

Federal Court



Cour fédérale

Date: 20140509

Docket: IMM-1165-13

Citation: 2014 FC 445

Ottawa, Ontario, May 9, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**GURPREET SINGH BAJWA,
SADHU SINGH BAJWA AND
KULWANT KAUR BAJWA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a visa officer's decision refusing to re-open Gurpreet Singh Bajwa's visa application file in order to extend the validity of his permanent residence visa.

I. Background

[2] Mr. Bajwa is a citizen of India and was, at the material time, a dependent of the applicants Sadhu Singh Bajwa and Kulwant Kaur Bajwa. The family had been sponsored to immigrate to Canada by Mr. Bajwa's sister and her husband.

[3] Permanent resident visas were issued to the family on June 24, 2010. The visas were valid until December 31, 2010. A cover letter addressed to Mr. Bajwa's father explained the various steps that the applicants were required to take in relation to these visas. Amongst other things, the family was advised that they were required to notify the Canadian High Commission of any changes in their family situation, in which case the visas were to be returned to the Canadian High Commission.

[4] The letter also stated that any criminal charges against any of the visa applicants arising after the date of the visa application had to be disclosed to Canadian immigration authorities before the family left for Canada. In addition, they were advised that if a family member was unable to travel to Canada prior to the expiration of the visa, they would have to reapply for admission.

[5] On June 18, 2010, when Mr. Bajwa was 23 years old, he was arrested and detained on charges of kidnap and rape. He says that a family had been pressuring him to marry their daughter and bring her with him to Canada. When he refused to do so, he says that he was falsely accused of these crimes. Mr. Bajwa was imprisoned for some nine months while he awaited trial, and he was ultimately acquitted of all of the charges in March of 2011.

[6] In the meantime, the family became concerned that the visas would expire before Mr. Bajwa would be able to travel to Canada. Mr. Bajwa's father has stated in his affidavit that he visited the Canadian High Commission in New Delhi on two occasions in late 2010 in order to request an extension to his son's visa. He deposes that the first time they went, the Commission was closed.

[7] On the second visit they were told that they could e-mail or write to the Commission, but that the visa could not be extended. However, a visa officer at the Canadian High Commission in New Delhi has provided affidavit evidence that it is "standard procedure" for the Commission to document visits by an applicant such as this in their computer system, and that there is no record of any such a visit by Mr. Bajwa's father.

[8] Mr. Bajwa's father admits that he never told Canadian immigration authorities about the charges that his son was facing, nor did he explain why an extension to the term of the son's visa was required.

[9] Rather than allow all of the family members' visas to expire, Mr. Bajwa's parents chose to travel to Canada on December 26, 2010, where they were subsequently landed. Mr. Bajwa remained in pre-trial custody in India, and his visa expired on December 31, 2010.

[10] At his trial in March of 2011, Mr. Bajwa's accusers withdrew their allegations and he was acquitted of the charges against him. On April 18, 2011, the applicants' Canadian counsel made a formal request for an extension of Mr. Bajwa's visa. This request was denied by a visa officer on April 28, 2011. The reason given was that it was "not ... possible to reopen our file

and extend the visa of Gurpreet Singh at this time”: see *Bajwa v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 864 at para. 42, [2012] F.C.J. No. 931 (*Bajwa #1*).

[11] In cross-examination, the officer evidently explained that granting an extension was not possible “based on standard office procedure” as provided for in the relevant policy manual: *Bajwa #1* at para. 43.

[12] In *Bajwa #1*, Justice O’Keefe found that the officer had fettered his discretion as the Policy Manual precluded any deviation from standard practice when no such limitation existed in either the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 or the *Immigration and Refugee Protection Regulations*, SOR/2002-227. Justice O’Keefe remitted the matter to the Canadian High Commission for re-determination by another officer. It is this re-determination decision that underlies this application for judicial review.

[13] Following Justice O’Keefe’s decision, the applicants submitted updated forms and documents in connection with their request for a visa extension. Mr. Bajwa was then interviewed by a different visa officer. The visa officer explains in her affidavit that she did this in order to approach the file in a “fair and transparent manner”. She explains that she wanted to “determine the situation” and the sequence of events so as to ascertain whether there were “compelling reasons” to justify the exercise of her discretion to re-open the visa application.

[14] During the interview with Mr. Bajwa, the officer asked questions about the history of the permanent resident application and actions that had been taken by Mr. Bajwa and his family in relation to their application for permanent residence. Questions were also asked with respect to the events giving rise to his arrest and his relationship with his accusers.

[15] In coming to the conclusion that the answers provided by Mr. Bajwa were not credible, the officer identified inconsistencies between what he had said about his relationship with his accusers at the interview, what he stated in his affidavit, and what his parents had said during the previous judicial review proceedings. The officer also did not find it credible in the context of Punjabi culture, that the accusers would “pressure” Mr. Bajwa into marrying a woman when their families had never even been introduced.

[16] The officer also found discrepancies between Mr. Bajwa’s testimony and that of his parents with regards to their two alleged visits to the Canadian High Commission. The evidence regarding the visits was vague and the officer was concerned about the fact that there was no mention of these visits in the Commission’s records, even though it is standard procedure that such a visit would have been documented in the computer system. As a consequence, the officer concluded that there was “insufficient evidence” to demonstrate that the applicants had ever approached the Canadian High Commission in New Delhi in order to seek an extension to Mr. Bajwa’s visa.

[17] According to the officer’s reasons, it was “of particular concern” that the applicants “hired an agent at the beginning of their application, consulted a lawyer in India and even hired a lawyer in Canada but did not inform our office or actually ask for an extension in writing until AFTER ACQUITTAL” [emphasis in original].

[18] The officer was thus satisfied that the applicants knew of their obligation to inform the Canadian High Commission of Mr. Bajwa’s arrest. The officer was further satisfied that they could have contacted the Canadian High Commission in order to inform them of Mr. Bajwa’s

arrest, either through a lawyer or an immigration consultant, and that they had chosen not to do so.

[19] As a consequence, the visa officer concluded that the applicants had not met their onus of showing that there were compelling reasons that would justify the exercise of her discretion to re-open Mr. Bajwa's visa application.

II. Issues

[20] The applicants raise three issues in this application.

[21] They argue firstly that the request for an extension to the term of Mr. Bajwa's visa was handled in an abusive manner by Canadian immigration authorities. This is because the applicants were never told that the real concern with respect to their first request for a visa extension was that they were simply not believed by the visa officer originally considering the request.

[22] The applicants also say that the officer should have put the inconsistencies in the evidence provided by the various members of the family to Mr. Bajwa's parents for explanation and that it was a breach of procedural fairness to fail to do so.

[23] Finally, the applicants say that the officer's decision was unreasonable.

III. Has the Handling of the Visa Extension Request been Abusive?

[24] As was noted earlier, the reason given for the first decision refusing to reopen Mr. Bajwa's file was that it was not possible to do so, as the relevant policy manual did not

contemplate such a course of action. It was on the basis of this decision that Justice O'Keefe rendered his decision in *Bajwa #1*.

[25] When the Certified Tribunal Record was produced in connection with this application for judicial review, a letter from the first visa officer to respondent counsel was included in the CAIPS notes. I am assuming that this occurred through inadvertence. In any event, the respondent has not asserted privilege over the contents of the letter or objected to the applicants' reliance upon it.

[26] In this letter, the first visa officer explained that the reason for the refusal of the initial request to re-open Mr. Bajwa's file was, in fact, the visa officer's belief that Mr. Bajwa's father had knowingly failed to tell the Canadian High Commission about his son's situation, and had not returned the visas as instructed in the letter accompanying the visas.

[27] The letter goes on to advise counsel that if the father had contacted the Canadian High Commission and returned the visas prior to leaving for Canada, "we would have reopened the case" and asked for proof of the son's situation. The officer noted that if Mr. Bajwa had been convicted, it would have rendered the whole family inadmissible to Canada.

[28] The officer concluded by stating that since Mr. Bajwa's father "knowingly ignored the instructions provided to him in our letter, I did not find it appropriate to reopen the case and process the son's application when the family was already in Canada".

[29] The reason for the refusal of the request to reopen that are cited by the visa officer in his letter to counsel are quite different than the reason that was provided to the applicants and to the Court in the context of the application for judicial review heard by Justice O'Keefe. Indeed,

Justice O’Keefe specifically noted that there was no reason to believe that the first visa officer’s decision was based upon the non-disclosure of the criminal charges: see *Bajwa* #1 at para. 55. No satisfactory explanation has been provided for this discrepancy, which is very troubling.

[30] As the Supreme Court of Canada has observed, transparency is one of the hallmarks of a reasonable decision: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190. Moreover, simple fairness requires that an applicant be told the real reason why an application is being refused.

[31] However, the applicants have not persuaded me that there was any bad faith on the part of the respondent in this case. Good faith is presumed, and the onus for establishing bad faith is a substantial one: *St. Laurent (Ville) v. Marien*, [1962] S.C.R. 580 at 585, [1962] S.C.J. No. 39.

[32] As troubling as these events may be, I am also not persuaded that I should grant this application for judicial review on this basis alone. As a result of Justice O’Keefe’s decision, the new visa officer conducted a *de novo* review of the applicants’ request to reopen his application. She appears to have come to her own conclusions with respect to the circumstances surrounding the family’s failure to disclose the fact that Mr. Bajwa was facing very serious criminal charges in India in a timely fashion.

[33] As a consequence, any unfairness that may have occurred in relation to the previous proceeding which culminated in the hearing before Justice O’Keefe was cured through the re-determination process.

[34] The real questions, then, are not how the earlier decision was reached, but whether the requirements of procedural fairness were met in this second proceeding and whether the officer's decision was reasonable.

IV. Were the Applicants Treated Unfairly in the Re-determination Process?

[35] While I appreciate that the decision at issue is of considerable importance to Mr. Bajwa and his family, as the applicants have acknowledged, the level of fairness owed to visa applicants is relatively low. Moreover, once a decision is made in connection with a visa application, there is no right to have the application re-opened, and a request for re-opening involves the exercise of a visa officer's discretion. If anything, the level of fairness owed in such circumstances may be even lower than that owed in connection with the original visa application.

[36] Mr. Bajwa's father was afforded with, and took advantage of, the opportunity to provide information with respect to the circumstances surrounding the arrest and imprisonment of his son in the context of their original application for judicial review. He also had the chance to explain the family's reasons for failing to disclose his son's situation to the Canadian High Commission in a timely manner.

[37] Thus the visa officer did have information from Mr. Bajwa's father before her, in the form of the father's affidavit and his cross-examination from the previous litigation. These materials address the very issues being addressed by the officer in this proceeding. In the circumstances, there was no obligation on the visa officer to go back to the father and give him a second opportunity to provide the same information.

[38] Moreover, the explanations that the father says that he would have provided to explain the discrepancies between his story and that told by his son seems to create further confusion and would have been unlikely to shed additional light on the situation or resolve the visa officer's credibility concerns.

[39] Counsel for the applicants suggested that Mr. Bajwa could not have known that there was any obligation on him to notify the Canadian High Commission, given that he was already in jail when the letter notifying his parents of this requirement was sent. In the circumstances, it was unfair for the visa officer to hold him accountable for any errors in judgment that may have been made by his parents.

[40] However, Mr. Bajwa was interviewed at some length by the visa officer and was given a fulsome opportunity to explain what had gone on. At no time did Mr. Bajwa ever deny being aware of his disclosure obligations. Instead, Mr. Bajwa said variously that "*we* didn't know what to do", "*we* were expecting my case to be finalized quickly", and that when "*we* realized that my court dates were being pushed *we* realized that the visas were going to expire". His use of the word "*we*" clearly suggests that he was part of the decision-making process in relation to the handling of the visa application in question.

[41] There were also material discrepancies between the information provided by Mr. Bajwa and that provided by his parents, both with respect to central matters surrounding the parents' efforts to seek an extension to the visa in late 2010, and with respect to more peripheral matters such as the circumstances giving rise to the criminal charges against Mr. Bajwa.

[42] Given that Mr. Bajwa and his parents were all parties to the visa application, I am not persuaded that the information provided by each family member constituted extrinsic evidence or that it had to be shared with the other members of the family, in order to give each them an opportunity to respond.

[43] Moreover, Mr. Bajwa, the person most directly affected by the decision in issue, was told about the inconsistencies between his story and that provided by his father, and he was afforded an opportunity attend in person in order to address the visa officer's concerns in this regard.

[44] Finally, the fact that Canadian immigration authorities have elected not to take steps to strip Mr. Bajwa's parents of their permanent residence status as a result of their failure to comply with their disclosure obligations does not render unfair the decision not to extend the term of Mr. Bajwa's visa.

[45] The applicants have thus not persuaded me that they were treated unfairly in the redetermination process.

V. Was the Visa Officer's Decision Reasonable?

[46] The visa officer also found that Mr. Bajwa was not forthcoming with some of his answers to her questions and that he was being evasive. The officer was obviously best situated to make that assessment, and her findings in this regard should be accorded considerable deference. Mr. Bajwa also acknowledged that previous affidavits sworn by him contained misleading statements.

[47] I also do not accept the applicants' argument that Mr. Bajwa could not have been expected to inform the Canadian High Commission of information that was material to his

family's permanent residence application. He was a college-educated adult who appears to have been fully aware that the criminal charges against him put his family's Canadian permanent residence prospects in jeopardy. I also note that there is no interpreter's certificate appended to his affidavit, indicating that Mr. Bajwa speaks English.

[48] That he was in jail through the validity period of his visa did not make him unable to inform the Canadian High Commission of the charges against him. He was in regular contact with a lawyer who could have contacted the High Commission on his behalf, or Mr. Bajwa could himself have written a letter to the Canadian High Commission.

[49] I have previously discussed the frailties in Mr. Bajwa's father's evidence regarding his efforts to advise Canadian immigration authorities of his son's circumstances. I would also note that the applicants have stated that Mr. Bajwa's brother-in-law in Canada was urging the family to notify the Canadian High Commission of the situation, and no explanation has been provided as to why the brother-in-law could not have sent an email or letter on their behalf, as they were advised to do, if the family had truly had difficulties communicating with the New Delhi office.

[50] Moreover, Mr. Bajwa's father had retained the services of an agent to assist them with the family's visa application. No satisfactory explanation has been provided as to why no assistance was sought from the agent when difficulties were encountered in contacting the Canadian High Commission.

[51] Given all of the problems identified by the officer with the information provided by the family, the officer's conclusion that the family had consciously chosen not to tell the Canadian immigration authorities about Mr. Bajwa's criminal charges until after the parents were landed in

Canada and Mr. Bajwa's criminal trial had been concluded was one that was reasonably open to the officer on the record before her.

[52] Mr. Bajwa had no right to have the term of his expired permanent resident visa extended. Rather, the onus was on the applicants to show that the circumstances warranted the exercise of the visa officer's discretion "in the interest of justice" and "in unusual circumstances": *Kheiri v. Canada (Minister of Citizenship and Immigration)* (2000), 193 F.T.R. 112 at para. 8, 8 Imm. L.R. (3d) 265. The applicants simply failed to discharge that onus.

VI. Conclusion

[53] For these reasons, the application for judicial review is dismissed. I agree with the parties that the facts of this case are unusual, and that it does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1165-13

STYLE OF CAUSE: GURPREET SINGH BAJWA, SADHU SINGH BAJWA
AND KULWANT KAUR BAJWA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 1, 2014

JUDGMENT AND REASONS: MACTAVISH J.

DATED: MAY 9, 2014

APPEARANCES:

Ms. Barbara Jackman FOR THE APPLICANTS

Mr. Michael Butterfield FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates FOR THE APPLICANTS
Barristers and Solicitors
Toronto, Ontario

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