

Federal Court



Cour fédérale

Date: 20171114

Docket: IMM-1575-17

Citation: 2017 FC 1036

Ottawa, Ontario, November 14, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MANPREET KAUR ARORA

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a decision by an immigration officer [the Officer] which denied the Applicant's application for permanent residence under the Federal Skilled Worker Program through the National Occupational Classification for "early childhood educators and assistants".

The Officer found that the Applicant had misrepresented the material fact that she had worked as a teacher at Tender Kids Pre-School [Tender Kids] which rendered her inadmissible for five years pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

<p>40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation</p> <p>(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;</p>	<p>40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :</p> <p>a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;</p>
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II. Facts

[2] The Applicant, a citizen of India, claimed that she worked at Tender Kids in Delhi as a play school teacher since October 2008.

[3] The Officer was unable to find any evidence of the existence of her alleged employers, Akash Public School and Tender Kids.

[4] The Officer became concerned that a reference letter included in the Applicant's application materials could be fraudulent when the telephone numbers given for the principal were unreachable mobile numbers associated with a name different from the principal's. The Officer sent a procedural fairness letter outlining this concern.

[5] In response, the Applicant provided a letter of explanation, a mobile phone bill, and an affidavit of the principal.

[6] Pursuant to an invitation from the Applicant, a site visit took place that is a matter of controversy in this case. Two immigration officers, including Mr. Hetherington, First Secretary at the High Commission of Canada, reported as follows about the site visit:

- the owner of a beauty parlour next door did not recognize a photograph of the Applicant, but recognized other school staff members;
- no neighbours were willing to provide information;
- the owner was not available because of illness;
- a Ms. Kaur recognized the Applicant's photograph and said she had been there two days before;
- Ms. Kaur and a cleaner confirmed that the Applicant had been working as a teacher at Tender Kids;
- another teacher, Nancy Kaur [Nancy] refused to provide information, but both Ms. Kaur and Nancy confirmed that the Applicant had not come to school that day;
- the Applicant, when telephoned because she was not at the school for the site visit, denied that there was a beauty parlour nearby and said that she had been at the school that morning, despite two witnesses who said the opposite, but explained that she was out running an errand which one of these same witnesses knew about; and

- Ms. Kaur started receiving telephone calls from the principal during her interview and the officers asked that she turn off the telephone.

[7] The officers, clearly suspicious of the circumstances, pressed the witnesses for the truth. Ms. Kaur admitted orally, and in writing confirmed, that the Applicant was not working at Tender Kids.

[8] It was the officers' conclusion that in view of the discrepancies, the Applicant had misrepresented her work experience.

[9] The Applicant, four days after the site visit, filed a complaint with the Embassy in Warsaw, the immigration section responsible for the file. She complained about the nature and tone of the visit. Attached to the complaint was a statement by Ms. Kaur in which she claimed that:

- the officers prevented anyone from leaving the school and locked the three teachers in separate rooms;
- people were barred from contacting the principal and cell phones were confiscated;
- three teachers and the cleaner confirmed that the Applicant worked at the school;
- one of the officers asserted that there was fraud and that Ms. Kaur could lose her job; and
- Ms. Kaur was pressured and signed whatever the officer required.

[10] As a result of the site visit, the Officer sent a second procedural fairness letter.

[11] The Applicant's response, prepared through a Canadian immigration consultant, contained a package of uncertified statements from third parties and an affidavit of Ms. Kaur largely repeating the incidents of aggressive behaviour with slight embellishment.

As noted in the Respondent's argument, what is missing from this affidavit is any statement as to the Applicant working as a teacher at the school.

[12] The Officer's decision reiterated the key facts and, in substantial reliance on the site visit report, concluded that the Applicant had misrepresented her employment status. The Officer considered the ebb and flow of Ms. Kaur's statements regarding the Applicant's position as a teacher and discounted her affidavit.

The Officer denied the application and found the Applicant to have misrepresented a material fact.

[13] The Applicant challenges both the decision and the way in which it was made. To this latter end, the Applicant submitted two affidavits attempting to buttress the unfairness of the investigation and the Respondent, while objecting to the Applicant's affidavits, filed an affidavit of Mr. Hetherington as to events at the site visit. The Respondent justified Mr. Hetherington's affidavit as giving the Court general background.

[14] While the affidavits go to the merits of the decision, they also go to the issue of procedural fairness in the way in which the decision was arrived at.

In these unusual and convoluted proceedings, I have admitted all the affidavits. They relate to a procedural fairness argument involving the decision maker having a “closed mind”, a matter that touches on both issues in this judicial review.

III. Analysis

[15] There are two matters in dispute:

1. whether the finding of misrepresentation was appropriate; and
2. whether the manner in which it was arrived at was procedurally fair.

[16] It is well established now that the finding of misrepresentation is subject to a reasonableness standard of review (*Patel v Canada (Citizenship and Immigration)*, 2017 FC 401, 279 ACWS (3d) 810), and procedural fairness is assessed on a correctness standard (*Rahimi v Canada (Citizenship and Immigration)*, 2017 FC 758, 282 ACWS (3d) 842).

A. *Misrepresentation*

[17] As to the misrepresentation of a material fact, there is no issue that the Applicant’s status as a teacher at Tender Kids was a material fact.

[18] On the issue of misrepresentation, the Officer reviewed in detail the conflicting evidence. The Officer weighed the evidence and gave greater weight to some and less or no weight to other evidence. In that regard, the Officer carried out the mandate imposed on him.

[19] It was open to the Officer to prefer the site visit report over the evidence with which it conflicted. Because the Officer relied on an internal report over that of an applicant, the Court carefully reviews such conclusions for unintended institutional preference.

I can find none here. Given the totality of the evidence, I cannot see that the Officer could have reached a different reasonable conclusion.

B. *Procedural Fairness*

[20] There are two aspects to this issue. The first is that the Officer had a “closed mind” – an allegation of bias or a reasonable apprehension of bias. Whether one dresses it up as an argument of “confirmation bias”, it is bias none the less.

The second is the manner in which some of the damning evidence was obtained, particularly at the site visit.

[21] The Applicant claims that this “closed mind” issue arose when the Officer, having been unable to locate the school, issued the first procedural fairness letter stating concerns around misrepresentation. That “closed mind” attitude then went on to taint all the other aspects of the decision making process, including the assessment of evidence provided in response to the procedural fairness letters.

[22] While the Officer’s first procedural fairness letter could have been phrased more benignly given the then uncertain state of affairs, the Officer is caught in a catch-22 situation. If the letter is phrased more benignly, the allegation later is that the recipient was misled as to the consequences of a response, but if phrased more severely, as in this case, bias is alleged.

[23] I can see no unfairness of bias in outlining directly the concerns the Officer had and in stating what might flow from a less than forthright response.

[24] As to the events at the site visit, it was not unfair to rely on that evidence. The Applicant had notice of what happened and was able to respond. The only issue that could arise is that if events unfolded as alleged, the evidence was coerced. It is incumbent on the Applicant to establish the underlying facts of coercion or mistreatment.

[25] In my view, the Applicant has not made out the case, on a balance of probabilities, that the two immigration officers engaged in the high-handed and aggressive conduct alleged.

[26] In sum, I can find no breach of procedural fairness.

IV. Conclusion

[27] For all these reasons, despite the impassioned and balanced argument of the Applicant's counsel, this judicial review will be dismissed. No question for certification exists.

JUDGMENT in IMM-1575-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1575-17

STYLE OF CAUSE: MANPREET KAUR ARORA v THE MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 9, 2017

JUDGMENT AND REASONS: PHELAN J.

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