Federal Court  Cour fédérale

Date: 20160211

Docket: IMM-2255-15

Citation: 2016 FC 182

Ottawa, Ontario, February 11, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JAVED MEMON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision dated April 30, 2015 of a Senior Immigration Officer [Officer] of Citizenship and Immigration Canada [CIC], in which the Officer refused to reconsider an earlier decision denying the Applicant's application for permanent residence on Humanitarian and Compassionate [H&C] grounds.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Applicant is a Pakistani national. He arrived in Canada on June 15, 1998, and his claim for refugee protection was denied in 1999. In November 1999, the Applicant married a Canadian citizen, who sponsored him, and in 2000 he submitted an application for permanent residence, supported by a request under H&C grounds for exemption from immigrant visa requirements. As he was advised that the Minister believed that he was inadmissible due to his membership in the Muttahida Quami Movement (MQM-A), he submitted an application for ministerial relief from such inadmissibility, which application remains pending.

[4] The Applicant understands that, until approximately 2013, CIC policy was not to decide applications for permanent residence without a decision on a relevant ministerial relief application. However, after a change in policy in 2013, a CIC officer reviewed the file, determined on or about March 11, 2015 that, notwithstanding the H&C grounds argued by the Applicant in 2000, he was inadmissible to Canada on security grounds pursuant to Section 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and denied his application.

[5] The Applicant then provided CIC with additional submissions requesting reconsideration of the decision denying his application for permanent residence. On April 30, 2015, the Officer refused this request for reconsideration. This refusal is the decision that is the subject of this judicial review.

II. Impugned Decision

[6] In examining the Applicant's request, the Officer was guided by CIC's Inland Processing Manual IP5 [IP5], which provides a non-exhaustive list of factors that may be relevant to consider when a request for reconsideration of a previous H&C decision is received.

[7] The Officer noted that the Applicant raised issues that had been dealt with in the previous H&C decision including establishment factors. The Applicant also argued disproportionate hardship due to his inability to support himself and lack of familial support. He had not previously raised the economic hardship factor, but the Officer found that there were no recent changes to his lack of familial support and the fact that the Applicant had not previously elected to include these factors did not constitute reasons for reconsideration.

[8] The Officer found that similar reasoning applied to the Applicant's assertion that there would be problems arising from his interfaith marriage if he were to return to Pakistan, as he had been married since 1999 and any such issue should have been raised earlier.

[9] Overall, the Officer concluded that the Applicant was seeking a re-examination of some factors that were already examined in the application for permanent residence that had been refused, as well as an examination of factors that had not previously been raised but which had not recently arisen. Therefore, the Applicant's reconsideration request was refused.

III. Issues and Standard of Review

[10] The Applicant submits the following issues:

A. What is the applicable standard of review?

B. Did the Officer unreasonably fetter her discretion to reconsider?

C. Did the Officer err in not reconsidering the Applicant's application for permanent residence in Canada in light of the submissions?

D. Did the Officer err in not considering the exemption that the Applicant was seeking within the submission?

[11] The parties agreed in oral argument that the standard of review applicable to the arguments raised by the Applicant is reasonableness. I concur (see *Mancheno v Canada (Minister of Citizenship and Immigration and Minister of Public Safety)*, 2013 FC 66, at para 10), and I consider the issue on this application to be whether the Officer's decision to refuse the reconsideration request was reasonable.

IV. Submissions of the Parties

A. *The Applicant's Position*

[12] The Applicant argues that the Officer fettered her discretion. No decision has yet been made on the ministerial relief application. However, in 2013, the CIC policy changed and permitted decisions on H&C applications while ministerial relief applications were still pending. The Applicant's request for reconsideration was based on the fact that he had not been advised of

this change. His application for permanent residence had been outstanding since 2000, and he did not receive notice of the intention to refuse and an opportunity to make submissions prior to the refusal. In particular, the Applicant wished to seek an exemption on H&C grounds from the application of 34(1) of IRPA, which was permitted under the law as applicable to his original application but under current law would not be permitted in a new H&C application.

[13] The Applicant submits that the Officer failed to take into account this aspect of the Applicant's request, finding that he was limited to considering the factors set out in IP5 and only considered those factors, which the Applicant argues to be an improper fettering of discretion. The Applicant argues that it is trite law that guidelines can be used as guides to assist officers in making decision, but cannot be treated as rigid rules that fetter discretion (see *Yhap v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 205). The Applicant's position is that the CIC did not consider the change in law and policy as noted in his request for reconsideration, as evidenced by the fact that she concluded that the Applicant could submit a new H&C application.

[14] The Applicant submits in the alternative that the Officer erred because she ignored relevant evidence and facts, specifically the Applicant's explanation that he could no longer make a request for an exemption because in a new application the bar against overcoming section 34(1) of IRPA would apply. Also, while the Officer noted that many of the factors argued by the Applicant could have been submitted before, she failed to understand that they were not submitted because the application had been refused without notification.

B. *Respondent's Position*

[15] The Respondent submits that no arguable issue is raised by the Officer's decision not to re-open the decision. An immigration officer is not obligated to reconsider an application for permanent residence. Rather, an officer considering a request to reconsider has a limited role and must determine if, given the relevant circumstances in a given case, it is opportune to exercise his or her discretion to reconsider (see *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230 [*Kurukkal*] at para 4-5). There is no general duty upon an officer to reconsider an application for permanent residence with the receipt of new information, nor is there an obligation to provide detailed reasons for deciding not to do so (see *Mojica v Canada (Citizenship and Immigration)*, 2014 FC 35).

[16] The Respondent does not dispute that there was a change in CIC policy as described by the Applicant. However, the Respondent's position is that the Applicant's contention, that a change in legislation or policy relating to the processing of H&C applications was somehow relevant to the reconsideration motion, ignores the fact that the change occurred well before the March 2015 refusal of the Applicant's H&C application.

V. Analysis

[17] The Respondent refers to the decision of the Federal Court of Appeal in *Kurukkal* as explaining the role of an immigration officer when presented with a request for reconsideration of an H&C decision. At paragraphs 4-5, the Court of Appeal held as follows:

> [4] In this case, the decision-maker failed to recognize the existence of any discretion. Therein lay the error. The immigration officer was not barred from reconsidering the decision on the basis of *functus officio* and was free to exercise discretion to reconsider, or refuse to reconsider, the respondent's request.
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> [5] The judge directed the immigration officer to consider the new evidence and to decide what, if any, weight should be attributed to it. In our view, that direction was improper. While the judge correctly concluded that the principle of *functus officio* does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider.

[18] I agree with the Respondent's position that an immigration officer is not obligated to reconsider an application for permanent residence. Rather, the obligation is to conduct what other authorities have referred to as a "screening exercise" (see *Charles v Canada (Citizenship and Immigration)*, 2014 FC 772 at para 51) to determine whether or not to exercise the discretion to reconsider. However, as stated in *Kurukkal*, in determining whether to reconsider, the officer must take into account all relevant circumstances.

[19] It is in this respect that I conclude the Officer erred in her decision whether to reconsider the Applicant's application. It was clear from the Applicant's submissions to the Officer in the request for reconsideration that he was asking the Officer to consider information and argument relevant to H&C grounds, in support of relief from inadmissibility under section 34(1) of IRPA, because of certain circumstances surrounding the issuance of the recent H&C decision. Specifically, the Applicant notes that his application for permanent residence on H&C grounds had been outstanding for 15 years and that he believed that no decision would be made on that application while his application for ministerial relief was still pending. He also referred to the

fact that he could seek an exemption from inadmissibility under section 34(1) on H&C grounds under his application dating back to 2000 but would be unable to do so under any future application because of intervening change in law.

[20] Effectively, the Applicant was explaining that he had anticipated having an opportunity to make submissions on H&C considerations, relevant to relief from inadmissibility, after receiving the decision on ministerial relief and before the H&C decision was made. It was for this reason, and because he could not seek relief from inadmissibility in a future H&C application, that he was asking the Officer to reconsider his application, taking into account evidence and submissions that related to events pre-dating the Officer's recent H&C decision.

[21] I express no opinion on whether circumstances of this sort warrant reconsideration of an H&C decision. However, there is no indication in the Officer's reasons that she considered whether these circumstances warranted such reconsideration. I agree with the Respondent's position that there is no general duty on the part of an immigration officer to provide detailed reasons for deciding not to exercise his or her discretion to reconsider an application (see *Trivedi v Canada (Citizenship and Immigration)*, 2010 FC 422 at para 30). However, the Officer did provide reasons for declining to reconsider the Applicant's application, and those reasons provide no indication that the Officer understood or considered the circumstances the Applicant was raising in support of his request for reconsideration.

[22] The Officer's decision refers to the Applicant having raised establishment factors that had been dealt with previously, as well as economic hardship problems arising from his interfaith

marriage which had not previously been raised but which were not new or recent developments. The Officer states that, if the Applicant had wanted these factors examined, he could have brought them forward for consideration at any time prior to the March 2015 decision. Most significantly, the Officer also states that the Applicant has not explained why he had not previously brought this forward or why this information was not available for consideration in the original application for permanent residence. The Officer expresses the view that any examination of these factors should be done under a new application.

[23] Not only do the Officer's reasons display no consideration of the circumstances raised by the Applicant in support of his request for reconsideration, but the statement that the Applicant has not explained why he had not previously brought forward the factors he wanted examined demonstrates that the Officer did not consider those circumstances, i.e. that the Applicant had understood pursuant to CIC's policy that the decision on his application would not be made until after his request for ministerial relief was decided, such that he would have an opportunity to make further submissions on the former after receiving the decision on the latter. The Officer's comments that the factors now raised by the Applicant should be advanced under a new application also indicate that she had not considered the Applicant's point that the change in law precluded him from seeking H&C relief against his inadmissibility in a new application.

[24] I find that the Officer's obligations when presented with the request for reconsideration required her to turn her mind to the circumstances raised by the Applicant and that she did not do so. Regardless of whether her failure to do so resulted from too strict an adherence to the guidelines in IP5, and therefore a fettering of her discretion, or whether the Officer simply

misunderstood or overlooked the arguments raised by the Applicant, I find that such failure represents a reviewable error rendering the decision unreasonable. The Applicant's request for re-consideration must therefore be referred to another officer for re-determination. This does not mean that that the March 2015 decision on the Applicant's application for permanent residence must necessarily be reconsidered, only that the decision whether or not to reconsider must be revisited in the context of the circumstances raised by the Applicant in support of his request.

[25] Neither party proposed a question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the Applicant's request for reconsideration is referred to a different immigration officer for re-determination in accordance with these reasons. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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