Federal Court  Cour fédérale

Date: 20110909

Docket: IMM-6777-10

Citation: 2011 FC 1064

Ottawa, Ontario, September 9, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

OMAR HASSAN KAHIN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Omar Hassan Kahin challenging a decision by an Immigration Officer refusing his application for a permanent resident visa on the basis that he had failed to sufficiently document the particulars of his life after entering Canada in 1993.

[2] Mr. Kahin is a Somalian who obtained refugee protection in Canada in 1993. The Respondent provisionally approved his application for permanent residence in November of that year.

[3] For reasons that are not fully explained in the record before me, the Respondent did not process or finalize Mr. Kahin's application for permanent resident status and portions of the file were eventually either archived or destroyed.

[4] In July of 2006, Mr. Kahin's counsel wrote to the Respondent to ascertain the status of his application. The Respondent invited Mr. Kahin to submit a fresh application and he did so in September 2006. At some later point the Respondent located the original application.

[5] In processing Mr. Kahin's new application, the Respondent had a number of questions about his whereabouts and activities during the previous 13 years.

[6] In his 2006 application, Mr. Kahin declared that he had been employed by a "Hunting Store" in Edmonton, Alberta in 2006, as a security guard with Vanguard Security in Vancouver, British Columbia between 2001 and 2003, and as a security guard with Avalon Security in Surrey, British Columbia between 1994 and 1998. He also advised the Respondent that he had been employed essentially "under the table" without a social insurance number.

[7] The Immigration Officer sought additional details concerning Mr. Kahin's work history during the previous ten years including the names of his employers, their locations, and the nature of his work. Mr. Kahin responded by declaring employment with the Avalon Company in Surrey between 1994 and 1998 and his current employment with Ipex in Edmonton.

[8] The Immigration Officer wrote once again to Mr. Kahin asking for confirmatory letters from three of his declared employers, namely Ipex, Vanguard Security, and the Hunting Store. Mr. Kahin responded cryptically by stating that Ipex refused his request for a letter and that he could not find either Vanguard Security or the Hunting Store for the purpose of seeking letters.

[9] The Immigration Officer's Report to File indicates that she quite properly took it upon herself to verify some aspects of Mr. Kahin's employment history. She contacted the office manager of Vanguard Security Ltd. who told her that no employment record for Mr. Kahin could be found. She also confirmed that all security guards employed by Vanguard Security were required to be licensed by provincial authorities. The Immigration Officer then contacted the Ministry of Public Safety in Victoria and learned that Mr. Kahin had only been licensed to work as a security guard in British Columbia for a few months in 1994. The Immigration Officer also carried out an internet search for Avalon Security (a.k.a. Avlon) and found only one reference to a company in Minnesota. A call to that business indicated that it had never operated outside of Minnesota. It is common ground that the Immigration Officer did not disclose any of the above information she obtained independently to Mr. Kahin or to his counsel before issuing the decision to reject his application for a permanent resident visa.

[10] The impugned decision summarized the Immigration Officer's concerns as follows:

> Having carefully reviewed your case, I am not satisfied that the information you have provided regarding your personal history, including your places of residence and activities is factual and complete. Consequently your application is refused.
>
> No further consideration may be given to your request for permanent residence as a protected person. Should you wish to pursue another application for permanent residence, you will be required to submit a

> new application requesting humanitarian and compassionate consideration, accompanied by new processing fees.
>
> This decision does not affect your status as a protected person in Canada.

[11] The determinative issue on this application concerns the duty of fairness which is, of course, reviewable on the standard of correctness. Specifically, the question before me is whether the Immigration Officer had a duty to disclose to Mr. Kahin the information she had obtained from third-party sources and to provide him with an opportunity to respond.

[12] Counsel for the Respondent argues with some persuasion that Mr. Kahin knew that the information he had provided might be subjected to verification and that it was well within Mr. Kahin's capacity to anticipate the nature of the Immigration Officer's concerns. In short, she argues that Mr. Kahin ought to have made the same enquiries and produced whatever evidence he could to corroborate his employment narrative. Having failed to put his best case forward, he cannot complain that the Immigration Officer's investigation undermined his story.

[13] The Respondent relies upon the Federal Court of Appeal decision in *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 at para 26, 147 FTR 307 [*Mancia*], which holds that generally available or open source documentary evidence obtained by a decision-maker in advance of the applicant's submissions is generally not required to be disclosed.

[14] The problem that I have with the Respondent's position is that the nature of the information obtained by the Immigration Officer does not conform to the principles articulated in *Mancia*,

above. Much of the obtained information came from private discussions with third parties, which would not have been known to Mr. Kahin and which, had he known of it, might have been open to clarification or contradiction. By way of example, there is no indication given in the Immigration Officer's reasons as to whether she asked the source from Vanguard Security about its practices for document retention and, more specifically, if its employment records from 2001 to 2003 were still available.

[15] It is impossible to know precisely from the Immigration Officer's reasons how much weight she gave to the information provided by Avalon Security. However, if her failure to locate such a business in British Columbia concerned her, she should have looked to Mr. Kahin for an explanation.

[16] This type of evidence falls squarely within the definition of extrinsic evidence, which must be disclosed to an interested party before it is relied upon. Having embarked upon these independent and private enquiries, the Immigration Officer had a duty to disclose the results and to invite a response. This is consistent with cases like *Zamora v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1414 at paras 17-18, 260 FTR 155, where Justice Sean Harrington noted the importance of disclosing independent research (including some forms of material obtained on the internet), particularly if the information is open to potential challenge on the basis of questionable validity or completeness: also see *Mancia* at paras 10 to 23. Although I accept the Respondent's point that Mr. Kahin could have reasonably anticipated that the Immigration Officer might seek to verify his declarations, he had no basis to anticipate what the results of that investigation might be. The information relied upon here might well be wrong, incomplete, or open to explanation. Even if

it was complete and accurate, that is not the point of concern. In *D.K. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 845, [2011] FCJ no 1046 (QL) (TD),

Justice François Lemieux described the relevant concern in the following passage at para 30:

> The Officer may have been right in concluding that the post-hearing material was of no value and may have been fraudulent but that is not the point. The point is that the applicant and her counsel had no opportunity to comment on the evidence which the officer herself obtained and relied on to render the decision she reached.

Fairness demanded that Mr. Kahin be given the opportunity to be told about the Immigration Officer's findings and afforded the right of response. He did not get that chance and the decision must accordingly be set aside.

[17] Neither party proposed a certified question that would be of any relevance to the above disposition.

[18] The matter must be redetermined on the merits by a different decision-maker.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed with the matter to be redetermined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	KAHIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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