

Federal Court



Cour fédérale

Date: 20111118

Docket: IMM-1510-11

Citation: 2011 FC 1325

Ottawa, Ontario, November 18, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

BALASINGAM NADESAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an Immigration Officer (Officer) dated February 22, 2011. The Officer refused to grant permanent residence to the Applicant based on the submission of statutory declarations in lieu of identity documents.

[2] For the following reasons, this application is allowed.

I. Background

[3] The Applicant, Balasingam Nadesan, was granted refugee status in Canada on December 1, 1997. He subsequently applied for permanent residence. On three occasions, however, he submitted fraudulent identity documents in support of his application.

[4] He therefore attempted to submit statutory declarations to establish his identity. In his declaration, he deposed that he was a citizen of Sri Lanka and no other country. He explained that he arrived in Canada with false documents and did not have any identity documents in his possession. He claimed that he was unable to obtain the documents from Sri Lanka as his parents are deceased, he has no siblings and his relatives fled from the country.

[5] Two statutory declarations were also provided by relatives who certify that they personally knew the Applicant in Sri Lanka and are now Canadian citizens.

[6] On November 26, 2010, the Applicant was informed that he must provide genuine identity documents. On February 22, 2010, the Officer formally refused the application for permanent residence. The Officer's CAIPS notes stated that she was "NOT PREPARED TO ACCEPT STAT DECS AS CLIENT HAS SUBMITTED NON-GENUINE DOCS ON MULTIPLE OCCASIONS AND THEREFORE HE IS REQUIRED TO SUBMIT IDENTITY DOCS."

II. Issue

[7] The Applicant raises the following issue:

- (a) Did the Officer err in law and breach procedural fairness in refusing to accept the Applicant's statutory declarations as satisfactory identity documents?

III. Standard of Review

[8] Questions of law and procedural fairness demand the correctness standard (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at paras 43-44)

IV. Analysis

[9] Section 50 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) lists the documents required to be submitted with an application for permanent residence. Section 178 provides for the submission of alternative documents including those issued outside Canada before entry or statutory declarations. It reads as follows:

Identity documents

178. (1) An applicant who does not hold a document described in any of paragraphs 50(1)(a) to (h) may submit with their application

Pièces d'identité

178. (1) Le demandeur qui ne détient pas l'un des documents mentionnés aux alinéas 50(1)a) à h) peut joindre à sa demande l'un ou l'autre des documents suivants :

(a) any identity document issued outside Canada before the person's entry into Canada; or

(b) if there is a reasonable and objectively verifiable explanation related to circumstances in the applicant's country of nationality or former habitual residence for the applicant's inability to obtain any identity documents, a statutory declaration made by the applicant attesting to their identity, accompanied by

(i) a statutory declaration attesting to the applicant's identity made by a person who, before the applicant's entry into Canada, knew the applicant, a family member of the applicant or the applicant's father, mother, brother, sister, grandfather or grandmother, or

(ii) a statutory declaration attesting to the applicant's identity made by an official of an organization representing nationals of the applicant's country of nationality or former habitual residence.

a) toute pièce d'identité qui a été délivrée hors du Canada avant son entrée au Canada;

b) dans le cas où il existe une explication raisonnable et objectivement vérifiable, liée à la situation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle, de son incapacité d'obtenir toute pièce d'identité, une affirmation solennelle dans laquelle il atteste de son identité et qui est accompagnée :

(i) soit d'une affirmation solennelle qui atteste l'identité du demandeur faite par une personne qui, avant l'entrée de celui-ci au Canada, a connu le demandeur, un membre de sa famille, son père, sa mère, son frère, sa soeur, son grand-père ou sa grand-mère,

(ii) soit d'une affirmation solennelle qui atteste l'identité du demandeur faite par le représentant d'une organisation qui représente les ressortissants du pays dont le demandeur a la nationalité ou dans

lequel il avait sa
résidence habituelle.

Alternative documents

Documents de remplacement

(2) A document submitted under subsection (1) shall be accepted in lieu of a document described in any of paragraphs 50(1)(a) to (h) if

(2) Les documents fournis au titre du paragraphe (1) en remplacement des documents mentionnés aux alinéas 50(1)a) à h) sont acceptés si :

(a) in the case of an identity document, the identity document

a) dans le cas d'une pièce d'identité, la pièce, à la fois:

(i) is genuine,

(i) est authentique,

(ii) identifies the applicant, and

(ii) identifie le demandeur,

(iii) constitutes credible evidence of the applicant's identity; and

(iii) constitue une preuve crédible de l'identité du demandeur;

(b) in the case of a statutory declaration, the declaration

b) dans le cas d'une affirmation solennelle, l'affirmation, à la fois :

(i) is consistent with any information previously provided by the applicant to the Department or the Board, and

(i) est compatible avec tout renseignement fourni précédemment par le demandeur au ministère ou à la Commission,

(ii) constitutes credible evidence of the applicant's identity.

(ii) constitue une preuve crédible de l'identité du demandeur.

[10] The Applicant submits that the Officer fettered her discretion and committed an error of law by not considering the contents of the statutory declarations since fraudulent documents had been submitted in the past.

[11] By contrast, the Respondent relies on an affidavit of the Officer to assert that the statutory declarations were considered but that in all the circumstances, specifically three instances of submitting fraudulent documents, there was no reasonable and objectively verifiable explanation for the Applicant's inability to obtain acceptable documentation. Moreover, the statutory declarations could not be considered credible. The Respondent directs this Court's attention to the principle that "[n]o utterance, no document, is proof of anything unless it is found to be credible. An assertion is not made more credible by being reduced to writing" (*Iqbal v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ no 1793, 93 ACWS (3d) 737 at para 8).

[12] However, this Court has been clear that affidavits from visa officers explaining and elaborating on their reasons after the fact should be given little weight (see *Basra v Canada (Minister of Citizenship and Immigration)*, 2009 FC 535, [2009] FCJ no 654 at para 12; *Hansra v Canada (Minister of Citizenship and Immigration)*, 2009 FC 230, [2009] FCJ no 297 at paras 14-15; *Alem v Canada (Minister of Citizenship and Immigration)*, 2010 FC 148, [2010] FCJ no 176 at para 19). This is certainly true of the affidavit presented in this case that seeks to provide a justification at paragraph 6 for refusing the Applicant's statutory declarations.

[13] I must therefore focus my analysis on the refusal letter and CAIPS notes of the Officer as constituting the decision under review and side with the Applicant. There is no evidence in the

Officer's notes that the contents of the statutory declarations were considered to assess the explanation for providing them in lieu of identity documents or reach a determination on credibility. Indeed, the Officer asserts "NOT PREPARED TO ACCEPT STAT DECS AS CLIENT HAS SUBMITTED NON-GENUINE DOCS ON MULTIPLE OCCASIONS AND THEREFORE HE IS REQUIRED TO SUBMIT IDENTITY DOCS." This implies an outright rejection of the statutory declarations, not a consideration of their appropriateness or credibility. There is no mention of the explanation provided in the Applicant's declaration.

[14] Section 178 of the Regulations makes clear that statutory declarations may be submitted where there is "a reasonable and objectively verifiable explanation related to circumstances in the applicant's country of nationality or former habitual residence" that an individual is unable to obtain identity documents. This necessitates an assessment of the reasons for providing a statutory declaration. In addition, the Officer is required to accept the statutory declarations as long as they are "consistent with information previously provided by the applicant" and "constitutes credible evidence of the applicant's identity." Here again, consideration must be given to whether the statutory declarations constitute credible evidence. They cannot simply be rejected in favour of the requirement for formal identity documents. The Regulations clearly contemplate the submission of either identity documents or statutory declarations to establish identity.

[15] Even though the Officer may have had concerns regarding the Applicant's credibility generally, given his previous submissions of fraudulent documents, the decision to refuse the statutory declarations without regard to their contents does not correspond to the requirements of section 178. Though I am not suggesting that the submission of fraudulent documents should have

been completely ignored by the Officer, the Regulations prescribe a particular process for considering the statutory declarations that has to be addressed. The failure to provide reasons for this outright rejection is similarly problematic. The Officer's decision therefore constitutes an error of law and is in breach of procedural fairness.

V. Conclusion

[16] The failure of the Officer to review the contents of the statutory declarations, make reference to doing so in her reasons, and provide justification for refusing to accept them amounts to an error of law and breach of procedural fairness.

[17] Accordingly, this application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1510-11

STYLE OF CAUSE: BALASINGAM NADESAN v. MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: NOVEMBER 3, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: NOVEMBER 18, 2011

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