Federal Court  Cour fédérale

Date: 20100618

Docket: IMM-5446-09

Citation: 2010 FC 665

Ottawa, Ontario, June 18, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

YURI BAYBAZAROV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Yuri Baybazarov, is a citizen of Russia. He submitted an application for permanent residence in Canada on August 21, 2006. The Applicant applied in the investor category after a positive selection as a Prince Edward Island Provincial Nominee. In a decision dated October 14, 2009, an Immigration Officer, in Moscow, Russia determined the Applicant inadmissible under s. 37(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

(*IRPA*) on grounds of engaging, in the context of transnational crime, in activities such as money laundering.

[2] The Applicant seeks judicial review of this decision on the basis that the Officer breached procedural fairness by not disclosing extrinsic evidence to the Applicant. On the facts of this application and for the reasons that follow, I agree with the Applicant and will allow this application for judicial review.

I. Background

[3] After the Applicant was interviewed in Moscow, on June 21, 2007, two documents were received by the Officer:

1. Message HQOC2532 (CBSA report), a document classified as “secret”, from Canadian Border Services Agency’s Organized Crime Section (OCS). OCS recommended further scrutiny of the Applicant’s potential criminal relations, and the “provenance and legitimacy of the large sums in question”.

2. A report from Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). FINTRAC found suspicious financial activity relating to the Applicant, his business partner in Canada and their corporation, Nuspark Inc.

[4] On July 23, 2009, a fairness letter (fairness letter) was sent to the Applicant. The fairness letter stated that the Officer had reasonable grounds to believe the Applicant was inadmissible under s. 37(1)(b) of *IRPA*.

> According to information received from our partner agencies, you and your prospective business partner . . . have transferred large sums of money among your various bank accounts via electronic fund transfer (EFTR) through banks located in countries such as Switzerland, Cyprus, Latvia (emphasis added).

[5] Outside of stating "our partner agencies", the Officer did not mention CBSA or FINTRAC reports. Moreover, the Officer did not disclose any specific concerns about the source of the Applicant's employment income. The Immigration Officer merely listed nine transactions between October 6, 2004 and July 5, 2006. The Applicant was granted 90 days to respond to the allegations of money laundering.

[6] In the rejection letter, the Officer provided the following rationale for his decision:

> While you contend that the source of your funds was earned through valid and legal employment in Russia, you have failed to substantiate that the source of your employment income is entirely legitimate or how you have amassed your significant net worth.

II. Analysis

[7] The determinative question in this application is whether, based on the CBSA report (which was not disclosed to the Applicant), the Applicant was not afforded a reasonable opportunity to disabuse the Officer's concerns about the source and legitimacy of his employment income, which were key findings in the CBSA report.

[8] The Applicant argues that the Officer relied on the CBSA report to come to his final determination. Because the Officer did not disclose the CBSA report, its contents, or concerns related to the Applicant's employment income in the fairness letter, the Applicant had no opportunity to address this issue. This is the crux of the Applicant's allegation of breach of procedural fairness (see *Rukmangathan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, 247 F.T.R. 147; *Khwaja v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 522, [2006] F.C.J. No. 703 (QL); *Mekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133, 66 Imm. L.R. (3d) 222; *Suleyman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 780, 330 F.T.R. 205).

[9] The Respondent argues that, on the facts of this case, it was not necessary to disclose the CBSA report. The Applicant failed to satisfy the Officer that the transactions listed in the fairness letter were legitimate. As such, regardless of whether the CBSA report was disclosed, the Applicant would have still been found inadmissible. Furthermore, at the time, the CBSA report was classified as secret. The Responded relies on *Au v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 243, 202 F.T.R. 57 to argue that there is no breach of procedural fairness if an applicant is given the opportunity to respond to concerns raised in an officer's mind (at para. 33).

[10] The jurisprudence of this Court is clear on a visa officer's duty of procedural fairness in relation to extrinsic evidence.

[11] First and foremost, applicants have the burden to establish entitlement to a visa. Applicants bear the responsibility to produce relevant information to assist their application. There is no obligation on officers to apprise an applicant of concerns that arise directly from statutory requirements. Officers are also not required to give applicants a "running score" of weaknesses in applications. See *Rukmangathan*, above, at paragraph 23; *Nabin v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 200, [2008] F.C.J. No. 250 at paragraph 7; *Rahim v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1252, 58 Imm. L.R. (3d) 80 at paragraph 14.

[12] Second, officers have a duty to notify applicants where: a) concerns arise about credibility, accuracy or genuineness of the information submitted (see *Nabin*, above, at para. 8); or b) the officer has relied on extrinsic evidence (see *Rukmangathan*, above, at para. 22; *Nabin*, above, at para. 8; *Mekonen*, above, at para. 4). The purpose of this duty is to allow applicants a fair and reasonable opportunity to know the case against them and to respond to concerns.

[13] In determining whether non-disclosure of extrinsic evidence amounts to a breach of procedural fairness, Justice Dawson applied the "instrument of advocacy" test. This asks whether the document was designed "to have such a degree of influence on the decision maker that advance disclosure is required to 'level the playing field'" (*Mekonen*, above, at para. 19).

[14] Ultimately, the underlying inquiry in the context of an officer using extrinsic evidence is as follows (*Mekonen*, above, at para. 27):

> […] the question is not whether the report is or contains extrinsic evidence of facts unknown to the person affected by the decision,

but whether the disclosure of the report is required to provide the person with a reasonable opportunity to participate in a meaningful manner in the decision-making process.

[15] Applying these principles to the case at hand, two questions must be answered: a) was the extrinsic evidence an instrument of advocacy; and b) was disclosure of the CBSA report necessary for the Applicant to reasonably disabuse the Officer's concerns in a meaningful manner?

[16] To answer the first question, I find that the CBSA report is an instrument of advocacy. The CBSA report discloses a number of serious allegations in considerable detail. The allegations appear to tie the Applicant or his publishing company to known organized crime figures. In cross-examination on his affidavit, the Officer was asked about his reliance on the CBSA report. He made a telling admission: "I did consider it, but I did not list it in the procedural fairness letter".

[17] Because of the Officer's admitted reliance on the CBSA report, and the Officer's suspicions of the Applicant's employment income, my answer to the second question is also yes. As admitted by the Officer, the fairness letter made no reference to the CBSA report or these allegations. The CBSA report (or at least the substance of its contents, if secrecy was an issue) ought to have been disclosed in the fairness letter. Without this disclosure, the Applicant had no way of meaningfully responding to concerns that his source of income was illegitimate.

[18] Considering the significance of this issue in the Officer's mind and final determination, it was incumbent upon the Officer to at least raise this issue or disclose the gist of the CBSA report. This was not done. Having failed to do so, I find that the Officer breached procedural

fairness. The Applicant had no meaningful way to respond to the Officer's specific concerns. At the end of the day, there was no level playing field.

III. Conclusion

[19] In light of the above, I will allow this judicial review application. Neither party proposed a question for certification.

[20] In his Notice of Application, the Applicant seeks his costs. There are no special circumstances that would warrant an award of costs in this matter; no costs will be awarded.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, the decision of the Officer is quashed and the matter remitted to a different Immigration Officer for re-determination.

2. No question of general importance is certified.

3. Each party is to bear its own costs.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Stephen W. Green Ms. Hilette Stein	FOR THE APPLICANT
Ms. Margherita Braccio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General for Canada Toronto, Ontario	FOR THE RESPONDENT