

Federal Court



Cour fédérale

Date: 20150224

**Docket: IMM-4210-13
IMM-4211-13**

Citation: 2015 FC 238

Vancouver, British Columbia, February 24, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALI FAISAL MAHMOOD

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] At the conclusion of the hearing on January 29, 2015, the parties were advised that this application would be allowed because there has been a breach of natural justice. These are the reasons for that finding.

Background

[2] Mr. Mahmood is a citizen of Pakistan. He applied for permanent residence under the Skilled Worker category on September 14, 2006, under the occupation of Business Risk Analyst. His wife and two children were included in the application as dependents. He submitted evidence that he had an uncle living in Canada, but his application was refused on May 12, 2011. It would have been successful except that he was not awarded points for having a relative in Canada. He sought judicial review of that decision and by consent order dated March 6, 2012, the matter was sent back to another decision-maker.

[3] On April 2, 2012, pursuant to the redetermination order, the respondent emailed Mr. Mahmood asking him to submit an updated Schedule 1/A and “any additional documentation or information you wish to provide for the Immigration Officer to review.” Mr. Mahmood complied and, among other documents, provided the “following documents as proof of the Principal Applicant’s relationship to his uncle, Mr. Muhammad Aziz Tahseen:” a copy of his uncle’s birth certificate, a copy of his mother’s Family Registration Certificate from the National Database and Registration Authority [NADRA], a copy of his uncle’s Canadian passport, a letter from his uncle dated April 2, 2012, in which he confirms that he has settled in Canada since 1974 and is the maternal uncle of Mr. Mahmood, his uncle’s most recent CRA Notice of Assessment, and various bills. In the submissions accompanying this information it was stated that the uncle’s birth certificate and mother’s family registration certificate showed that they had the same father and mother, and therefore Mr. Mahmood should be awarded points under the adaptability factor for his family relationship in Canada.

[4] By email dated June 1, 2012, the immigration officer wrote as follows:

In order to proceed with your application, the following documents are required within 30 days:

Proof of relationship to your relative living in Canada:

- *Original* of uncle's birth certificate.
- Documentation of relationship of mother and uncle other than the recently recorded NADRA. For example. Documents may include birth certificates, marriage certificates and school certificates.
[emphasis in original]

[5] The CAIPS notes, to which Mr. Mahmood was not privy at that time, explain the officer's concerns and her thinking as to why this information was sought. On May 31, 2012, the officer notes as follows:

Documentation provided to demonstrate relationship of person in CDA to applicant raises concerns. Supplies what states to be birth certificate and yet appears to be, unusually for 1942/1943, computer generated. It bears the UK flag image at bottom. Additionally, NADRA form supplied indicates relationship of PA's mother to himself, and not to her brother, done in 2001. This is now the crux of the matter as these points are crucial. Documentation of the relationship needs to be clarified.

As a consequence of these concerns the June 1, 2012 letter, set out above, was sent.

[6] In response, by letter dated July 4, 2012, Mr. Mahmood submitted the following: the uncle's original birth certificate and the mother's original birth certificate. Both documents show that they share the same parents.

[7] The decision under review was by letter dated April 18, 2013, in which the immigration officer wrote that Mr. Mahmood had been awarded 66 points; the minimum requirement is 67

points. The officer writes: “Sufficient evidence has not been provided to award adaptability points for a relative in Canada, thus 0 points awarded for adaptability [emphasis added].” Again, the CAIPS notes explain the officer’s concerns and reasoning:

PA was asked to provide – by July 26, 2012 – proof of relationship between mother and uncle other than recently recorded docs. Specific examples of docs were stated (i.e. marriage and school certs). However, PA has only submitted a larger size document stating to be the original birth cert for uncle. This is not an acceptable document as it does not conform to any known official Pakistani birth certificate (quality is poor, appears hand-made, British flag image at bottom, appears to have been newly created even though issue date is stated to be 1942).

[8] By letter dated May 2, 2013, Mr. Mahmood’s lawyer asked the officer to reconsider, stating “the evidence provided to your office demonstrating that Mr. Mahmood has an uncle in Canada was not insufficient.” It is explained that the documentation submitted shows that Mr. Mahmood’s mother and uncle have the same parents and thus he is Mr. Mahmood’s uncle. The letter also provides an explanation from the uncle as to why his birth certificate is in a different form than his sister’s, namely because his was issued by the British authorities when Pakistan was still a British colony.

[9] The officer refused the request stating, in part, as follows:

The birth certificate submitted for your relative was deemed insufficient to establish relationship, as were the other documents you had submitted to support the relative’s parentage. You were therefore given the opportunity to provide sufficient proof; specifically you were requested to provide documentation of relationship other than a recently recorded NADRA birth certificate, and in particular we requested a copy of your relative’s marriage certificate or school certificate. No such documentation was submitted and therefore it was concluded that you did not provided [sic] satisfactory evidence to establish relationship to an eligible relative. [emphasis added]

Issues

[10] A number of issues were raised by Mr. Mahmood in his memorandum; however, the real and determinative issue is whether the officer breached procedural fairness and natural justice in the decision-making process.

Analysis

[11] The officer breached procedural fairness in two respects. First, it is evident from the CAIPS notes that the officer's real concern was the genuineness of the uncle's birth certificate, but this concern was never squarely put to Mr. Mahmood. Second, the officer unfairly assessed the application against evidence the officer alleged was specifically sought, but was not.

Genuineness of Birth Certificate

[12] There is no question that an officer is entitled to proof of the relationship to a Canadian relative when it is asserted in an application. In this case it is evident that if the officer accepted as genuine the mother's and the uncle's birth certificates, then they proved that they had common parents and the Canadian relative was, as claimed, an uncle of Mr. Mahmood. If the certificates were genuine, then no other reasonable conclusion could be reached; indeed, any other conclusion would be perverse. This is not, as the officer says, a question of "insufficient" evidence. It is a question of the veracity of the documentation provided.

[13] The officer's concerns regarding the uncle's birth certificate, as evidence from the CAIPS notes, was that it was fraudulent. The officer may be correct; however, Mr. Mahmood was never informed of this concern, which arose in the officer's mind when the copy of the birth certificate

was examined. Rather than informing Mr. Mahmood of this concern and giving him an opportunity to respond, the officer only asked that he provide the original of the uncle's birth certificate – which he did.

[14] I agree with Mr. Mahmood that the jurisprudence in this court holds that if an officer has concerns about the credibility or veracity of documents submitted by an applicant, he is under a duty to inform the applicant of that concern and give him an opportunity to reply: *Hassani v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 1597; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39; *Kuthathasan v Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 587; *Ororunshola v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ No 1383; *John v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 350 (TD); *Sketchley v Canada (Attorney General)*, [2005] FCJ No 2056 (CA).

Assessment of Requested Documentation

[15] In my view, procedural fairness and natural justice requires a decision-maker who has requested specific information, which has been provided, to assess the application on the basis of the evidence sought and provided, not on an alleged failure to provide evidence that was not sought.

[16] In this case, after the officer's review of the application, in addition to the unstated concern about the genuineness of the uncle's birth certificate, the officer required further

evidence to establish the relationship between the mother and uncle. The officer, in an affidavit filed in this application attests as to why she asked for additional documents in this regard:

In Pakistan, both school documents and marriage documents record the name of the father of the student, bride or groom. As these documents would record the information provided at the time of registration for school or a marriage, I consider them valuable documentation to establish family relationships. A birth certificate itself established the parent-child relationship. To establish the relevant relationship for selection points under adaptability, the sibling relationship of the Applicant's mother and Muhammed Tahseen must also be clearly established.

[17] Contrary to the officer's email of May 24, 2013, it was not true that "in particular we requested a copy of your relative's marriage certificate or school certificate." What was requested was documentation of the relationship of Mr. Mahmood's mother and uncle other than the recently recorded NADRA. The letter did not request any particular document(s) but merely gave examples stating that "documents may include birth certificates, marriage certificates and school certificates" [emphasis added]. What was provided were the original birth certificates of each of the mother and uncle (one of the suggested documents) and, as the officer noted in her affidavit "a birth certificate establishes the parent-child relationship." These documents showed that these two persons had the same parents.

[18] Rather than examining the evidence that was provided pursuant to the request, the officer wrongly stated that she had "requested a copy of your relative's marriage certificate or school certificate" and because neither was submitted, "therefore it was concluded that you did not provided [sic] satisfactory evidence to establish relationship to an eligible relative" [emphasis added]. The officer's conclusion was based solely on the failure to provide the marriage or school certificates; but the birth certificates provided were specifically listed as acceptable

documents by the officer, and they had been provided. In short, the officer rejected the evidence tendered without considering it, notwithstanding that she had specifically mentioned that evidence as an example of the type of document she was looking for. Instead, she rejected the application for the failure to provide documents that had not been specifically requested and without assessing those that were provided as suggested.

Conclusion

[19] The respondent submitted that even if a breach of procedural fairness was found, this application should be dismissed as the uncle's birth certificate was clearly suspect. I am not prepared to do so. It may be that the document will subsequently not be found to be valid; however, Mr. Mahmood must be given an opportunity, now that he knows the officer's concerns, to try to address them through whatever other evidence he can offer.

[20] Mr. Mahmood sought costs from the respondent on the basis that there are "special reasons" within the meaning of Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, for doing so. The respondent acted quickly to consent to judgment with respect to the first impugned decision. It is truly regrettable it did not do so with respect to the second impugned decision; however, the high standard required to award costs has not been met.

[21] Nonetheless, Mr. Mahmood has been waiting since September 14, 2006, when his application was first submitted to have it evaluated fairly and justly. Despite two attempts, that has not yet happened. If the time required for the last assessment is used as a guide, it will be ten

(10) years from the application date before he will receive the third, and hopefully last, assessment. The delays have been no fault of his, but entirely the fault of the respondent. Accordingly, it is appropriate to order that the redetermination of Mr. Mahmood's application is to be done only with respect to points for adaptability, as the other criteria have never been questioned. Moreover, that decision is to occur within a period of ninety (90) days from the date of these reasons, after advising Mr. Mahmood of exactly the concerns regarding the evidence tendered of the relationship between his mother and uncle.

[22] Following the hearing of this application, counsel for the respondent wrote to the court advising that it was his recollection that the court had not canvassed the parties as to the merits of certifying a question. Counsel proposed the following question for certification:

When evidence submitted as part of an overseas application for permanent residence is void of credibility on its face, does procedural fairness generally require a visa officer to raise authenticity with the applicant and provide an opportunity to address concerns?

[23] Counsel also asked for clarification of whether the court's order requiring the respondent to re-determine the application for permanent residence within ninety (90) days was "directed towards a selection decision, or a final decision" and suggested that it would be inappropriate if it were directed to a final decision as "this process involves matters which are not wholly within the control of [the respondent]."

[24] A review of my notes and the court's digital audio recording of the hearing reflects that the parties were canvassed as to whether they wished to propose a question and counsel for the respondent informed the court that he had no question to propose.

[25] In any event, the question now proposed is not certifiable because there was no finding made by the court that any evidence was void of credibility on its face. Certainly that was the respondent's submission at the hearing but it was not one accepted by the court. It was merely an allegation made by the officer that the document was fraudulent.

[26] The judgment will issue that the application be re-determined and a final decision rendered within ninety (90) days. Should the time frame provided prove impossible or impracticable, the parties may jointly write to the court asking that I extend the time for re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application is allowed and the decision of the immigration officer refusing Mr. Mahmood's application for a permanent resident visa as a Skilled Worker is set aside;
2. His application is to be redetermined by a different officer who is ordered to accept the previous ratings on each of the selection criteria except for the rating for adaptability which is to be reassessed after informing Mr. Mahmood if there are any specific concerns regarding the documentation previously submitted and giving him a reasonable opportunity to provide further information and evidence;
3. Such redetermination is to be completed within ninety (90) days of the date of this Judgment, or such further time as the court may order should that time frame be impossible or impracticable;
4. No question is certified; and
5. No order is made as to costs.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4210-13
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STYLE OF CAUSE: ALI FAISAL MAHMOOD v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 29, 2015

JUDGMENT AND REASONS: ZINN J.

DATED: FEBRUARY 24, 2015

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