Federal Court  Cour fédérale

Date: 20101214

Docket: IMM-1311-10

IMM 1847-10

Citation: 2010 FC 1272

Ottawa, Ontario, December 14, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

AMRITPAL KAUR SIDHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The application in IMM-1311-10 is made pursuant to s. 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), for judicial review of a decision dated February 17, 2010 where Citizenship and Immigration Canada (CIC), Case Processing Centre Mississauga (CPC), found the applicant to be ineligible to sponsor a member of the family class because she did not meet the minimum necessary income (MNI) requirement.

[2] The application in IMM-1847-10 is a for judicial review made pursuant to s. 72 of IRPA, of the decision of the CPC dated March 11, 2010, where the application to reconsider the decision dated February 17, 2010 was dismissed.

[3] The applications for judicial review will be denied for the reasons elaborated below.

Facts

[4] The applicant filed a sponsorship application for her two parents and her two siblings on April 20, 2007.

[5] On her initial application, the applicant had indicated that the family unit was seven persons and that there was sufficient income for a family of that size.

[6] In making its decision, the Board learned that the applicant had another child in India, and counted this child without knowing about two other children living in India since 2003 with her ex-husband.

[7] In its refusal letter of February 17, 2010, CPC considered that the applicant had a family of eight and stated that the required income was $60,585. The applicant's income was less than the MNI, and she was found ineligible for sponsorship.

[8] Following that decision, the applicant’s consultant sent a letter dated March 23, 2010 to CPC asking for a reconsideration in which she referred to a phone call from the CPC to the applicant a few weeks before receiving the negative decision dated February 17, 2010.

[9] The applicant stated that the officer called to clarify information regarding one of her children from her previous marriage but did not inquire about the other children from that marriage and their custody arrangements.

[10] The applicant takes issue with the fact that the officer did not answer her question when she asked what was the purpose of the call. She now alleges that the application would not have been refused if the purpose of the inquiry had been clarified during the said phone call, as she would have explained her reasons for not including the other children living with her ex-husband.

[11] The applicant’s consultant also stated in her letter that there had been an error in checking the wrong box stating that the applicant wanted her application to be withdrawn if she was not found eligible (page 29, applicant's record in IMM-1847-10, see check to question number 1 and page 51 for the alleged error). Included with the consultant's letter was a letter by the applicant confirming that she did not want to withdraw her sponsorship application in case she failed to meet the eligibility requirements. In other words she wanted to keep her right of appeal.

[12] The applicant received a response dated March 11, 2010 in which her request for reconsideration was refused.

Impugned Decision

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[13] In its decision dated February 17, 2010, CPC found that the applicant's income did not meet the minimum requirement of $60,585 for a family of eight persons. It then withdrew the application since this had been requested by the applicant on her application. The applicant filed an appeal at the Immigration Appeal Division (IAD). On August 25, 2010, the IAD dismissed the appeal for lack of jurisdiction (applicant's book of authorities, tab 1).

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[14] In its decision dated March 11, 2010 the CPC stated that the definition of a "dependent child" under the *Immigration and Refugee Protection Regulations* SOR/2002-227 (the regulations), does not consider custodial circumstances. The CPC further stated that although the children in question were not in the custody of the applicant, the court order provided, indicated that she shared joint guardianship and that she had financial obligations towards the children in the form of child support payments.

[15] The CPC stated that the legal parent child relationship still existed and that there was no indication of any severance of this. As such, the CPC found that the applicant's children from her previous marriage must remain in the family size for the purpose of assessing the minimum necessary income required for sponsorship.

[16] Finally, the CPC found that the decision dated February 17, 2010 could not be reconsidered where the sponsor erred in the completion of her sponsorship application.

Issues

[17] The issues are as follows:

a. With respect to the February 17, 2010 decision, did the officer breach his duty of procedural fairness when he failed to inform the applicant of the reason for his phone call?

b. With respect to the March 11, 2010 decision, did the officer err in failing to reconsider the previous decision in light of counsel's error?

Standard of Review

[18] As a general rule, issues of natural justice and procedural fairness are to be reviewed on the basis of a correctness standard (*Khosa v Canada (Minister of Citizenship & Immigration)*, [2009] 1 S.C.R. 339 at para 43).

[19] Questions relating to evaluations of fact and evidence are reviewable according to the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. As a result, this Court will only intervene to review a visa officer's decision if it does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmui*r, above, at para 47). For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process.

Relevant Legislation

[20] The applicable legislation is in the attached appendix.

a. With regards to the February 17, 2010 decision, did the officer breach his duty of procedural fairness when he failed to inform the applicant of the reason for her phone calls?

Applicant's Arguments

[21] The applicant submits that the family unit of the applicant is either seven (the applicant her husband and her child from her second marriage + her two parents and two siblings = seven persons) or ten (the above seven persons plus the three children from the applicant's previous marriage), not eight.

[22] The applicant argues that the officer who called her breached fairness in failing to advise the applicant of the purpose of the information being sought. The applicant submits that the purpose of the inquiry was to determine whether the applicant's family unit was seven or eight, and, had the Minister disclosed the purpose of the call, the applicant contends that she would have advised the officer that there were three other children, not just one from a previous marriage.

Respondent's Arguments

[23] At the hearing, the respondent underscored that the applicant should have known that the decision-maker's questions about the one child still in India were to determine the size of the family for the MNI requirement.

Analysis

[24] The rules of natural justice and the concept of procedural fairness vary depending on the context (*Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 at para 21).

[25] As noted by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para 115:

> What is required by the duty of fairness — and therefore the principles of fundamental justice — is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker*, supra, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; O*ld St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J. More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker, supra*, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker, supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.

[26] In this case, though the decision to grant or dismiss an application to sponsor a family member is obviously important, but it is not such as to affect the fundamental rights of an individual.

[27] Therefore, I find that in this case, the duty of fairness owed to the applicant was low. The applicant should have advised the inquiring officer of the other details of her other children when she found that the officer was inquiring about one of her children from her previous marriage.

[28] There was no obligation by the officer to advise the applicant of why she was making her inquiries given the context of the decision to be taken.

b. With respect to the March 11, 2010 decision, did the CPC err in failing to reconsider the previous decision in light of counsel's error?

Applicant's Arguments

[29] The applicant argues that the CPC erred in failing to reconsider the decision in light of counsel's error in filling out her original application. The applicant submits her consultant brought his error almost immediately to the attention of the Minister (letter in applicant's record at page 51).

[30] The applicant states that she did not want the application to be withdrawn if she was found ineligible. The applicant alleges that she wanted to keep her right of appeal if she received a negative decision.

[31] She cites *Washagamis First Nation v Ledoux,* 2006 FC 1300, [2006] F.C.J. 1639 (QL) at para 33 for the proposition that when an error is committed solely by counsel, the litigant should not be constructively held to have been a party to the error. The applicant submits that the reasoning in this case should be followed here because she lost her right of appeal due to her the consultant's error.

[32] She also submits that by rendering its decision of March 11, 2010, CPC refused to exercise its discretion and did not follow the instructions from the Federal Court of Appeal in *Kurukkal v*

Canada (Minister of Citizenship and Immigration), 2010 FCA 230, [2010] F.C.J. No. 1159 (QL). (It is to be noted that it is the Court who provided the parties with that decision).

Respondent's Arguments

[33] The respondent alleges that while it is unfortunate that there was an error made in the applicant's application, applicants should be held to the consequences of the choice of her advisor whether that advisor is a lawyer or a consultant (*Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266, [2001] F.C.J. No. 482 (QL) at paras 5-10).

Analysis

[34] *Muhammed v Canada (Minister of Citizenship and Immigration)*, 2003 FC 828, [2003] F.C.J. No. 1080 (QL), is distinguishable from the case at bar on several points. In that case, the applicant's lawyer had ceased to represent the applicant a week *after* the record in question should have been served and filed. The general discussion was relating to deadlines. It was decided that, it would have been unfair for the applicant's judicial review to have been terminated because of the lawyer's negligence. Furthermore, in that case the applicant was requesting an extension of time, whereas in this case the applicant is requesting that her case be reconsidered (*Muhammed*, above at paras 20 and 21; also at para. 31 of the decision).

[35] In the present case, the Court sees no reason why the reasoning in *Cove*, above should not be followed. After an analysis of the applicant's affidavit, her consultant's letter dated February 23, 2010 and her own of the same date, the Court is not persuaded that specific instructions were given to her consultant that she wanted a safeguard of an appeal in the eventuality of a negative decision.

[36] I am also unable to conclude that CPC refused to exercise its discretion to reconsider its decision. I am of the opinion that CPC did in fact exercise its discretion by refusing to reconsider because it was not satisfied that the alleged error by the applicant's consultant was a satisfactory explanation. I do recognize that this is my interpretation of CPC's determination when I read "… Unfortunately, this decision cannot be reconsidered where the sponsor erred in the completion of this application …" (page 1, tribunal's record in IMM-1847-10).

[37] No question for certification was proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the applications for judicial review in IMM-1847-10 and IMM-1311-10 be dismissed. No question is certified.

"Michel Beaudry"
Judge

APPENDIX

Immigration and Refugee Protection Regulations (SOR/2002-227)

2. “dependent child”, in respect of a parent, means a child who	2. « enfant à charge » L’enfant qui :
(a) has one of the following relationships with the parent, namely,	a) d’une part, par rapport à l’un ou l’autre de ses parents :
(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or	(i) soit en est l’enfant biologique et n’a pas été adopté par une personne autre que son époux ou conjoint de fait,
(ii) is the adopted child of the parent; and	(ii) soit en est l’enfant adoptif;
(b) is in one of the following situations of dependency, namely,	b) d’autre part, remplit l’une des conditions suivantes :
(i) is less than 22 years of age and not a spouse or common-law partner,	(i) il est âgé de moins de vingt-deux ans et n’est pas un époux ou conjoint de fait,
(ii) has depended substantially on the financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student	(ii) il est un étudiant âgé qui n’a pas cessé de dépendre, pour l’essentiel, du soutien financier de l’un ou l’autre de ses parents à compter du moment où il a atteint l’âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :
(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and	(A) n’a pas cessé d’être inscrit à un établissement d’enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,
(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or	(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,
(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.	(iii) il est âgé de vingt-deux ans ou plus, n’a pas cessé de dépendre, pour l’essentiel, du soutien financier de l’un ou l’autre de ses parents à compter du moment où il a atteint l’âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1311-10 and IMM-1847-10
STYLE OF CAUSE:	AMRITPAL KAUR SIDHU and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 8, 2010
REASONS FOR JUDGMENT:	BEAUDRY J.
DATED:	December 14, 2010

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Michael Butterfield	FOR THE RESPONDENT

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