Federal Court  Cour fédérale

Date: 20150925

Dockets: IMM-5760-13
IMM-5761-13

Citation: 2015 FC 1116

Toronto, Ontario, September 25, 2015

PRESENT: The Honourable Mr. Justice Diner

Docket: IMM-5760-13

BETWEEN:

DELERA BEGUM
SHAMMY AKTER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5761-13

AND BETWEEN:

DELERA BEGUM
SHAMMY AKTER

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This case concerns Bangladeshi citizens who applied through the Singapore visa office [Singapore] for permanent residence [PR]. Unbeknownst to them, Singapore cancelled the immigrant visas shortly after issuing them, due to the receipt of a "poison pen" letter [Letter]. The Applicants travelled to Canada without knowing about the cancellation. They were questioned upon arrival, deemed inadmissible, and issued exclusion orders due to having attempted entry without a valid visa. The two judicial reviews attack the decisions (i) by Singapore to cancel the immigrant visas and (ii) by a Minister's Delegate to issue exclusion orders. These two decisions, and their outcomes, in my view, violated the Applicants' rights to procedural fairness. The applications will accordingly be sent back for reconsideration.

[2] The Begum scenario arose from an unusual set of circumstances and an unintentional set of consequences, as will emerge through the facts below. As these facts are unique unto themselves, the outcome is therefore highly point-specific.

II. PRELIMINARY ISSUES

[3] The style of cause in IMM-5761-13, which pertains to the Exclusion Order, should reflect the Minister of Public Safety and Emergency Preparedness, rather than the Minister of

Citizenship and Immigration. With the consent of the parties, I will allow the style of cause to be so amended, pursuant to Rule 76 of the *Federal Courts Rules* (SOR/98-106).

III. OVERVIEW: THE KEY FACTS

[4] In February 2008, the Applicants were co-sponsored by the daughter and son-in-law of Delera Begum, the primary applicant [PA]. The second applicant is the PA's daughter (who is also the sponsor's sister).

[5] Two deaths occurred during the five years of the sponsorship's processing. First, the PA's husband, who was an applicant, passed away in 2009. Second, the son-in-law (co-sponsor) died in 2012, leaving Shahina Akter as the sole sponsor [Sponsor]. The Applicants diligently responded to all file requests from Singapore, including delivery of new financial, police, and medical assessments after the unfortunate changes to the family's composition.

[6] Processing, it appeared, was complete in the summer of 2013. Single entry immigrant visas were affixed to the passports in June 2013, and were picked up by the Applicants in late July along with their Confirmation of Permanent Resident certificates. Unbeknownst to the Applicants, however, Citizenship and Immigration Canada [CIC] received the anonymous Letter dated July 1, 2013. Specifically, the Letter was delivered to Case Processing Centre Mississauga [CPC-M] by mail on July 5, 2013. The Letter was "imaged" into the CIC computer system by CPC-M on August 1, 2013.

[7] The Letter contained two allegations that remain under investigation: first, that the PA had an undisclosed criminal record, and second, that the Sponsor's sister (and co-applicant) had an undisclosed marriage. The Applicants have strongly denied both allegations, and continue to offer to provide any and all available documentation to counter them.

[8] Singapore, by a decision dated August 7, 2013, cancelled the immigrant visas, stating that the Applicants' files would be reassessed. A registered letter setting this out was sent to the Applicants the same day, and copied by electronic mail [email] to the Sponsor. The email was received in the Sponsor's inbox on August 7. Singapore's registered letter arrived at the Applicants' home in Bangladesh after they had arrived in Canada, which was on August 15, 2013. Upon arrival, Canada Border Services Agency [CBSA] advised that their visas had been cancelled.

[9] An inadmissibility hearing with a CBSA Minister's Delegate took place on August 19. The Delegate decided to issue section 44(1) reports under the *Immigration and Refugee Protection Act* [IRPA, the Act]. The accompanying exclusion order was based on failure to hold the valid visas when seeking to enter Canada, with the intention of establishing permanent residence [PR], pursuant to IRPA sections 41 and 20(1)(a), and section 6 of the *Immigration and Refugee Protection Regulations* [IRPR, the Regulations]. In tandem, these provisions state that foreign nationals who seek to enter Canada must first establish that they hold the visa or other document required under the Regulations. IRPA's section 41(a) stipulates that a foreign national is inadmissible for failing to comply with IRPA through an act or omission which contravenes a provision of the Act.

IV. ISSUES TO BE DECIDED

A. *Was Singapore's decision to cancel the visas interlocutory (interim) or final?*

[10] The Applicants assert that the issuance of the single entry immigrant visas by Singapore was a final decision, albeit within a PR determination that was still ongoing at the time (although the investigation is currently stalled). The Applicants argue that they acted in good faith at all times and should not suffer negative consequences arising out of the unilateral actions and decisions of the visa office, which they did not know about until being confronted by CBSA upon arrival at the Airport. The Respondent, on the other hand, contends that the visa cancellations were interlocutory steps taken pending further investigation and finalization of the file. There was no choice, by operation of the law, other than visa cancellation.

B. *Were the Applicants' rights to procedural fairness breached by either decision?*

[11] The Applicants' rights to procedural fairness were breached, they assert, both when Singapore (i) failed to provide them with an opportunity to respond to the Letter's allegations at the outset, and (ii) failed to ensure they received notice of the visa cancellation. The Respondent counters the revocation letter was sent to and received at the Sponsor's email, an authorized address. The Sponsor had previously communicated with Singapore by email. The Respondent argues that the jurisprudence has clearly established that the Applicants bear the burden of reversing the onus that correspondence communicated to an authorized address is presumed to have been received, and since that has not been done, there were no breaches of fairness.

[12] The parties agree that procedural fairness issues are reviewed on a standard of correctness (*Mission Institution v Khela,* 2014 SCC 24, at para 79*)*. The parties further agree that if the Singapore decision is found to be tainted by procedural unfairness, the Minister's Delegate exclusion order is tainted by extension, because it was based solely on arriving in Canada with cancelled visas.

V. ANALYSIS

[13] Let me begin by making two preliminary comments. First, this case turns on a unique set of facts, and due to its unusual circumstances, should be viewed within that narrow prism. Second, there appears to be no bad faith by either party. Rather, a series of seemingly honest miscommunications led to its unfortunate and unintended outcome. Having said that, I agree that unfairness resulted to the Applicants, and therefore am sending this file back for reconsideration, which will entail the resumption of Singapore processing and whatever steps remain in the Letter investigation.

A. *Issue 1: Was Singapore's decision to cancel the visas interlocutory (interim) or final?*

[14] With respect to the first issue - the nature of the Singapore decision being challenged - I find it to be a final decision. I acknowledge that the process has not ended, and that a final decision is yet to be made on the PR visas. However, as for the visas themselves, the parties agree that once cancelled on August 7, 2013, they served no useful purpose: as the Respondent put it in oral submissions, life could not at that point be breathed back into the visas. The characterization of the cancelled visas as being spent leads directly to the conclusion that the

decision was a final one: both parties also acknowledge that new visas may be reissued at some future time, namely after the conclusion of the pending Singapore investigation. This properly gives rise to a judicial review, and I do not agree with the Respondent that this judicial review is premature, precisely because of the visa cancellations' finality (along with the inadmissibility findings and exclusion orders that ensued as a result).

[15] There is scant jurisprudence surrounding immigrant visa cancellations. The closest case brought to my attention was *Chan v Canada (Citizenship and Immigration)*, [1996] 3 FC 349 [*Chan*]. Although facts and conclusions of *Chan* were different, the Court nonetheless accepted jurisdiction over the judicial review, and confirmed that the visa officer had jurisdiction to reconsider a previous decision to issue, and thus cancel, the immigrant visa.

B. *Issue 2: Were the Applicants' rights to procedural fairness breached by either decision?*

[16] The jurisprudence is also clear that once the visa office proves that a communication was sent to an applicant, and there is no indication that the communication failed, the risk of non-delivery rests with the applicant -- not with the respondent *(Halder v Canada (Citizenship and Immigration)*, 2012 FC 1346 at paras 41-42, 49). The applicant bears the onus to rebut the presumption of delivery: see *Mannil v Canada (Citizenship and Immigration)*, 2014 FC 70 at para 30. The Respondent relied on my recent decision in *Khan v Canada (Citizenship and Immigration)*, 2015 FC 503, along with the other cases mentioned, for the proposition that the Applicants received the email via the Sponsor, who failed in her duty to check her email. I, however, am satisfied that the facts in this case meet the test set out in the jurisprudence for the following reasons.

[17] The Applicants have demonstrated they did not receive the Singapore cancellation communication, through uncontroverted evidence. First, the registered Singapore letter arrived at the Applicants' home in Bangladesh only after they arrived in Canada. Second, the Sponsor explains, in her unchallenged affidavit, why she (and thus the Applicants) never received the email notification before they left Bangladesh:

> 9. My e-mail address is: akter.shahina5@gmail.com. I am not a frequent user of e-mail and I am not very knowledgeable about the internet. I learned how to use e-mail around 2011, as I was learning about using a computer at that time. Before November 2011, I only checked my e-mail once every two weeks, or perhaps even once a month.
>
> 10. Around November 2011, I provided my e-mail address to the Canadian immigration authorities. After that, I occasionally received emails from Canadian immigration authorities regarding my application to sponsor my sister and mother. I generally checked my e-mail approximately twice a week while my sister and mother's applications was in process. I was anxious for my mother and sister to be approved and to receive visas to Canada. When they finished their medical examinations, I hoped a decision would be made soon, so I checked my e-mail a little more frequently.
>
> 11. After my sister and mother received their visas on July 30, 2013, I believe that I checked my e-mail on or about August 3, 2013, just in case Immigration had sent anything after they had picked up the visas. I did not check my e-mail again until August 16, 2013. I did not check it during that time because the visas had already been issued. I was no longer concerned about my mother and sister's application. I did not believe there was any reason immigration authorities would contact us again. I was also busy with getting ready for my sister and mother to arrive, including shopping, money and their travel. (Application Record [AR], pages 16-17, Affidavit of Shahina Akter, paras 9-11)]

[18] The Respondent counters that the Applicants authorized the Sponsor to be their unpaid representative and provided her email address. Singapore corresponded with her on at least one occasion by email, as reflected in the computer notes: see Certified Tribunal Record [CTR], at

pages 48-49, 58-59. However, I remain unconvinced. The uncontroverted evidence (because the Sponsor was never challenged or cross-examined on her affidavit) is quite clear as to why her email was received but not opened until after the Applicants arrived in Canada. And it is for this reason that I find a breach in effective notification of the visa cancellation.

[19] I would add that what is also clear from the record is that the Sponsor provided her phone number, and the Respondent corresponded with her by telephone to discuss the death of the co-Sponsor (CTR, page 50). The Respondent also communicated directly with the primary Applicant via text message to her mobile phone in Bangladesh, advising that passports were ready for pick up. The Applicants acted on this text quickly, travelling to the visa office two days later (AR, page 26, Affidavit of Shammy Akter, at para 7). There are no notations to corroborate the mode of said communication in the computer notes, but again, there is no reason to question the Applicants' unchallenged, sworn testimony.

[20] Finally, I would add the anonymous Letter was received by the Respondent a month before the revocation decision. The Letter contained two serious and unsubstantiated allegations. I agree with the Applicant, that over the intervening month (between July 5 and August 7, 2013), the Respondent could have made a minimal effort to provide the Applicants with an opportunity to respond to the allegations prior to the visa cancellation decision.

[21] The Respondent argues that CPC-M only uploaded the letter image on August 1. My first observation is that is not the fault of the Applicants. My second observation is that other, more effective means of communication were available to the Respondent, based on the contact

history on the file: Singapore had, after all, communicated with the Applicants by text message in the days before viewing the Letter (when Singapore notified the Applicants that their passports were ready).

[22] Furthermore, the Respondent had, earlier in the process, phoned the Sponsor to discuss the death of her husband, the co-sponsor. I find that for such a critical, and highly unusual, action - to revoke duly issued immigrant visas, which in this case led to inadmissibility and exclusion orders - a more immediately verifiable mode of communication is warranted. Email may be a perfectly acceptable, and indeed preferred, mode of communication by a visa office to applicants for ordinary, run-of-the-mill communications. Cancelling immigrant visas can hardly be described as an ordinary communication. In this case, it undid the culmination of a 5-year process, and one that the Applicants had long awaited in order to be reunited with their close family in Canada. They would have known they had a limited time in which to present their visas to Canadian border authorities, before the expiry of their visas and their underlying medical results.

[23] In short, telephone or text messaging, both more immediately verifiable modes of communication, should be used for critical or unusual circumstances, where feasible. Here, they were feasible, having been used previously in the course of the applications.

[24] One is left to hope that given the Applicants' unclear status after nearly two years in Canada as a result of these circumstances, the remaining steps of PR processing, including any remaining investigation, can occur without further delay. One also hopes that the parties can find

some way to resolve the status issues non-prejudicially until a final decision is made in the sponsorship application that was filed over seven years ago.

VI. CONCLUSION

[25] The result of these judicial reviews flow from a unique and unfortunate set of facts that had unintended and unsettling consequences. The Applicants can neither be faulted for the fact that they departed Bangladesh for a new life in Canada before receiving registered letters, nor for the failure of their Sponsor to check her email after the issuance of their immigrant visas. The cancellation of those immigrant visas is both an unusual and unexpected occurrence. The Applicants should have been given an opportunity to respond to the anonymous and, until now, unsupported allegations contained in the poison pen letter. Failing such opportunity to respond, the Respondent should, at minimum, have used a more immediate and verifiable method of communicating the cancellation, such as a telephone call, to be given the opportunity to avoid the severe consequences that flowed at the airport.

VII. CERTIFIED QUESTIONS

[26] As requested by the Respondent and agreed to by the Applicants, these reasons were sent in draft format to allow each party to provide submissions on any proposed certified questions.

[27] The Respondent proposed two questions:

1. For the purposes of determining who bears the risk of non-delivery of a communication, is an email recipient deemed not to have

received an email by virtue of the fact that he/she failed to check for new messages?

2. Is a visa post restricted to relying on immediately verifiable modes of communication when communicating non-ordinary or critical matters or when unusual or unexpected matters arise?

[28] I agree with the Applicant's that the Respondent's proposed questions do not meet the test for certification. As explained above, this case turns on a highly particularized set of facts and resulting circumstances. Having said that, the first question asked is not determinative of the judicial review because the sponsor was not "deemed" to have failed to receive the email: she provided sworn affidavit evidence which was not challenged.

[29] The second question is also not determinative of the judicial review in that this judgment addresses the duty of procedural fairness, the content of which is highly variable depending on the particular facts of any given case. As this case is highly fact specific, neither of the proposed questions transcend the interests of the parties nor contemplate issues of broad significance or general application (*Zhang v Canada (Citizenship and Immigration),* 2013 FCA 168 at para 9; *Canada (Citizenship and Immigration) v Liyanagamage,* [1994] FCJ. No 1637, (1994) 176 NR 4 at para 4).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicants' judicial reviews are allowed.
    a. The Exclusion Order of August 19, 2013 is set aside.
    b. The Singapore office will resume the processing of the Applicants' application for permanent residence.
2. The style of cause in IMM-5761-13 is amended; the Respondent is changed from "The Minister of Citizenship and Immigration" to "The Minister of Public Safety and Emergency Preparedness".
3. No questions will be certified.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5760-13
STYLE OF CAUSE:	DELERA BEGUM ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-5761-13
STYLE OF CAUSE:	DELERA BEGUM ET AL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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