

Federal Court



Cour fédérale

Date: 20140507

Docket: IMM-1499-13

Citation: 2014 FC 434

Ottawa, Ontario, May 7, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

**RAJESH CHAWLA,
JYOTSNA RAJESH CHAWLA
DISHA RAJESH CHAWLA AND
DEV RAJESH CHAWLA**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), of a decision rendered by Catherine Marx (the Officer) of the Immigration Section of the High Commission of Canada in New Delhi, refusing the application for permanent residence of the Applicants for misrepresentation under paragraph 40(1)(a) of the *IRPA*.

[2] Based on the analysis set out below, this application for judicial review is granted.

I. Facts

[3] Rajesh Chawla (the principal Applicant), a citizen of India, applied in March 2010 to come to Canada as a skilled worker and asserted that he had worked since 2003 as a cook at Sheetal Picnic Mini Dhaba restaurant in Mumbai (the restaurant), an establishment owned by Rajesh Mehra.

[4] In view of the fact that the principal Applicant had no training as a cook and the pay stub that he submitted did not match his income tax statement, inquiries were made to verify his employment. A phone call was placed to the restaurant using the phone number provided by the Applicants' consultant. A man named Mr. Naresh, who claimed to have been working in the restaurant for nine years, answered the phone and informed the Officer that no one by the name of Rajesh Chawla had ever worked there. According to the Respondent, Mr. Naresh also explained that the restaurant had changed location about three years ago, that the name of the proprietor was Rajesh Mehra and that he was not there but would come in the evening, that there were four other cooks working there but no one by the name of Rajesh Chawla, and that the eatery offered only vegetarian food.

[5] The principal Applicant was then put on notice of the adverse information and provided with the opportunity to respond. The "fairness letter" sent to him did not provide the details of the interview with Mr. Naresh, but merely stated: "Our investigation staff conducted a

verification on this restaurant in January 2012: Based on the information gathered during the investigation it was reported to us that you have never worked at this restaurant”.

[6] The principal Applicant responded to that letter on March 14, 2012. In his response, he indicated that he had been on leave for two and a half months at the time of the investigation, and that there had been a total change of staff during his absence. He also provided another letter from Mr. Mehra, in which he re-confirmed that the principal Applicant had been working for him since 2003. He also submitted receipts bearing his signature to support his contention that he had worked for the restaurant.

[7] On December 1, 2012, the Applicants’ application for permanent residence was refused.

II. Decision under review

[8] In her letter to the principal Applicant, the Officer essentially mentioned that the application for permanent residence was rejected because he was inadmissible for misrepresentation under paragraph 40(1)(a) of the *IRPA*, having misrepresented his work experience at the restaurant.

[9] In the Computer Assisted Immigration Processing System (CAIPS) notes, it was indicated that a phone call was made to the restaurant and that a Mr. Naresh informed the Officer of the following:

- (1) He is working with this eatery for about 9 years now

(2) This is a small eatery and was earlier located in a shop in Gokul Galaxy, Thakur Complex, Kandivali (east) but relocated to Vasant Smruti, Thakur Complex, Kandivali (E) about 3 years ago

(3) The name of the proprietor is Mr. Rajesh Mehra and he is not in the eatery and will come in the evening

(4) There are 4 other cooks/ 'boys' working in this eatery but NOBODY by the name of RAJESH CHAWLA (the Principal Applicant) is or was working with them in the kitchen as a cook

(5) The eatery offers only vegetarian food and no-non-vegetarian is served here.

[10] The CAIPS notes also mention that "the information provided by Mr Naresh is consistent with the information provided by the employer/consultant's fax and that found on web directories". The notes also indicate that the principal Applicant's signature on the receipts provided does not match the one on his application. As a result, the Officer decided to put more weight on Mr. Naresh's allegations since there was no reason for him not to tell the truth.

III. Issues

[11] This application for judicial review raises two questions:

- a) Did the visa officer breach the principles of fairness as a result of her failure to give more details in the fairness letter with respect to the information collected during the further inquiry, thereby preventing the principal Applicant from having an opportunity to respond to that information?
- b) Is the Officer's decision reasonable?

IV. Analysis

[12] It is well established that the standard of review for a procedural fairness issue is correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Ghasemzadeh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 716 at para 16; *Karami v Canada (Minister of Citizenship and Immigration)*, 2009 FC 788 at para 18.

[13] As for the second question, it must be reviewed under the standard of reasonableness. We are indeed facing a situation of mixed fact and law and the discretionary power of the Officer to assess the evidence before her. As a result, the Court will not intervene unless the decision does not fall “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[14] It is well established that procedural fairness requires that applicants for permanent residence be provided a meaningful opportunity to respond to perceived material inconsistencies or credibility concerns with respect to their files: *Qin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 at para 38; *Abdi v Canada (Attorney General)*, 2012 FC 642 at para 21; *Zaib v Canada (Minister of Citizenship and Immigration)*, 2010 FC 769 at para 17; *Baybazarov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 665 at para 17; *Hussaini v Canada (Minister of Citizenship and Immigration)*, 2013 FC 289 at para 5 [*Hussaini*]). This entails that an officer’s reliance on extrinsic evidence without allowing an applicant the opportunity to know and reply to that evidence amounts to procedural unfairness: *Amin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 206.

[15] Indeed, the Respondent's own guidelines provide as follows concerning extrinsic evidence:

The applicant must be made aware of the "case to be met", i.e., the information known by the officer must be made available to the applicant prior to the decision being made. For example, if an officer relies on extrinsic evidence (i.e., evidence received from sources other than the applicant), they must give the applicant an opportunity to respond to such evidence.

Overseas Processing Manual, Chapter OP-1: Procedures, s. 8
"Procedural fairness"

[16] In the case at bar, the Applicants were provided very little information as to the Officer's concerns. Apart from stating that an investigation was conducted and that, following this investigation, concerns as to misrepresentation arose, the fairness letter does not provide any other information. It is not stated what reasons led the Officer to conduct an investigation, how the investigation was conducted, or what information gathered during the investigation led to the conclusion that the principal Applicant had misrepresented his employment.

[17] Counsel for the Respondent submitted that the Applicants were provided with sufficient information to participate in a meaningful manner in the decision-making process and to fully and fairly present their case. I disagree. Had the principal Applicant been told by the Officer not only that she had some questions as to whether he ever worked in the restaurant, but also that these concerns were the result of information gathered from a phone call placed to the restaurant, he would have been in a better position to assuage these concerns.

[18] Of equal significance for the principal Applicant were the various pieces of information provided by Mr. Naresh over the phone (i.e. that the restaurant had relocated three years ago, that

the name of the proprietor is Mr. Rajesh Mehra, that there are four other cooks working in this eatery, and that the eatery offers only vegetarian food). If the principal Applicant had been told about this extrinsic evidence, he would have been able to dispute those facts, thereby undermining the credibility of Mr. Naresh. Indeed, the further affidavit filed by the Applicants for the purpose of this application for judicial review asserts that Mr. Naresh provided the wrong number of employees, the wrong date when the restaurant moved location and incorrectly identified the restaurant as vegetarian. It is not for this Court to determine who is telling the truth and whether or not Mr. Naresh provided accurate information. The Officer may well have decided to prefer the information provided by Mr. Naresh over the claims made by the Applicants even after having considered the Applicants' response to that information. However, this is pure speculation and there is no way to know how the permanent residence application would have been decided had the Applicants been provided with all the extrinsic evidence collected by the Officer.

[19] For all of the foregoing reasons, I am of the view that the Applicants were not able to participate in a meaningful way to the decision-making process, nor did they have an opportunity to respond to the Officer's concerns since they were kept in the dark about much of the information upon which the Officer made her decision. This case is similar to previous decisions of this Court, including *Moiseev v Canada (Minister of Citizenship and Immigration)*, 2008 FC 88 and *Hussaini*, above. I find, therefore, that there was a breach of procedural fairness and that the file should be sent back to a different officer.

[20] In light of this finding, there is no need to answer the second question. While the decision may well have been reasonable had the Applicants been given the opportunity to fully make their case, this is not what happened here. As a result, the Court refrains from making any determination in this respect.

[21] There is one further argument made by the Applicants that needs to be addressed.

Counsel for the Applicants submitted that the Officer should have interviewed the principal Applicant regarding the credibility concerns after his telephone conversation with Mr. Naresh. There is no right to an interview in such circumstances, and the case law cited by the Applicants in support of their proposition goes no further than indicating that such a duty may arise where the credibility, accuracy or genuine nature of the information submitted by an applicant is the basis of a visa officer's concern: see *Ismailzada v Canada (Minister of Citizenship and Immigration)*, 2013 FC 67 at para 20, citing *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways, in different situations. As long as an applicant is provided with an opportunity to respond and present his or her submissions, natural justice will be respected: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 33.

V. Conclusion

[22] This application for judicial review is allowed. Neither party proposed a serious question of general importance for certification purposes, and none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for re-determination.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1499-13

STYLE OF CAUSE: RAJESH CHAWLA, JYOTSNA RAJESH CHAWLA
DISHA RAJESH CHAWLA AND DEV RAJESH
CHAWLA v MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 29, 2014

JUDGMENT AND REASONS: DE MONTIGNY J.

DATED: MAY 7, 2014

APPEARANCES:

Jeremiah Eastman FOR THE APPLICANTS

Catherine Vasilaros FOR THE RESPONDENT

SOLICITORS OF RECORD:

Eastman Law Office Professional Corporation FOR THE APPLICANTS
Barrister and Solicitor
Brampton, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario