Federal Court  Cour fédérale

Date: 20130215

Docket: IMM-6325-12

Citation: 2013 FC 155

Vancouver, British Columbia, February 15, 2013

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

FEI ZHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Mr. Fei Zhu, seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by a visa officer at the Canadian Consulate in Hong Kong, dated May 17, 2012, refusing his federal skilled worker immigration application. The Applicant seeks an order setting aside the decision and referring the matter back to the Tribunal with directions to allow him to perfect his application, under the authority of paragraph 18.1(3)(b) of the *Federal Courts Act*, RSC, 1985, c F-7.

I. FACTS

[2] Citizenship and Immigration Canada [CIC] received the Applicant's application for a permanent resident visa as a member of the Federal Skilled Worker [FSW] class on September 5, 2006. He requested that his application be assessed based on his occupation of "Securities Agent, Investment Dealer and Broker – NOC 1113."

[3] On February 13, 2012, a visa officer in the Hong Kong Visa Office sent the Applicant a letter requesting that he submit updated application forms and supporting documents by June 13, 2012 (120 days from the date of the letter). The letter indicated that the Office was prepared to begin assessment of the application and warned that any failure to submit documentation by the stated deadline could result in the refusal of the application.

[4] The government proposed an amendment to the IRPA on March 29, 2012, in budget-related Bill C-38. The amendment proposed section 87.4 of the IRPA, which would terminate pre-February 27, 2008 federal skilled worker applications that had not been given a selection decision by March 29, 2012. The proposed subsection 87.4(5) was to prevent anyone from receiving recourse or indemnity for such a termination.

[5] On April 4, 2012, CIC issued operational bulletin 400, which mentioned that Bill C-38 had to be passed by Parliament in order to take effect and instructed officers to put the processing of any FSW application received before February 27, 2008, and for which a decision had not been made before March 29, 2012, on hold.

[6] A visa officer in the Hong Kong Visa Office sent the Applicant a letter, dated April 16, 2012, advising him that his application would not be processed and instructing him to ignore the recent request to submit full application forms and supporting documentation.

[7] On April 27, 2012, CIC issued operational bulletin 413 instructing local managers to continue processing federal skilled worker applications submitted before February 27, 2008 and that were not decided by March 29, 2012.

[8] In early May 2012, the Applicant learned through an Internet chat room that applications were being processed and that he should perfect his application. The Applicant collected the documents he had already prepared and submitted them in haste on May 7, 2012 to the Hong Kong Visa Office to avoid the impact of the potential changes to IRPA, well before his 120-day deadline.

[9] On May 17, 2012, the visa officer issued a "decision letter" denying the application.

[10] The Applicant did not receive notice before the decision on May 17, 2012 that his application would be processed nor did he receive an opportunity to perfect his application with the knowledge that his application was indeed being processed. In a letter of the same date as the decision letter, written after the decision, the Applicant was notified that his application was being processed because Bill C-38 was not yet law.

[11] Section 87.4 of the IRPA became law on June 29, 2012, and the section terminates FSW applications undecided by March 29, 2012. CIC's operational bulletin 442 instructs that if an application has been finalized by June 29, 2012, and an officer has decided it after March 29, 2012, the decision on the application stands.

II. DECISION

[12] In a letter dated May 17, 2012, Visa Officer Yvonne Tsang (the Officer) determined that the Applicant did not meet the requirements for immigration to Canada under the FSW class because he was unable to become economically established in Canada in accordance with subsection 12(2) of the IRPA and subsection 75(1) of the *Refugee Protection Regulations*, SOR/2002-227. The Officer based her determination on the minimum requirements and criteria set out in subsections 75(2) and 76(1) of the Regulations for the occupation for which the Applicant requested assessment.

[13] The Applicant received high scores under the age and experience factors, but low scores under the education, official language proficiency, arranged employment and adaptability factors. The Officer offers the following reasoning for awarding low scores in education and adaptability.

[14] Applying the definition of "full-time" and "full-time equivalent" education found in subsection 78(1) of the Regulations, the Officer concludes that the Applicant did not submit any reliable evidence as proof of completion of high school education in July 1993. However, the Officer gives the Applicant the benefit of the doubt and awards him points for completing high school.

[15] The Officer notes that the Applicant submitted a "Credentials Report" indicating that he had completed an undergraduate program in accountancy by correspondence at Renmin University from 2000 to 2003, and a diploma confirming the same. She also notes that the Applicant had not submitted any corresponding transcripts or other reliable and official university documentation indicating the period that would have been required to complete the correspondence diploma program on a full-time basis. Consequently, the Officer is unable to determine that the Applicant had completed the program from 2000 to 2003. The Officer states that even if she gave the Applicant the benefit of the doubt and assigned the assessment points for having completed a three-year full-time equivalent diploma program from 2000 to 2003, he still would not obtain sufficient points to qualify for immigration to Canada.

[16] In support of the adaptability factor, the Officer notes that the Applicant submitted notarized certificates indicating a relationship between his dependent wife and his aunt, Madam Gao, a Canadian citizen. He also submitted his aunt's 2011 Canada Revenue Agency Notice of Assessment and her February-March 2012 Canadian bank statement with no transactions on it.

[17] The Officer accepts that the Applicant had established that his aunt is a Canadian citizen and has a bank account in Canada, but she is not satisfied that the documentation submitted was sufficient to satisfactorily demonstrate his aunt had "normal residency" in Canada. As a result, the Officer awards the Applicant no points under adaptability for having an eligible family relative in Canada.

[18] In summary, the Officer awards the Applicant a total of 49 points, below the 67 point minimum requirement, and does not grant the Applicant a visa under subsection 11(1) of the IRPA.

[19] On May 17, 2012, the same day the decision later was dated and issued, the Officer sent another letter stating that the letter sent to the Applicant on April 16, 2012, instructing him that on March 29, 2012, the Minister had terminated processing of his decision and that he should not perfect his application, was incorrect. The letter informs the Applicant that the Minister's proposal to terminate certain federal skilled worker applications was of no legal effect because its enabling act (the *Jobs, Growth and Long-term Prosperity Act,* SC 2012, c 19, section 707) had not come into force. The Officer informs the Applicant that, as a result, until such time as the FSW proposal becomes law, this office will continue to make selection decisions on pre C-50 applications. Finally, the Officer informs the Applicant that his application has been put into process and a selection decision has been made on that day.

IV. ISSUES

[20] The following issues are raised in this judicial review:

1. Did the Officer's failure to provide the Applicant notice that his application was being processed and an opportunity to perfect his application amount to a breach of procedural fairness?
2. Did the delayed processing of the Applicant's application amount to a breach of procedural fairness?
3. Did the Officer fail to exercise her statutory jurisdiction to process the application?
4. Was the Officer's decision reasonable?

5. Do subsections 87.4(1) and 87.4(2) of the IRPA preclude the remedy requested?

V. STANDARD OF REVIEW

[21] There is no dispute as to the applicable standards of review.

[22] The appropriate standard of review for issues of procedural fairness is correctness (see: *Singh v Canada (MCI)*, 2012 FC 855 at para 24).

[23] The applicable standard of review of a decision of a visa officer assessing an application in the Federal Skilled Worker class is reasonableness. It is a decision that involves findings of fact and law for which the visa officer has a particular expertise warranting a high degree of deference (see: *Singh*, above, at paras 22-23 and *Chen v Canada (MCI)*, 2011 FC 1070 at para 7).

VI. PRELIMINARY MATTER

[24] The Applicant seeks to adduce before the Court fresh evidence that was not before the Officer. In particular, the Applicant submits his credentials report and a transcript for his adult junior diploma program from Tianjin University, which he obtained in 1995.

[25] It is well established that a judicial review is conducted on the basis of the evidence that was before the decision-maker who made the decision being reviewed. The circumstances here do not warrant a departure from this general rule. The fresh evidence shall not be received or considered in this application (see: *Smith v Canada*, 2001 FCA 86).

VII. ANALYSIS

[26] I will now turn to the issues set out above.

[27] The first two issues relate to procedural fairness. The Applicant contends that the delay of over five years from the date of the application until he was notified that the application was being processed is unreasonable and caused him prejudice. He further contends that the Officer breached her duty of procedural fairness by failing to inform him that his particular application would be processed and should be perfected. This notice was given only after the decision was rendered.

[28] The Respondent submits that the Officer committed no breach of procedural fairness. The Respondent argues that the duty of fairness owed by a visa officer on an application for permanent residence is quite low and easily met. The Respondent acknowledges that the April 16, 2012 letter informing the Applicant that his application would not be processed was "regrettable", but that the Applicant nevertheless perfected his application well before the expiration of the 120-day deadline. The Respondent submits the Applicant was advised of the required forms well ahead of time and never requested any additional time to provide documents.

[29] In the context of an application for mandamus, the more than five-year delay it took to process the application would likely result in a finding that the delay was unreasonable, absent any satisfactory explanation by the Minister for the delay. No such explanation is offered on the record before me. In any event, it would not be open to the Applicant to seek mandamus at this juncture since the application has been processed. Further, it is not for the Court to speculate on what evidence and submissions would have been put forward by the Minister had this been a mandamus application.

[30] I am not prepared to find that by reason of the delay the Applicant suffered the prejudice alleged. The changes brought to the applicable legislative scheme, introduced to address significant backlogs in FSW applications, cannot form the basis of unfair practice by the Minister and resulting prejudice to the Applicant. I consequently reject the Applicant's argument that "keeping the Application outstanding by way of unreasonable delay and then legislating a provision to terminate the Application amounts to setting the applicant up for failure…." There is simply no evidence to support such an allegation.

[31] While the more than five-year delay it took to process the Application may have been unreasonable, it does not support a finding of procedural unfairness. However, for the reasons that follow, I find that the unusual circumstances that led to the processing of Mr. Zhu's application amount to an unfair process.

[32] The content of the duty of fairness of a visa officer on an application for permanent residence is at the lower end of the range (see: *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (C.A.). A visa officer is nonetheless subject to the duty of fairness. At paragraph 35 of its decision in *Chiau*, the Court of Appeal articulated that duty to include "… a reasonable opportunity to know and respond to information on which the officer proposes to rely in making his decision. Whether the appellant was denied this reasonable opportunity depends on an analysis of the factual, administrative and legal contexts of the decision."

[33] Here the unfairness lies not in the failure to inform the Applicant of the materials required to he was required to submitt with his application. The Applicant had access to the checklist of the

materials that were required for his application, and the onus was on him to provide those materials. Rather, the unfairness lies in the nature of the information communicated to the Applicant about the process and when it was communicated.

[34] The Applicant was informed by the Officer on April 16, 2012 that his application would not be processed. He was instructed to "… ignore our recent request to submit full application forms and supporting documentation." There is no dispute that the April 16, 2012 letter was sent in error. This was the last communication received by the Applicant from the Officer or the Hong Kong Visa Office before he received the May 17, 2012 refusal letter. The letter informing the Applicant of the Officer's new instructions to process the application was sent on the same day as the decision letter, and it was received by the Applicant after he was informed of the negative decision.

[35] In the circumstances, the failure of the Officer to provide sufficient notice of her changed instructions to process the application deprived the Applicant of a reasonable opportunity to respond. It is no defence to suggest the Applicant suffered no prejudice since he filed his documents in any event. It is only by happenstance, by accessing a chat room on the Internet, that the Applicant became aware that FSW applications were being processed. He had no information specific to his application. He sent the information he had obtained on the misapprehension that it was urgent to do so, "because applications could be terminated when the new Law comes into effect." His undisputed evidence is that he submitted his evidence "even though [he] did not have a complete set of forms and documents because [he] had ceased preparing and collecting them."

[36] The Applicant should have been informed that his application was again being processed and should have been provided adequate time to gather and submit his evidence. The letter informing the Applicant that his application was being processed should have been sent without delay after the Officer received instructions from CIC on April 27, 2012, to process the application. The Applicant should also have been provided a reasonable opportunity file forms and documents in support of his application as he saw fit. Even at the lower end of the range, the content of the duty owed by the Officer included providing the Applicant that opportunity. The Applicant was prejudiced because he was not afforded a reasonable opportunity to perfect his application before a decision was rendered. As a result, the process that led to the determination of the application was unfair. In acting as she did, the Officer caused a breach of procedural fairness.

[37] Breaches of procedural fairness must be material to the outcome of the process (see: *Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at para 6). This breach of procedural fairness resulted in the Applicant being deprived of an opportunity to submit further documents before the decision was made. Since the Officer's negative decision on the application turned, to a significant degree, on the adequacy of documentation submitted by the Applicant, the circumstances leading to the breach of procedural fairness were material and prejudicial to the Applicant. Having found a material breach of procedural fairness, the Court cannot allow the decision to stand. The Officer's decision will be set aside.

[38] Since my above finding is determinative of the judicial review application, it is not necessary to consider the remaining issues, including the issues relating to the reasonableness of the decision. I will, however, consider the remedy sought by the Applicant.

VII. REMEDY

[39] The Respondent submits that the new legislative scheme modifies IRPA to terminate FSW applications made before February 27, 2008, where it had not been established by an officer, in accordance with the regulations, whether the Applicant meets the selection criteria and other requirements applicable to that class. The Respondent contends that there is no discretion on the part of the Minister to process terminated applications. The Respondent further argues that the new provisions also provide that any final Court order made on or after March 29, 2012, pertaining to these terminated applications will be negated by the operation of law, thereby making the remedy sought unavailable.

[40] The Respondent contends that a selection decision was made by the Officer on May 17, 2012, and therefore the Applicant's FSW application would be terminated by operation of law pursuant to section 87.4(1) of the IRPA.

[41] For ease of reference I reproduce below the relevant provisions of the IRPA:

87.4 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of federal skilled workers that was made before February 27, 2008 is terminated if, before March 29, 2012, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to that class.	**87.4** (1) Il est mis fin à toute demande de visa de résident permanent faite avant le 27 février 2008 au titre de la catégorie réglementaire des travailleurs qualifiés (fédéral) si, au 29 mars 2012, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres exigences applicables à cette catégorie.

(2) Subsection (1) does not apply to an application in respect of which a superior court has made a final determination unless the determination is made on or after March 29, 2012.	(2) Le paragraphe (1) ne s'applique pas aux demandes à l'égard desquelles une cour supérieure a rendu une décision finale, sauf dans les cas où celle-ci a été rendue le 29 mars 2012 ou après cette date.
…	…
(5) No person has a right of recourse or indemnity against Her Majesty in connection with an application that is terminated under subsection (1).	(5) Nul n'a de recours contre sa Majesté ni droit à une indemnité de sa part relativement à une demande à laquelle il est mis fin en vertu du paragraphe (1).

[42] The Applicant argues that section 87.4 of the IRPA does not apply in the circumstances of his application. For the reasons that follow, I agree with the Applicant's submission.

[43] The complicating factor in this case is that, at the time the decision was rendered on the application, the provisions of section 87.4 were not yet law. Consequently, at the time the decision was made, the application was not terminated. Upon the issuance of operational bulletin 442, the Minister directed that the application be processed. The application was processed and decided. At the time section 87.4 was passed into law, the application was no longer an undecided application that could be terminated, but was an application that was legally decided, albeit after March 29, 2012.

[44] In my view, subsection 87.4(1) is not applicable in the circumstances. The provision cannot serve to strike a validly rendered visa officer's decision. The provision expressly deals with undecided applications, not decisions. While it is true that Mr. Zhu's application remained undecided after March 29, 2012, a decision was rendered by the Officer on May 17, 2012 before

the provision was passed into law. Had the application not been decided before subsection 87.4(1) was passed into law, then the application would have been terminated. At the time the decision was rendered, the law was not in effect and the decision was valid.

[45] Section 87.4 of the IRPA does not address the specific circumstance of Mr. Zhu's application. There is no transitional provision to address applications that were decided after March 29, 2012 and before the new provisions were passed into law on June 29, 2012. The provision deals with undecided applications and does not provide for nullification of lawfully rendered decisions of visa officers. Parliament would have had to expressly provide for such a result in the amended legislation.

[46] The Respondent concedes that subsection 87.4(5) does not preclude judicial review of the Officer's decision but argues that a remedy cannot be granted on review due to the operation of section 87.4 of the IRPA. In my view, this position is inconsistent and untenable. Judicial review necessarily involves the granting of an appropriate remedy when a reviewable error is found in the rendering of a decision. In my view, if Parliament wished to limit the remedies available on judicial review in such cases, it would have to do so expressly in the statutory scheme. Neither subsection 87.4(2) nor subsection 87.4(5) operate to preclude a remedy on judicial review in circumstances where subsection 87.4(1) does not apply.

VII. CONCLUSION

[47] For the above reasons, if find that the process that led to the Officer's decision was an unfair process which resulted in a breach of procedural fairness. Consequently, the decision will be set

aside and returned to a different visa officer for reconsideration on a revised record to be perfected by the Applicant. The Applicant will be afforded a reasonable delay to prepare and submit his forms and documentation in support of his application.

[48] Further, the provisions of section 87.4 are not applicable in the particular circumstances of this case.

VIII. CERTIFIED QUESTION

[49] The parties will be afforded an opportunity to raise a serious question of general importance as contemplated by paragraph 74*(d)* of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Written submissions on any question of general importance to be raised shall be served and filed no later than February 22, 2013. Responding submissions, if any, shall be served and filed no later than February 27, 2013.

THIS COURT ORDERS that:

1. This application for judicial review is granted.

2. The decision to refuse Mr. Zhu's application for permanent residence in the Federal Skilled Worker class is set aside.

3. Mr. Zhu's application for permanent residence is to be perfected within a reasonable delay and remitted to a different visa officer for reconsideration.

4. Written submissions on any question of general importance to be raised shall be served and filed no later than February 22, 2013. Responding submissions, if any, shall be served and filed no later than February 27, 2013.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lawrence Wong Masao Morinaga	FOR THE APPLICANT
Hilla Aharon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lawrence Wong & Associates Vancouver, BC	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT