Federal Court  Cour fédérale

Date: 20210602

Docket: IMM-6282-19

Citation: 2021 FC 524

Ottawa, Ontario, June 2, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

JAGTAR SINGH SARAN

Applicant

and

THE MINISTRY OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Jagtar Singh Saran, is a citizen of India. In early 2019, he married his spouse, Sukhjit Saran Kaur, who also is a citizen of India and who works in Canada on a Post-Graduation Work Permit. Mr. Saran applied for an open work permit as a spouse under the International Mobility Program. This was his second work permit application. He also previously applied three times for a temporary resident visa. All were refused.

[2] The Applicant's most recent application was refused after a Visa Officer interviewed the Applicant and his spouse at the High Commission of Canada in New Delhi, India. The Officer doubted the genuineness of their marriage and found the Applicant inadmissible to Canada for five years because of misrepresentation, further to paragraphs 40(1)(a) and 40(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Applicant seeks judicial review of the Officer's October 1, 2019 decision.

[3] Although the Applicant challenged the officer's decision as being unreasonable and lacking procedural fairness, I find the determinative issue in this matter is a lack of procedural fairness based on a reasonable apprehension of bias, having regard to the supporting affidavits of the Applicant and his spouse described in greater detail below. The parties do not disagree regarding the applicable standard of review. Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The focus of the reviewing court is essentially whether the process was fair, bearing in mind the duty of procedural fairness is variable, flexible and context-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77.

[4] In support of his judicial review application, the Applicant and his spouse each submitted an affidavit about what transpired at the hearing before the Officer. Having regard to the applicable principles enunciated in *Access Copyright*, I find this evidence is relevant to the procedural fairness issue raised in this matter and, hence, admissible. Evidence not before the

decision maker generally is not admissible on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 17. Where, however, the material assists the court to understand the general background circumstances of the judicial review, is relevant to an issue of procedural fairness or natural justice, or where the material highlights a complete absence of evidence before the decision maker, this Court can make an exception and accept that evidence: *Access Copyright*, above at para 20.

[5] In addition to the interview notes not correctly reflecting his answers, Mr. Saran alleges that: (i) the interpreter he brought to the interview was told to leave before it began; (ii) the interview was conducted in Hindi, not Punjabi as stated in the Global Case Management System [GCMS] notes which form part of the reasons for the decision; (iii) the interviewer cut him off before he could complete some of his answers; (iv) the interviewer told him to speak slowly but then said that he was taking too long to answer; and (v) the interviewer was rude, did not want to hear from them anymore, indicated she had no more time for them, told them to get lost, invited someone else into the interview room while they still were there, and threatened to ban the Applicant for five years if they did not leave.

[6] The Applicant's spouse similarly disputes the accuracy of the notes regarding her answers. She further alleges that: (i) the interviewer told her to speak more slowly but when she complied, the interviewer told her she purposefully was delaying her answers; (ii) when she and her husband returned to the interview room together (they were interviewed separately), the

Officer told her not to speak even though she was called for the interview; (iii) the Officer was extremely rude, told them to get lost, and threatened to ban the Applicant from Canada for five years if they did not leave.

[7] I agree with the Applicant that it seems unlikely an officer would admit, in the GCMS notes, to conduct of the nature described in the Applicant's affidavit and that of his spouse. The Respondent argues that contemporaneous GCMS notes are preferred to subsequent affidavits: *Sidhu v Canada (Citizenship and Immigration)*, 2017 FC 1139 [*Sidhu*] at para 13. In my view, such preference depends on the circumstances. I note in *Sidhu*, for example, that both parties submitted fresh evidence in the form of subsequent affidavits on which the affiants were cross-examined. In addition, Justice Gleeson was prepared to consider the Applicant's fresh evidence in respect of the Applicant's argument that the process was procedurally unfair: *Sidhu*, at para 15.

[8] At the hearing of this matter, the Respondent also sought to rely on the decision of this Court in *Cabral* where Justice Zinn held that, "[i]t was not necessary, as the Plaintiffs submit, that each of the officers making the various decisions tender an affidavit": *Cabral v Canada (Citizenship and Immigration)*, 2016 FC 1040 [*Cabral*], at para 10. In the same paragraph, however, Justice Zinn also held that, "evidence from the GCMS notes may be contradicted by direct evidence tendered by the Plaintiffs."

[9] The Respondent argues that the GCMS notes should be preferred because they were made contemporaneously, while the affidavits of the Applicant and his spouse were made about

five months after their interviews. I imagine, however, that if the interviews were conducted in the manner described in the affidavits, the Applicant and his spouse would not forget the experience easily. Further, the Respondent admitted that if the interviews transpired as described, then the Visa Officer's behaviour was outrageous and amounted to conduct unbecoming. The difficulty I have with the Respondent's effort to cast doubt on the version of events described by the Applicant and his spouse is that the Respondent did not cross-examine the Applicant and his spouse on their affidavits, nor did the Respondent submit an affidavit from the Visa Officer. The Applicant's fresh evidence in this case, thus, remains uncontroverted.

[10] In the circumstances of this matter, I therefore find the Applicant has established a reasonable apprehension of bias. According to Justice Strickland, the test for a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude? Would [they] think it is more likely than not that the decision-maker whether consciously or unconsciously would not decide fairly? (*Yukon Francophone School Board, Education Area No. 23 v Yukon Territory (Attorney General)*, 2015 SCC 25)": *Sandhu v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 889 [*Sandhu*] at para 61. There is a rebuttable presumption that a tribunal member will act fairly and impartially. Suspicion alone of bias is not enough; a real likelihood or probability of bias must be demonstrated (by the person alleging bias) and the threshold for a finding of real or **perceived** bias is high.

[11] In my view, the Applicant's fresh evidence meets this high threshold. The uncontroverted and direct affidavit evidence of the Applicant and his spouse demonstrates, at the very least,

perceived bias on the part of the Visa Officer, warranting this Court's intervention. I, therefore, grant the Applicant's judicial review application. The Visa Officer's decision is set aside. The matter will be remitted to a different Visa Officer to conduct a new interview and determine the matter afresh.

[12] Neither party proposed a serious question of general importance for certification and I find that none arises in the circumstances of this case.

JUDGMENT in IMM-6282-19

THIS COURT'S JUDGMENT is that:

1. The Visa Officer's October 1, 2019 decision is set aside.
2. The matter will be remitted to a different Visa Officer to conduct a new interview and determine the matter afresh.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex A: Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

Requirements	**Formalités**
Application before entering Canada **11 (1)** A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**Visa et documents** **11 (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Misrepresentation **40 (1)** A permanent resident or a foreign national is inadmissible for misrepresentation **(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	**Fausses déclarations** **40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants : **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
Application **40 (2)** The following provisions govern subsection (1): **(a)** the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced	**Application** **40 (2)** Les dispositions suivantes s'appliquent au paragraphe (1) : **a)** l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6282-19
STYLE OF CAUSE:	JAGTAR SINGH SARAN v THE MINISTRY OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	MAY 17, 2021
JUDGMENT AND REASONS:	FUHRER J.
DATED:	JUNE 2, 2021

APPEARANCES:

Felix Chakirov	FOR THE APPLICANT
Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robert Blanshay Blanshay Law Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT