Federal Court  Cour fédérale

Date: 20190606

Docket: IMM-4060-18

Citation: 2019 FC 790

Ottawa, Ontario, June 6, 2019

PRESENT: Mr. Justice Bell

BETWEEN:

JAGIR KAUR AULAKH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant [Ms. Aulakh] seeks judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision of an Immigration Officer [the Officer], rendered on July 13, 2018 [the Decision] refusing Ms. Aulakh's application for permanent residence status on the basis of misrepresentation, thereby barring her from making a similar application for five (5) years. The five-year bar results from

the Officer's conclusion that Ms. Aulakh misrepresented her son's age on her Permanent Resident [PR] application in order that he could accompany her to Canada as a "dependent child".

II. Factual Background

[2] Ms. Aulakh is a 61-year-old resident of India. She has four (4) children. One of Ms. Aulakh's sons [Ranvir Aulakh] is a permanent resident in Canada. He applied to sponsor Ms. Aulakh to come to Canada. In November 2015, Ms. Aulakh filed her application for PR in which she identified herself as the principal Applicant and one of her sons [Manbir Singh] as a dependent. Ms. Aulakh contended that Manbir's birthdate is August 25, 1989. She submitted a birth certificate, family photographs and school records to support her contention that he was born on August 25, 1989.

[3] Following an interview with Ms. Aulakh and Manbir, the Officer provided her with a procedural fairness letter expressing concerns that she had not fulfilled her obligation to "answer truthfully all questions put to [her]" as required by subsection 16(1) of the *IRPA*. The Officer was particularly concerned about Manbir's purported date of birth; he clearly being of the view that Manbir was older than contended to by Ms. Aulakh. The Officer raised the following points:

1. Manbir's birth certificate that was included in Ms. Aulakh's PR application was sent for verification to the issuing authority, who informed the Officer that the record did not exist and that the document was not genuine;

2. Ranvir Aulakh [Ranvir], Ms. Aulakh's sponsor, had declared in writing in 2004 in his application for permanent resident status that his brother, Manbir, was born on April 5, 1984. This would make Manbir five (5) years older than claimed by Ms. Aulakh, and hence not her dependent;
3. Manbir's school records purported to be from 2001 to 2002 and 2004 to 2005, looked more recent than his school records from 2007. The records also included several spelling mistakes which the Officer expected would have been corrected over the years;
4. In Ranvir's wedding photos, taken in 1998, Manbir looks much older than 9 years (which is the age he would have been if he were born in 1989); and
5. On September 20, 2017, the date of the interview, Manbir appeared older than his stated age.

[4] Ms. Aulakh's consultant responded that the spelling errors in the school records were honest mistakes and that Ranvir's statement as to the date of birth was a typographical error. The consultant also stated that Manbir looked older because he was taller than most kids his age and that his appearance can be explained by nutrition and lifestyle. Furthermore, the consultant stated that Ms. Aulakh had communicated with the issuing authority of the birth certificate, who were able to confirm that it does, in fact, exist and that a certified copy had been ordered.

[5] In November 2017, Ms. Aulakh received a second birth certificate from the issuing authority, which she provided to the Officer. After receiving the second certificate, the Officer observed that the first birth certificate indicated the birth was registered on August 29, 1989,

while the second was registered on August 30, 1989. No explanation was offered by Ms. Aulakh for this discrepancy, nor was any explanation offered as to why the first birth certificate could not be located by the issuing authority. Also, the certificates contained different registration numbers, which, again, was not explained by Ms. Aulakh. Further, despite the fact that the first birth certificate could not be authenticated by the issuing authority, Ms. Aulakh insisted that it was genuine.

[6] Without requesting that the second birth certificate be authenticated, the Officer rejected the application for a permanent resident visa and imposed the five-year bar on making another application.

III. Decision Under Review

[7] In the Officer's opinion the determinative issue was credibility. The discrepancies noted by him include those listed in paragraph 3 herein.

[8] In the Officer's notes one reads, in part, as follows:

> I am satisfied that the applicant and the adult dependent did misrepresent a material fact which could have induced an error in the administration of the Act in the [sic) adult child could have been included based on his age when he was not eligible. I have [sic] reviewed the explanations provided however they do not allay my concerns. It is much more reasonable to consider that the birthday given on the siblings [sic] application was the correct one as there was no interest in stating a date which was incorrect and the BC which was found to be non-genuine was actually non genuine as opposed to the second BC we received. On balance I am satisfied that misrepresentation has occurred and that it could have induced an error in the administration of the act in that a visa

> would have been issue [sic] to a non eligible [sic] family member. [Emphasis is mine.]

[9] The Officer considered all materials and evidence before him as well as subsection 16(1), paragraph 40(1)(a), paragraph 40(2)(a) and subsection 40(3) of *IRPA*. The Officer concluded Ms. Aulakh had deliberately misrepresented her son's age. That misrepresentation, according to him, could have induced an error in the administration of the *IRPA*. The Officer also considered and rejected Ms. Aulakh's request for humanitarian and compassionate consideration pursuant to subsection 25(1) of the *IRPA*.

IV. Relevant Provisions

[10] The relevant provisions of the *IRPA* are subsection 16(1), paragraph 40(1)(a), paragraph 40(2)(a) and subsection 40(3). These provisions are set out in the Schedule attached to these reasons.

V. Summary of Ms. Aulakh's Formulation of the Issues

[11] Ms. Aulakh contends that the Officer breached the duty of procedural fairness by not requesting the issuing authority authenticate the second birth certificate. Her counsel ably contends that the "exculpatory" evidence should have been treated in the same manner as the "inculpatory" evidence. The failure to take this step, according to Ms. Aulakh, demonstrates bias or a reasonable apprehension of bias on the part of the Officer. Ms. Aulakh further contends the lack of procedural fairness is demonstrated by the Officer's use of tunnel vision in his

assessment of the second birth certificate. She effectively contends the Officer erred in failing to give it any weight.

[12] Regardless of the perceived unfairness or bias of the Officer, Ms. Aulakh contends the decision is unreasonable given that it is unclear whether the Officer found the second birth certificate to be genuine. She says this ambiguity leads to a decision that is not justified, transparent and intelligible.

VI. Analysis

A. *Standard of review*

[13] When determining whether a decision-maker has met his or her duty of procedural fairness, the correctness standard applies (*Mission Institution v Khela*, 2014 SCC 24; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]). Recent jurisprudence from the Federal Court of Appeal suggests no standard of review need be applied, but that the correctness standard best reflects the analysis to be undertaken (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69). I intend not to get lost in the academic debate. On the issue of whether procedural fairness was respected or whether bias or a reasonable apprehension of bias influenced the decision-making process, the Court owes no deference to the decision-maker. The Court must undertake its own analysis of the issue and make its own conclusion (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 50).

[14] The second issue advanced by Ms. Aulakh concerns a question of mixed fact and law and, hence, attracts a reasonableness review. The Court must show deference to the decision-maker's analysis and decision provided the analysis demonstrates justification, transparency and intelligibility and the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

B. *Did the Officer breach the duty of procedural fairness or demonstrate bias or a reasonable apprehension of bias by failing to send the second birth certificate to be authenticated?*

[15] Ms. Aulakh contends the Officer was motivated by tunnel vision and demonstrated a reasonable apprehension of bias because he did not send the second birth certificate to be authenticated. The test for apprehension of bias, as set out in the dissenting opinion of De Grandpré, J. in *Committee for Justice and Liberty et al. v National Energy Board et al*., [1978] 1 S.C.R. 369, at p. 394 and reiterated in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20, requires the Court to consider what "an informed person, viewing the matter realistically and practically — and having thought the matter through" would have concluded.

[16] Ms. Aulakh's counsel considers the matter rather straightforward – an unbiased decision-maker would surely have sent the second birth certificate to be authenticated. That is clearly one perspective and one not to be quickly discounted. That said, I cannot agree. Someone fully informed of the facts would recognize that Ms. Aulakh's other son, her sponsor, was on record as saying his brother, Manbir, was five (5) years older than held out in the two birth certificates; namely, Manbir was born in 1984 and not 1989. That same informed person would know that

spelling errors were found in school records, not a place one expects to find spelling errors. That same informed person would also know that the dates of registration and the registration numbers on the two birth certificates were different. That same informed observer would also know that the first birth certificate offered by Ms. Aulakh was determined not to be genuine by the issuing authority and that she (Ms. Aulakh) continued to insist it was genuine. The informed bystander, with no interest in the matter, would be aware of the photos taken at the sponsor Ranvir's marriage, would have examined them and would have been able to discern the difference between a 9-year old boy and a 14-year old adolescent. The informed bystander would also know that Ms. Aulakh should have been aware of the discrepancies between the dates and the registration numbers of the two birth certificates and that she offered no explanation, nor did she seek one from the issuing authority. Finally, the informed bystander, in my respectful view, would conclude that it would make no difference whether the issuing authority now confirmed that the second birth certificate was genuine. I say this because Ms. Aulakh insists the first birth certificate is genuine even though the issuing authority says that is not the case. If she is willing to assert the analysis of the first birth certificate resulted in a false-negative by the issuing authority, why, I ask, could the second analysis not constitute a false-positive?

[17] Given the overwhelming evidence before the Officer and Ms. Aulakh's demonstrated unwillingness to accept the opinion of the issuing authority regarding the authenticity of the first birth certificate, what useful purpose could have been served to subject the second to an analysis? If such analysis and investigation of the second birth certificate had been important to Ms. Aulakh, she would have, in my opinion, sought explanations for the discrepancies from the issuing authority before sending the second birth certificate to the Officer.

[18] While carefully framed, and at first blush a reasonable argument, I see no merit in the assertion of reasonable apprehension of bias or "tunnel vision" as asserted by Ms. Aulakh. She cannot have it both ways. She cannot plead the issuing authority is wrong regarding its conclusion about the first birth certificate, yet contend her rights to procedural fairness are violated when that same issuing authority, considered unreliable by her, is not consulted regarding the second birth certificate. This is particularly relevant given the assertion by the sponsor, Ranvir, that his brother Manbir was born in 1984 and not 1989 and the other overwhelming evidence available to the Officer.

[19] In my view an informed by-stander would not conclude that the Officer demonstrated bias or an apprehension of bias in his approach to the evidence available to him. He did not act with tunnel vision. He carefully considered all of the evidence available to him.

C. *Ambiguity: Are the reasons justified, transparent and intelligible?*

[20] There appears to be some merit to the suggestion the Officer demonstrates ambiguity and confusion with respect to whether the second birth certificate was genuine. In the event he believed the second birth certificate was genuine, then the decision is clearly, in my view, lacking in intelligibility. Ms. Aulakh points to the Officer's conclusion that the first birth certificate was "[…] found to be non-genuine […] as opposed to the second BC […]" to suggest the second birth certificate was determined to be genuine. With respect, I do not interpret the Officer's notes as indicating that he considered the second birth certificate to be genuine. When one reads the whole of the notes in context, one readily observes that the Officer is weighing the second birth certificate against, among others, the following factors: the first birth certificate

which was determined to be non-genuine, which purported to bear the same date of birth; the statement of Ranvir that Manbir was born in 1984; and the other "concerns" the Officer had with respect to the evidence of Manbir's age, which, of course, included the school records. The Officer weighed the totality of the evidence, including the second birth certificate. That certificate did not overcome the Officer's concerns; hence, the use of the word "against". There is, in my view, no finding by the Officer the second birth certificate was genuine. To the contrary, given that it contained the same basic information regarding the date of birth as the first certificate, but differed in other respects such as the date of registration of the birth, he appears to give it little or no weight.

[21] While the Officer could have employed clearer language, one must bear in mind the context within which the notes were made. Those notes do not constitute a decision of a Court where the author has weeks or months to put his or her thoughts together. These are notes made contemporaneously with the events. I would not expect them to be perfect and fully expressive, in a literal sense, of the meaning the Officer intended to convey. To approach the notes in any other way, would, in my view, constitute an effort by the Court to find a reason to interfere. A judicial review is not a treasure hunt for error. A reviewing court must instead approach the reasons and outcome of the Officer's decision as an "organic whole" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para. 54; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 53).

[22] I would add that in my view Ms. Aulakh is requesting this Court to re-evaluate the evidence and substitute her view of the preferred outcome, something the reasonableness standard does not permit reviewing courts to do (*Dunsmui*r at para 47; *Khosa* at paras 59 and 61).

[23] Upon considering the Officer's decision and notes as a whole, I am satisfied the decision meets the test of reasonableness in that it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at para. 47). I also find that considering the totality of the decision and the notes, the Officer's reasons are justified, transparent and intelligible.

VII. Conclusion

[24] For the foregoing reasons, I would dismiss the application for judicial review without costs. Neither party proposed a question for certification and, in my view, none arises in the circumstances.

JUDGMENT in IMM-4060-18

THIS COURT'S JUDGMENT IS THAT the within application for judicial review is dismissed, without costs. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

SCHEDULE

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**	***Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27**
Obligation – answer truthfully	**Obligation du demandeur**
16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	**16 (1)** L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.
Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
[…]	[…]
Application	**Application**
(2) The following provisions govern subsection (1):	**(2)** Les dispositions suivantes s'appliquent au paragraphe (1) :
(a) the permanent resident or the foreign	a) l'interdiction de territoire court pour les

national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and	cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;
[…]	[…]
Inadmissible	**Interdiction de territoire**
(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).	**(3)** L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.

FEDERAL COURT

SOLICITORS OF RECORD

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