Federal Court  Cour fédérale

Date: 20140314

Docket: IMM-3855-12

Citation: 2014 FC 253

Ottawa, Ontario, March 14, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

XIN YU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] and section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant is requesting an order of *mandamus* with respect to his application for permanent residence in Canada as a member of the Federal Skilled Worker [FSW] class.

BACKGROUND

[2] The Applicant is a citizen of China. He submitted an application for Permanent Residence as a FSW through the Beijing visa office on or about 7 December 2007. After he was married in August 2008, his spouse was included in his application as a dependent.

[3] On 20 October 2010, a Program Assistant at the Beijing Embassy reviewed the Applicant's application and assessed it against the selection criteria listed in section 76 of the *Immigration and Refugee Protection Regulations, SOR/2002-227* [Regulations]. Based on this review, the Program Assistant calculated that the Applicant would receive 68 points, and noted this total in his file on the Computer-Assisted Immigration Processing System [CAIPS].

[4] On 29 March 2012, the Federal government proposed amendments to the Act. These amendments included the addition of section 87.4, which terminated FSW applications filed before 27 February 2008, unless an officer had determined before 29 March 2012 that the FSW selection criteria and other statutory requirements were met.

[5] On 29 June 2012, section 87.4 of the Act came into force. On 17 December 2012, the Applicant received correspondence from Citizenship and Immigration Canada [CIC] informing him that since a selection decision had not been made on his application before 29 March 2012, his application had been terminated by operation of law.

[6] This application for judicial review was originally included as part of a representative proceeding challenging the termination of some 1400 FSW applications under section 87.4, which

has now been heard and determined by my colleague Justice Rennie: see *Tabingo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 377 at paras 31 and 36 [*Tabingo*]. Justice Rennie dismissed the applications, while certifying certain questions of general importance under subsection 74(d) of the Act, and an appeal to the Federal Court of Appeal is currently under way (Federal Court of Appeal File No. A-185-13). However, prior to the determination of *Tabingo*, above, the Court had granted the Applicant permission to file a separate application and record on 9 January 2013, and leave on that separate application was granted on 6 September 2013. The Applicant argues that the factual basis of his claim differs from the claims at issue in the *Tabingo* proceeding, and that the Court should reach a different conclusion.

STATUTORY PROVISIONS

[7] The following provisions of the Act are applicable in these proceedings:

Application made before February 27, 2008	**Demandes antérieures au 27 février 2008**
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.
[…]	[…]

[8] The following provisions of the Regulations are applicable in these proceedings:

Selection criteria

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

(i) education, in accordance with section 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

(v) arranged employment, in accordance with section 82, and

(vi) adaptability, in accordance with section 83; and

(b) the skilled worker must

(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to one half of the

Critères de sélection

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) l'expérience, aux termes de l'article 80,

(iv) l'âge, aux termes de l'article 81,

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) la capacité d'adaptation, aux termes de l'article 83;

b) le travailleur qualifié :

(i) soit dispose de fonds transférables et disponibles — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du

minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or	revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,
(ii) be awarded points under paragraph 82(2)(a), (b) or (d) for arranged employment, as defined in subsection 82(1), in Canada.	(ii) soit s'est vu attribuer des points aux termes des alinéas 82(2)a), b) ou d) pour un emploi réservé, au Canada, au sens du paragraphe 82(1).
Number of points	**Nombre de points**
(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of	(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :
(a) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;	a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;
(b) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and	b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;
(c) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.	c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.
[…]	[…]

ISSUES

[9] The Applicant raises the following issue:

a. Is the Applicant's application terminated by operation of section 87.4 of the Act?

ARGUMENTS

The Applicant

[10] The Applicant submits that the CAIPS notes show that an officer established, prior to 29 March 2012, that the Applicant met the selection criteria for the FSW class. As such, section 87.4 ought not to apply to him.

[11] The Applicant says that section 87.4 does not terminate all FSW applications received before 27 February 2008. Rather, it selectively terminates certain of these applications. For each file, he argues, an individualized assessment must be made as to whether the file was reviewed by an officer and a determination was made prior to 29 March 2012 that the applicant met the selection criteria. In this case, he argues, the CAIPS notes show that a determination was made on 20 October 2010 that he met the selection criteria. As such, his application should not have been automatically terminated under section 87.4.

[12] The Applicant argues that this interpretation is confirmed by reviewing Operational Bulletin 442 [OB 442], which provides instructions for processing FSW applications received prior to 27 February 2008 in light of the enactment of section 87.4. He says that OB 442 presents three scenarios where an FSW application received before 27 February 2008 will not be terminated: 1) where a positive determination has been made and entered into the processing system prior to 29 March 2012; 2) where a selection decision was not entered into the processing system, but the file

notes prior to 29 March 2012 clearly state that the selection criteria have or have not been met; and 3) where a negative decision was previously made but the file was re-opened due to an order of a Superior Court (including the Federal Court) or a settlement agreement entered into by way of a Court order. The Applicant argues that he falls within the second category: while no final selection decision was entered into the processing system, the CAIPS notes clearly state that he met the selection criteria.

i. Selection criteria under section 76 of the Regulations

[13] The Applicant submits that the term "selection criteria" in section 87.4 refers to the "points system" established by section 76 of the Regulations. FSW applicants must receive at least 67 points. Since the Applicant was awarded 68 points, he met the selection criteria.

[14] The Applicant argues that section 87.4 must be interpreted restrictively using the principles of statutory interpretation. The provision does not state that a final selection decision must have been made before 29 March 2012 in order to avoid termination of the application. The provision makes no mention of a final decision. Rather, it states that it must have been "established" by an officer prior to 29 March 2012 that the Applicant met the selection criteria. In this case, he argues, this requirement was met, because the CAIPS notes entered on 20 October 2010 show an officer's assessment that he met the selection criteria.

[15] The Applicant does not dispute the Respondent's assertion that a Program Assistant does not have the authority to make a final decision on the Applicant's FSW application. However, he argues that section 87.4 does not require a final decision. He says that OB 442, discussed below, makes no

distinction between an assessment made by a Program Assistant and an assessment made by a visa officer.

[16] While the Applicant maintains that a final selection decision is not required under section 87.4, he notes that CIC inquiries into admissibility criteria, such as health and security checks, are indications that such a decision has been made. He says it is CIC procedure to request a medical examination only after an applicant has been found to meet the selection criteria, and the CAIPS notes reveal that medical checks were initiated on his application on 23 November 2010. This is indicated by the notation "IMM1017S REQUESTED: 23-11-2010", and suggests that a positive selection decision had been made. The Applicant says that the Respondent's submissions on this point are contradictory: the Respondent acknowledges at one point that medical checks may have been triggered, but argues elsewhere that the fact that medical checks were not initiated is evidence that the review of the Applicant's application did not result in a favourable selection decision.

ii. Operational Bulletin 442

[17] The Applicant asserts that OB 442, mentioned above, entitles him to have his application processed to a final decision. OB 442 states that a decision as to whether the applicant meets the selection criteria "was made" prior to 29 March 2012 if "the file notes clearly state that the selection criteria have or have not been met, but a selection decision has not yet been entered into the processing system." Here, it is clear that a Program Assistant reviewed the file on 20 October 2012, after the Applicant had submitted everything that was required, and awarded the Applicant 68 points. Therefore, the Program Assistant made a determination that the Applicant met the selection criteria.

[18] The Applicant says that the language of OB 442 supports his view that section 87.4 does not require a final decision. OB 442 recommends processing applications to a final decision in cases where it was established before 29 March 2012 that the applicant met the selection criteria, but the application was not finalized prior to 29 June 2012. This indicates that the word "established" in section 87.4 does not mean that a final selection decision must have been made.

[19] Furthermore, none of the scenarios described in OB 442 that indicate that a selection decision was "not made" apply to the Applicant. Apart from additional documentation relating to the birth of his son, which was requested on 17 April 2012, no further documentation was requested from him that could have served to inform of a selection decision.

The Respondent

i. Application Properly Identified as Terminated

[20] The Respondent asserts that the Applicant's application was terminated when subsection 87.4(1) came into force on 29 June 2012. Only a conclusive determination by a visa officer before 29 March 2012 that the Applicant met the selection criteria would avoid termination, and such a determination did not occur.

[21] For a FSW applicant who applied before 27 February 2008 to avoid having their application terminated, he or she must demonstrate: i) the existence of a conclusive selection decision; ii) made on or before 28 March 2012; iii) by an officer authorized by law to assess the selection criteria: *Tabingo*, above, at para 28.

[22] The Respondent says that the word "established," which precedes the phrase "meets the selection criteria," envisions a conclusive determination on the selection criteria. When used in a statutory provision, the word "established" requires that the fact in question be demonstrated on a balance of probabilities: *Opitz v Wrzesnewskyj*, 2012 SCC 55 at paras 53 and 172.

[23] The Program Assistant who conducted the review was not a visa officer or a Designated Immigration Officer and was not authorized to make a selection decision. While the term "officer" is not defined in the Act, section 2 of the Regulations defines it to mean "a person designated as an officer by the Minister under subsection 6(1) of the Act." The CIC Instruments of Designation and Delegation stipulate which officials at visa posts are authorized to assess FSW applications based on the FSW selection criteria. The Program Assistant lacked the authority to make a selection decision, and was not an "officer" as contemplated in subsection 87.4(1).

[24] Furthermore, the Respondent argues, the 20 October 2010 paper screening was not a selection decision. It was tentative, not conclusive. It outlined the points that the Applicant might receive based on the selection criteria, pending the receipt of further information. For example, three points were preliminarily allocated for adaptability, but this was subject to confirmation of the Applicant's wife's educational credentials. *Tabingo*, above, at para 28 confirmed that a paper screening is not a selection decision as envisioned in subsection 87.4(1). OB 442 also confirms that a preliminary review of the file does not qualify as a selection decision pursuant to paragraph 87.4(1), and that no decision could have been made when further information had been requested but not assessed.

[25] As further evidence that a favourable selection decision was not made, the Respondent notes that the security, criminality or medical checks that would have resulted from such a decision were not initiated.

[26] The Respondent argues that the rules of statutory interpretation require that subsection 87.4(1) be given a large and liberal interpretation that best ensures the attainment of its objects: *Interpretation Act*, RSC 1985, c I-21, section 12. The terms in the provision must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27. This Court has affirmed that the language in subsection 87.4(1) displaces the presumptions against retrospectivity and interference with vested rights that might otherwise warrant a restrictive interpretation: *Tabingo*, above, at paras 22-23 and 29.

[27] Subsection 87.4(1) does not require an individualized assessment of the case for non-termination before a FSW application can be identified as terminated. The factual criteria for termination either do or do not exist: *Tabingo*, above, at paras 31 and 36. Subsection 87.4(1) provides no discretion to avoid termination if these factual criteria are met.

ii. Mandamus *Cannot be Issued*

[28] The Respondent submits that *mandamus* cannot be issued because the application was terminated by operation of law pursuant to paragraph 87.4(1). Mandamus cannot lie to compel a

decision on an application that no longer exists: *Shukla v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1461 at paras 29-30; *Tabingo*, above, at para 139.

ANALYSIS

[29] At the judicial review hearing before me the Applicant conceded that Justice Rennie has already assessed most of the issues raised in this case in *Tabingo*, above. Justice Rennie certified several questions in *Tabingo*, so those issues will be determined by the Federal Court of Appeal.

[30] The only issue before me is a factual one. The Applicant says that, in his case, a positive selection decision was made by a qualified officer before 29 March 2012. The evidentiary basis offered for this assertion is the affidavit of Mr. Daniel Vaughan submitted by the Respondent in the present application. Mr. Vaughan is the Operations Manager in the Immigration Section in Beijing.

[31] Paragraphs 3 to 5 of Mr. Vaughan's affidavit read as follows:

> 3. I reviewed the CAIPS notes pertaining to the Applicant's terminated FSW application. There is an October 20 2010 entry in the CAIPS made by "VCH". The initials VCH refer to Victoria Chua. Ms. Chua is locally engaged staff employed at the Canadian Embassy in Beijing. Although I was not responsible for the assessment of economic applications in October 2010, I understand that, at that time, Program Assistants in Beijing would review FSW applications and enter points against selection criteria in preparation for review by an officer. This was an administrative task – taking information on file at face value and putting the information against the assessment criteria. The file was then reviewed by an officer for selection; only after an officer had reviewed the file would a selection decision be entered, and next processing actions initiated. Program Assistants do not have the delegated authority to make selection decisions.
>
> 4. Based on my knowledge of the locally engaged staff, I can confirm that Victoria Chua was employed in the Immigration Section as a Program Assistant in the Immigration Registry at the time I arrived in Beijing. She joined the Economic Class Unit as a Program Assistant in September, 2010. Although she was not under my supervision as a member of the Economic Class Unit, I was aware of the work

> performed by Program Assistants in that unit. Ms. Chua continued to work in the Economic Class Unit until April, 2011. She worked in the Family Class Unit from April, 2011 to November, 2011 as a Program Assistant; since November, 2011 she has worked as a Program, Assistant in the Medical Unit.
>
> 5. At no time has Ms Chua worked as a Visa Officer or Designated Immigration Officer or possessed the authority to render decisions on immigration applications.

[32] I cannot accept the Applicant's interpretation of these paragraphs. I do not think Mr. Vaughan is saying that a selection decision was made in this case. The affidavit read as a whole makes it clear that he is referring to the general process involved, and not the Applicant's particular file. In my view, the affidavit shows that no selection decision was made by a qualified officer.

[33] There is nothing else on the record before me that supports the proposition that a selection decision was made in this case that would exempt the Applicant from subsection 87.4(1) of the Act. That being the case, his application was terminated and there is no basis for a grant of *mandamus*.

[34] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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