Federal Court  Cour fédérale

Date: 20180816

Docket: IMM-670-18

Citation: 2018 FC 838

Toronto, Ontario, August 16, 2018

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ERITREA LEBASI MERASHE AND KIDANE MASHO MESELE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Eritrea Lebasi Merashe (the "Principal Applicant") and her husband, Mr. Kidane Masho Mesele (collectively "the Applicants") seek judicial review of a decision made on August 2, 2017 by a Visa Officer (the "Officer"), rejecting their request to process a "following family member under the one year window of opportunity" provision of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 (the "Regulations").

[2] In their notice of application for leave and for judicial review, the Applicants named the Minister of Immigration, Refugees and Citizenship in Canada as the Respondent. The style of cause has now been amended to show the Minister of Citizenship and Immigration as the Respondent (the "Respondent").

[3] By Order made on July 16, 2018, a request for an extension of time to commence this application was granted and leave was granted for judicial review.

[4] The Principal Applicant is a citizen of Eritrea who moved to Sudan around 1969 or 1970, where she was recognized as a refugee by the Sudanese government. She was included as a dependent on the application made by her son Sami Kidane Masho in his Resettlement Registration Form submitted to the United Nations High Commissioner for Refugees (the "UNHCR") in Sudan. She signed that form with her thumb print on March 10, 2014.

[5] The Principal Applicant came to Canada as a Government Assisted Refugee and was granted confirmation of permanent residence on September 21, 2015.

[6] On or about February 22, 2016, the Principal Applicant submitted a request for her husband to be processed for immigration to Canada under the One Year Window of Opportunity provision, as set out in section 141 of the Regulations which provides as follows:

Non-accompanying family member	**Membre de la famille qui n'accompagne pas le demandeur**
141 (1) A permanent resident visa shall be issued to a family	**141 (1)** Un visa de résident permanent est délivré à tout

member who does not accompany the applicant if, following an examination, it is established that

(a) the family member was included in the applicant's permanent resident visa application at the time that application was made, or was added to that application before the applicant's departure for Canada;

(b) the family member submits their application to an officer outside Canada within one year from the day on which refugee protection is conferred on the applicant;

(c) the family member is not inadmissible;

(d) if the applicant is the subject of a sponsorship application referred to in paragraph 139(1)(f)(i), their sponsor has been notified of the family member's application and an officer is satisfied that there are adequate financial arrangements for resettlement; and

(e) in the case of a family member who intends to reside in the Province of Quebec, the competent authority of

membre de la famille du demandeur qui ne l'accompagne pas si, à l'issue d'un contrôle, les éléments suivants sont établis:

a) le membre de la famille était visé par la demande de visa de résident permanent du demandeur au moment où celle-ci a été faite ou son nom y a été ajouté avant le départ du demandeur pour le Canada;

b) il présente sa demande à un agent qui se trouve hors du Canada dans un délai d'un an suivant le jour où le demandeur se voit conférer l'asile;

c) il n'est pas interdit de territoire;

d) dans le cas où le demandeur fait l'objet de la demande de parrainage visée au sous-alinéa 139(1)f)(i), le répondant a été avisé de la demande du membre de la famille et l'agent est convaincu que des arrangements financiers adéquats ont été pris en vue de sa réinstallation;

e) dans le cas où le membre de la famille cherche à s'établir au Québec, les autorités compétentes de cette province sont d'avis

that Province is of the opinion that the foreign national meets the selection criteria of the Province.	qu'il répond aux critères de sélection de celle-ci.
Marginal note: Non-application of paragraph 139(1)(b)	**Note marginale : Non-application des exigences prévues à l'alinéa 139(1)b)**
(2) For greater certainty, the requirements set out in paragraph 139(1)(b) do not apply to the application of a non-accompanying family member.	(2) Il est entendu que les exigences prévues à l'alinéa 139(1)b) ne s'appliquent pas à la demande d'un membre de la famille du demandeur qui ne l'accompagne pas.

[7] By an email dated May 8, 2017, addressed to the husband, the Officer raised some concerns about his status, including his date of birth and the time frame about his absence from Port Sudan, and his whereabouts prior to the departure of the Principal Applicant for Canada. In that email, the Officer said that there was insufficient evidence "to establish that you were the non-accompanying spouse" of the Principal Applicant or that he was unavailable for examination, as part of her application for permanent residence, prior to her departure for Canada.

[8] This email, although addressed to the husband, was sent to the email address of one Flora Aruna, a case worker with the Manitoba Interfaith Immigration Council. Ms. Aruna was considered the "contact" person since she had filed form IMM 5475, entitled "Authority to Release Personal Information to a Designated Individual".

[9] The email was never received by the Applicants and they did not respond. This email was considered by the Respondent to be a “procedural fairness letter”.

[10] According to the notes of the Officer maintained in the Global Case Management System (the “GCMS”) as contained in the Certified Tribunal Record, an entry was made on August 1, 2017 confirming that no response was made by mail or email to the May 8, 2017 email. The note provided that based on the information on file, the requirements of section 141 of the Regulations were not met and the application would be refused.

[11] The negative decision was sent to the Applicants’ current mailing address on August 2, 2017.

[12] On September 25, 2017, Ms. Shakila Atayee, also of the Manitoba Interfaith Immigration Council, sent an email to the Respondent, advising that the male applicant had received the refusal letter of August 2, 2017 and asking for the opportunity for the Principal Applicant to respond to the concerns set out in the email of May 8, 2017.

[13] According to the entry made on October 20, 2017 in the GCMS notes, the Respondent was prepared to receive submissions within the next 30 days, in respect of the Procedural Fairness letter of May 8, 2017.

[14] On November 22, 2017, an entry was made that the deadline for submissions for reconsideration had passed without submissions being presented. The Officer noted that the application remained closed.

[15] The Applicants now argue that the decision was made in breach of their right to procedural fairness since they were not given the opportunity to reply to the procedural fairness letter of May 8, 2017, before their application was refused. They submit that the email of May 8, 2017 was sent to Ms. Aruna who did not have authority to represent them, since the form IMM 5475 authorized Ms. Aruna only to "release personal information to a designated individual".

[16] The Applicants argue that the servants and agents of the Respondent failed to confirm that form IMM 5476 had been filed. That form is entitled "Use of a Representative" and according to instructions prepared by the Respondent for the use of his servants and agents, the inclusion of this form on a file is the responsibility of employees of the Respondent. Referring to the decision in *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, the Applicants note the various factors to be considered in assessing the content of the duty of fairness in a particular case, especially the degree of importance of an administrative decision to persons concerned.

[17] The Applicants submit that the decision in question is critically important to them and that the failure of the Respondent to insure compliance with his administrative procedures amounts to a breach of procedural fairness.

[18] The Applicants also argue that the negative decision is unreasonable since it was made without regard to the evidence provided. They refer to the decision in *Cepeda-Guitierrez et al v Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35 (T.D.). They submit that the officer committed a reviewable error in failing to consider all of the evidence.

[19] For his part, the Respondent submits that there was no breach of procedural fairness since the Applicants were given the opportunity to make their submissions, even after the decision of August 2, 2017, as noted in the entry made on October 20, 2017, in the GCMS notes.

[20] The Respondent also argues that the Officer's negative decision was reasonable in light of the evidence submitted by the Applicants.

[21] The issue of procedural fairness raised in this case is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 S.C.R. 339. The merits of the decision, raising an issue of findings of fact, are reviewable on the standard of reasonableness; see the decision in *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190.

[22] According to the decision in *Dunsmuir, supra*, the reasonableness standard requires that a decision be transparent, justifiable and intelligible, falling within a range of possible and acceptable outcomes that is defensible on the law and the facts.

[23] Although there is substance to the Applicants' submissions about a breach of procedural fairness, it is not necessary for me to address those arguments since I am satisfied that the decision does not meet the standard of reasonableness.

[24] I agree with the submissions of the Applicants that the Officer failed to consider the totality of the evidence about the circumstances of their marriage, the whereabouts of the husband prior to the Principal Applicant's departure for Canada and the husband's date of birth.

[25] There was evidence before the Officer. The evidence was important and the principle discussed in *Cepeda Gutierrez, supra*, applies here. I refer to paragraph 17 of that decision where the Court said the following:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence': *Bains v Minister of Employment of Immigration* (1993), 63 F.T.R. 312 (T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact…

[26] The failure to consider all relevant evidence amounts to a reviewable error.

[27] The application for judicial review is granted, the decision set aside and the matter remitted to a different Officer for redetermination. There is no question for certification arising.

[28] In the circumstances where the procedural fairness letter was not sent to an authorized representative of the Applicants, I suggest that the Applicants now be given the opportunity to respond to that letter.

JUDGMENT IN IMM-670-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision is set aside and the matter remitted to a different Officer for redetermination. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-670-18
STYLE OF CAUSE:	ERITREA LEBASI MERASHE AND KIDANE MASHO MESELE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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