Federal Court  Cour fédérale

Date: 20130320

Docket: IMM-8801-11

Citation: 2013 FC 289

Toronto, Ontario, March 20, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

MIRAFGHAN HUSSAINI AND KUBRA HUSSAINI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This an application for judicial review of the April 26, 2011 decision of the First Secretary (Immigration) at the Canadian Embassy in Bishkek, Kyrgyzstan [the visa officer], refusing the applicants' application for permanent residence in Canada as members of the Convention refugee abroad class or the Humanitarian-protected persons abroad class. The visa officer found the applicants' claims for protection lacked credibility due to contradictions between their statements and those of Mr. Hussaini's sister, Shikiba Rizayee, who had immigrated to Canada in 2006.

[2] In this application for judicial review, the applicants argue that the visa officer violated their rights to procedural fairness by not providing them sufficient opportunity to explain the inconsistencies. I agree and am therefore allowing this application for the reasons set out below.

Background

[3] The applicants are a husband and wife from Afghanistan. Mr. Hussaini claims that his father and sister were killed by armed men in 2005 when his family refused to allow one of the village men to marry his sister. Following the murders, Mr. Hussaini and his family continued to receive threats and tried to escape the perpetrators by moving to Kabul. However, he says the threats continued and that the family therefore fled Afghanistan for Kyrgyzstan in 2007. The United Nations High Commissioner for Refugees recognized the applicants as refugees in 2010, and they sought settlement in Canada as members of the Convention refugee abroad class or the Humanitarian-protected persons abroad class.

[4] During an interview with immigration authorities in 2009 as part of their application for permanent residence, Mr. Hussaini revealed that another sister, Ms. Rizayee, had successfully immigrated to Canada. The visa officer made a note to review the sister's immigration file for references to their parents and sisters. This investigation was done, and the visa officer surmised that Ms. Rizayee had indicated in her 2006 immigration application that her father and sister – who according to the applicants had been murdered in 2005 – were present at her 2006 wedding and had met her spouse at about that time.

[5] Upon discovering these inconsistencies, the visa officer wrote a so-called "fairness letter" to the applicants, in which she stated:

> It has come to my attention that part of the information provided by you in support of your application is not credible. You stated as part of your refugee claim that your father and your sister Diljan were killed in Afghanistan in June 2005. However, our verifications indicate that your father was present in Afghanistan for your sister Rizayee's wedding on 27 January 2006, and, moreover, that he was alive in June 2006 and living with your family in Kabul.

The visa officer, however, did not indicate the source of her concerns nor did she provide a copy of Ms. Rizayee's permanent residence application. The applicants were given sixty days to respond to the concerns outlined in the visa officer's letter.

[6] The applicants responded with two letters: one from Mr. Hussaini, the other from Ms. Rizayee. She explained in her letter that she had two wedding ceremonies to her husband because the Canadian Embassy in Islamabad had not accepted the first marriage, which was done by proxy. Both Mr. Hussaini and Ms. Rizayee indicated that their father and sister were present at the first wedding, in 2004, but not at the 2006 wedding, that their father had never lived in Kabul and had been murdered in 2005.

[7] The visa officer accepted that the applicant's father did not attend Ms. Rizayee's second wedding, but determined that there were other inconsistencies between her 2006 application and the applicants' claims. The visa officer wrote in her Computer Assisted Immigration Processing System [CAIPS] notes as follows:

> I accept that Shikiba Rizayee had two marriage ceremonies and that the principal applicant's parents attended the first marriage,

> however neither the principal applicant nor his sister have explained why on Shikiba's application for permanent residence, received 01 June, 2006 both of the principal applicant's parents, Zarghoon and Guljan were listed as alive and living in Kabul, and that her application also states that both parents met Shikiba's sponsor on 27 January, 2006. It is impossible for all of these facts, the applicant's father's death and his father's subsequent meeting of Shikiba's sponsor, to be true. Neither the principal applicant nor Shikiba state that Shikiba provided erroneous or misleading information on her application for permanent residence. Therefore, I am not satisfied that the applicant has provided credible or truthful information about details that are central to his family's claim for refugee protection.
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> [Emphasis added.]

[8] In the present application for judicial review, the applicants argue that they would have been able to provide more information had they known the source of the visa officer's concerns. More specifically, Ms. Rizayee claims to not recall having submitted a 2006 application but that an interpreter would have had to fill it out for her if she had. The applicants additionally point to a number of other errors contained in the application as further demonstrating that it was inaccurate and thus claim that they should have been afforded an opportunity to explain why it should not impugn their credibility. Finally, Ms. Rizayee explained that in 2006 she was not yet aware that her father and sister had been murdered as her family had shielded her from this news while she was living alone in Pakistan, awaiting the outcome of her husband's application to sponsor her to settle in Canada.

Issues and Standard of Review

[9] The only issue that arises in this application is whether the applicants were denied procedural fairness. This claim is a matter for me to determine as administrative tribunals are accorded no deference in respect of procedural fairness claims (*Canada (Minister of Citizenship*

and Immigration) v Khosa, 2009 SCC 12 at para 43; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100, [2003] 1 SCR 539; *Amri v Canada (Minister of Citizenship and Immigration)*, 2012 FC 713 at para 7).

Analysis

[10] As counsel for both parties agree, it is well-settled that procedural fairness requires that applicants for permanent residence be provided a meaningful opportunity to respond to perceived material inconsistencies or credibility concerns with respect to their files (*Qin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 at para 38 [*Qin*]; *Abdi v Canada (Attorney General)*, 2012 FC 642 at para 21 [Abdi]; *Zaib v Canada (Minister of Citizenship and Immigration)*, 2010 FC 769 at para 17 [*Zaib*]; *Baybazarov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 665 at para 17 [*Baybazarov*]). This requires that the applicant be told of the concern of the decision-maker and be provided with disclosure of the substance of any extrinsic evidence that is the source of concerns that the decision-maker intends to rely on (see e.g. *Qin* at para 38; *Abdi* at para 21; *Baybazarov* at para 12). Such extrinsic evidence may well include evidence from an applicant's family member, except, perhaps, in a spousal sponsorship application, where the contradictory evidence might not be considered extrinsic (see e.g. *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 204 at para 27 [*Ahmed* 1] and *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 205 at paras 30-31 [*Ahmed* 2]).

[11] In this case, I find that the applicants were denied a meaningful opportunity to respond to material information contained in Ms. Rizayee's 2006 permanent residence application and that such information constitutes extrinsic evidence that ought to have been disclosed to them. The

key issues troubling the visa officer arose from statements in Ms. Rizayee's 2006 application concerning the presence of the applicant's father at her wedding, which the visa officer assumed was held in 2006, i.e. after the date of the alleged murder, the listing by Ms. Rizayee in her 2006 application of her father and deceased sister as then being living relatives and her mention of her spouse's having met her father in 2006. The fairness letter sent to the applicants squarely raised the issue of the father's presence at the wedding, and the applicants provided evidence to address this concern. However, the applicants were not put on sufficient notice of the other two concerns to be in a position to adequately address them.

[12] Insofar as concerns the statements made by Ms. Rizayee regarding who her living relatives were in 2006, to be in a position to address this concern, it was necessary for the applicants to know where the concern came from – the issue was not so much whether Ms. Rizayee's father and sister were alive in 2006 as opposed to why she said they were. Had the applicants known that this concern stemmed from statements made in Ms. Rizayee's application and what the concern was, they could have provided the explanation that is now before the Court via Ms. Rizayee affidavit, namely, that Ms. Rizayee did not learn of the deaths until after she had moved to Canada in 2007. Because adequate disclosure was not made, they were not in a position to provide the explanation.

[13] Likewise, they were not able to provide any explanation for the inconsistency the visa officer found to arise from the statements in the application regarding the date of the meeting between Ms. Rizayee's spouse and her father, because this concern was not disclosed to the applicants. Contrary to what the respondent asserts, the mere inquiry to determine the date of

Ms. Rizayee's permanent residence application and request for a copy of her permanent resident card were not sufficient to put the applicants on notice as to the source of and details of the visa officer's concerns. It was equally possible that the information the officer was relying on might have come from elsewhere. Moreover, as counsel for the applicants convincingly argues, since the applicants were unrepresented and there is nothing to indicate they had any knowledge of the immigration process, there is no reason to conclude that they ought to have asked for disclosure of Ms. Rizayee's permanent residence application. Such request was only made by counsel in connection with this application.

[14] This case is similar to *Ahmed* 1, *Ahmed* 2, *Baybazarov*; *Zaib, Amin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 206, *Mekonen v Canada (Citizenship and Immigration)*, 2007 FC 1133, and *Wong v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 24, 141 FTR 62, relied on by the applicants, where similar failures to disclose details from extrinsic evidence were found to give rise to violations of procedural fairness. On the other hand, *Kunkel v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347 and *Toma v Canada (Minister of Citizenship and Immigration)*, 2006 FC 779, relied on by the respondent, are distinguishable as there, unlike here, the officers provided notice of their concerns to the applicants.

[15] Accordingly, because the visa officer did not provide adequate disclosure to the applicants, her decision must be set aside in order to afford the applicants an opportunity to provide their explanations in respect of the concerns that flow from Ms. Rizayee's 2006 immigration application. It may well be that these explanation will be insufficient, but that is a

matter for the visa officer to whom the file is remitted to decide as it is up to visa officers – and not this Court in an application such as this – to evaluate applicants' credibility.

[16] For these reasons, this application for judicial review is granted. No question for certification was proposed and none is appropriate as the legal principles governing this decision are clear and the outcome specific to the facts of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the April 26, 2011 decision of the First Secretary (Immigration) is allowed;
2. The decision is set aside;
3. The applicants' application for permanent residence as members of the Convention refugee abroad class or of the Humanitarian-protected persons abroad class is remitted to the respondent for re-determination by a different officer;
4. In connection with that re-determination, the applicants shall be afforded an opportunity to file additional evidence and make additional submissions with regard to the immigration application of Shikiba Rizayee;
5. No question of general importance is certified under section 74 of the *Immigration and Refugee Protection Act*, SC 2001, c 27; and
6. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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