Federal Court  Cour fédérale

Date: 20110407

Docket: IMM-3373-07

Citation: 2011 FC 433

Ottawa, Ontario, April 7, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

RASHID MAHMOOD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Counsellor (Immigration), Georges Ménard, (the Officer) of the Canadian High Commission (CHC) in Islamabad, Pakistan, dated June 18, 2007, wherein the Officer refused the Applicant's mother's application for permanent residence in Canada on the grounds that she was inadmissible due to misrepresentation of material facts in her application for permanent residence in Canada.

[2] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, Mahmood Rashid, is a Canadian citizen. He applied to sponsor his mother, Fatima Bashir, for permanent residence in Canada. The application was received at the visa post on October 22, 2002 and included the Applicant's sister, Munazza Aslam, who at the time was 22 years old and a dependent of Ms. Bashir.

[4] Ms. Bashir provided supporting documentation concerning herself and her daughter. When the application was reviewed, concerns were raised regarding the authenticity of Ms. Aslam's educational documents. Copies of the educational certificates were sent to the Controller of Examinations, Board of Intermediate & Secondary Education of Lahore for verification.

[5] On January 30, 2007 the visa post received confirmation from the authorities in Lahore that the educational certificates were counterfeit. The visa post sent Ms. Bashir a fairness letter dated May 5, 2007 informing her of this fact and alerting her that she may be found inadmissible to Canada for misrepresentation. Ms. Bashir was given 30 days to respond to the concerns of the visa post.

[6] Ms. Bashir wrote to the visa post explaining that her daughter was an established doctor in Pakistan and was shocked to learn that her educational documents were counterfeit. Ms. Bashir also explained that her daughter was no longer interested in immigrating to Canada. The letter concluded with Ms. Bashir expressing her desire to go and live with her son in Canada.

B. *Impugned Decision*

[7] The file was forwarded to the Officer for his review. The Officer was satisfied that the educational documents were counterfeit and remarked that Ms. Bashir had not addressed this issue in her letter. The Officer concluded that Ms. Bashir's misrepresentation was material in that it could induce an error in the administration of the Act. By letter dated June 18, 2007 Ms. Bashir was informed that her application was refused due to misrepresentation pursuant to subsection 40(1)(a) of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [IRPA] and that she was inadmissible for a period of two years pursuant to paragraph 40(2)(a).

II. Issues

[8] The Applicant raises the following issues:

(a) Did the Officer err in finding that Ms. Bashir misrepresented the education of her dependent daughter, Ms. Aslam?

(b) Did the Officer breach the duty of fairness owed to Ms. Bashir by failing to provide the details of what he considered to be misrepresentations and by failing to give Ms. Bashir an

opportunity to disabuse him of his concerns pertaining to the educational documents of the dependent daughter?

(c) Is the decision of the Officer reasonable?

[9] These issues can be summarized as:

(a) Was the Officer's decision reasonable?

(b) Did the Officer breach the duty of procedural fairness?

[10] The Respondent also raises the preliminary issue of standing, asserting that the Applicant has no standing to bring this application.

III. Standard of Review

[11] The appropriate standard of review to apply to an Officer's decision to refuse an application for permanent residence on the grounds of misrepresentation is reasonableness (*Lu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 625, 167 ACWS (3d) 978 at para 12). Judicial deference to the decision is appropriate where the decision making process demonstrates justification, transparency and intelligibility and the decision falls within a range of possible, acceptable outcomes defensible on the facts and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[12] On issues of procedural fairness, this Court will show no deference to the Officer, and will intervene if a breach is found (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392).

IV. Argument and Analysis

A. *Does the Applicant Have Standing?*

[13] The Respondent submits that the Applicant, as the sponsor of Ms. Bashir, has no standing to challenge the refusal of the application since he is not "directly affected" by the decision as required by subsection 18.1(1) of the *Federal Courts Act* (RS, 1985, c F-7*)*. The jurisprudence of this Court supports this position. The Respondent cites *Carson v Canada (Minister of Citizenship and Immigration)* (1995), 95 FTR 137 at para 4:

> [4] While Mrs. Carson has an interest in this proceeding, in that she is Mr. Carson's sponsor for landing in Canada and she was interviewed as part of the marriage interview involving the H&C determination, these facts are insufficient to give her standing in this judicial review. Mrs. Carson is a Canadian citizen and does not require any exemption whatsoever from the Immigration Act or regulations. Moreover, whether she has standing or not has no impact whatsoever on the ultimate issue in this matter. Accordingly, with respect to this proceeding, the applicant, Tonya Carson, is struck as a party.

(see also *Wu v Canada (Minister of Citizenship and Immigration)* (2000), 183 FTR 309, 4 Imm LR (3d) 145 at para 15).

[14] The Respondent submits that this application for judicial review should be dismissed on this basis alone.

[15] I have had the benefit of reading my colleague, Justice Luc Martineau's recent decision, *Huot v Canada (Minister of Citizenship and Immigration)*, 2011 FC 180. He determined that the statements made in *Carson* and *Wu*, "made at another time…under the former *Immigration Act*" were not binding and determinative, and that the facts of the case before the Court would need to be considered in exercising the Court's discretion to grant standing to a party (at para 20). In the present matter, I would like to echo the sentiment expressed by Justice Martineau at paras 14 and 15:

> [14] […] the hearing before the judge on the application for review must not become an arena where a party can present yet again each and every possible preliminary motion and objection that has not previously been decided or heard.
>
> [15] The Court must be able to control the proceedings that are before it so as to prevent abuse. In this regard, a party's lack of status should normally have been decided prior to the hearing on the merits by means of a motion to strike, if necessary. […]

[16] In the interests of justice, I am of the view that this preliminary objection on the part of the Respondent at this late stage should be dismissed. However, if I am wrong, given my conclusion with respect to whether the Officer's decision was reasonable there is no need to make a finding with respect to the standing of the Applicant.

B. *Was the Officer's Decision Reasonable?*

[17] The Applicant submits that any alleged misrepresentation was not "material" in that it was relevant only to the admissibility of Ms. Aslam, and not to the admissibility of Ms. Bashir herself. The Applicant also submits that the decision was unreasonable because the Officer assumed that Ms. Bashir knowingly presented counterfeit documents when in fact, there was no evidence to support this presumption.

[18] The Respondent submits that the Officer considered all of the evidence before coming to the conclusion that Ms. Aslam misrepresented her educational background. The Officer had the verification from the authorities stating that the documents were counterfeit, and Ms. Bashir provided no evidence to refute this in her letter. The decision was not based on an erroneous finding of fact, or in a perverse or capricious manner without regard for the material before the Officer.

[19] The Respondent submits that, despite the Applicant's contention to the contrary, a misrepresentation made in respect of a dependent child is relevant to the admissibility of the principal applicant. I share the view of the Respondent. Section 42 of the IRPA provides that a foreign national is inadmissible if any accompanying family member is inadmissible. Section 42 of the IRPA reads:

Inadmissible family member	Inadmissibilité familiale
42. A foreign national, other than a protected person, is inadmissible on grounds of an	42. Emportent, sauf pour le résident permanent ou une personne protégée, interdiction

inadmissible family member if	de territoire pour inadmissibilité familiale les faits suivants :
(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible;	a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;
[…]	[…]

[20] In the present case, the misrepresentation prevented the Officer from being satisfied that the daughter was not inadmissible and resultantly, prevented the Officer from determining that Ms. Bashir was admissible.

[21] Regarding the intentionality of the misrepresentation, as the Respondent submits, this Court has held that the misrepresentation provisions of paragraph 40(1)(a) of the IRPA are not dependent on whether the misrepresentation was intentional (*Lu*, above). The section reads:

Misrepresentation	Fausses déclarations
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[22] This section catches misrepresentations that may be fraudulent, negligent or innocent (*Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 378, 89 Imm LR (3d) 36 at paras 16 and 18). As such, the fact that Ms. Bashir claims to have been unaware that the documents were fraudulent does not bring to light a reviewable error on the part of the Officer.

[23] The Applicant has failed to show that the Officer's decision was unreasonable in any way. There is no basis on which this Court should disturb the Officer's decision.

C. *Did the Officer Violate the Duty of Procedural Fairness Owed to Ms. Bashir?*

[24] The Applicant submits that the Officer failed to give the Applicant adequate details regarding his concerns and failed to give her a proper opportunity to respond to those concerns. The Applicant argues that the Officer erred in not indicating in the fairness letter the scope of the type of response he was looking for and in not inviting Ms. Bashir and Ms. Aslam to come in for an interview.

[25] The Respondent takes the position that the fairness letter sent to Ms. Bashir fulfilled the duty of fairness the Officer owed Ms. Bashir. The letter identified which documents were believed to be fraudulent, alerted her to the possible misrepresentation finding, and invited her to respond to the Officer's concerns.

[26] Again, I agree with the Respondent's submissions. The content of the duty of fairness varies depending on the facts of each case (*Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 FCR 195 at para 40). In *Khwaja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 522, 148 ACWS (3d) 307 at para 17, Justice Edmond Blanchard stated that the duty of fairness requires:

> [17] […] 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.[…]

[27] An oral hearing is not always required in order for a visa officer to fulfill his duty of procedural fairness (*Ghasemzadeh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 716, 372 FTR 247 at para 27). As Justice François Lemieux wrote in *Ghasemzadeh* at para 27:

> [27] […] What the duty requires is that the applicant be afforded a meaningful opportunity to present the various types of evidence relevant to his or her case and have it fully and fairly considered. Generally, where there are credibility issues, a person is entitled an opportunity to address the issues which may form a credibility finding in some meaningful way (*Mukamutara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 451, [2008] FCJ No 573 at para 24).[…]

[28] In some instances it might be difficult to parse credibility concerns from the mere fact or substance of an alleged misrepresentation. However, in the present matter I find that Ms. Bashir was given a reasonable opportunity to present evidence to refute the Officer's concerns. She was unable to do so. Like in *Ghasemzadeh*, above, the Officer based his decision not on an adverse credibility finding, but on the mere fact of the misrepresentation - that counterfeit documents were presented. Given an appropriately meaningful opportunity to explain why counterfeit documents

were provided, Ms. Bashir failed to do so. I cannot find support for the Applicant's argument that the Officer was in error in not detailing the scope of the response desired. It is clear from the fairness letter that the Officer sought an explanation for the provision of fraudulent documents beyond a bald expression of shock.

[29] As the Respondent submits, the duty of fairness does not relieve an applicant from having to discharge the onus to satisfy the Officer that she has met all of the requirements of the IRPA and is entitled to a visa (*Baybazarov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 665, at para 11). Again, there is no basis on which the Officer's decision should be set aside.

V. Conclusion

[30] No question was proposed for certification and none arises.

[31] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Fernand A. Majid	FOR THE APPLICANT
Manuel Mendelzon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fernand A. Majid Barrister & Solicitor Mississauga, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT