

Federal Court



Cour fédérale

**Date: 20100314**

**Docket: IMM-4212-10**

**Citation: 2011 FC 304**

**Toronto, Ontario, March 14, 2011**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**LUNN KIM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] **BORN TOO SOON** – Born too soon to be eligible to apply for permanent residence in Canada as a member of the family class. The visa officer concluded that the applicant misrepresented the age of two of his children. The application was dismissed pursuant to section 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 which provides that a foreign national is inadmissible for directly or indirectly misrepresenting material facts relating to a relevant matter which could induce an error in the administration of the Act. This is a judicial review of that decision.

[2] Another sibling, the eldest sister, Sophary, a Cambodian national, became a permanent resident of Canada in July 2001, sponsored by her husband. She first attempted to sponsor her parents and four siblings in 2004, but was unsuccessful in that she lacked sufficient funds. She applied again in 2007. It is that application which is the subject of this judicial review.

[3] The lock-in date with respect to the ages of the minor children was 9 February 2007. At that time to be eligible, a dependent child who had left school had to be less than 22 years of age as required by section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[4] Although the birth certificates indicated that all four siblings were then under 22 years of age, the visa officer had concerns with the two eldest, Sophara, said to be born 10 September 1985, and Sopharith, said to be born 9 July 1988. These concerns culminated in bone density tests. The results suggested that at the lock-in date Sophara was at least twenty-four and a half and Sopharith at least twenty-two and a half years of age.

[5] The visa officer certainly had reasons to be concerned. Based on the documents she considered, Sophara's vaccination certificate, both in the English translation and in the original, indicates that he was vaccinated before he was born. The birth certificates were of recent origin. There had been a major flood in Cambodia in 2000 as a result of which many government documents, including the original records of birth, were destroyed. Recreated documents naturally were looked at with suspicion. Sophara and Sopharith both appeared older than their birth

certificates would suggest. Mr. Kim acknowledged that fact but attributed their appearance to acne and living outdoors.

[6] Counsel for Mr. Kim mounted a strenuous argument based on the unreliability of bone density tests as an indicator of age. He also argued, quite correctly, that government issued documents are presumptively valid. It is not necessary for me to consider these issues, although I should point out that the authenticity of the birth certificates are not in issue, rather their contents, as they had to be recreated by those who may have had an interest in the matter.

[7] I say this because in the certified tribunal record, the CAIPS (Computer Assisted Immigration Processing System) Notes, part of the electronic data processing used by Canadian immigration officers, contains an entry on 7 July 2000 that the documents then reviewed indicated that the eldest sister, Sophary, had four sponsorable siblings, the first two of which were born in 1985 and 1988. No mention of this entry is made in the decision.

[8] In the oft cited case of *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1988), 157 FTR 35, [1998] FCJ No 1425 (QL), Mr. Justice Evans acknowledged the presumption that the decision maker had reviewed the entire record. He stated that the Court might infer that an erroneous finding of fact was made without regard to the evidence from the Tribunal's failure to mention in its reasons relevant evidence which pointed to a different conclusion from the one reached. He said at paragraph 17:

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. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (Fed. 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. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[9] Given the 2000 entry in the CAIPS Notes and given that the first sponsorship application had been made in 2004 when Sophara, the eldest sibling, would have been only 19, the reasons for rejecting this application had to state why the CAIPS Notes entry was not reliable. I can only conclude that the Officer made a finding of fact without regard to the evidence.

[10] The judicial review shall be granted. There is no serious question of general importance to certify.

**ORDER**

**FOR THE REASONS GIVEN;**

**THIS COURT ORDERS that:**

1. The application for judicial review is granted.
2. The decision rendered by the visa officer is set aside and the matter is returned to another visa officer for redetermination.
3. There is no serious question of general importance to certify.

“Sean Harrington”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4212-10

**STYLE OF CAUSE:** KIM LUNN v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 9, 2011

**REASONS FOR ORDER  
AND ORDER:** HARRINGTON J.

**DATED:** MARCH 14, 2011

**APPEARANCES:**

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