, rule 36. In the absence of such rules, it cannot be assumed that a document sent is received, and the burden is on the applicant to make sure that it has been effectively received if there is any doubt.

[24] Having so found, I am therefore of the view that the duty of fairness was not breached in this case, and there are accordingly no grounds for setting aside the decision under review. The visa officer was entitled to make a decision based on the documents in his possession. The applicant was made aware of the Officer's concern, and it was up to him to assuage these concerns within the time delay he was provided. While unfortunate, this result was not beyond the applicant's ability to prevent.

[25] At the end of the hearing, counsel for the applicant proposed a certified question to the Court. Counsel for the respondent asked permission to make representations with respect to that proposed question after having had an opportunity to see the reasons for the decision. I granted that permission, and I will therefore allow the applicant seven days from the release of these reasons to make representations with respect to his proposed certified question, and a further seven days to the respondent to file a response.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. A separate order will be made to deal with any proposal for a certified question.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1006-09
STYLE OF CAUSE:	LI FENG MEI *v.* THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	October 13, 2009
REASONS FOR ORDER:	de MONTIGNY J.
DATED:	October 14, 2009

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