Federal Court  Cour fédérale

Date: 20130613

Docket: IMM-6928-12

Citation: 2013 FC 633

Ottawa, Ontario, this 13th day of June 2013

Present: The Honourable Mr. Justice Pinard

BETWEEN:

Asadullah KHAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act") of a decision by an immigration officer (the "officer") with the High Commission of Canada in Islamabad, Pakistan (the "High Commission"). In the decision, dated May 9, 2012, the officer refused the applicant's application for a permanent resident visa.

[2] The applicant is a citizen of Pakistan. On November 22, 2005, Citizenship and Immigration Canada (CIC) received his application for permanent residence. The application listed two dependent male children: Usman Asad, born January 21, 1982, and Sarbuland Chaudhary, born October 27, 1986.

[3] In a letter dated February 11, 2011, the applicant informed CIC that he was withdrawing his son Usman as a dependent applicant because Usman was over 22 years of age at the time of the submission of sponsorship date.

[4] On August 6, 2011, the High Commission mailed the applicant a letter (the "fairness letter") informing him that it had concerns he may have misrepresented Sarbuland's date of birth, as the bay-form (a child registration form) he submitted appeared to alter Sarbuland's date of birth from 1981 to 1986, thereby misrepresenting his eligibility as a dependent child. The letter also stated that the fact the birth dates of the applicant's four children were not listed in chronological order on the bay-form strengthened the High Commission's doubts. The High Commission informed the applicant that he had 45 days to respond to its concerns.

[5] In a letter dated August 24, 2011 and received by the High Commission on September 14, 2011, the applicant responded, *inter alia*, that he had not altered the bay-form and that his youngest son Sarbuland was born on October 27, 1986.

* * * * * * * *

[6] In his decision, the officer determined that the applicant did not meet the requirements for a permanent resident visa. The officer found that the applicant had misrepresented material facts related to both Sarbuland and Usman's dates of birth by providing an altered bay-form, thereby raising concerns over Sarbuland's eligibility as a dependent and concerns over Usman's identity and admissibility. The officer stated that this counterfeit documentation and false information could have induced errors in the administration of the Act.

* * * * * * * *

[7] Paragraph 40(1)(*a*) of the Act defines misrepresentation as follows:

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;

[8] Section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, defines a dependent child as follows:

"dependent child", in respect of a parent, means a child who	« enfant à charge » L'enfant qui :
(*a*) has one of the following relationships with the parent, namely, (i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or (ii) is the adopted child of the parent; and	*a*) d'une part, par rapport à l'un ou l'autre de ses parents : (i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait, (ii) soit en est l'enfant adoptif;

(*b*) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and not a spouse or common-law partner,

(ii) has depended substantially on the financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

b) d'autre part, remplit l'une des conditions suivantes :

(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) il est un étudiant âgé qui n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :

(A) n'a pas cessé d'être inscrit à un établissement d'enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) il est âgé de vingt-deux ans ou plus, n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental.

* * * * * * * *

[9] This matter raises one issue: whether the officer erred by concluding that the applicant had misrepresented a material fact.

[10] It is well established in the case-law that an assessment of a misrepresentation decision under section 40 of the Act is reasonableness (*Gatue v The Minister of Citizenship and Immigration*, 2012 FC 730 and the authorities cited therein). Accordingly, the Court will consider "the existence

of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]).

* * * * * * * *

[11] The applicant essentially submits that the officer erred by not having regard to the totality of the evidence and that he disregarded the majority of the documentary evidence before him with respect to the birth date of Sarbuland.

[12] The applicant submits he satisfied the statutory onus by providing multiple identity documents that stated Sarbuland was born on October 27, 1986. He had provided Sarbuland's national identity card, passport and educational documents. In his August 24, 2011 response to the fairness letter, the applicant reminded the visa office that he had submitted these documents and also provided an original birth certificate for Sarbuland and photocopies of expired passports for both Sarbuland and Usman. The applicant notes that in this letter he explained that he had obtained Sarbuland's identity documents far in advance of his application, which he says demonstrates that the documents could not have been prepared to further any misrepresentation in his application. Both expired passports for Sarbuland and Usman were issued in June 2005 and one of Sarbuland's education documents dates back to September 2002. The applicant submits that the bay-form was just a supporting document and did not carry substantial weight in light of the primary official identity documents submitted.

[13] Moreover, the applicant notes that other than a personal assessment, the visa section gave no evidence to the applicant in support of the position that there was an error on the bay-form.

[14] For his part, the respondent submits that contrary to the applicant's argument, the officer considered all of the evidence and that it was open to the officer to ascribe more weight to the bay-form than the other documents the applicant submitted. The respondent maintains that the officer reasonably found that the misrepresentation of the birth dates for Sarbuland and Usman were material facts since the birth dates directly affected their eligibility and the officer's ability to assess identity, which could have induced errors in the administration of the Act.

* * * * * * * *

[15] The officer's explanation as to why the altered bay-form outweighed the other identity documents submitted that corroborated the stated birth year, namely Sarbuland's national identity card, passport, birth certificate and educational documents, appears in the Computer Assisted Immigration Processing System notes and reads as follows:

> I note that Sar Buland's secondary school cert and his civil docs list his date of birth as 27-10-1986 but these docs have little credibility as there is no central computerized registry to registry (*sic*) birth dates.

[16] I am troubled by this explanation. First, the reason given to attribute little credibility to the other documents could also apply to the bay-form. Moreover, I think it is noteworthy that the applicant provided expired passports for Sarbuland and Usman that were issued fourteen years

before the applicant applied for permanent residence and the officer did not explain what incentive the applicant would have had for misrepresenting his children's birth years at that time.

[17] The officer's lack of reasonable explanation for preferring the bay-form over the voluminous other identity documentation leads me to question what possible identity documentation the applicant could have provided in response to the fairness letter that could have satisfied the officer.

[18] I find, therefore, based on *Dunsmuir*, *supra*, that it was unreasonable for the officer to give preference and greater weight to the bay-form without providing a credible explanation for doing so.

* * * * * * * *

[19] For the above-mentioned reasons, this application for judicial review is allowed and the matter is sent back to another immigration officer for redetermination.

[20] No question of general importance is certified.

JUDGMENT

The application for judicial review is allowed. The decision rendered by an immigration officer with the High Commission of Canada in Islamabad, Pakistan, on May 9, 2012, is quashed and the matter is remitted to a different immigration officer for redetermination.

"Yvon Pinard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6928-12
STYLE OF CAUSE:	Asadullah KHAN v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 2, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	June 13, 2013

APPEARANCES:

Me Amandeep Singh	FOR THE APPLICANT
Me Kim Sutcliffe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Singh Thind & Associates Surrey, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT