Date: 20071009

Docket: IMM-6605-06

Citation: 2007 FC 1045

Ottawa, Ontario, October 9, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

YELENA SAKIBAYEVA and
COURTNEY JULIAN KELSHAM DEHN

Applicant(s)

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

1. This is an application for judicial review by Yelena Sakibayeva and Courtney Dehn challenging a decision by a visa officer at the Canadian Embassy in Moscow by which Ms. Sakibayeva's request for a visitor's visa to Canada was denied. Mr. Dehn is a Canadian permanent resident and he is Ms. Sakibayeva's fiancé. The stated purpose for Ms. Sakibayeva's visit to Canada was to marry Mr. Dehn in Calgary.

2. On the day of the hearing of this application, counsel for the Respondent advanced two preliminary procedural arguments. I reserved decision on both matters.

3. The first argument was that Mr. Dehn could not represent Ms. Sakibayeva at the hearing because they had failed to establish any basis for being excused from the requirements of Rule 119 of the *Federal Courts Rules*, SOR/98-106. On this issue, the Respondent is correct. Neither Ms. Sakibayeva nor Mr. Dehn offered any evidence which would exempt Ms. Sakibayeva from the requirement that she be represented by a solicitor. In the result, Mr. Dehn was not entitled to represent her interests before the Court notwithstanding her prior written authorization. A private arrangement of the sort made here between Mr. Dehn and Ms. Sakibayeva is not sufficient to allow a party to litigation in this Court to ignore the requirements of Rule 119.

4. The second argument advanced on behalf of the Respondent was that Mr. Dehn had no legal standing as a party to this application. While this argument has considerable substantive strength, I am not prepared to order that Mr. Dehn be removed as a party to the application at this very late stage in the process.

5. This application was commenced on December 15, 2006 and Mr. Dehn was named as a party at that time. At least one other preliminary motion was resolved by the Court by Order dated April 26, 2007. The Respondent could have moved at any time under Rule 104(1)(a) to have Mr. Dehn removed as a party and failed to do so. Indeed, this argument was not brought before the Court by way of a formal motion by the Respondent at any time. It was essentially raised as an

invitation to the Court to remove Mr. Dehn as a party pursuant to the Court's inherent authority. While I do not doubt that the Court has an inherent discretion to remove a party, I am not disposed to exercise that authority in these circumstances. Generally the issue of a party's standing ought to be resolved with a proper and timely motion brought under Rule 104. To leave this issue essentially to the eve of the hearing on the merits is to create the potential for significant prejudice. Ms. Sakibayeva presumably had an expectation that Mr. Dehn, as a party, would be able to argue the merits of their joint application even if he had no right to represent her before the Court. Had the issue of Mr. Dehn's standing as a proper party to the application been resolved in favour of the Respondent at an earlier point, Ms. Sakibayeva would have had the option of retaining counsel to represent her. This was an option that would be effectively foreclosed if Mr. Dehn was removed on the day of the hearing of the application. While an adjournment might have been an option, it would not be fair to impose upon Ms. Sakibayeva a further lengthy delay in resolving this matter because the Respondent failed to raise the standing issue at an earlier point in the proceeding.

6. The decision that is challenged by Mr. Dehn on this application was apparently rendered by a letter sent on December 8, 2006. Although there are indications in the Record that a formal decision letter was sent to Ms. Sakibayeva from the Canadian Embassy in Moscow, neither party was able to produce a copy. Mr. Dehn claims that no such letter was ever received and that Ms. Sakibayeva was first notified of the decision by e-mail from the Embassy. Counsel for the Respondent asserts that a copy of the official decision letter was not maintained in the Embassy file apparently for reasons of administrative efficiency. Nothing of consequence turns on this point because other evidence of the decision is available in the Record including the CAIPS notes

maintained by the visa officer. Those notes offer the following reasons for refusing a visa to Ms. Sakibayeva:

> Appl claims she is self-employed but no proof provided of any business she operates. Claims to own property but no proof provided. Has produced bank statement dated 8NOV06 indicating she has balance of 14K+ USD; however, source of funds not obvious. Wants to marry fiancé in CDA but gives no reason for wanting to do so, since her family remains in Kazakhstan. Appl has no travel history, no obvious source of employment or valid reason, in my opinion, to marry in CDA. Am not satisfied Appl satisfies TRV requirements. Application refused.

7. Despite the multitude of arguments advanced by Mr. Dehn, there is only one matter that is of any legal concern. In a response to a written request from Ms. Sakibayeva, the visa officer provided the following e-mail reply on December 13, 2006:

> According to the Canadian *Immigration and Refugee Protection Act* and Regulations, applicants for temporary resident visas must establish that they have a genuine intent to enter Canada for a temporary purpose only and that as temporary residents, they will not engage in unauthorized employment or study or attempt to remain permanently in Canada. Applicants must also show that they have the necessary resources for the stay envisaged, and that they are willing and able to return to their own country. The officer must refuse to issue a visa if any of these requirements are not met. In seeking to come to a fair decision the officer takes into consideration all factors such as the following: <u>the applicant's ties to their homeland</u>, employment, <u>family ties</u>, future plans, previous travel abroad, reasons for visiting Canada and incentives to return home.
>
> Ms. Sakibayeva Yelena made an application for a temporary resident visa on November 23, 2006, and her application was finalized on December 5, 2006. Ms. Sakibayeva Yelena was refused issuance of a visa as I was not satisfied that Ms. Sakibayeva Yelena was a genuine temporary resident who would leave Canada at the end of her authorized stay. <u>When reviewing the file I took into consideration the fact the applicant is not well enough established in Russia personally, professionally or financially to be a genuine</u>

> visitor to Canada. I considered the degree of Ms. Sakibayeva's establishment in Russia, her previous travel history and her reason for travel to Canada. Given that Ms. Sakibayeva Yelena has very strong ties to Canada and all her family remains in Kazakhstan.
>
> I was not convinced that she would have compelling reasons to return to Russia at the end of her authorized stay. I hence determined that Ms. Sakibayeva Yelena did not meet the requirements for issuance of a visa to visit Canada.
>
> [Emphasis added]

8. The problem with the above explanation is that it contains a significant factual error insofar as it identifies Ms. Sakibayeva's place of residence as Russia. Her visa application clearly and correctly identified her place of residence as Kazakhstan. This was also the place where her mother and other members of her immediate family resided and where she also claimed to have some economic ties.

9. Counsel for the Respondent argues that the visa officer's post-decision e-mail is both irrelevant and inadmissible. It is described as a mere courtesy letter which did not form part of the decision. Reliance is placed on previous decisions of the Court which have cast doubt on the relevance of post-decision evidence, including affidavits deposed by the decision-maker to supplement or to explain a decision: see *Quiroa v. Canada (Minister of Citizenship and Immigration),* 2007 FC 495, 157 A.C.W.S. (3d) 631 and *Rafieyan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 727, 158 A.C.W.S. (3d) 982.

10. It seems to me, however, that the e-mail in this case does not give rise to the kinds of reasonable concerns that arise when an applicant seeks to rely upon evidence that was not before the decision-maker or where the decision-maker, in furtherance to the litigation, deposes an affidavit to elaborate on or to recast the decision. First of all, the e-mail is not new evidence; it is a statement by the decision-maker made contemporaneously with the decision by which the decision is explained. Because the statement was not made in contemplation of litigation, pending or extant, and because it was made essentially against interest, it is inherently trustworthy.

11. I do not read the authorities as going so far as to declare that *ex post facto* affidavits by a decision-maker are inadmissible in judicial review proceedings. Clearly they have a place as a means to address issues of fairness, bias and jurisdiction. According to my colleague Justice Luc Martineau in *Kalra v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 941, [2003] F.C.J. No. 1199, such an affidavit may also have some value to "elaborate" on other information contained within a decision-maker's notes "but not as a late explanation for the decision".

12. I consider the visa officer's December 13th e-mail to be indistinguishable from CAIPS notes, which are frequently relied upon as forming part of a decision or as reasons for a decision. The inherent reliability of CAIPS notes comes from their relative contemporaneity with the decision, albeit that they may sometimes be created after the decision was made: see *Kalra*, above, at para. 21. In my view, this e-mail is admissible and reliable and it should be considered in assessing whether the decision to deny Ms. Sakibayeva's visa was patently unreasonable.

13. Counsel for the Respondent concedes that the visa officer's December 13th e-mail incorrectly ascribed Russian residency to Ms. Sakibayeva but he asserts that it was an inconsequential typographical mistake made after the decision was rendered. I am not prepared to accept this characterization of the mistake. The context of the visa officer's statement concerning Ms. Sakibayeva's supposed Russian residency is not indicative of a typographical error. In three separate places, she is described as a resident of Russia and yet her family are correctly noted to be residents of Kazakhstan. The clear inference arising from the e-mail is that Ms. Sakibayeva's motivation to return to Russia was substantially weakened by the fact that her family resided elsewhere, specifically in Kazakhstan.

14. There is also nothing in the CAIPS notes which is inconsistent with the visa officer's explanatory e-mail or which would suggest that the residency mistake only arose *ex post facto* to the actual decision. In the absence of any evidence showing that the residency finding was anything other than what it was represented to be, I must take it at face value. In other words, it is a clear factual mistake going to a material issue bearing on the likelihood that Ms. Sakibayeva would leave Canada upon the expiry of her visitor's visa. Although the visa officer gave other reasons for refusing a visa to Ms. Sakibayeva, I am in no position to determine whether the same decision would have been reached in the absence of this error. I am satisfied, though, that this factual mistake is of sufficient import to render the decision patently unreasonable.

15. I would be remiss if I did not comment on the tone and content of Mr. Dehn's written submissions to the Court. His materials contain numerous inflammatory characterizations of the

visa officer and the Department. Those accusations are entirely gratuitous, demeaning and unwarranted and they reflect poorly on Mr. Dehn's judgment and objectivity. There is not a scintilla of evidence in the Record to support his opinions that the decision-maker in this case was a compulsive liar, inept, incompetent, fanatical or a religious misogynist. His description of the visa refusal decision as "stupid" and his assertion that it was based on "targeted malice and discrimination against Kazakhstan citizens" are equally unwarranted and inappropriate. Ordinarily the type of objectionable statements made by Mr. Dehn would justify an award of costs against him. In this instance, however, an award of costs in the amount of $500.00 has already been made against him for his inflammatory pleadings in the context of a pre-hearing motion. In my view that is a sufficient deterrent in the circumstances.

16. The Respondent has not proposed a certified question and no question arises from these reasons.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is allowed with the matter to be remitted to a different decision-maker for reconsideration on the merits.

" R. L. Barnes "

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-6605-06
STYLE OF CAUSE:	YELENA SAKIBAYEVA ET AL v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
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Mr. Brad Hardstaff	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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