Federal Court  Cour fédérale

Date: 20131010

Docket: IMM-1462-13

Citation: 2013 FC 1023

Ottawa, Ontario, this 10th day of October 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

Kuldeep KAUR

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 (the "officer"), dated January 28, 2013, declaring the applicant inadmissible by reason of misrepresentation pursuant to section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act").

[2] The evidence consists of documents concerning the applicant's son, which were submitted as part of her application for permanent residence. The application for permanent residence includes the son as a dependent child. The officer concluded that the Matriculation and Senior Secondary certificates of her son were fraudulent. As a result, he concluded that the applicant is inadmissible. I have come to the conclusion that the decision of the officer is not reasonable under the circumstances. Furthermore, the peculiar circumstances of this case are such that I conclude that procedural fairness was not afforded. Hence the matter must be remitted to a different officer for a redetermination. Here are my reasons for reaching that conclusion.

Facts

[3] The applicant wishes to qualify for the issuance of a permanent resident visa to Canada. She is sponsored by her daughter who is a permanent resident of Canada. On or about November 11, 2010, the applicant filed her application for permanent residence, with supporting documents, to the Canadian High Commission in New Delhi, India. It appears that in the two years that followed, the processing of the application involved various requests for information or updates.

[4] On or about November 9, 2012, the High Commission in New Delhi sent a letter to the applicant expressing forcefully some concerns about some of the documentation already provided. The so-called "fairness letter" states:

> In support of your application for permanent residence in Canada, you submitted educational documents of your son Sukhjeet Singh. Your son's High School and Senior Secondary certificates have been verified to be fraudulent.

[5] It has been alleged by the applicant that the fairness letter did not disclose sufficient details for the purpose of providing a response. I have concluded that such is not the case. The documents referred to in the letter comprise just a few pages and, although some precision could have been helpful, it was not difficult on the face of the documents to see where the problem resided. A more significant difficulty is that the letter gave the applicant 30 days from the date of the letter for a response to be provided.

[6] It is not disputed by the respondent that the November 9 letter did not reach the applicant until December 3, 2012. At the very least, the respondent cannot contradict the affidavit of the applicant to the effect that she received the letter on that day.

[7] An extension of time was requested by the applicant's then counsel on December 11, 2012. No explanation is provided for why it took eight days for the applicant to seek the extension. Be that as it may, it can hardly be disputed that the respondent received such e-mail because it sought an authorization for counsel to act on behalf of the applicant, in view of the fact that someone else appeared to have been acting on behalf of the applicant before that date.

[8] On January 7, 2013, the same counsel reiterated his request for an extension of time and provided at the same time the respondent with the form confirming that he was representing the applicant.

[9] It is not disputed that the respondent never provided a response as to whether or not time was extended in order to respond to the fairness letter of November 9, 2012. Conversely, the

applicant did not show diligence in addressing the concerns that were explicit in the November 9, 2012 letter.

[10] Just over two weeks after having received the confirmation of the change in representative of the applicant, the respondent tersely rejected the application for permanent residence in Canada. The applicant was declared to be inadmissible, pursuant to section 40 of the Act, and the reason given reads as follows:

> On your application for permanent residence in Canada, you included Sukhjeet Singh as your dependent child. In support of Sukhjeet Singh's application, you submitted his Matriculation and Senior Secondary certificates issued by the Punjab School Education Board. Upon verification, we were advised by the Punjab School Education Board that Sukhjeet Singh's Matriculation and Senior Secondary certificates were fraudulent. We advised you of this finding by letter dated November 9, 2012, but have not received your response so far. I conclude that you submitted fraudulent educational certificates for Sukhjeet Singh to establish that he meets the definition of "dependent child" in the *Immigration and Refugee Protections* [*sic*] *Regulations*.

Analysis

[11] The only evidence before the Court comes from the Computer Assisted Immigration Processing System (CAIPS) notes maintained by the respondent. The notes do not tend to support the broad statement found in the letter of January 28, 2013. In an entry made on October 4, 2012, one can read:

> I called up the Khalsa Amarjit Sr. Sec. School, Domali Kapurthala, details mentioned on the matric and senior secondary cert. I provided the details of both the certificates, the Principal of the school checked her records and confirmed that no record found in their records neither by name nor by the roll no and registration number for class 10-march 2004 and class – 12-senior secondary 2006.

[12] As can be readily seen, there is no evidence that the School Education Board was contacted. It is the Board that issued the certificates. Furthermore, there was no confirmation that the certificates were fraudulent. It appears to be the conclusion reached by the officer because no records were found by the Principal.

[13] Indeed, in the CAIPS notes of January 28, 2013, an entry reads:

> I have reviewed all of the facts of this case and note that the applicant has not responded to our procedural fairness efforts. On the balance of probabilities, it is indeed more probable that the applicant has misrepresented facts that are material to a determination under the IRPA. . . .

I would have thought that the statement is not completely accurate. Although the comments had not yet been made by the applicant, she had already asked twice for an extension of time without getting a response from the respondent. There had been a response to the "procedural fairness efforts", although it was not the fulsome response. Such a statement leaves the impression that the applicant has remained silent since November 9, 2012. The statement lacks in precision and may convey an inaccurate perception. That leads to the conclusion that the balance of probabilities favours misrepresentation given the lack of response. Evidently, the decision to declare the applicant inadmissible by reason of misrepresentation was influenced by the lack of response to the procedural fairness efforts.

[14] The telephone call to the Khalsa Amarjit Senior Secondary School took place in early October 2012. The fairness letter was issued more than a month later, suggesting that there was no urgency. There is no evidence on the record to contradict that the said letter was received by the applicant merely a few days before the 30-day period for responding was to expire. However there

were in December 2012 and January 2013 communications coming from the applicant which clearly suggested that a response to the concern would be forthcoming. In spite of that, the respondent concluded the matter by a letter on January 28 based on the reason that no response to the fairness letter of November 9, 2012 had been received at that date. One is hard-pressed to understand why the respondent was in a hurry to conclude in a case that had started in November of 2010 by the filing of an application for permanent residence.

[15] What is more is that the letter of January 28 is silent as to why the documents submitted qualify under paragraph 40(1)(*a*) of the Act. The paragraph reads as follows:

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;

[16] Here, the record shows that other documents, which are part of the record, would tend to support the contention that the applicant's son was a student in university, which would suggest that high school had been completed. Yet, the respondent considers that the misrepresentation concerns material facts that relate to a relevant matter that could have induced an error in the administration of this Act.

[17] It is unclear to me why the respondent proceeded precipitously and sent the letter of January 28, 2013 after two requests for an extension of time had been filed, without a response. In fairness, the applicant could have been more diligent. Not only were the two requests for an

extension of time separated by one month, but it would have been in the best interests of the applicant to supply information, even if partial information, to support her contention that the respondent's misgivings were not appropriate, if not altogether unfounded. Nothing of the sort took place.

[18] In my view, the decision is problematic on two fronts. First the process followed is defective. Second, the decision lacks in demonstrating why it is reasonable in the circumstances to conclude that the misrepresentation, if any, is material and satisfies the test of section 40 of the Act.

[19] In this case, after reviewing the application for two years, the respondent provided a "fairness letter" allowing for 30 days to answer, yet it appears that it is received only 24 days later. Although the evidence would suggest that the two requests for an extension of time were received by the respondent, no response is given. And then, suddenly, a final determination is made.

[20] As stated by Brown and Evans in their *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing Inc., 2013), about procedural fairness, at paragraph 7:3110:

> . . . Its principal purpose is to provide a meaningful opportunity for those interested to bring evidence and arguments that are relevant to the decision to be made to the attention of the decision-maker, and correlatively, to ensure that the decision-maker fairly and impartially considers them.

I am of course conscious of the fact that the fair opportunity to participate is not an open-ended proposition. It is tempered by, in the words of Brown and Evans, "the public interest in effective, expeditious and efficient decision-making . . ." (at paragraph 7-1100). It seems to me that if fairness commands that the applicant be advised of admittedly legitimate concerns, it follows that a fair

opportunity to respond must be given. In the particular circumstances of this case the precipitation of the respondent remains unexplained, as well as the fact that it did not communicate with the applicant's representative in due course. Efficient decision-making cannot obviate the need to allow for representations to be made. In the particular circumstances of this case, I believe a proper response was not given.

[21] The standard of review in matters of procedural fairness is correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392). Here, the respondent did not allow the applicant to be heard. That would suffice to dispose of the matter.

[22] However, there is more. In my view, the decision in itself suffers from a defect that would be deserving of this Court's intervention.

[23] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the Court states that:

> [47] . . . . In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

In a case where the reasons are not completely accurate and where it is unclear how the alleged misrepresentation vitiates the process so much that it could induce an error in the administration of the Act, there is no other conclusion possible but to find the reasons as being deficient.

[24] Perfection in the reasons given by decision-makers is not the standard to which they are held. Indeed, the adequacy of reasons is not, on its own, a basis to quash a decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62,

[2011] 3 SCR 708 at paragraph 14). Moreover, reasons do not have to be extensive or seek to include all arguments.

[25] However, and respectfully submitted, the reasons once read together with the outcome in this case do not allow the reviewing judge to ascertain that the decision falls within a range of possible acceptable outcomes and thus is reasonable. That is the standard that has to be met (*Newfoundland and Labrador Nurses' Union, supra*, at paragraph 16). Merely repeating what the statute says is simply not enough.

Conclusion

[26] As a result, the matter is returned for a redetermination by a different officer. The new officer will have to allow the applicant time in order to make submissions in relation to the concerns raised in the fairness letter of November 9, 2012. A period of forty-five (45) days following the issuance of this judgment should suffice for the representations to be made.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application for judicial review is allowed.
2. The matter is to be re-determined by a different officer once the officer has received the applicant's submissions in relation to the concerns raised in the fairness letter of November 9, 2012.
3. A period of forty-five (45) days following the issuance of this judgment is given to the applicant to submit the said submissions to the respondent.
4. The parties agreed that there is no question for certification. The Court concurs.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1462-13
STYLE OF CAUSE:	Kuldeep KAUR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 12, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	ROY J.
DATED:	OCTOBER 10, 2013

APPEARANCES:

Ms. Puneet Khaira	FOR THE APPLICANT
Mr. Edward Burnet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lindsay Kenney LLP Langley, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT