Federal Court Cour fédérale

Date: 20131209

Docket: IMM-7196-12

Citation: 2013 FC 1231

Ottawa, Ontario, December 9, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

RITA KUMARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] This is an application pursuant to subsections 72(1) and 72(2) of the *Immigration and Refugee Protection Act* [IRPA] to review and set aside a purported decision on the applicant's application to sponsor her parents and siblings under the Family Class, made by an immigration officer at the Case Processing Centre of Citizenship and Immigration Canada [CIC] and dated June 19, 2012, in addition to an order of *mandamus* requiring CIC to determine the applicant's application for sponsorship of her parents in accordance with the IRPA and its regulations.

[2] For the reasons which follow, the application is denied.

2. Background

[3] Ms Kumari applied on July 10, 2007 to sponsor her parents and her two brothers as permanent residents of Canada. She subsequently applied on May 30, 2008 to sponsor her second husband as well. Although this was a separate application, the effect was to increase her combined sponsorship request from a family size of five to a family size of six.

[4] On her sponsorship application of May 2008, the applicant indicated at question 1 of form IMM 1344 that she wished to withdraw her sponsorship application if she did not meet the sponsorship requirements and wanted a refund of all processing fees for processing her sponsorship application ($1,400) less $75.

[5] She states that a few days later she forwarded a letter to CIC with a changed first page of the sponsorship form indicating that she wished to proceed with the application even if she did not meet the requirements to sponsor her parents. Although she would not then receive a refund of the processing fees, sponsored family members may still apply for permanent residence visas, and although these would likely be refused because the sponsor did not meet the requirements, the sponsor would have a right of appeal. There is no copy of this letter in the record.

[6] An affidavit from Officer SF of CIC indicates that in sponsorship paperwork signed two years later on December 17, 2010, the applicant continued to check the box for "Withdraw your

sponsorship application. All processing fees less $75 will be refunded." in the event she was found to be ineligible.

[7] On January 20, 2010, an initial assessment by an immigration officer at CPC Mississauga indicated that the applicant did not meet the sponsorship requirements for a family group of six persons, i.e. the applicant, her husband, her father, her mother and two brothers. The sponsorship application was then referred for concurrence, noting that the sponsor "indicate[d] to discontinue [sponsorship] file if found ineligible." [My emphasis]

[8] On July 22, 2011, Ms Kumari received a letter from CIC, advising her that she did not meet the Low Income Cutoff for sponsorship purposes. She had met the threshold for four family members but no longer met it for five. She was therefore ineligible as a sponsor on the date the CIC advised her that she failed to meet the requirements of the Immigration Legislation.

[9] A refund of processing fees was initiated. In the computerized Field Office Support System [FOSS] the officer recorded the following:

> *22 JUL/2011*
> *- FILE FINALIZED TODAY*
> *- ELIGIBILITY REQUIREMENTS NOT MET*
> *- NEGATIVE RECOMMENDATION CONCURRED ON 05JUL2011 AS PER ABOVE*
> *- SPR OPTED TO DISCONTINUE IF FOUND INELIGIBLE TO SPR*
> *- INITIATED REFUND IN THE AMNT OF $ 1325.*
> *MAX-CPCM*
>
> [Emphasis added]

[10] However, the letter of July 22, 2011 mistakenly used the form intended to respond to sponsors who had indicated their intention to withdraw their application if found ineligible. Thus, contrary to its own notes and its actions to close the applicant's file and return the processing fees of $1,325, the CIC erroneously informed her that as she had indicated that she wished to continue with the application, it would remain open, without mentioning that her processing fees would be returned.

[11] According to the incorrect letter, the applicant's relatives could carry on and submit their applications for permanent residence visas. The letter pointed out the slim likelihood of success, indicating that her ineligibility to sponsor them would be a significant factor in consideration of the applications.

[12] The letter incorrectly indicated that "the undertaking has been forwarded to our post abroad for consideration". However, no visa post was named. The letter also advised her that her relatives were required to file their applications for permanent residence as quickly as possible directly to the visa office, preferably within six months, and that if they were not received by the visa office within one year, the file would be closed.

[13] A refund cheque of $1,325 was issued in the applicant's name on July 26, 2011, mailed to her address and subsequently cashed.

[14] On November 4, 2011, the federal government suspended family class sponsorships for parents. Ms Kumari states that she did not resubmit her application because she believed that her file was still open.

[15] On May 30, 2012, Ms. Kumari wrote to CIC to ask that it amend her application to drop her brothers as sponsorees. Her income for 2011 would meet the Low Income Cutoff threshold if she sponsored her parents only.

[16] On June 19, 2012, Officer AC of CIC, rather than amending the application, wrote to Ms Kumari to inform her that a decision had already been made on July 22, 2011, that her sponsorship had been discontinued and no application forwarded to a visa office, and that CIC was now returning her documents.

[17] Two days later, Officer AC recorded in the CIC computerized notes:

> 21JUN2012 RECEIVED NEW PACKAGE FROM COUNSEL: HARINDER SINGH GAHIR/GAHIR DEOL & NAGPAL. IT CONTAINS NEW 1344/IMM8'S ETC. INCLUDING DOCS FROM SAME SPONSOR FOR SAME PA. COUNSEL SEEMS TO INDICATE THAT CASE WAS APPROVED. RETURNED ENTIRE KIT/DOCS AND SENT LTR ADVISING CASE WAS DISCONTINUED AND REFUND ISSUED TO SPONSOR. ALL HAS BEEN RETURNED TO COUNSEL. PLEASE NOTE IMM5476 SIGNED BY SPONSOR FOR REP HARINDER SINGH GAHIR/GAHIR DEOL NAGPAL LAW FIRM. AC/CPCM.

[18] On July 4, 2012, Ms Kumari's counsel wrote to CIC to say that the returned sponsorship file had been received and that this was an error. Counsel claimed that the applicant had clearly indicated on her Form IMM 1344, *Application to Sponsor, Sponsorship Agreement and*

Undertaking that she wished to proceed even if ineligible. CIC had confirmed on July 22, 2011 that it was proceeding with the application.

[19] The only copy of a document indicating that the box for "Proceed with the application for permanent residence. Processing fees will be retained" was ticked off, was provided by applicant's counsel on a copy of the first page of the seven-page form (which is in the record at page 30). The form is not dated but the information on the page indicates that May 15, 2011 was the date on which Ms Kumari's second marriage ended, meaning that it postdates that date.

[20] Three weeks later, Officer SF recorded:

> 25 JUL2012-RECD NOTICE OF APPEARANCE JULY 24, 2012. SPR IS FILING AN APPLICATION FOR LEAVE AND JUDICIAL REVIEW. CPCM, SF.

[21] Further notes by Officer SF dated September 10, 2012 indicate that:

> WHEN I REVIEWED THE IMAGED COPY OF THIS FILE, I NOTED THAT THE WRONG NOT MET LETTER TEMPLATE WAS SENT TO THE SPONSOR AND IMAGED. SPR OPTED TO WITHDRAW IF INELIGIBLE. A DISCONTINUED DECISION WAS ENTERED BUT WE SENT THE NOT MET OPT TO PROCEED LETTER IN ERROR. SENDING A CORRECTED VERSION OF THE NOT MET LETTER AND ADVISING SPR TO DISREGARD ORIGINAL COVER LETTER THIS DATE. CPCM, SF.

[22] CIC's Officer MAX therefore wrote to Ms Kumari again on September 10, 2012 to instruct her to disregard the July 22, 2011 letter as it had been sent in error. Ms Kumari was still ineligible, but the Officer now stated that she had indicated in her original sponsorship application that she wished to withdraw the application if she was determined to be ineligible, and therefore her application had been formally withdrawn without right of appeal. The letter which she should have

received would have indicated that a refund of her fees was being processed and would be mailed to her in approximately six weeks.

3. Contested decision

[23] The applicant argues that the decision was the letter from Officer AC on June 19, 2012. The respondent argues that the decision was the July 22, 2011 letter from Officer MAX.

4. Issues

[24] The following issues arise in this matter:

a. Did the applicant amend her application prior to July 22, 2011 and if so should the decision of that date be set aside?

b. If the applicant did not amend her application prior to July 22, 2011, should the decision by CIC to close the applicant's application on July 22, 2011 nevertheless be set aside due to the misstatement that the file would remain open?

c. If it is not possible to set aside the decision, can CIC be estopped as argued by the applicant from reversing the decision of July 22, 2011 to not forward the applicant's sponsorship undertaking to the visa post abroad for processing?

d. If not, are there any other legal or equitable remedies available to the applicant in this judicial review application?

5. Standard of review

[25] The applicant simply submits that "the decision of the CIC is so faulty that it will fail any standard of review." I would agree as the error is acknowledged and the only issue is that of the consequences of the error.

[26] To the extent that the consequence falls within the application of the rule of estoppel or some form of procedural fairness, the standard of review would be correctness. See *Pavicevic v Canada (Attorney General)*, 2013 FC 997 at 29:

> 29 The standard of review for questions involving the doctrine of legitimate expectations as well as promissory estoppel and rules of procedural fairness is correctness (Productions Tooncan (XIII) inc c Canada (Ministre du Patrimoine), 2011 FC 1520 at para 41; Sketchley v Canada (Attorney General), 2005 FCA 404 at para 53). Whether the preconditions to the operation of issue estoppel are met is a question of law as it affects an individual applicant's procedural rights (Rahman v Canada (Minister of Citizenship and Immigration), [2006] F.C.J. No. 1661 at para 12 (TD) (QL)). Issues of abuse of process concern procedural fairness which are reviewed on a correctness standard (Herrera Acevedo v Canada (Minister of Citizenship and Immigration), 2010 FC 167 at para 10)

6. Analysis

a. Did the applicant amend her application prior to July 22, 2011 and if so should the decision of that date be set aside?

[27] The computerized FOSS notes of the respondent are consistent from January 20, 2010 through to July 22, 2011 in recording that the applicant had indicated that she wished to discontinue her sponsorship application if found ineligible.

[28] The applicant claims that a few days after sending the sponsorship application on May 30, 2008, she forwarded a letter to CIC which changed the first page of the sponsorship form to indicate

that she wished to proceed with the application if she did not meet the requirements to sponsor her parents. This is contradicted by the amended application package she returned to CIC in December 2010 which was before the officers at CIC when they rendered their decision in July 2011.

[29] In her factum, the applicant claims that in 2012 her solicitor returned to the CIC her complete sponsorship file. The front page of the application form provided at that time cannot be that sent shortly after May 30, 2008 because it contained information regarding her second marriage ending on May 15, 2011. This means that it could only have been submitted some three years later.

[30] I conclude therefore that no letter was sent as claimed by the applicant, or if sent it was never received by the CIC, and in any event was countermanded by the amended application provided in December 2010.

[31] While there is no need to decide this issue, had CIC received the instructions to keep the file open even if ineligible, I would conclude that this would constitute grounds to set aside the decision to close the file, such that the file would have remained open as indicated in CIC's letter of July 22, 2011.

b. If the applicant did not amend her application prior to July 22, 2011, should the decision by CIC to close the applicant's application on July 22, 2011 nevertheless be set aside due to the misstatement that the file would remain open?

[32] The applicant argues that the "decision" of June 19, 2012 which is described as refusing the applicant's sponsorship application should be set aside and a *mandamus* ordered requiring CIC to

determine the application. The respondent indicated at the hearing that had the applicant indicated her intention to proceed even if ineligible that the matter would not have been before the Court.

[33] The problem with this request is that the decision to close the file was made on July 22, 2011 and the letter of June 19, 2012 simply communicated that decision. The letter refusing the application refers back therefore to the decision to close the file, the setting aside of which I conclude is the actual remedy being sought.

[34] The decision to close the file was based on three criteria: (1) the applicant's ineligibility, (2) the applicant's having indicated that she wished to have the file closed and her processing fees returned if she was ineligible and (3) the respondent's returning the processing fees.

[35] The miscommunication to the applicant that the file would remain open played no role in CIC's decision to close the file. That decision was completed based on the criteria required to close the file prior to the communication to the applicant. The communication to the applicant later on the same day cannot affect a decision properly taken prior to the communication occurring. The same applies for the correction communicated on June 19, 2012.

[36] The miscommunication can only give rise to remedies that are based on the consequences that flow from it, such as a right to extend time to challenge the decision, or some other remedies based on a misrepresentation, neither of which is in play in this judicial review application.

c. If it is not possible to set aside the decision, can CIC be estopped as argued by the applicant from reversing the decision of July 22, 2011 to not forward the applicant's sponsorship undertaking to the visa post abroad for processing?

[37] If the decision to close the file cannot be set aside, there is no remedy available in the circumstances to require it to be re-opened and proceeded with as though not closed. This is without regard to the questionable proposition of using an estoppel as a form of *mandamus* to require CIC to act in some fashion.

[38] An estoppel in whatever form is a shield used to prevent a party from taking some action contrary to its previous conduct or statement. It cannot be used as a sword to oblige a party to undo a past decision, which is the actual effect of what the applicant is asking for in requiring the application to be proceeded with. That cannot be done until the past decision to close the file is set aside.

d. Are there any other legal or equitable remedies available to the applicant in this judicial review application?

[39] I point out the further challenge that the applicant faces, were a declaration or some other remedy sought, on the basis that the misstatement in the letter of July 22, 2011 caused her to miss opportunities to sponsor her family members. It would appear that the applicant contributed to this situation inasmuch as the form that she checked off clearly indicated at question 1 that she wished to withdraw her sponsorship application if she did not meet the sponsorship requirements and receive a refund of all processing fees [$1,400] less $75.

[40] A reasonable person in the circumstances of the applicant would be aware that the benefit obtained by withdrawing the sponsorship application was to avoid losing a significant processing

fee upon the family members' application for permanent residence being refused. That reasonable person, upon receipt of the processing fee, which receipt I find occurred in these circumstances, would recognize that some mistake must have occurred. In my view this person would follow up to ensure the letter was not in error and that she had not received the processing funds by mistake. Had this action been undertaken, the error would have been corrected in July 2011 or shortly thereafter. This would have provided sufficient time for the applicant to file a fresh application to sponsor her parents prior to the suspension of family class sponsorships in November 2011.

7. Conclusion

[41] For the above reasons, the application for judicial review is denied.

[42] There is no question proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is denied.

2. There is no question for certification.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7196-12
STYLE OF CAUSE:	RITA KUMARI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 4, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	ANNIS J.
DATED:	DECEMBER 9, 2013

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