Federal Court  Cour fédérale

Date: 20170605

Docket: IMM-4735-16

Citation: 2017 FC 549

Vancouver, British Columbia, June 5, 2017

PRESENT: The Honourable Mr. Justice Barnes

Docket: IMM-4735-16

BETWEEN:

RAJVIR KAUR

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The Applicant challenges a decision of a visa officer declaring her to be inadmissible on the basis of a misrepresentation finding. In the result, the Applicant's application for permanent residency as a member of the skilled worker class was refused. The misrepresentation finding also bars the Applicant from entering Canada for five years.

[2] The record discloses that after applying for permanent residency, the Applicant married a Canadian permanent resident. Shortly thereafter, she became pregnant. Based on the newly acquired marital status, the Applicant sought to withdraw her application for permanent residency in favour of pursuing a marital sponsorship. The withdrawal request was refused and the application under the skilled worker class went forward. In the course of that process, it was determined that the Applicant may have misrepresented certain aspects of her declared employment history. This resulted in the issuance of a fairness letter, which, in turn, prompted a reply from the Applicant's representative. Although the Applicant asserted that any errors in her declaration were immaterial and innocent, the primary thrust of her request for relief concerned her intervening marriage and pregnancy. In particular, she made an "appeal for mercy" based on the best interests of her child-to-be. The visa officer rejected the application on the following basis:

> I have reviewed the information regarding the applicant's stated employment experience, the verification results, the PFL and the applicant's response. The applicant has submitted updated letters stating that she was employed as a Civil Engineer at New Gautam Nagar Co-op Labour and Construction Company from Oct 2010 to June 2016.These are directly in conflict with the findings of the verification. I prefer the spontaneous information provided by the employer during the verification to the information and documents produced in response to the PFL and give them more weight. The ImmRep notes that the applicant requested to withdraw this application because she expects to be sponsored by her Can PR spouse and therefore had no reason to misrep her employment experience. I note that withdrawal request was received the same day as the verification with the employer and that, at the time the application and the employment reference letter were submitted, the applicant was not married and that her marriage and possible sponsorship were not relevant factors at that time. I am satisfied, on a balance of probabilities, that the applicant deliberately misrepresented her employment experience, a material fact related to the relevant matters of eligibility for membership in the economic class as a Federal Skilled Worker pursuant to R75(2) and of the points to be awarded for employment experience. The

> misrepresentation of these material facts could have induced an error in the administration of the Act through the issuance of a visa to an ineligible person. I therefore find the applicant to be described by paragraph 40(1)(a) and to be inadmissible to Canada.
>
> I note the ImmRep's request for H&C consideration due to the anxiety caused to the applicant by the ongoing application. Since that anxiety is caused by the applicant's misrepresentation of a material fact related to a relevant matter, it would be contrary to the intent of the Act to grant the applicant permanent resident status or an exemption from any applicable criteria or obligations of this Act on that basis. I further note the request for consideration of the best interests of the applicant's child. I note the child is not yet born, with a due date of 2016/11/18. I am not satisfied that I can consider the BIOC of a child not yet independently in existence despite the ImmRep's reference to Li v. Canada (Public Safety) and on that basis, I decline to consider the BIOC. Application refused pursuant toA40/A11.

[3] The determinative issue on this application concerns the visa officer's treatment of the Applicant's pregnancy and, in particular, the refusal to consider the best interests of the child yet to be born. According to the visa officer, a pregnancy does not engage any humanitarian or compassionate considerations.

[4] In my view, this part of the decision constitutes an abrogation of the authority conferred under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and is unreasonable.

[5] A pregnancy and the likely birth of a child are relevant and, in many cases, compelling facts that must be taken into account in deciding whether to grant this form of relief to an applicant. The probable implications of refusing relief in such cases include prolonged family separation and concerns about support for the child-to-be. These are not matters that can be

swept away on the basis that the child is "not yet independently in existence". It is also not open to a visa officer to dismiss on-point decisions of this Court as if they are of no consequence to the decision. This Court has made it very clear in *Li v Canada*, 2016 FC 451, [2016] FCJ No 416 (QL) [*Li*], and *Hamzai v Canada*, 2006 FC 1108, [2006] FCJ No 1408 (QL), that a pregnancy is a relevant consideration in the exercise of humanitarian and compassionate discretion. These decisions significantly curtail the range of the decision-maker's discretion and they certainly cannot be rejected out-of-hand. Although a child has not been born, the decision-maker is required to apply some common sense to the situation and to carefully reflect on the circumstances that are most likely to be present at the end of the pregnancy. Contrary to the apparent view of the visa officer, the pending birth of a child in this context has nothing whatsoever to do with an assertion of fetal rights.

[6] I also do not accept the Respondent's argument that the decision in *Li*, above, can be distinguished. It is of no consequence in law that the child, once born, is not a Canadian citizen, nor does it matter that the Applicant and the child are outside of Canada. What is relevant is whether and for how long the family is likely to be separated.

[7] For the foregoing reasons, this application is allowed. The matter is to be redetermined on the merits by a different decision-maker. Neither party provided a certified question and no issue of general importance arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter shall be sent back for redetermination on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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