Date: 20070720

Docket: IMM-936-06

Citation: 2007 FC 756

Ottawa, Ontario, July 20, 2007

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

WAZIR ALI PARDHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant seeks judicial review of the December 14, 2005 decision of a Visa Officer (the Officer) denying his application for permanent residence because he was found to be inadmissible on grounds of serious criminality. In support of his application for permanent residence, the Applicant's wife had submitted a forged document.

1. Background

[2] The Applicant, Wazir Ali Pardhan, is a citizen of Pakistan, who in February 2005 applied for a permanent residence visa at the Canadian High Commission in Islamabad, Pakistan, under the category of business immigrant-investor. The Applicant's wife, Sumera Amir Ali, and their four minor children were included as accompanying dependents. The Applicant's wife signed a background declaration which accompanied the application, confirming that she had obtained a Higher Secondary School Certificate (HSC or Certificate) from the "Board of Intermediate Education Karachi". The Certificate was submitted with the application.

[3] In reviewing the application, the Officer advised the Applicant that she had reasonable grounds to believe that his wife's HSC was a false document. In a letter dated October 24, 2005, the Officer notified the Applicant of her concerns with respect to this document and invited the Applicant to respond.

[4] The Applicant responded by letter wherein he admitted the certificate was not a genuine document and filed an affidavit by his wife wherein she attested that the certificate was not genuine and that her husband had not been aware of this fact. She explained that the Certificate had been arranged by her parents and given to her in-laws after her marriage in order to keep their word that she had a high school degree. She further attests that her parents had informed her in-laws prior to her marriage that she had indeed obtained an HSC and wanted to avoid embarrassment.

2. Impugned Decision

[5] By letter dated December 14, 2005, the Officer denied the application for the following reasons:

> (a) The Applicant was a person described in paragraph 36(1)(*c*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) and is thereby inadmissible by reason of serious criminality;
>
> (b) The Applicant's wife proffered as genuine a forged document in violation of article 471 of the Pakistan Penal Code and is equivalent to an offence under subsection 368(1) of the *Criminal Code*, R.S.C. 1985, c. C-46; and
>
> (c) Since the Applicant's wife is inadmissible, the Applicant is inadmissible by operation of subsections 11(1) and 42(*a*) of the Act.

3. Issues

[6] Did the Officer err in finding the Applicant to be inadmissible as a result of his being a person described in subsection 36(1) of the Act?

4. Standard of Review

[7] In *Ouafae v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 459 at paragraphs 18 to 20, my colleague, Justice Yves de Montigny, reviewed the jurisprudence of this Court on the issue of the applicable standard of review of decisions of visa officers. I am in

agreement with his assessment of the jurisprudence. The nature of the decision under review is a key factor. Here, the question is one of mixed fact and law; is the Applicant inadmissible by reason of serious criminality? The facts are essentially admitted and the Officer must consider the application of various sections of the Act. The decision does not call for the exercise of discretion.

[8] In these circumstances, less deference is warranted by a reviewing Court. I therefore find that the applicable standard of review for the question before me is reasonableness *simpliciter*.

5. Analysis

[9] The Applicant was found to be inadmissible pursuant to paragraph 36(1)(*c*) of the Act. The provision requires that it be established that the act committed outside Canada constitutes an offence in the place it was committed and, that the act, if committed in Canada would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[10] The inquiry mandated by the Act requires a determination of the equivalency of the two offences. To do so the essential elements of the offences must be compared in order to determine if they correspond. In *Brannson v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 141 at pages 152-153, Justice Ryan stresses the importance of analyzing the essential elements of the offences:

> …Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each

> and be satisfied that these essential elements correspond. One must, of course, expect differences in the wording of statutory offences in different countries….

[11] A criminal equivalency assessment must be conducted by the Visa Officer in making his or her determination as to the applicability of paragraph 36(1)(*c*) of the Act. The jurisprudence of the Federal Court of Appeal has established that equivalency can be determined in three ways:

(1) by comparing the precise wording in each statute both through documents and, if available, through the evidence of experts in the foreign law in order to determine the essential elements of the respective offences;

(2) by examining the evidence, both oral and documentary, to ascertain whether that evidence is sufficient to establish that the essential elements of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provision in the same words or not;

(3) a combination of the two.

See *Brannson v. Minister of Employment and Immigration*, [1981] 2 F.C. 141; (1980), 34 N.R. 411 (C.A.); *Hill v. Minister of Employment and Immigration* (1987), 73 N.R. 315 (F.C.A.); *Steward v. Canada (Minister of Employment and Immigration)*, [1988] 3 F.C. 487; (1988), 84 N.R. 236 (C.A.).

[12] In her decision letter, the Officer indicated that the Applicant's wife had committed an offence under the section 471 of the Pakistan Penal Code, by using as genuine a forged document. The Officer cited that section of the Pakistan Penal Code and concluded that the act constituted an offence under the laws of the place where it occurred. She then concluded, without further analysis, that if committed in Canada, the offence would be punishable under subsection 368(1) of the *Criminal Code of Canada* by a maximum term of imprisonment of at least ten years. The Officer then cited that section of the *Criminal Code of Canada*. The Officer conducted no further equivalency analysis in her decision.

[13] While the pertinent sections of the two offences were cited in the Officer's decision letter, no analysis was conducted in respect to the precise wording in each statute. The essential elements of the offences in play were not identified by the Officer and consequently not compared to assess whether they correspond. Further, no expert evidence on foreign law was adduced in this case, without which, one can only speculate as to whether all of the requisite elements have been met to conclude, as did the Officer, that an offence under the laws of Pakistan occurred. Further, no examination of the evidence was conducted by the Officer to ascertain whether or not the evidence adduced was sufficient to establish that the essential ingredients of the offence in Canada had been proven for the purpose of the foreign proceedings.

[14] It may well have been open to the Officer to conclude as she did, but the Court is not in a position to speculate on that result absent a proper equivalency assessment as dictated by the above cited jurisprudence. The Officer's equivalency assessment is deficient and as a result, the

Officer's finding of inadmissibility by reason of serious criminality cannot stand. In the circumstances, this constitutes a reviewable error.

[15] For the above reasons the application for judicial review will be allowed. The matter will be returned for reconsideration before a differently constituted panel of the Immigration and Refugee Board in accordance with these reasons.

[16] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the Act and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is allowed.

2. The matter is returned for reconsideration before a differently constituted panel of the Immigration and Refugee Board in accordance with these reasons.

3. No serious question of general importance is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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