Federal Court Cour fédérale

Date: 20101102

Docket: IMM-2149-10

Citation: 2010 FC 1075

Toronto, Ontario, November 2, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

TAPAN KUMAR PAUL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In my view, the respondent not only breached the rules of natural justice and acted unfairly towards Tapan Kumar Paul, but did so in an egregious manner.

[2] Mr. Paul is a citizen of Bangladesh. He submitted an application for permanent residence in Canada as a skilled worker to the High Commission of Canada in Singapore in July 2006 – four and

one-half years ago. In his application he claimed 5 points for having a relative in Canada because his sister was a Canadian citizen residing in Canada. His application stated that her name was Tapashi Das and that she was married. Given that she did not have the applicant's family name, it was reasonable to believe that she took her husband's name. In any event, anyone reviewing the application would immediately see that Ms. Das and the applicant did not share a last name.

[3] On November 27, 2009, the applicant received a letter from the High Commission in Singapore requesting additional supporting documentation. The letter provided a list of documents and read: "YOU SHOULD SUBMIT <u>ONLY</u> THOSE ITEMS MARKED WITH AN "✓ (emphasis added)."

[4] The letter is a form letter. One of the documents listed in it is "Notarized copy of Marriage Certificate(s) for ______"; there was no checkmark next to this item. He was asked by way of a check mark to provide "Proof of your relationship to your relative in Canada (Birth Certificates <u>only</u> are accepted. Statutory declarations are not acceptable) (emphasis added).

[5] Mr. Paul dutifully complied and provided his sister's birth certificate, which of course was in her birth name, Tapashi Rani Paul. It indicated the same date of birth as that indicated on Mr. Paul's application and on the Certificate of Canadian Citizenship of Tapashi Das that he had submitted with it. Mr. Paul did not provide his sister's marriage certificate as the respondent had directed him to provide <u>only</u> the checked documents.

[6] On February 11, 2010, the applicant received notice of a negative decision on his application. He had been awarded 66 points, one point short of the required 67 points. He had received 0 points for having a family member in Canada. The Officer wrote that:

> [Y]ou have not demonstrated that you have a qualifying relative residing in Canada. You did not provide a marriage certificate which would demonstrate the relationship between you and Mrs. Das. Consequently, 0 points were awarded for adaptability.

[7] The CAIPS notes which form a part of the Certified Tribunal Record may explain why the Officer awarded the applicant zero points for failing to provide his sister's marriage certificate when it has been specifically indicated to the applicant that only her birth certificate was to be provided.

[8] The Officer who reviewed the application on November 26, 2009, noted that if the relative in Canada was established to be his sister, then he would be awarded 5 points for adaptability and would thus have sufficient points to be awarded the visa. That Officer made the following entry: "MARRIAGE CERTIFICATE OF SISTER AND PROOF OF LIVING IN CDA TO BE REQUESTED." Although the file folder provided as a part of the certified tribunal record indicates that on November 27, 2009, a document request was made, the letter that was sent, dated November 27, 2009, does not form part of the Certified Tribunal Record. It is this letter that specifically did not ask the applicant to send a copy of his sister's marriage certificate; in fact, it indicated to any reasonable person reading it that he should not send the marriage certificate to the respondent.

[9] There is no question that officers would be well advised to review the actual letters sent to applicants in such situations rather than simply relying on the CAIPS notes, as appears to have been the case here. Mistakes do happen and instructions given are not always carried out precisely.

Because of that failure the Officer whose decision is under review penalized the applicant. He stated in the CAIPS notes: "APPLICANT HAS NOT PROVIDED PROOF OF RELATIONSHIP WITH TAPASHI DAS. HE HAS PROVIDED BIRTH CERTIFICATE OF TAPASHI RANI PAUL BUT NO MARRIAGE CERTIFICATE TO INDICATE THAT TAPASHI DAL (*sic*) IS SAME PERSON."

[10] One might excuse the Officer for coming to this decision as the letter sent to the applicant that failed to ask for the marriage certificate was apparently not before him or her. However, how does one excuse, or even comprehend, how the respondent continued to defend that decision after receiving a copy of the letter with the record filed with the application for leave and judicial review?

[11] The letter makes it clear and obvious that the respondent led the applicant to believe that he need not, and in fact should not, send the marriage certificate to the reviewing Officer. The respondent's actions are akin to those of Lucy, who, contrary to her assurances, pulls the football away from Charlie Brown just as he is about to kick it. Lucy's action is mean and unfair; the respondent's action breaches the duty of procedural fairness.

[12] At the hearing, after indicating my view that the respondent was clearly in the wrong, I asked the parties to address the issue of costs. The applicant asked for costs of $1,500.00 while the respondent submitted that there were no exceptional circumstances justifying an award of costs.

[13] Section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 provides:

> No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

[14] I am of the view that there are special reasons why costs should be awarded in this case. The Immigration Officer who made the decision made a clear error, and in so doing committed an egregious breach of procedural fairness. The respondent decided to oppose the applicant's application for leave and for judicial review, causing the applicant to incur significant legal expenses even though he is clearly in the right. Furthermore, the respondent's submissions did not address the serious issue raised by the applicant and on which he was successful. Instead, the respondent made boilerplate submissions about the duty to give reasons and patent unreasonableness which have no relevance to the single and clear issue raised by the applicant.

[15] In *Dhoot v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1295, Justice Kelen awarded costs where a letter requesting an interview was not sent to an applicant. At para. 19 he wrote that:

> It is wrong for the respondent, in a case such as this, to oppose the applicant's Court case. For this reason there are special circumstances in this case to award legal costs to the applicant. The applicant presented clear evidence that he did not receive the letter scheduling the interview. The respondent should have recognized that this letter was not properly sent or received, so that this Court hearing should not have been necessary. Accordingly, the legal costs associated with this application before the Court are awarded to the applicant.

[16] In this case, the conduct of the respondent throughout has been unfair, improper, and has resulted in undue prolongation of proceedings and a delay in the applicant's application being

determined in a timely manner. These are sufficient special reasons to justify an award of costs. Further, it is appropriate to order the respondent to give prompt attention to the applicant's application for a permanent resident visa as a skilled worker.

[17] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. This application is allowed and the decision of the Immigration Officer dated February 11, 2010, denying the applicant's application for a permanent resident visa as a skilled worker is set aside.

2. The applicant's application for a permanent resident visa as a skilled worker is remitted to a different Immigration Officer for an assessment in keeping with these reasons and with the following directions:

   (i) the assessment and decision of the Immigration Officer shall be made within three months of the date of this Judgment, failing which, in light of the initial scoring of the application, the respondent shall grant the applicant a permanent resident visa as a skilled worker; and

   (ii) if the Immigration Officer is of the view that the applicant's sister's marriage certificate or any other document is required to be provided, the applicant shall be informed of the specific documents he is to provide and be given a reasonable period of time to provide them.

3. No question is certified.

4. There being special reasons in this case, as provided in section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, the applicant is awarded his costs, fixed at $1,500.00 inclusive of disbursements and taxes.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2149-10
STYLE OF CAUSE:	TAPAN KUMAR PAUL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 28, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
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