

Federal Court



Cour fédérale

Date: 20160527

Docket: IMM-1362-15

Citation: 2016 FC 588

Ottawa, Ontario, May 27, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

TENZIN YONTEN

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] These Reasons are issued pursuant to the Judgment issued on April 29, 2016.

[2] Mr. Tenzin Yonten (the “Applicant”) seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision of a visa officer (the “Visa Officer”) in New Delhi, India dated January 19, 2015 rejecting his sponsored application for permanent

residence on humanitarian grounds. The Officer determined that the Applicant was inadmissible pursuant to paragraph 38(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

II. BACKGROUND

[3] In April 2004, the Applicant's father applied to sponsor him for permanent residence on humanitarian and compassionate grounds. The application was approved in principle on February 7, 2012.

[4] On January 17, 2012, the Applicant and his sister underwent a routine medical examination, conducted by a physician at the Max Medcentre, requested by the Canadian High Commission in New Delhi. Both the Applicant and his sister's Medical Reports note concerns that they suffered from active tuberculosis.

[5] The Applicant's sister received correspondence from the Canadian High Commission in February 2012 requesting that she undergo further testing and treatment. She was later permitted to come to Canada.

[6] The Applicant did not receive any requests for further examinations or treatment at that time.

[7] In March 2012, the Applicant was diagnosed with tuberculosis by a physician at Meena Devi Jindal Medical Institute & Research Centre. He began treatment which concluded in April 2013.

[8] In August 2012, the Applicant received a phone call from Max Medcentre requesting that he undergo further medical examination. The Applicant attended the clinic on August 29, 2012 and August 30, 2012 for further tests. Those tests showed abnormalities and the Applicant underwent ~~in~~ more testing, at the request of the Canadian High Commission, on November 6, 2012, November 20, 2012, February 7, 2013, and May 16, 2013.

[9] During these medical appointments, the Applicant did not inform physicians with the Max Medcentre that he was already being treated for tuberculosis.

[10] On June 11, 2013, the Applicant completed a second routine medical examination at the request of the Canadian High Commission.

[11] On July 8, 2013, a medical officer provided his opinion that the Applicant was inadmissible to Canada because he had a health condition, that is active tuberculosis, which might reasonably be expected to be a danger to public health pursuant to subsection 38(1) of the Act.

[12] The Applicant received a procedural fairness letter dated July 12, 2013 inviting him to make submissions or provide information relating to the medical officer's opinion. In his

response to this letter, the Applicant disclosed that he was receiving treatment for tuberculosis from the Meena Devi Jindal Medical Institute & Research Centre.

[13] The Applicant received a second procedural fairness letter dated April 8, 2014, asking for more information about his medical condition.

[14] An email dated January 7, 2015 from the medical officer to the Visa Officer, detailed the medical officer's opinion that the Applicant was inadmissible. This email refers to two phone calls made by the medical unit in New Delhi: one to the Max Medcentre on November 12, 2014 and one call made on November 14, 2014 to the Meena Devia Jindal Medical Institute & Research Centre.

[15] The email recorded that during the November 12, 2014 phone call, a physician at the Max Medcentre said that the Applicant had not been treated for active tuberculosis, nor had the Max Medcentre confirmed that he did not suffer from that disease.

[16] The medical officer's email contains a number of observations about the Meena Devi Jindal Medical Institute & Research Centre. The medical officer noted that the clinic is a "charity GP clinic" and that "[n]ot infrequently, ventures like this are created to "process black money" [an Indian expression for 'launder money'].

[17] The Applicant was unaware of the January 7, 2015 email until he obtained his file through a request made pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1.

[18] The Applicant's application was refused on January 19, 2015.

III. SUBMISSIONS

[19] The Applicant argues that the Visa Officer breached the duty of procedural fairness owed to him by failing to provide him with an opportunity to respond to the medical officer's email or the information obtained in the November 12, 2014 and November 14, 2014 phone calls.

[20] The Applicant submits the Visa Officer was obliged to inform him of the negative medical officer's opinion and allow him to comment upon that opinion; see the decisions in *Muliadi v. Canada (Minister of Employment & Immigration)*, [1986] 2 F.C. 205 and *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407.

[21] The Applicant also argues that the Visa Officer's decision is unreasonable since the determination that he has active tuberculosis is outside the range of possible, acceptable outcomes based upon the available medical evidence.

[22] The Minister of Citizenship and Immigration (the "Respondent") submits that the duty of procedural fairness does not require the disclosure of non-extrinsic evidence; see the decision in *Asmelash v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1732. He argues that the medical unit's phone calls did not reveal anything not known to the Applicant. He contends that it was expected that medical doctors might consult each other.

[23] The Respondent also argues that the opinion about the Meena Devi Jindal Medical Institute & Research Centre, that it was possibly a money-laundering charity, did not affect the medical officer's assessment of the medical reports from that facility.

[24] With respect to the Applicant's argument that the Visa Officer's decision was unreasonable, the Respondent submits that it was reasonable for the Visa Officer to rely upon the medical officer's opinion.

IV. DISCUSSION

[25] Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43.

[26] The Visa Officer's decision in a humanitarian and compassionate application involves the exercise of discretion and is reviewable on the standard of reasonableness; see the decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, [2015] 3 S.C.R. 909 at paragraph 44. In order to meet the reasonableness standard, the reasons offered must be justifiable, transparent, intelligible and fall within a range of possible, acceptable outcomes; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[27] In my opinion, the non-disclosure of the January 7, 2015 email constitutes a breach of the duty of procedural fairness owed to the Applicant. The email expressed concerns about the Applicant's medical diagnosis, treatment and the Meena Devi Jindal Medical Institute &

Research Centre. The Applicant was unaware of these concerns and was not given the opportunity to refute them.

[28] The duty of procedural fairness requires that the Visa Officer provide the Applicant with an opportunity to comment upon the negative medical officer's opinion; see *Muliadi, supra*. In failing to do so, the Visa Officer committed a reviewable error.

[29] I am also satisfied that the Visa Officer's decision is unreasonable.

[30] The Visa Officer relied upon the medical officer's opinion which considered irrelevant factors and did not consider the totality of the medical evidence. The medical officer noted the possibility that the Meena Devi Jindal Medical Institute & Research Centre was engaged in money laundering, in concluding that the Applicant suffered from tuberculosis.

[31] In my opinion, the fact that "not infrequently" clinics like the Meena Devi Jindal Medical Institute & Research Centre are created to "process black money", is irrelevant to the assessment of the admissibility of the Applicant pursuant to section 38(1) of the Act.

[32] In the result, this application for judicial review is allowed. The decision is set aside and the matter remitted to a different Immigration Officer for re-determination. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1362-15

STYLE OF CAUSE: TENZIN YONTEN v. MINISTER OF CITIZENSHIP
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