Federal Court  Cour fédérale

Date: 20110331

Docket: IMM-383-10

Citation: 2011 FC 400

Ottawa, Ontario, March 31, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NITESH JAMALSINH THAKOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (the Act) for judicial review of a decision of an immigration officer (the officer) of Citizenship and Immigration Canada (CIC), dated January 5, 2010, wherein the officer denied the applicant's application for permanent residence as a member of the spouse or common-law partner in Canada class because the applicant was described in subparagraph

125(1)(c)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[2] The applicant requests an order quashing the decision of the officer and remitting the matter back for redetermination by a different officer.

Background

[3] Nitesh Jamalsinh Thakor (the applicant) was born on April 17, 1979 and is a citizen of India.

[4] The applicant entered Canada on June 24, 2005. He married Lesley Ann Callaghan, a Canadian citizen, on December 8, 2007.

[5] The applicant's marriage license indicates that his spouse was never previously married. However, the applicant's spouse was married in 2002 and she applied to sponsor her first husband in 2003.

[6] On June 19, 2008, the applicant's spouse submitted an application undertaking to sponsor and support the applicant in which she indicated that she had never been married, in a common-law or conjugal relationship. She declared all the information in the undertaking to be complete and correct.

[7] CIC interviewed the applicant and his spouse on October 27, 2009. CIC requested that they bring copies of their marriage license as well as any divorce certificates, if either of them were previously married.

[8] During the interview, the applicant's spouse admitted that she had in fact been previously married, that she had attempted to sponsor her husband and that she was unsure whether she was legally divorced from her first husband.

[9] The applicant and his spouse were given until December 5, 2009 to provide a divorce certificate showing that the applicant's spouse was divorced at the time of their marriage. By fax dated December 4, 2009, the applicant's Member of Parliament (MP) submitted a request on behalf of the applicant for an extension of time until the end of January 2010, to provide the document. This fax did not provide reasons for why the extension was required or what actions had been taken until that point to obtain the divorce certificate. CIC granted an extension of time until December 31, 2009. The applicant did not contact CIC again.

[10] CIC refused the applicant's application on January 5, 2010 for failure to show that his spouse was not married to another person at the time that the applicant married her as required by subparagraph 125(1)(c)(i) of the Regulations.

Officer's Decision

[11] The officer found that the applicant had not complied with subparagraph 125(1)(c)(i) of the Regulations which states that a foreign national cannot be a member of the spouse or common-law partner in Canada class if either party to the applicant's marriage was the spouse of another person at the time of their marriage.

[12] The officer found that the applicant had not provided evidence that at the time of his marriage, his spouse was not married to another person. The officer refused the application on this basis.

Issues

[13] The applicant submitted the following issues for consideration:

1. Did the officer err in law in the exercise of his discretion by ignoring evidence, misconstruing evidence and fettering his discretion?

2. Was the application denied fundamental and natural justice by the conduct of the officer in this case?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer breach the duty of fairness to the applicant by not allowing a longer extension of time to provide the divorce certificate?

Applicant's Written Submissions

[15] The applicant submits that the officer acted unfairly in determining the applicant's permanent residence application. The applicant did not know that his spouse had been previously married and, therefore, did not know the need to produce a divorce certificate at the October 27, 2009 interview. The officer was aware that the divorce certificate would need to be obtained from India and should have provided the time requested to do so.

[16] The applicant submits that by providing the applicant a shorter time extension than that which he requested, the officer fettered his discretion. An individual fettering of discretion can result in a breach of the duty to act fairly. The date selected by the officer was arbitrary, especially given that the application for permanent residence was first submitted in June 2008 and had already taken approximately seventeen months to be processed. The extra 22 days requested by the applicant would not have been an inordinate delay in these circumstances.

Respondent's Written Submissions

[17] The respondent emphasizes that the applicant's spouse misrepresented her martial status in her undertaking to sponsor the applicant and apparently in obtaining her marriage license. Despite the requirement to be truthful on immigration applications, the applicant and his spouse both stated on their immigration application and forms that neither had been previously married.

[18] The applicant and his spouse were advised that they should bring with them to the October 27, 2009 interview, a photocopy of any previous divorce certificates.

[19] The applicant's spouse did not tell the truth at the interview about being previously married until she was confronted with the fact that she had applied to sponsor her first husband.

[20] The respondent submits that the applicant and his spouse were given a reasonable period to provide the divorce certificate. There is no evidence that the officer was advised that the applicant would be seeking a document from India. The applicant was granted a further extension of time, until December 31, 2009, despite the fact that he provided no explanation for why he needed an extension and what he had done to try and obtain the document.

[21] The applicant did not contact CIC after being given the extension until December 31, 2009 to indicate that it was not sufficient time. He did not contact CIC after the December 31, 2009 deadline. Due to his own actions, the applicant has waived any right to now complain about the time extension provided.

[22] The Court cannot consider the divorce deed as it was not before the officer in making his decision. The applicant has not provided any indication of when the document was requested or received. Assuming the divorce deed is valid, it indicates at paragraph 7 that the applicant's spouse was provided with a copy. There is no evidence that the applicant's spouse did not have it in her possession prior to the October 27, 2009 interview.

[23] The Federal Court has held that not granting an extension of time does not automatically amount to breach the duty of fairness.

[24] The applicant was under an obligation to produce the requested document. Since it was not produced, it was open to the officer to refuse the application for the reasons that he did. The applicant and his spouse were treated fairly.

Analysis and Decision

[25] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[26] Decisions of an immigration officer regarding applications for permanent residence under the family class involve questions of mixed fact and law and the established standard of review is reasonableness (see *Natt v Canada (Minister of Citizenship and Immigration)*, 2009 FC 238, 80 Imm LR (3d) 80 at paragraph 12).

[27] **Issue 2**

Did the officer breach the duty of fairness to the applicant by not allowing a longer extension of time to provide the divorce certificate?

The content of the duty of fairness varies depending on the facts of each case (see *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, 236 DLR (4th) 485).

[28] Mr. Justice Edmond Blanchard held in *Khwaja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 522, 148 ACWS (3d) 307 at paragraph 17, that the "duty of fairness requires that an applicant be given notice of the particular concerns of the visa officer and be granted a reasonable opportunity to respond by way of producing evidence to refute those concerns."

[29] In this case, the issue is whether or not the applicant was provided a reasonable opportunity to respond to the concern that at the time of his marriage, his spouse was married to another person.

[30] The applicant and his spouse were notified by CIC in a letter and accompanying document checklist sent on September 29, 2009 that they were to bring divorce certificates of any previous marriages to their interview with CIC.

[31] In the October 27, 2009 interview with CIC, the applicant's spouse admitted to being previously married despite stating the contrary on her sponsorship undertaking. She and the applicant were provided 30 days to present the divorce certificate. The day before that deadline arrived, the applicant, through his MP, requested a further extension of time but did not provide reasons why he needed the extension or details about what efforts he had taken to obtain the document. He was nevertheless given an extension until December 31, 2009. The applicant gave no indication that he could not obtain the document in the time provided and he had no further contact with CIC.

[32] The onus was on the applicant to provide the immigration officer with all necessary documents to determine the application for permanent residence. The officer was not required to provide the applicant with several opportunities to satisfy the officer that the applicant met the requirements of the Act and the Regulations (see *Madan v Canada (Minister of Citizenship and Immigration)*, 172 FTR 262, [1999] FCJ No 1198 (FCTD) (QL) at paragraph 6).

[33] There is jurisprudence from this Court that refusing to grant an extension may result in a breach of the duty of fairness. In *Ram v Canada (Minister of Citizenship and Immigration)*, 189 FTR 306 (FCTD), Mr. Justice Max Teitelbaum quashed a visa officer's decision refusing a request for an additional 30 days to respond. However, as noted by Deputy Justice Orville Frenette in *Anbouhi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 284 at paragraph 40 in analyzing *Ram* above:

> It is important to note that the applicant in that case provided reasons for why the required documentation could not be obtained within the time granted.
>
> (Emphasis removed)

[34] In the particular circumstances of this case, the applicant's spouse misrepresented her previous martial status, the applicant and his spouse had notice to provide any divorce certificates, the applicant was given two extensions of time to produce the certificate and the applicant failed to offer reasons for why he was unable to obtain the document in the time given. Under these circumstances, it was reasonable for the officer to make his decision refusing the application for permanent residence based on the information before him on January 5, 2010. The application for judicial review is dismissed.

[35] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[36] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Regulations (SOR/2002-227)

125.(1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if	125.(1) Ne sont pas considérées comme appartenant à la catégorie des époux ou conjoints de fait au Canada du fait de leur relation avec le répondant les personnes suivantes :
. . .	. . .
(c) the foreign national is the sponsor's spouse and	c) l'époux du répondant, si, selon le cas :
(i) the sponsor or the spouse was, at the time of their marriage, the spouse of another person, or . . .	(i) le répondant ou cet époux était, au moment de leur mariage, l'époux d'un tiers, . . .

FEDERAL COURT

SOLICITORS OF RECORD

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