Date: 20090304

Docket: IMM-3714-08

Citation: 2009 FC 238

Ottawa, Ontario, March 4, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

BAKHSHISH SINGH NATT,
HARBHAJAN KAUR and SATNAM SINGH

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a visa officer dated July 11, 2008, refusing the applicants' application for permanent residence on the grounds that the adult male applicant, Mr. Bakhshish Singh Natt, (hereinafter referred to as the applicant) misrepresented information in his medical examination.

FACTS

[2] The applicants, Mr. Natt, his wife Mrs. Harbhajan Kaur, and their son Satnam Singh, are citizens of India. Mr. Natt and Mrs. Kaur have a daughter, Mrs. Inderjit Rai, who is a Canadian citizen.

[3] Mrs. Rai had previously applied to sponsor the applicants for permanent residence as members of the family class. That application was rejected in 2003 because the sponsor did not meet the "low-income cut-off". Mr. Natt had medical examinations, including chest x-rays in 2001 and 2002 in support of this application. These x-rays showed abnormalities in the lungs, but Mr. Natt was still found medically admissible.

[4] Mrs. Rai later met the income cut-off and re-applied to sponsor the applicants in 2003. The sponsorship was approved in 2006, and the application was referred to the Canadian visa post in New Delhi for processing. Mr. Natt states he once again completed medical examinations at the office of a Designated Medical Practitioner (DMP), including two x-ray examinations in July and August of 2006. The results of these tests were sent directly to the visa post and were not provided to the applicants. The results indicated "no abnormalities" in the lungs, which was inconsistent with the 2001 and 2002 x-rays.

[5] The medical officer reviewed Mr. Natt's x-rays from 2001 and 2002 and his July and August 2006 x-rays and concluded that they were not of the same individual. The immigration officer suspected that Mr. Natt had someone else take his x-rays for him. Mr. Natt received a written request from the visa post to meet with the medical officer, and did so on September 6, 2006. The officer showed the two x-rays and told him these were from his previous and current examinations and that they did not match. Mr. Natt denied falsifying his x-rays. The respondent states that the applicant was then sent to take a final, unscheduled x-ray after the meeting. This final x-ray revealed that the applicant had abnormal lung fields, evidence of tubercular lesions, and

evidence of fibraosis/fibrocalcification. However, these abnormalities again did not render the applicant medically inadmissible under IRPA.

[6] On October 24, 2006, the applicant was sent a "fairness letter" informing him that the visa post was of the opinion that he had provided false information in his medical examination and inviting the applicant to respond within 60 days. The letter accused the applicant of misrepresentations and therefore being inadmissible to Canada.

[7] Applicant's counsel sent a letter to the visa post on November 8, 2006, asking for the chest x-rays, medical reports and correspondence between the visa office and the applicants in order to respond to the allegation of misrepresentation. The designated visa officer responded over 1 year later on December 21, 2007, refusing to provide the records directly and informing the applicant's counsel that the records would have to be obtained through a separate Access to Information Act request. The applicants state that neither they nor their sponsor were aware of this exchange of letters regarding the request for documentation.

[8] The applicants state that between 2007 and 2008, they sent numerous requests for a status update to the Canadian High Commission in India without receiving any response.

[9] On July 11, 2008, the visa officer refused the applicants' application for permanent residence on the basis that they were inadmissible pursuant to section 40 of the *Immigration and Refugee Protection Act* (IRPA), due to misrepresentation. The visa officer stated:

> …Based on the information available to this office, I have concluded that you have misrepresented information in respect of your medical examination.
>
> I reached this determination based on information received from our medical section stating that you used deceitful methods in performing the Immigration Medical Examination at one of our Designated Medical Practitioners. You substituted someone to do the chest x-ray on your behalf and gave incorrect statements regarding your medical tests. You have misrepresented information in respect of your medical examination. The misrepresentation or withholding of information in respect of your medical examination could have induced errors in the administration of the Act as you would have qualified for a permanent residence visa on that basis.
>
> As a result, you are inadmissible to Canada for a period of two years from the date of this letter.

RELEVANT LEGISLATION

[10] Section 40 of IRPA provides that a foreign national is inadmissible for misrepresenting or withholding facts that could induce an error in the administration of IRPA:

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;
(*b*) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	*b*) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(*c*) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the	*c*) l'annulation en dernier ressort de la

foreign national; or

(*d*) on ceasing to be a citizen under paragraph 10(1)(*a*) of the *Citizenship Act*, in the circumstances set out in subsection 10(2) of that Act.

Application

(2) The following provisions govern subsection (1):

(*a*) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two 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

(*b*) paragraph (1)(*b*) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

décision ayant accueilli la demande d'asile;

d) la perte de la citoyenneté au titre de l'alinéa 10(1)*a*) de la *Loi sur la citoyenneté* dans le cas visé au paragraphe 10(2) de cette loi.

Application

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

a) l'interdiction de territoire court pour les deux 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;

b) l'alinéa (1)*b*) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

ISSUES

[11] While the applicant raises three issues in this application, the Court only needs to deal with one issue:

1. Did the visa officer breach the rules of natural justice and duty to act fairly by failing to provide the medical evidence and x-rays to applicant's counsel as requested so that the applicant would know the case against and have a meaningful opportunity to respond?

STANDARD OF REVIEW

[12] Decisions of a visa officer are entitled to a substantial degree of deference. Following the Supreme Court's decision in *Dunsmuir v. New Brunswick* [2008] S.C.J. No. 9, 2008 SCC 9, holding that the two standards of review are correctness and reasonableness, decisions of a visa officer relating to applications for permanent residence under the family class involved questions of mixed fact and law and are subject to a standard of review of reasonableness: *Odicho v. Canada (MCI),* 2008 FC 1039; *Mukamutara v. Canada (MCI),* 2008 FC 451, 161 A.C.W.S. (3D) 954.

[13] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." *Dunsmuir* at paragraph 47.

[14] Issues relating to natural justice and procedural fairness will be reviewed on a correctness standard.

ANALYSIS

With respect to breach of natural justice and duty to act fairly

[15] The applicant submits that the officer's finding was unreasonable and not in accordance with the evidence for several reasons. First, the applicant submits that he had no opportunity to falsify the x-rays by sending another individual to take the tests for him. When completing the x-rays, he was required to provide identification and the medical examination form from the visa post

which attached his photograph. The Designated Medical Practitioner's Handbook of the respondent confirms that there are tight controls in place to identify persons taking a medical exam. Specifically, the handbook provides that the x-ray technician must sign the form certifying that the x-ray taken was of the person whose photograph and signature are on the form, and must then collect the forms and directly transmit them to the visa post.

[16] The applicant notes that all the medical personnel involved in the case, whose correspondence with the visa post is included in the record, expressed surprise that the applicant would be able to circumvent their strict security procedures. Nonetheless, all the letters assumed that the applicant had managed to do so, which the applicant submits is simply self-serving as these medical personnel depend on the visa post for business and would not admit the possibility of an error on their end. The applicant submits that it is not logically coherent that in spite of strict security procedures, he was able to falsify the evidence on two separate occasions. The applicant submits that either the security controls were in place, in which case he could not possibly have done so; or, the controls were extremely lax, in which case it is equally possible that a technical or administrative error occurred at the medical practitioners' offices.

[17] The applicant further submits that the signed declarations of the medical technicians in each of the two x-rays he has been accused of falsifying must be given weight. In each case, the signed declaration states, "I certify that I have carried out the X-ray of the person whose photograph and signature are on this form." The photograph and signature on each of these forms matches all the other photos and signatures on the file. In light of this, the applicant submits that an equally

plausible explanation - that there was an error at the medical practitioner's office - should have been considered by the visa officer. However, there is no indication that any investigation into such a possibility occurred.

[18] The applicant also submits that he had no motive to falsify the x-ray evidence, or to falsely state that he had not undergone any tests, because none of the x-rays showing abnormalities or other medical evidence rendered the applicant inadmissible.

[19] The Court does not need to deal with any of the points raised above. The key and deciding issue is whether the visa officer breached the duty to act fairly in making this decision.

[20] The applicant submits that his procedural fairness rights were breached because the visa office did not provide him with the medical documentation and x-rays requested. The visa officer informed applicant's counsel that an access to information request would have to be made in order for the applicant to obtain his medical documents, including the x-rays.

[21] The applicant relies on a number of cases that sets out a visa applicant's right to see and comment on negative evidence. For example, in *Muliadi v. Canada (MEI)*, [1986] 2 FC 205, 66 N.R. 8, the Federal Court of Appeal held that a visa applicant who had been refused admission under the entrepreneur class because of a negative assessment of a business proposal should have been informed of the negative assessment and given an opportunity to comment before the decision was rendered. In *Thamotharampillai v. Canada (MCI)*, 2003 FC 836, 237 F.T.R. 16, Justice

Heneghan found that the failure of an immigration officer to disclose the contents of a criminal report and give the applicant to respond was a breach of procedural fairness.

[22] Here, however, the respondent submits that it did not refuse to provide the applicants with the records, but instructed the applicants as to the procedure to be followed under the *Access to Information Act* to obtain the records. The respondent states that it cannot be held responsible if the applicant did not follow the procedure and moreover, that there was ample time to do.

[23] The respondent's "fairness letter" to the applicant states that the applicant used deceitful methods in performing his immigration medical examination, that he substituted someone else to do his chest x-rays and that he gave incorrect statements regarding his medical tests. The fairness letter states that a person is inadmissible under section 40 of *IRPA* for misrepresenting material facts leading to a matter that could induce an error in administration of the immigration law. The Court finds that this is a very serious accusation against the applicant.

[24] The applicant's lawyer immediately responded to the "fairness letter", with a letter dated November 6, 2006 to the visa officer requesting copies of the medical reports and x-rays so that the applicant could properly respond.

[25] The respondent only replied in a letter dated December 21, 2007. As the Court expressed at the hearing, it is shocking that the respondent only replied over one year and one month later, and then told the applicant to make an "access to information request" to obtain these documents. That

is blatantly unfair and a blatant misstatement of the law. The delay is unfair to the applicant whose application for permanent residence is delayed needlessly for one year and one month, and then told to submit an “access to information request” which will compound the delay. The respondent has a duty to act fairly which is to provide the applicant immediately with the alleged “evidence” against him and an opportunity to respond. This is trite law. No “access to information” request is necessary to obtain information which the respondent relied upon in accusing the applicant of misrepresentation.

[26] For this reason, the Court indicated at the hearing that this application will be allowed because the respondent has breached the duty to act fairly towards the applicant. Moreover the respondent will be directed to provide the applicant’s counsel, Mr. Kingwell, with the actual chest x-rays on an immediate basis. Mr. Kingwell is an officer of the Court, and can be trusted to keep the x-rays safe, and to return them to the respondent. (The other medical information is already in the possession of Mr. Kingwell as a result of this court case.)

COSTS

[27] The applicant has requested costs. Rule 22 of the *Immigration and Refugee Protection Rules* allow for the award of costs to the parties in respect of an application for judicial review where special reasons exist. As I indicated at the hearing, after hearing submissions from the parties, special reasons in this case exist. The applicant should not have had to bring a Federal Court case in order to obtain his chest x-rays and be given a proper opportunity to respond to the misrepresentation accusations.

[28] At the hearing, the parties decided that costs will be according to the tariff. Upon reviewing materials, the parties agreed that costs to the applicant according to the tariff total $2,160.00.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is allowed with the direction that the respondent immediately provide to the applicants' counsel, Mr. Daniel Kingwell, the five chest x-rays of the applicant Mr. Natt;
2. the decision of the visa officer dated July 11, 2008 is quashed and set aside; and
3. the applicants are awarded their costs in the fixed amount of $2,160.00.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3714-08
STYLE OF CAUSE:	BAKHSHISH SINGH NATT, HARBHAJAN KAUR and SATNAM SINGH v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 18, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	March 4, 2009

APPEARANCES:

Daniel Kingwell	FOR THE APPLICANTS
Neal Samson John Provart	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Daniel Kingwell Mamann & Associates	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT