Federal Court  Cour fédérale

Date: 20190703

Docket: IMM-4636-18

Citation: 2019 FC 886

Ottawa, Ontario, July 3, 2019

PRESENT: Madam Justice Roussel

BETWEEN:

KELECHI B. AGBAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Kelechi B. Agbai, is a citizen of Nigeria. On or about September 26, 2017, she submitted her Express Entry profile to Immigration, Refugees and Citizenship Canada [IRCC]. Her profile indicated that she had an offer of employment in Canada accompanied by a positive Labour Market Impact Assessment [LMIA] valid until October 19, 2017. She was accepted in the Express Entry pool of candidates on September 26, 2017.

[2] On October 4, 2017, the Applicant received an invitation to apply for permanent residence under the Federal Skilled Workers Program. The invitation indicated that she had to submit her complete application before January 3, 2018.

[3] The Applicant submitted her permanent residence application on November 13, 2017. The next day, she was advised by IRCC that her application had been received and that it was being reviewed to determine if it met the requirements of a complete application according to section 10 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The letter further informed the Applicant that while processing times might vary, IRCC tried to process most applications submitted under the Express Entry System in six (6) months or less.

[4] By letter dated November 30, 2017, IRCC advised the Applicant that the following documents were required to continue the review of her application: (1) a Use of Representative form; (2) a Release of Information form; and (3) a Birth Certificate for one of the Applicant's children.

[5] On January 4, 2018, an analyst from IRCC noted in the Global Case Management System [GCMS] that the LMIA provided with the Applicant's Express Entry profile had expired prior to the lock-in date of the application for permanent residence. The analyst recommended further review.

[6] At some point thereafter, the Applicant's file was transferred to London for further processing. The Applicant's file was returned to Sydney, Nova Scotia in July 2018 after it was determined that the file had been transferred to London in error.

[7] On August 31, 2018, the Applicant filed an application for leave and judicial review [ALJR] seeking an order of *mandamus* to compel IRCC to complete the processing of her application for permanent residence. The ALJR was eventually dismissed on November 21, 2018 for failure to file the Applicant's Record.

[8] On September 6, 2018, an Officer from the Centralized Intake Office in Sydney, Nova Scotia [Officer] dismissed the Applicant's permanent residence application. The Officer noted that the Applicant had indicated in her Express Entry profile that she had a qualifying offer of arranged employment for which she was awarded two hundred (200) points. The Officer further noted that a review of the Applicant's file demonstrated that she did not have a qualifying job offer as per the requirements of subsection 29(2) of the Ministerial Instructions respecting the Express Entry System [Ministerial Instructions] since her LMIA had expired on October 19, 2017 and her application for permanent residence was received on November 13, 2017. As the Applicant no longer had a qualifying offer of arranged employment as per subsection 29(2) of the Ministerial Instructions, she was no longer awarded the two hundred (200) points for arranged employment. This change therefore brought the Applicant's rank below the lowest ranking person invited to apply in the round of invitation under the Express Entry Comprehensive Ranking System. Having found that the Applicant no longer possessed the qualification on the basis of which she was ranked under an instruction given pursuant to

paragraph 10.3(1)(h) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the Officer concluded that the Applicant no longer met the requirements of section 11.2 of the IRPA.

[9] The Applicant seeks judicial review of this decision. In essence, she contends that the Officer's interpretation of subsection 11.2(1) of the IRPA is wrong and that IRCC breached procedural fairness by subjecting her to an eleven (11) month delay despite knowing that the LMIA had expired before her application for permanent residence was refused.

II. Analysis

A. *Standard of review*

[10] The standard of review applicable to the analysis of an applicant's eligibility for permanent residence as a federal skilled worker is reasonableness (*Wijayansinghe v Canada (Citizenship and Immigration)*, 2015 FC 811 at para 25 [*Wijayansinghe*]; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 14 [*Hamza*]; *Bazaid v Canada (Citizenship and Immigration)*, 2013 FC 17 at para 36; *Khowaja v Canada (Citizenship and Immigration)*, 2013 FC 823 at para 7; *Roberts v Canada (Citizenship and Immigration)*, 2009 FC 518 at para 15).

[11] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[12] Where issues of procedural fairness arise, the role of this Court is to determine whether the procedure is fair considering all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Dunsmuir* at para 79).

B. *Section 11.2 of the IRPA*

[13] The Applicant submits that the Officer's interpretation of subsection 11.2(1) of the IRPA is wrong. She argues that her LMIA was valid both when the invitation to apply was sent – on October 4, 2017 – and when IRCC received her application – on or about September 26, 2017, when the Applicant's Express Entry profile was submitted to IRCC. The Applicant contends that subsection 11.2(1) of the IRPA is not aimed at *completed* applications, simply *received* ones. Additionally, the language used in subsection 11.2(1) of the IRPA is not definitive as it states "an officer may not", rather than "must" or "shall".

[14] I cannot accept the Applicant's interpretation of subsection 11.2(1) of the IRPA.

[15] To understand the issues before the Court, it is useful to provide a brief overview of the framework under which the Applicant submitted her application for permanent residence.

[16] Section 11.2 of the IRPA provides as follows:

11.2 (1) An officer may not issue a visa or other document in respect of an application for permanent residence to a foreign national who was issued an invitation under Division 0.1 to make that	**11.2 (1)** Ne peut être délivré à l'étranger à qui une invitation à présenter une demande de résidence permanente a été formulée en vertu de la section 0.1 un visa ou autre document à l'égard de la demande si,

application if — at the time the invitation was issued or at the time the officer received their application — the foreign national did not meet the criteria set out in an instruction given under paragraph 10.3(1)(e) or did not have the qualifications on the basis of which they were ranked under an instruction given under paragraph 10.3(1)(h) and were issued the invitation.

(2) Despite subsection (1), an officer may issue the visa or other document if, at the time the officer received their application,

[…]

(b) the foreign national did not have the qualifications they had at the time the invitation was issued and on the basis of which they were ranked under an instruction given under paragraph 10.3(1)(h), but

(i) they met the criteria set out in an instruction given under paragraph 10.3(1)(e), and

(ii) they occupied a rank that is not lower than the rank that a foreign national was required to have occupied to be invited to make an application.

[Emphasis added.]

lorsque l'invitation a été formulée ou que la demande a été reçue par l'agent, il ne répondait pas aux critères prévus dans une instruction donnée en vertu de l'alinéa 10.3(1)e) ou il n'avait pas les attributs sur la base desquels il a été classé au titre d'une instruction donnée en vertu de l'alinéa 10.3(1)h) et sur la base desquels cette invitation a été formulée.

(2) Malgré le paragraphe (1), le visa ou autre document peut être délivré à l'étranger si, lorsque sa demande a été reçue par l'agent, selon le cas :

[…]

b) il n'avait pas les attributs — qu'il avait au moment où l'invitation a été formulée — sur la base desquels il a été classé au titre d'une instruction donnée en vertu de l'alinéa 10.3(1)h), mais :

(i) il répondait aux critères prévus dans une instruction donnée en vertu de l'alinéa 10.3(1)e),

(ii) il occupait un rang qui n'est pas inférieur au rang qu'un étranger devait occuper pour être invité à présenter une demande.

[Non souligné dans l'original.]

[17] Division 0.1 of Part 1 of the IRPA is entitled “Invitation to Make an Application.” Under the terms of subsection 10.1(1) of the IRPA, a foreign national who seeks to enter Canada as a member of a class that is referred to in an instruction given under paragraph 10.3(1)(a) of the IRPA, may only make an application for permanent residence if the Respondent has issued them an invitation to do so.

[18] Subsection 10.3(1) of the IRPA provides that the Respondent may give instructions governing any matter relating to the application of Division 0.1, including the classes in respect of which a foreign national may be invited to apply for permanent residence under subsection 10.1(1) of the IRPA (IRPA, para 10.3(1)(a)), the criteria that a foreign national must meet to be eligible to be invited to make an application (IRPA, para 10.3(1)(e)) and the basis on which an eligible foreign national may be ranked relative to other eligible foreign nationals (IRPA, para 10.3(1)(h)).

[19] The Ministerial Instructions were given by the Respondent under the authority of this provision. One of the classes for which an invitation may be issued under subsection 10.1(1) of the IRPA is the federal skilled worker class referred to in subsection 75(1) of the IRPR.

[20] Subsection 75(1) of the IRPR describes the federal skilled worker class as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the province of Quebec. The criteria to be assessed for the purposes of determining whether a skilled worker under the federal skilled worker class “will be able to become

economically established in Canada" are set out in subsection 76(1) of the IRPA. *Inter alia*, the skilled worker must be awarded not less than the minimum number of required points based on a number of factors that include whether the skilled worker has "arranged employment" as defined in section 82 of the IRPR.

[21] Section 82 of the IRPR defines arranged employment as an offer of employment that is made by a single employer, other than certain specified employers, for continuous full-time work in Canada having a duration of at least one year after the date on which a permanent resident visa is issued, in an occupation that is listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix.

[22] Under subsection 29(1) of the Ministerial Instructions, a foreign national with a "qualifying offer of arranged employment" will be assigned either fifty (50) or two hundred (200) points depending on the type of employment. The expression "qualifying offer of arranged employment" is defined in subsection 29(2) of the Ministerial Instructions. It includes an arranged employment as it is defined in subsection 82(1) of the IRPR and which is supported by a valid assessment that the requirements set out in subsection 203(1) of the IRPR with respect to the offer have been met. This includes an assessment of whether the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada (IRPR, para 203(1)(b)).

[23] When the Applicant was invited to apply for permanent residence, the invitation was based on the information she had provided in her Express Entry profile. She was awarded two

hundred (200) points for arranged employment and her overall score was five hundred and five (505) points. When she applied for permanent residence on November 13, 2017, her LMIA was expired and she no longer had a "qualifying offer of arranged employment" as per the terms of subsection 29(2) of the Ministerial Instructions, resulting in a loss of two hundred (200) assigned points. The Officer concluded that this loss of points brought her rank below the lowest ranking person who was invited to apply in the Applicant's round of invitation, under the Express Entry Comprehensive Ranking System.

[24] Even if the Applicant had the required number of points when she was invited to apply, she did not at the time she applied for permanent residence.

[25] The Applicant is under the mistaken impression that the application which is referred to in subsection 11.2(1) of the IRPA is the application in which she submitted her Express Entry profile on or about September 26, 2017. She claims that she made her application on or about September 26, 2017 and that she simply completed her application on November 13, 2017. In my view, the wording of subsection 11.2(1) does not support the Applicant's interpretation. It is equally not supported by a reading of subsection 10.1(3) of the IRPA that provides that "a foreign national who wishes to be invited to make an application must submit an expression of interest to the [Respondent] …." Thus, the Express Entry profile submitted by the Applicant should be construed as an "expression of interest" rather than an application.

[26] Equally without merit is the Applicant's argument that subsection 11.2(1) is permissive because it uses the word "may" instead of "shall". A review of the French text of subsection

11.2(1) of the IRPA demonstrates that the provision is clearly more determinative than discretionary or permissive.

[27] Therefore, the relevant date for the purposes of section 11.2 of the IRPA was November 13, 2017.

C. *Breach of procedural fairness*

[28] The Applicant claims that IRCC breached procedural fairness. In essence, she argues that: (1) IRCC should have returned her application as incomplete or requested an updated LMIA; (2) she was subjected to an eleven (11) month delay despite IRCC knowing that the LMIA had expired; (3) her application for permanent residence was dismissed as a means of retaliation for bringing a *mandamus* application before this Court; and (4) if the application had been returned or denied in November 2017, she would have been able to reapply, with valid medical and police clearances. The Applicant asks for extra costs, in the amount of $5,500.00 under section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [FCCIRPR] as well as a refund of the $1,850.00 payment.

[29] The Applicant's arguments are unfounded.

[30] The Officer was under no duty to return the Applicant's permanent residence application as incomplete or request an updated LMIA. While the LMIA was a precondition for the Applicant being assigned points for a "qualifying offer of employment" as per the Ministerial Instructions, a "qualifying offer of employment" was only one of several factors being

considered in the overall assessment of the Applicant's permanent residence application under the Express Entry federal skilled worker class. Contrary to the Applicant's contention, insufficient points do not amount to an "incomplete" application.

[31] Moreover, it is well established that the duty of procedural fairness owed by visa officers is on the low end of the spectrum and that procedural fairness applies to concerns about the credibility, veracity or authenticity of the documents rather than to the sufficiency of the evidence. There is no obligation on a visa officer to provide an applicant with an opportunity to address concerns regarding supporting documents that are incomplete, unclear or insufficient. There is no indication in the file before me that the Officer had any concerns regarding the genuineness of the application (*Singh v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 266 at paras 14-16, *Wijayansinghe* at paras 28–29; *Hamza* at paras 23-25).

[32] As for the issue of the eleven (11) month delay, I understand the Applicant's frustration when one considers that IRCC was aware of the expired LMIA long before the Applicant's permanent residence application was refused. I also recognize that the Applicant may have the impression that she was misled by the deadline provided in the October 4, 2017 invitation letter to apply for permanent residence.

[33] However, the October 4, 2017 invitation letter clearly stated that if the Applicant's situation changed, she should try to recalculate her points score before deciding to apply for permanent residence. The letter also provided a link to assist the Applicant in recalculating her score and informed the Applicant that if her new score was lower than the minimum points score

in the round of invitation from which she was invited to apply or, if she no longer met the minimum criteria for Express Entry, she should consider declining the invitation to apply. The Applicant was also advised that if she nonetheless decided to apply, her application could be refused and the application fee would not be returned. The invitation letter also provided examples of changes which could result in a lower points score and specifically mentioned the example of a loss of a valid job offer. Based on the wording of the invitation letter, it was incumbent on the Applicant to ensure that she maintained the minimum points required to be considered for the Express Entry Program. The Applicant could have sought to obtain a new LMIA prior to submitting her application for permanent residence given that she had until January 3, 2018 to apply.

[34] Moreover, while the acknowledgement of receipt letter dated November 14, 2017 indicated that IRCC attempted to process most applications in six (6) months or less, the letter also stated that processing times might vary and that the processing time for her application will depend on the individual circumstances of her file.

[35] Regarding the entry in the GCMS notes demonstrating that IRCC was aware on January 4, 2018 that the LMIA was expired, it was not unreasonable for the analyst to recommend further review of the Applicant’s permanent residence application to determine whether she was still eligible and whether she still had the qualifications on the basis of which she was ranked when she was issued the invitation (IRPA, para 10.3(1)(h)).

[36] Finally, while it is unfortunate that the Applicant's file was erroneously sent to London, the Applicant has not persuaded me that the delay in issuing the decision was so unreasonable that it constitutes a breach of procedural fairness.

[37] As for the Applicant's allegation that her application for permanent residence was dismissed as a means of retaliation for bringing a *mandamus* application before this Court, there is no evidence in the record to support the allegation.

[38] Finally, damages are not available as a remedy in an application for judicial review. Also, no costs should be awarded in an application for judicial review under the IRPA, save for the existence of special reasons (FCCIRPR, s 22). The threshold for "special reasons" is very high. Special reasons may exist where the Respondent's conduct is "unfair, oppressive, improper or actuated by bad faith" (*Uppal v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 1390 at para 8 (QL)). Although there is some precedent for awarding costs for undue delays, the delay in this case does not meet the high threshold. There is also no indication that the Respondent acted in a manner that is unfair, oppressive, improper or in bad faith. A mere error on the part of a decision-maker is insufficient to warrant an award of costs (*Sapru v Canada (Citizenship and Immigration)*, 2011 FCA 35 at para 65). Based on the above-mentioned jurisprudence, I am not convinced that the high threshold for costs has been met.

[39] Accordingly, the application for judicial review is dismissed. No questions were proposed for certification.

JUDGMENT in IMM-4636-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4636-18
STYLE OF CAUSE:	KELECHI B. AGBAI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JUNE 5, 2019
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	JULY 3, 2019

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