

Federal Court



Cour fédérale

Date: 20110627

Docket: IMM-6142-10

Citation: 2011 FC 781

Ottawa, Ontario, June 27, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**AJESHNI KUMAR
SANJAY NAND
SARWAN KUMAR
PRAKESH WATI
SUMIT KUMAR**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an immigration officer,

wherein the officer determined that the applicants are inadmissible to Canada for misrepresentation pursuant to paragraph 40(1)(a) of the Act.

[2] The applicants request:

1. that the decision be set aside and the claim remitted for redetermination by a different member of the Board; and
2. costs.

Background

[3] Ajeshni Kumar is a permanent resident of Canada who applied in 2006 to sponsor her family under the family class pursuant to section 117 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[4] The applicants, Sarwan Kumar (her father), Prakash Wati (her mother) and their dependant son, Sumit Kumar (her brother) were included in the application for permanent residence and are citizens of Fiji.

[5] As part of the application process, in 2009, the Consulate General of Canada in Australia (the Consulate) sent Sumit Kumar an IMM5406 form with instructions to fully complete and return the form. In the signed IMM5406 form, Sumit Kumar declared NA under the section B headed children.

[6] The Consulate twice requested a statutory declaration from Sumit Kumar verifying his marital status in March and April 2010.

[7] On May 23, 2010, Ajeshni Kumar sent an email to the Consulate advising that her brother Sumit Kumar:

...would like to declare that he is engaged to his girlfriend and they have a daughter together. [...] Sumit was unaware of the area to make such a declaration and wanted your honourable consulate to have these facts to avoid any future confusion.

[8] On May 27, 2010, the officer received a letter dated April 28, 2010 from Sumit Kumar with the note at the bottom, "yes I am currently engaged to my girlfriend."

[9] The Consulate requested on June 3, 2010, that Sumit Kumar provide a birth certificate for his daughter and complete a family class questionnaire form among others.

[10] The officer sent out a fairness letter to Ajeshni Kumar on July 14, 2010 stating that because the applicants failed to declare the existence of a child at the time of applying for permanent residence, the officer had come to the conclusion that Sumit Kumar misrepresented himself and that all of the applicants could possibly be inadmissible for permanent residence.

[11] The officer gave the applicants an opportunity to respond to the letter.

[12] Ajeshni Kumar responded for her brother through a letter dated August 17, 2010, stating that Sumit Kumar had not been in touch with his ex-girlfriend for four years and only became aware of the child after November 2009.

Officer's Decision

[13] On August 19, 2010, the officer found that the applicant, Sumit Kumar had misrepresented or withheld material facts contrary to paragraph 40(1)(a) of the Act and that pursuant to paragraph 40(2)(a), he and the other persons included in the sponsorship application were inadmissible to Canada for two years.

[14] The officer reached this conclusion because in the application for permanent residence dated September 8, 2009, the applicant, Sumit Kumar indicated "NA Not Available" under the heading children. In the family class questionnaire form submitted by Sumit Kumar, the officer became aware that Sumit Kumar had been in constant contact with his daughter since her birth and was aware of her existence at the time he completed his permanent residence application.

Issues

[15] The issues are as follows:

1. What is the appropriate standard of review?
2. Was the officer's decision reasonable?
3. Did the officer breach the applicants' right to procedural fairness?

Applicants' Written Submissions

[16] The applicants submit that because the applicant, Sumit Kumar disclosed the existence of his child and the fact that he is engaged before the officer made a decision, there was no possibility for inducing an error in the administration of the Act under paragraph 40(1)(a). The applicants rely on *Kaur v Canada (Minister of Citizenship and Immigration)*, 2007 FC 268, in which they submit Madam Justice Johanne Gauthier held that Parliament did not intend to punish the withdrawal of inaccurate statements through the application of section 40 of the Act.

[17] The applicants further submit that the officer breached procedural fairness by not convoking an interview. Since Sumit Kumar's credibility was at stake as he stated he did not know of the existence of his daughter until November 2009, the officer was obligated to convoke an interview and put his concerns directly to Sumit Kumar.

Respondent's Written Submissions

[18] The respondent submits that there was more than sufficient evidence before the officer to reasonably determine that the applicant is inadmissible 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" as per paragraph 40(1)(a) of the Act. This provision must be understood as including misrepresentation which could induce, as well as does induce, an error in the

administration of the Act. The respondent submits that this includes situations where an applicant misrepresents himself and then later retracts or rectifies the misrepresentation.

[19] The respondent further argues that the officer was not required to hold an interview. The existence of a child was an essential and material fact that was required to be disclosed in the application itself. Nevertheless, the officer followed up on more than one occasion requesting clarification from the applicant, Sumit Kumar. It was only then that the existence of his fiancé and daughter were revealed.

Analysis and Decision

[20] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57).

[21] The standard of review which applies to the findings of fact made by an immigration officer is that of reasonableness (see *Dunsmuir* above, at paragraphs 47 and 53; *De Luna v Canada (Minister of Citizenship and Immigration)*, 2010 FC 726 at paragraph 12). However, any issues of procedural fairness, including the right to be heard, will be reviewed on the correctness standard (see *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at paragraph 43).

[22] **Issue 2**

Was the officer's decision reasonable?

I find that the officer's decision was reasonable for the following reasons.

[23] Form IMM5406 "Additional Family Information", which the applicant, Sumit Kumar was required to fill out, indicates in Section B, "CHILDREN (include ALL sons and daughters, including ALL adopted and step-children, regardless of age or place of residence)."

[24] Sumit Kumar did not disclose that he had a daughter when he signed the permanent residence application form in September 2009. Rather, he wrote "NA Not Available".

[25] Following an exchange between the officer and Sumit Kumar concerning his marital status, the officer determined that Sumit Kumar had known about the existence of his child from the family class questionnaire that he and his fiancé filled out and signed on June 29, 2010.

[26] This questionnaire states:

4. When did you begin dating and how long did you date before deciding to get married?

6 yrs but not married yet, engaged to be married in the future.

5. Who proposed marriage?

Sumit propose when the child was born.

a) When and where did the proposal take place?

At his home.

[...]

8. Have you met your partner's parents? Yes [circled]

a) Briefly describe your first meeting with your partner's parents:

When the child was born.

[...]

12. Are you in regular contact with your partner? Yes [circled]

a) If yes, by what means (i.e. telephone/letters/email) and how frequently?

Everyday visit each other with our child.

[27] The words of section 40 of the Act must be given their ordinary meaning and the provision must be interpreted harmoniously with the purpose of the Act (see *Thomson v Canada (Department of Agriculture)*, [1992] 1 SCR 385). Paragraph 40(1)(a) clearly indicates that withholding material facts which could induce an error in the administration of the Act is misrepresentation. Contrary to the applicants' submission, the Act does not require that an error has been induced. Rather, withholding a material fact which could induce an error is sufficient for misrepresentation.

[28] Given the applicant Sumit Kumar's answers to this questionnaire, it was reasonable for the officer to conclude that Sumit Kumar's withholding of the fact that he had a daughter on the original application for permanent residence amounted to misrepresentation under paragraph 40(1)(a) because it could have induced an error in the administration of the Act. I would also note that there was no satisfactory explanation given for the withholding of the information.

[29] **Issue 3**

Did the officer breach the applicants' right to procedural fairness?

The officer did not breach the applicants' right to procedural fairness.

[30] The officer gave the applicant, Sumit Kumar, several opportunities to correct the problems with his marital status and to explain the discrepancy between the original permanent residence application and the declaration that he had a child with his girlfriend.

[31] The officer was under no obligation to convoke an interview.

[32] The jurisprudence indicates that an officer is not under a duty to inform the applicant about any concerns regarding the application which arise directly from the requirements of the legislation or regulations (see *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at paragraphs 23 and 24).

[33] The Regulations provide at subsection 10(2) that:

10. . . .

(2) The application shall, unless otherwise provided by these Regulations,

(a) contain the name, birth date, address, nationality and immigration status of the applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;

10. . . .

(2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :

a) les nom, date de naissance, adresse, nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;

[Emphasis added]

[34] As such, the existence of a child of Sumit Kumar was a material fact that the Regulations required to be included in the application for permanent residence. The officer did not err by not convoking an interview.

[35] The applicants did not wish to submit a proposed serious question of general importance for my consideration for certification. Because of my findings, I need not give the respondent time to submit a proposed question as the respondent only wished an opportunity to submit a question if my decision did not recognize the words, could induce, in paragraph 40(1)(a) of the Act.

[36] As a result, I would dismiss the application for judicial review.

JUDGMENT

[37] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(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;

...

(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

...

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

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;

...

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

a) l'interdiction de territoire court pour les deux ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

...

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

10. . . .

(2) The application shall, unless otherwise

10. . . .

(2) La demande comporte, sauf disposition

provided by these Regulations,

contraire du présent règlement, les éléments suivants :

(a) contain the name, birth date, address, nationality and immigration status of the applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;

a) les nom, date de naissance, adresse, nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6142-10

STYLE OF CAUSE: AJESHNI KUMAR
SANJAY NAND
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SUMIT KUMAR

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 31, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: June 27, 2011

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