Federal Court  Cour fédérale

Date: 20120130

Docket: IMM-4646-11

Citation: 2012 FC 117

BETWEEN:

ALLAMA BHUIYAN
FARRAH FAHMIDA IQBAL
ISHMAM IQBAL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] The Bhuiyan family, from Bangladesh, unsuccessfully applied for refuge status in Canada. Thereafter, their request for permission to apply for permanent resident status from within Canada, which is the exception rather than the rule, was rejected on 14 April 2011. Afterwards, on 24 June 2011, they submitted further information and requested that the matter be reopened. The senior immigration officer charged with the matter refused to do so. This is the judicial review of that decision.

ISSUES

[2] For some time, there was a division within this Court as to whether immigration officers were barred from revisiting a matter after they had made their decision, because of the doctrine of *functus officio*. However, the Court of Appeal held in *Canada (Minister of Citizenship and Immigration) v Kurukkal*, 2010 FCA 230, [2010] FCJ No 1159 (QL), that that principle does not strictly apply in non-adjudicative administrative proceedings, and that the officer in appropriate circumstances has discretion to reconsider his or her decision.

[3] Therefore, the first issue in this case is whether or not the senior immigration officer was aware she had discretion to reconsider her decision. If so, the second issue is whether or not that discretion was exercised. Finally, on what standard should the refusal be reviewed by this Court?

BACKGROUND

[4] The applicants came to Canada in August 2003 to seek refugee status. Their claim was dismissed by the Immigration and Refugee Board of Canada in June 2004. Leave to judicially review that decision was denied by this Court. Subsequently, they applied for a pre-removal risk assessment. A negative decision was handed down in August 2008, and leave to judicially review that decision was also dismissed.

[5] They also sought permission to apply for permanent resident status from within Canada based on humanitarian and compassionate considerations. That application was refused in April

2008. However, their circumstances may have changed and so they submitted a second application in July 2009, an application which was dismissed, as aforesaid, in April 2011.

[6] A number of issues had been raised in the application. Of relevance to the request to reopen is the health of Ms. Farrah Iqbal, who had been involved in a serious automobile accident. She had suffered injuries, had ongoing pain and was undergoing medical care.

[7] In her original decision dismissing the H&C application, the officer noted that Ms. Iqbal was receiving physiotherapy treatment for backlash following her motor vehicle accident; "however, submissions indicate that she has "improved considerably"." There was no evidence to support the proposition that she was medically unable to travel or would not be able to receive similar treatment in Bangladesh.

[8] It is the position of the applicants that in their request that the H&C application be reopened, they provided material which indicated that Ms. Farrah Iqbal's situation is now deteriorating, and that she would not receive adequate medical treatment in Bangladesh.

THE DECISION UNDER REVIEW

[9] On 29 June 2011, the senior immigration officer wrote as follows:

> Dear Mr. Bhuiyan and Ms. Iqbal:
>
> This letter is in response to the receipt of additional submissions dated **24 June 2011,** pertaining to your Humanitarian and Compassionate (H&C) application for permanent residence in Canada.

> Your H&C application was considered on its substantive merits and has been refused. You were provided with the decision in person on **14 April 2011**, thereby fully concluding your application; the additional submissions will not be considered.
>
> Should you have different or additional information, you may wish to submit a new H&C application for permanent residence in Canada, including fees to the Case Processing Centre in Vegreville, Alberta.

DID THE SENIOR IMMIGRATION OFFICER KNOW SHE HAD DISCRETION TO REOPEN?

[10] It might be inferred from the refusal letter, if taken alone, that the officer was not aware she had discretion to reopen. She states the matter was concluded and additional submissions would not be considered. However, the officer is taken to have been aware of *Inland Processing Manual IP5: Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds*. Annex 12 is a form letter which may be used when a case is not reopened. It reads:

> **Annex 12 – Submissions received after refusal – Case not reopened**
>
> This letter is in response to the receipt of additional submissions dated (date), pertaining to your Humanitarian and Compassionate (H&C) application for permanent residence in Canada.
>
> Your H&C application was considered on its substantive merits and has been refused. You were provided with the decision in person on (date), therefore fully concluding your application. After considering the additional submissions, the initial decision to refuse your H&C application remains unchanged.
>
> Should you have different or additional information, you may wish to submit a new H&C application for permanent residence in Canada, including fees to the Case Processing Centre in Vegreville, Alberta.
>
> [My emphasis.]

[11] Given the similarity of language, it is reasonable to infer that the officer was aware she had discretion.

HOW WAS THE DISCRETION EXERCISED?

[12] Given that the following words "after considering the additional submissions, the initial decision to refuse your H&C application remains unchanged" did not appear in the refusal letter, it is reasonable to infer that the officer did not consider the additional submissions.

[13] Although a contract case, the decision of Lord Cross of Chelsea, in *Mottram v Sunley*, [1975] 2 Lloyd's Rep. 197 (HL), is instructive. He said at page 209:

> When the parties use a printed form and delete parts of it one can, in my opinion, pay regard to what has been deleted as part of the surrounding circumstances in the light of which one must construe what they have chosen to leave in.

[14] As to the distinction between inference and conjecture, as Mr. Justice MacGuigan wrote in *Minister of Employment and Immigration v Satiacum* (1989), 99 NR 171, 16 ACWS (3d) 191 (FCA), at paragraphs 34 and 35:

> The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in **Jones v. Great Western Railway Co.** (1930), 47 T.L.R. 39, at 45, 144 L.T. 194, at 202 (H.L.):
>
> > "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the

> validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference."
>
> In **R. v. Fuller** (1971), 1 N.R. 112 at 114, Hall J.A. held for the Manitoba Court of Appeal that "[t]he tribunal of fact cannot resort to speculative and conjectural conclusions." Subsequently a unanimous Supreme Court of Canada expressed itself as in complete agreement with his reasons: [1975] 2 S.C.R. 121 at 123, 1 N.R. 110 at 112.

The Court of Appeal recently turned its mind to this issue again in *Attaran v Canada (Minister of Foreign Affairs)*, 2011 FCA 182, 420 NR 315, at paragraphs 32 and following. In my opinion, in this case we are in the realm of inference, not speculation.

[15] Even if the boilerplate remark that the additional material had been considered had been inserted in the refusal letter, it would not necessarily follow that reconsideration actually took place. As stated in Court of Appeal in *Attaran,* above, at paragraph 36:

> Conversely, just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. […]

WHAT IS THE STANDARD OF REVIEW?

[16] The decision not to consider the additional submissions must be subject to review on the standard of reasonableness. Discretion is not unfettered. It cannot operate without reference to the statute or regulation which empowers the decision-maker.

[17] As stated by Mr. Justice Rand in *Roncarelli v Duplessis*, [1959] SCR 121, at page 140:

> […] there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

[18] In *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539, at paragraph 91, Mr. Justice Binnie seized upon another passage from that same set of reasons.

> The Minister does not claim an absolute and untrammelled discretion. He recognizes, as Rand J. stated more than 40 years ago in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, that "there is always a perspective within which a statute is intended to operate".

[19] As recently noted by the Supreme Court in *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] SCJ No 2 (QL), the reasonableness standard of review is even applicable to the review of a municipal taxation by-law. As to what that standard requires, in speaking for the Court, Chief Justice McLachlin stated at paragraph 18 of *Catalyst*:

> The answer lies in *Dunsmuir*'s recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry: *Dunsmuir*, at para. 64. As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59, *per* Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand. For this reason, it is useful to look at how courts have approached this type of decision in the past: *Dunsmuir*, at paras. 54 and 57. To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded. This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of

> reasonable outcomes. It simply recognizes that reasonableness depends on the context.

WAS THE DECISION REASONABLE?

[20] In canvassing this point during argument, the parties agreed that if the decision-maker had said she was too busy, or did not feel like looking at the material, that decision would be unreasonable. Indeed, to use the language of section 18.1(4)(d) of the *Federal Courts Act*, such a decision would be perverse or capricious. To complete that paragraph, this Court may grant judicial review on the grounds that the decision was made "without regard for the material before it".

[21] In first instance in *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2009 FC 695, [2010] 3 FCR 195, Madam Justice Mactavish was dealing with an H&C application. The officer gave Mr. Kurukkal a delay in which to provide proof that his wife had died. As no documentation was provided within that delay, the application was denied. Shortly thereafter, Mr. Kurukkal came up with his wife's death certificate together with an explanation as to why there were delays in obtaining it. In addition to holding that the doctrine of *functus officio* did not apply, she remitted the matter to a different immigration officer for re-determination. In particular, the officer was directed to consider the said death certificate and to decide what, if any, weight should be attributed to it.

[22] The Court of Appeal agreed that the decision maker was not *functus officio*, but it disagreed with the direction that the immigration officer had to consider the new evidence. Madam Justice Layden-Stevenson stated, at paragraph 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.

[23] Of course, we do not know what the immigration officer did, or did not do, once the matter was referred back.

[24] The Minister submits that as long as bad faith is not involved, the decision maker need not consider the additional material submitted. Reliance was placed on *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283, [2009] FCJ No 1643 (QL), a decision of Mr. Justice Mainville, as he then was; *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422, [2010] FCJ No 486 (QL), a decision of Mr. Justice Crampton, as he then was; and *Noor v Canada (Minister of Citizenship and Immigration)*, 2011 FC 308, [2011] FCJ No 388 (QL), a decision of Mr. Justice Scott. I consider this reliance misplaced.

[25] All three cases dealt with visa applications. The instructions made available to applicants make it perfectly clear that they have to get it right the first time. There is no obligation on visa officers to point out that documents are missing. For instance, in *Trivedi*, the applicant was on

notice: “We will not request further information to support your application. You must therefore submit complete and detailed information and documents at this time.”

[26] Thus, it was not unreasonable in those three cases for the visa officers to refuse to reconsider. However, an H&C application is an ongoing process. In fact, the application had been updated more than once before the decision was rendered denying permission to apply for permanent residency from within Canada.

[27] To use the words of the Court of Appeal in *Kurukkal*, above, how can an officer “[take] into account all relevant circumstances” without even a preliminary vetting of the further documentation submitted? In my opinion, it follows that the decision was unreasonable, and must be sent back to another immigration officer for re-determination.

CERTIFIED QUESTION

[28] Counsel for the Minister shall have one (1) week herefrom to propose a serious question of general importance to certify. If so, the applicant shall have one week thereafter to reply.

“Sean Harrington”
Judge

Ottawa, Ontario
January 30, 2012

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mike Bell	FOR THE APPLICANTS
Peter Nostbakken	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bell, Unger, Riley, Morris Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT