Date: 20110112

Docket: IMM-874-10

Citation: 2011 FC 30

Toronto, Ontario, January 12, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ISURUNI MERCY ERANGA PREMARATNE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is a 28-year old citizen of Sri Lanka. By way of written application dated November 17, 2009, the Applicant applied for a study permit (also referred to as a student visa) to allow her to come to Canada to attend an eight-month certificate program in International Business Management at George Brown College in Toronto, Ontario. In a decision dated November 26, 2009, a visa officer (Officer) refused her application. The Applicant seeks judicial review of this decision.

[2] The Officer's reasons were set out in the Computer Assisted Immigration Processing System (CAIPS) notes, as follows:

> I am not satisfied with PA's personal establishment if uncle in CDA is required to pay for her studies. Also not clear as to why PA waited til this stage of her career to seek foreign studies. Not satisfied that she is a genuine student but rather using the process to gain access to CDA.

[3] The Respondent concedes that the Officer erred by failing to consider the financial position of the uncle in Canada and the evidence submitted by the Applicant that appears to demonstrate that he could pay for her studies. On the basis of this conceded error, the Respondent submits that this Court should order that the decision of the Officer be quashed and the matter remitted to a different Officer for re-determination.

[4] The Applicant is not content with this suggested resolution. In addition to an order quashing the decision, the Applicant seeks the following relief:

1. An order directing the Respondent to reconsider the Applicant's application for a student visa within 30 days of order;
2. An order that, if the Respondent has any concerns with respect to the Applicant's application, the Applicant be apprised of those specific concerns in writing, within three days, and the Respondent provide the Applicant 15 days in which to respond in writing;
3. An order that the Applicant not be charged additional fees;
4. An order that the Respondent shall adopt non-arbitrary and unbiased criteria for evaluation of student visa;

5. An order that the Respondent adopt procedures to ensure that the decision making process is free of ethnic and religious bias and those procedures be made available forthwith to the Applicant and publicized in Sri Lanka;
6. An order that the Respondent shall not permit the opinions or advice of locally engaged staff, with respect to the authenticity of a visa application, be relied upon by any designated decision maker;
7. An order that all visa applications be made only by properly trained and qualified Canadian visa officers;
8. An order prohibiting the Respondent from defacing passports of persons refused a visa; and
9. An order for costs.

[5] In the context of judicial review of immigration matters, the usual remedy granted to a successful applicant is an order referring the matter to a different decision-maker for re-determination. In exceptional circumstances, the Court may provide special directions (see, for example, *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31, 222 FTR 160 at para 14). However, in the circumstances of this case, I am not prepared to make any of the "extra" orders requested by the Applicant, with the exception of request #3 (no additional fees).

[6] Further, I am not satisfied that the usual remedy of remitting the matter to a different visa officer for re-determination is possible. The original application was for a study permit for the explicit purpose of pursuing a specific program of studies at George Brown College from January 2010 to August 2010. The acceptance from George Brown College referred only to this one

program. The Applicant concedes that she must submit a new application for a study permit to commence her studies in May or September 2011. Thus, in practical terms, the entire process will take place afresh. From an operational perspective, the Respondent may choose to assign the same application number to a re-application; I leave that decision to the Respondent. Further, as conceded by the Respondent, no further fees should be assessed for the re-application, if made.

[7] With respect to the relief requested by the Applicant, I begin by observing that there is a strong presumption that visa officers will follow the law as set out in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) and in the applicable jurisprudence. Secondly, I note that this is an individual case and not a class application, or an application that is representative of a large number of related judicial review applications. While the Applicant's counsel strongly asserts that there are other instances of the errors conceded on this file, such evidence is anecdotal and not properly before me.

[8] On the various orders sought by the Applicant in this case, I express the following views:

1. The Applicant wants me to provide direction to the Respondent that the concerns of a reviewing visa officer be communicated to the Applicant with a defined period for response. It is trite law that an applicant bears the burden of providing the visa officer with the documentation necessary to support the application. As acknowledged by the Respondent, extrinsic evidence relied on by an officer must normally be disclosed to an applicant. However, aside from such obligation to disclose, it is well established that a visa officer need not provide a "running score" to an applicant (see, for example, *Wen v. Canada*

(Minister of Citizenship and Immigration), 2002 FCT 1262, 25 Imm. L.R. (3d) 316 (FCTD)). Not only would the requested order be an improper direction, it may well be contrary to the existing jurisprudence.

2. The timing of the processing of the new application is not something that ought to be the subject of arbitrary Court-imposed timelines. This is particularly true given that the Applicant acknowledges that she must re-apply to George Brown College. I assume that the Respondent would respond to a completed student visa application within a reasonable time. With respect to timing of a decision, I observe that the original decision was made nine days after the application was submitted, indicating that visa officers are aware of the time-sensitive nature of student visa applications. It is not necessary for this Court to impose a time limit.
3. In the circumstances, I am prepared to order that the Applicant not be obliged to pay an additional fee for the new application, if made.
4. I am certainly not prepared to direct that, “the Respondent shall adopt non-arbitrary and unbiased criteria for evaluation of student visa” or that, “the Respondent adopt procedures to ensure that the decision making process is free of ethnic and religious bias and those procedures be made available forthwith to the Applicant and publicized in Sri Lanka”. It is presumed that the visa officer who decides this matter will make a determination in an impartial, unbiased manner having regard to all of the evidence, the Respondent’s Guidelines and the existing jurisprudence. That is simply a matter of law and common sense; no order is required or appropriate. Should the new officer fail to do so, the Applicant may bring an application for judicial review to challenge the decision.

5. With respect to the training and qualifications of visa officers, there is absolutely no evidence before me that indicates that the use of untrained or unqualified visa officers is taking place.
6. I am not persuaded that the Officer who signed the decision relied on, or was unduly influenced by, "the opinions or advice of locally engaged staff". At an operational level, it is not unusual – or wrong in law – for visa officers to use clerical, secretarial or administrative staff to assist in the processing of applications. Unless there is persuasive evidence that such staff actually made or influenced the decision, there is no reviewable error. In this case, it appears that staff members were involved in some way. However, the use of such staff does not mean that the Officer did not assess the evidence herself or make the final decision. Accordingly, there is no need to provide the order sought by the Applicant.
7. There are no "special reasons" to allow an order of costs to be awarded to the Applicant pursuant to rule 22 of the *Immigration and Refugee Protection Rules*, SOR/93-22.

[9] Finally, the Applicant requests that I stop the Respondent's practice of "defacing" passports when applications for student visas are refused in Sri Lanka. In a letter to the Court dated January 6, 2011, the Applicant expands on this concern:

> One of the most important issues this application places before [the] Honourable Court is the everyday practice of defacing foreign passports by the visa officer and her colleagues which the Respondent Minister and the Canada Border Services Agency has [acknowledged] is not authorized by statute or regulation. Indeed this practice is a serious criminal offence in the Applicant's country of residence and continues to damage Canada's reputation.

[10] I am not prepared to provide any such direction or order. In oral submissions, counsel for the Applicant retracted his "criminal offence" accusation. Even without the criminal allegation, I have absolutely no record before me that would support the claims made by the Applicant in this regard.

For example, the Applicant did not provide the Court with a copy of the pages from the Applicant's passport that had been allegedly "defaced".

[11] Moreover, the Applicant's oral argument that this "defacing" practice was contrary to the *Privacy Act*, R.S.C. 1985, c. P-21 was not put forward in the application for judicial review and is, thus, without any evidentiary foundation.

[12] On a final note, I have serious concerns with respect to certain of the Applicant's allegations. The Applicant claims that the Officer "committed perjury by insisting that she indeed has lawful authority to deface passports". A review of the record (most of which is not properly before me, in any event) discloses no such insistence by the Officer. The Applicant has paraphrased and mischaracterized the statements of the Officer. Such serious allegations that could reflect on the reputation of the Officer should not be made except with the clearest evidentiary record to substantiate them. In this case, no such record exists. Indeed, having reviewed the transcript extracts of the Officer's cross-examination relied on by the Applicant (in a different case), I am satisfied that they demonstrate that the Officer tried to answer all questions posed to her professionally and honestly. The accusation of perjury is completely without foundation.

[13] Along with the claim of "perjury", the Applicant's record also contains unsubstantiated accusations of "contempt of Court" and "criminal activity". Even though the Applicant's counsel appeared to resile somewhat from these assertions during oral submissions, such unwarranted and unsubstantiated attacks on the integrity of the Respondent and his officers could justify an award of

costs against the Applicant's counsel personally. Since no such costs were requested, none will be awarded.

[14] In sum, this judicial review will be allowed with an order that, if the Applicant chooses to re-apply for a student visa, the matter should be referred to a different visa officer for determination. Further, unless the original fees have been refunded to the Applicant, she should not be obliged to pay any additional fees for her next application, if made.

[15] In my view, this is a case that stands on its facts and is not an appropriate case for the certification of a question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the decision of the Officer dated November 26, 2009 is quashed;

2. in the event that the Applicant re-applies for a temporary resident student visa:

    a. the re-application is to be referred to a different visa officer for determination;

    b. any documents from the original application, to the extent that they are relevant to the re-application, are to be considered to form part of the re-application record; and

    c. no fees are to be assessed for the consideration of this next application.

3. no question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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