

Federal Court



Cour fédérale

**Date: 20151105**

**Docket: IMM-2684-14**

**Citation: 2015 FC 1253**

**Ottawa, Ontario, November 5, 2015**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**MAHESH KUMAR SHARMA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the decision of the First Secretary (Immigration) of the High Commission of Canada in New Delhi, India, dated February 15, 2014, wherein the First Secretary refused the applicant's application for a permanent resident visa in Canada under the federal skilled worker category (the decision).

[2] The applicant seeks an order setting aside the negative decision and returning the matter to a different individual for redetermination.

I. Background

[3] The applicant is a citizen of India. He submitted an application for permanent residence in Canada under the federal skilled worker class.

[4] The applicant worked with North India Computers from November 1, 1997 to May 22, 2005 as a computer instructor. This employment was used to fulfill the work experience requirement under the federal skilled worker program.

[5] On April 28, 2012, a processing officer [or officer] called North India Computers, the business where the applicant was alleged to have worked as a computer instructor, for verification of the facts. The officer was given contradictory statements by two employees: i) Mr. Sameer, an employee of eight years stated North India Computers deals in sales/purchase/repairs, but not education; and he has never heard of the applicant; and ii) Mr. Tony, a senior employee of 15 years, confirmed the business is in sales/purchase and repair of computers business for the last five years and was in the computer education business earlier at 2451-52, Sector 22-C, Chandigarh. He also confirmed the name of Mahesh as one of the four instructors at Sector 22-C.

[6] On February 19, 2013, a visa officer sent a procedural fairness letter to the applicant and requested clarification of the inconsistencies noted from the information obtained during the verification phone call and the facts supplied by the applicant. The following issues were

highlighted: i) a long term employee with North India Computers confirmed that the company does not offer computer education courses but it specialized in the sale, purchase and repair of computers; ii) contradictory information provided between the applicant and an employee of North India Computers regarding the location of North India Computers at the time of the applicant's employment; and iii) the applicant was unable to describe his duties at North India Computers although he worked there for eight years.

[7] On March 7, 2013, the applicant sent a letter in response to the February 19, 2013 request.

## II. Decision Under Review

[8] In the Global Case Management System [GCMS] notes dated January 13, 2014, a processing officer observed the applicant wrote in his response letter that he requested information from North India Computers addressing the officer's concerns, such as proof of address change and a list of employees to be sent directly to the High Commission. However, to this date, no such documentation was received. The processing officer was also not satisfied with the applicant's explanations and found they did not overcome the concerns raised by the phone verification. The officer gave more weight to the information obtained during the phone verification. Therefore, the processing officer was not satisfied that the applicant was employed as a computer instructor at North India Computers. The processing officer concluded that the applicant has submitted fraudulent work experience documents and therefore does not meet the work experience requirements under NOC 4131 as a computer instructor.

[9] The officer further stated that on a balance of probabilities, the applicant misrepresented his work experience.

[10] In a letter dated February 15, 2014, the First Secretary refused the applicant's application finding that the applicant was not employed as he alleged and that he was inadmissible for misrepresenting or withholding material facts related to his employment experience. The First Secretary reviewed the notes of processing officers, the verification notes and the applicant's response to the procedural fairness letter. The First Secretary found the applicant is inadmissible to Canada under section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

### III. Issues

[11] The applicant raises the following issues:

1. Did the First Secretary breach the principles of fairness as a result of failure to give full details in the fairness letter with respect to the information collected during the further inquiry, thereby preventing the applicant from having an opportunity to respond to that information?
2. Did the First Secretary make an error of fact by ignoring that the applicant himself completed his computer education diploma from North India Computers before being employed as a computer instructor at the same place?

[12] The respondent raises one issue: the applicant has failed to demonstrate that there is an arguable issue of law upon which the proposed application for judicial review might succeed.

[13] I would rephrase the issues as follows:

- A. What is the standard of review?
- B. Did the First Secretary breach procedural fairness?
- C. Was the First Secretary's decision reasonable?

#### IV. Applicant's Written Submissions

[14] The applicant submits the standard of review for questions of fact is the standard of reasonableness and the standard of review for questions of law is the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[15] First, the applicant submits an officer partially communicated the findings of the investigation and did not disclose the full details of the investigation; hence, the officer breached procedural fairness. Procedural fairness requires that applicants for permanent residence be provided a meaningful opportunity to respond to perceived material inconsistencies or credibility concerns (*Qin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 147, [2013] FCJ No 167). Under *Amin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 206, [2013] FCJ No 216, this Court found an officer's reliance on extrinsic evidence without allowing an applicant the opportunity to know and reply to that evidence amounts to procedural unfairness. Here, the applicant did not have the opportunity to provide a more detailed explanation to address the inconsistencies the processing officer observed from the phone verification.

[16] With respect to the discrepancy of the location of North India Computers, the applicant argues he explained the issue of location to the officer. He submitted 20-C was the registered

office of the business and 22-C mentioned by Mr. Tony was the computer education facility. North India Computer possessed both of these premises.

[17] The applicant argues had he been informed about the extrinsic evidence the officer obtained through the phone evidence, he would have been able to dispute those facts.

[18] Also, the applicant argues the officer failed to afford equal weight to all elements of the investigation. The officer did not ask the applicant to obtain a letter or proof that the employer had submitted the information the applicant requested as noted in his response to the fairness letter.

[19] Second, the applicant submits the officer disregarded key evidence. The officer ignored the statements of the senior employee, the applicant's diploma indicating that the applicant himself obtained his computer education from North India Computers and affidavits of the applicant's students.

V. Respondent's Written Submissions and Further Memorandum

[20] In the form of preliminary objection, the respondent submits the following evidence postdates the First Secretary's decision dated February 15, 2014 and should not be considered by this Court: i) Exhibit F, a letter dated March 12, 2013 with a notary stamp of May 28, 2014; ii) Exhibit I, an affidavit sworn on June 2, 2014; and iii) Exhibit J, affidavits sworn on May 28, 2014. The respondent also argues these documents are not properly sworn exhibits to the applicant's affidavit filed in support of this application.

[21] First, the respondent submits the First Secretary did not breach procedural fairness. It argues the letter sent to the applicant advised him of the processing officer's concerns as well as how these concerns came to be. The letter informed the applicant of the phone verification and the resulting discrepancies discovered. The respondent argues although the processing officer did not specifically advise the applicant of the statement of the senior employee, this does not have an impact on the discrepancy as perceived by the officer because the discrepancy was about the business of the company.

[22] Further, the applicant's own response to the fairness letter indicates he had a full opportunity to respond. In his response, he indicated that he requested information from North India Computers such as proof of address change and a list of employees. Therefore, the applicant had a full opportunity to provide any necessary explanations.

[23] Second, the respondent submits the First Secretary's decision was reasonable. It argues the duty of the officer was fulfilled by giving the applicant notice of the discrepancies and giving him an opportunity to explain. The applicant had the onus to provide the necessary explanation and supporting documents. The officer did not have the duty to send another follow-up request (*Oladipo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 366 at paragraph 24, [2008] FCJ No 468). Even in light of all the other documents, the officer was reasonable to find the applicant's explanation did not overcome concerns in the absence of information from North India Computers.

[24] In the respondent's further memorandum, it argues with respect to procedural fairness, there is no obligation on the part of the First Secretary to make further inquiries if an application is ambiguous (*Lam v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8315 (FC) at paragraph 4 [*Lam*]).

[25] I need not deal with the issue of evidence that post-dated the First Secretary's decision as the applicant informed the Court that he was not relying on evidence that was not before the First Secretary.

## VI. Analysis and Decision

### A. *Issue 1 – What is the standard of review?*

[26] Insofar as the issue of procedural fairness is concerned, it is a matter of natural justice and it is reviewed on the standard of correctness (*Kastrati v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1141 at paragraphs 9 and 10, [2008] FCJ No 1424).

[27] With respect to the issue of the reasonableness of the First Secretary's decision is concerned, it involves questions of fact and it is reviewed on the standard of reasonableness. The standard of reasonableness means that I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir* at paragraph 47). Here, I will set aside the First Secretary's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*),



2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the First Secretary breach procedural fairness?*

[28] The applicant submits that the First Secretary breached procedural fairness by not disclosing all of the evidence received from North India Computers' employees, Mr. Sameer and Mr. Tony.

[29] Mr. Sameer, who worked at North India Computers from 2004 until 2012, told the processing officer that the company only dealt in the sale, purchase and repair of computers and it did not offer computer education courses. However, Mr. Tony, who was employed by North India Computers from 1997 to 2012, stated to the processing officer that the company was in the sale/purchase and repair of computers business for the last five years (i.e. 2007 to 2012) and that earlier, the company was in the computer education business. He also stated that one of the instructors had the name Mahesh. The applicant had stated that he worked at North India Computers as a computer instructor from November 1997 to May 2005.

[30] The First Secretary, in the fairness letter to the applicant, disclosed Mr. Sameer's evidence that the company did not offer computer education courses but failed to mention Mr. Tony's evidence that computer education courses were offered prior to 2005 and that one of the instructors had the name Mahesh.

[31] In my view, the failure of the First Secretary to mention evidence that favoured the applicant and which should have answered the concerns about the applicant working as a computer instructor constitutes a breach of procedural fairness.

C. *Issue 3 - Was the First Secretary's decision reasonable?*

[32] I am of the view that the First Secretary's decision was unreasonable. The First Secretary made an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paragraphs 16 and 17, 157 FTR 35). The First Secretary appears to have ignored the evidence of Mr. Tony relating to the company providing computer education. The First Secretary also did not address the evidence that stated the applicant studied at North India Computers and received a diploma from North India Computers. This constitutes a reviewable error by the First Secretary.

[33] As a result, the application for judicial review must be allowed and the decision of the First Secretary is set aside and the matter is referred to a different individual for redetermination.

[34] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"

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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	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;
(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or	c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou de protection;
(d) on ceasing to be a citizen under	d) la perte de la citoyenneté :
(i) paragraph 10(1)(a) of the Citizenship Act, as it read immediately before the coming into force of section 8 of the Strengthening Canadian Citizenship Act, in the circumstances set out in subsection 10(2) of the Citizenship Act, as it read immediately before that coming into force,	(i) soit au titre de l'alinéa 10(1)a) de la Loi sur la citoyenneté, dans sa version antérieure à l'entrée en vigueur de l'article 8 de la Loi renforçant la citoyenneté canadienne, dans le cas visé au paragraphe 10(2) de la Loi sur la citoyenneté, dans sa version antérieure à cette entrée en vigueur,

...

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.

...

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.

***Federal Court Rules, SOR/98-106***

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2684-14

**STYLE OF CAUSE:** MAHESH KUMAR SHARMA v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 6, 2015

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

**DATED:** NOVEMBER 5, 2015

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