Federal Court  Cour fédérale

Date: 20140710

Docket: IMM-3152-13

Citation: 2014 FC 678

Toronto, Ontario, July 10, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

NARINDER PAL KAUR
BALJIT SINGH KULAR
HARNOOR KAUR KULAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] This is an application for judicial review by Narinder Pal Kaur, Baljit Singh Kular and Harnoor Kaur Kular (the Applicants) of a decision made by a Visa Officer of the High Commission of Canada in New Delhi, India dated April 18, 2013, wherein the Officer determined that the principal Applicant Narinder Pal Kaur does not meet the requirements for the issuance of a permanent residence visa as a Skilled Worker pursuant to the *Immigration and*

Refugee Protection Act, SC 2001, c 27 (*IRPA* or the *Act*) and the *Immigration and Refugee Protection Regulations*, SOR`2002-227 (*IRPR* or the *Regulations*).

[2] For the reasons that follow, I have found that this application for judicial review ought to be allowed.

I. Facts

[3] The principal Applicant, Narinder Pal Kaur, her husband, Baljit Singh Kular and their daughter, Harnoor Kaur Kular, are citizens of India. In April of 2011, the principal Applicant applied for permanent residence under the Skilled Worker Class as a Restaurant Manager. It is alleged that the principal applicant submitted her application along with all supporting documents and her application was approved by the Centralized Intake Office (CIO) in Sydney, Nova Scotia prior to its transfer to the High Commission in New Delhi for further processing.

[4] In March of 2013 the Applicant received a letter from New Delhi asking her to provide updated proof of settlement funds at the current time. Although no amount was specified in the letter, she checked the CIC website and determined that the necessary amount was currently $17,011. With the understanding that her application was now in the final stage of processing, the Applicant made an Account Payee's Draft (bank draft) in the amount of $17,050 on March 4, 2013, payable by the Bank of Nova Scotia in Toronto.

[5] The principal Applicant received a refusal letter dated April 18, 2013 stating that she did not meet the requirements for permanent residence under the Skilled Worker Class.

II. Decision under Review

[6] The stated reason for the refusal was that the principal Applicant did not submit satisfactory proof of settlement funds as she only submitted a bank draft. The Officer was not satisfied that the proof of funds submitted respects the requirements as outlined in subparagraph 76(1)(b)(i) of the *Regulations*. The Officer concluded that "there is insufficient evidence submitted with our [the principal Applicant] application that this money is currently available to you or that these funds are unencumbered by debts or other obligations".

[7] The Officer further indicated in her CAIPS/CGMS notes that "PA has submitted a copy of the bank draft, but there is insufficient evidence on file to demonstrate where this money has come from or that the bank draft has not been cancelled in India". The Officer went on:

> Therefore, I am not satisfied that these funds are available to PA – PA has not demonstrated that these funds are "unencumbered by debts or other obligations". The Bank Draft was issued in India by an unknown source (the name of the person who bought the draft is not named on the draft and no explanation has been provided by PA). With no explanation as to the province of these funds, it is not known where these funds come from or whether a third party has lent the money/bought the bank draft for PA. As such, I am not satisfied that these funds do not have to be reimbursed to a third party and/or that these funds are not encumbered by debts or other obligations.
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> Application Record, pp. 115-116.

III. Issues

[8] The parties substantially agree on the issues raised by this application for judicial review, and they can be formulated as follows:

- Was it reasonable for the Officer to conclude that the Applicants failed to provide sufficient proof of unencumbered settlement funds?
- Did the Officer breach the duty of fairness by not giving the Applicants an opportunity to respond to her concerns regarding the settlement funds?

IV. Analysis

[9] Both parties agree, and I concur, that the assessment of an application for a permanent residence under the Skilled Worker Class is a discretionary exercise involving questions of mixed law and facts and should be given a high degree of deference. The applicable standard of review is therefore reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47, 53, 66 and 62; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paras 52-62. In reviewing an officer's decision on a standard of reasonableness, the Court should not interfere if the officer's decision is transparent, justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. It is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence that was before the officer.

[10] As for the question of procedural fairness and natural justice, the standard of review is correctness: *Dunsmuir*, at para 50; *Khosa*, at para 43. In reviewing an officer's decision on a

standard of correctness, a reviewing court will undertake its own analysis of the question and reach its own conclusion.

A. Was it reasonable for the Officer to conclude that the Applicants failed to provide sufficient proof of unencumbered settlement funds?

[11] The principal Applicant applied for permanent residence as a member of the economic class pursuant to s. 12(2) of the *IRPA*, and more particularly as a skilled worker. Division 1 of Part 6 of the *IRPR* set out the requirements that applicants must meet to become permanent residents as skilled workers. For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, an applicant must be awarded a minimum of 67 points on the basis of education, proficiency in the official languages of Canada, age, arranged employment, and adaptability (s. 76(1)(a) of *IRPR*). An applicant must also prove that his or her settlement funds are available and transferable and unencumbered by debts or other obligations, according to s. 76(1)(b)(i), unless he or she is awarded points for arranged employment (s. 76(1)(b)(ii). Those sections read as follows:

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:	**76.** (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :
[…]	[…]
(b) the skilled worker must	b) le travailleur qualifié :
(i) have in the form of transferable and available funds,	(i) soit dispose de fonds transférables et disponibles — non grevés de dettes ou d'autres obligations financières —

unencumbered by debts or other obligations, an amount equal to one half of the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or	d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,
(ii) be awarded points under paragraph 82(2)(a), (b) or (d) for arranged employment, as defined in subsection 82(1), in Canada.	(ii) soit s'est vu attribuer des points aux termes des alinéas 82(2)a), b) ou d) pour un emploi réservé, au Canada, au sens du paragraphe 82(1).

[12] In the case at bar, the Applicant had submitted proof of funds at the time of the application in the form of a term deposit. When the Officer requested an updated assessment, the Applicant was directed to the CIC website where she was able to determine the exact amount to prove. She then submitted a copy of a bank draft slightly exceeding the required amount of money.

[13] I agree with counsel for the Respondent that the initial assessment conducted by the Centralized Intake Office in Sydney is irrelevant for the purposes of the Officer's assessment. As is made clear in OP 6B Federal Skilled Workers – Applications received on or after June 26, 2010, applicants must demonstrate that they have the requisite settlement funds at the time the application is made, as well as at the time the visa is issued (Respondent's Book of Authorities, Tab 2, section 9.1). See also: *Pasco Pla v Canada (Minister of Citizenship and Immigration)*, 2012 FC 560, at para 25.

[14] The fact that a Canada Border Services Agency would have examined the Applicant upon her arrival in Canada is similarly irrelevant. Again, I agree with counsel for the Respondent that the implication of the Applicant's argument is that the Officer was not required to be satisfied that she met the requirements of the *Act* and the *Regulations* because a subsequent verification would take place at the Port of Entry. If this argument were to have merit, it would render meaningless any evaluation taking place before the Port of Entry.

[15] That being said, I fail to understand the logic behind the Officer's reasoning that a bank draft is insufficient proof of unencumbered settlement funds because it does not provide any information on where the money came from, whether the draft has been cancelled, whether the funds are encumbered by debts or other obligations, who bought the draft, or whether a third party has lent the money to the Applicant. The same deficiencies clearly affect the other acceptable proofs of settlement funds listed in the CIC's Document Checklist. According to that document, current bank certification letter, evidence of savings balance and fixed or time deposit statements are all acceptable types of evidence. Not only is this list clearly not exhaustive, but as conceded by counsel for the Respondent, these accepted methods of proving settlement funds would as easily as a bank draft allow an applicant to subvert this requirement by borrowing money from a third party and depositing the money into his or her bank account. If the *Regulations* are deficient in this respect, they should be amended to allow for a more probing examination of the source of the funds, whatever the type of evidence chosen to establish the availability and transferability of these funds. If, on the other hand, there are good reasons not to investigate any further into the origin of the funds, then bank drafts should not be excluded as a

possible way of establishing unencumbered and readily transferable funds merely because they do not provide information as to where the money comes from.

[16] In the case at bar, there is no evidence whatsoever that the Applicants borrowed the money from someone else to purchase the bank draft. Indeed, the main Applicant stated in her affidavit that she kept the money in her fixed deposit in order to meet the requirements of the *IRPA* with respect to settlement funds (Application Record, p. 15, at para 3). Accordingly, the Officer's concerns with respect to the bank draft were based on pure speculations, and for that reason her decision is unreasonable.

B. Did the Officer breach the duty of fairness by not giving the Applicants an opportunity to respond to her concerns regarding the settlement funds?

[17] It is well established that an officer is under no obligation to provide a running score of weaknesses in an applicant's application: see, for ex., *Thandal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 489, at para 9; *Nabin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 200, at paras 7-10; *Soor v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1344, at para 4. On the other hand, procedural fairness requires that an applicant be provided an opportunity to address an officer's concern when the credibility, accuracy or genuine nature of the information submitted is at stake: *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, at para 24. Such a requirement will apply particularly when an applicant could not have anticipated the officer's concerns: *Kuhathasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 457, at paras 39-41.

[18] Contrary to the Respondent's submissions, I am of the view that the principal Applicant's credibility was on the line in the case at bar. The Officer was clearly questioning where the money came from and implicitly casts doubt as to whether the money guaranteed by the bank draft was hers. The Applicant had no way to know that the bank draft submitted would raise suspicion, especially since no concerns were raised with the term deposit that she initially provided to meet the settlement fund requirement. In such circumstances, the Officer clearly had a duty to give the Applicant an opportunity to disabuse her of her concerns, just as it was done on two previous occasions with respect to other issues.

[19] This breach of procedural fairness is another ground upon which this application for judicial review ought to be granted.

V. Conclusion

[20] For all the reasons set out above, this application for judicial review is granted. No question is certified.

ORDER

THIS COURT ORDERS that this application for judicial review be granted. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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