

Federal Court



Cour fédérale

Date: 20150420

Docket: IMM-7324-13

Citation: 2015 FC 503

Toronto, Ontario, April 20, 2015

PRESENT: The Honourable Mr. Justice Diner

Docket: IMM-7324-13

BETWEEN:

SHAMAILA KHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision of an Officer [Officer] of Citizenship and Immigration Canada [CIC] rejecting the Applicant's application for permanent residence [PR] as a member of the Spouse or Common-Law Partner in Canada class. In a letter dated October 15, 2013, CIC informed the Applicant that she had failed to submit the documentation required for

approval, as requested by CIC in a letter dated May 31, 2013 [Letter]. As a result, the Applicant could not establish that she met the requirements of PR as required by section 72(1)(d) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227).

II. Facts

[2] The Applicant is a divorced woman from Lahore, Pakistan. She has two children from her previous marriage, who are in her full time custody. Ms. Khan filed a refugee claim in 2010, which was refused by the Refugee Protection Division of the Immigration and Refugee Board, with leave subsequently being dismissed by this Court in August 2012.

[3] While her refugee claim was being appealed, the Applicant met her future sponsor at a movie theatre in Toronto. The couple married in January 2013, and a spousal application for PR was submitted two days after the marriage, on January 21, 2013.

[4] The application was submitted by the Applicant's previous counsel. On May 31, 2013, CIC wrote a letter to the Applicant, having found the file to be missing necessary documentation needed to assess the application. The Officer requested specific documentation, including a divorce certificate and passport information, due by August 29, 2013.

[5] CIC sent the Letter to the mailing address on file, the office of her aforementioned counsel, which the Applicant concedes received correspondence from CIC both prior to and after the Letter (Applicant's Record [AR], p 8-9, paras 11, 12; Affidavit of June Tkachuk, p 2-3, paras

7, 9). Ms. Khan claims to never have received the Letter, and consequently, submits that she was never given an opportunity to respond to its contents.

[6] The Applicant deposes in her affidavit that she was only made aware, over the telephone, that CIC required her divorce certificate, and that she provided this document to CIC by way of correspondence dated July 2, 2013 [Response]. Ms. Khan ended her Response advising CIC to inform her if further documentation was still required of her:

“Please let me know if there is anything else that I need to provide you with. I look forward to your response. Thank you”

(Certified Tribunal Record [CTR], p 76).

[7] On October 15, 2013, CIC refused Ms. Khan’s application for permanent residence on the basis that she had not complied with all of the requests for documentation made in the Letter (CTR, p 74). CIC also sent an approval notice on the same date to her husband, approving his eligibility as a sponsor for Ms. Khan’s permanent residence application.

III. Parties’ Positions

[8] The Applicant submits that it was unreasonable for the Officer to make a decision on the basis of the missing documents, when she had clearly intimated in her Response that she believed her application to be complete. The Applicant contends that this reverses the onus, normally placed upon applicants, that documents that have been duly mailed have been received.

[9] The Applicant further submits that it is contradictory for the Officer to, on the same day, simultaneously refuse her permanent residence application while approving her husband as her sponsor.

[10] The Respondent, in reply, argues that it met the obligations of procedural fairness. The Letter itemized the documents requested, and Ms. Khan's Response only partially fulfilled CIC's request for materials. The Applicant provided no reason for why the other documents in the Letter were not included. CIC took reasonable steps to provide notice to the Applicant of the deficiencies in her application, and there was no breach of procedural fairness in this case.

IV. Issue

[11] The sole issue is whether CIC breached the Applicant's procedural fairness rights by refusing her application on the grounds of insufficient documentation, despite her prior indication that CIC should advise her if further documentation was required.

V. Standard of review

[12] The standard of review for violations of procedural fairness in permanent resident applications is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Miah v Canada (Citizenship and Immigration)*, 2015 FC 36 at para 27; *Essaidi v Canada (Citizenship and Immigration)*, 2011 FC 411 at para 11).

VI. Analysis

[13] The jurisprudence makes it clear that where CIC has no indication that the communication has failed or been misdelivered, the risk of non-delivery rests with the Applicant (*Kaur v Canada (Citizenship and Immigration)*, 2009 FC 935 at para 12). Otherwise put, once a decision maker proves on a balance of probabilities that communication was sent, the onus shifts to the Applicant to demonstrate there was a failure to receive the communication (*Mannil v Canada (Citizenship and Immigration)*, 2014 FC 70 at para 30). Where CIC has no indication that the communication has failed or been misdelivered, the risk of non-delivery rests with the Applicant (*Kaur v Canada (Citizenship and Immigration)*, 2009 FC 935 at para 12).

[14] As Justice Snider points out in *Yang v Canada (Citizenship and Immigration)*, 2008 FC 124 at para 14, there are good reasons for placing such an onus on the Applicant. Ensuring that each notice is received would impose a considerable burden on CIC, and would negatively impact the ability of the Department to deal with applications expeditiously.

[15] Circumstances like Ms. Khan's are not unique. In *Halder v Canada (Citizenship and Immigration)*, 2012 FC 1346 [*Halder*], the Applicant was also requested to provide passport information. The Officer sent a reminder letter advising of the 30 day deadline to provide these documents, but when the passport copies were not received, his application was refused (*Halder* at paras 7, 12). Justice Russell upheld the decision upon judicial review.

[16] Ms. Khan argues that the distinguishing factor in this case is that, in her Response, she requested notification from CIC if any further documentation was required. In my view, this is not sufficient to establish a breach of procedural fairness.

[17] As Justice Nadon of the Federal Court of Appeal noted in *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45, the requirements of procedural fairness are to be assessed contextually (see also *Ross v Canada (Attorney General)*, 2015 FC 344 at para 5; *Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193 at para 21). I do not foreclose the possibility that CIC's muteness to an applicant's attempt to confirm the sufficiency of her application may in some circumstances rise to a breach of procedural fairness, if the inquiries are sustained and/or specific, for example. The facts of this case, however, do not warrant such a finding.

[18] It is trite law that the onus is on an applicant to ensure the completeness and accuracy of her application (*Paashazadeh v Canada (Citizenship and Immigration)*, 2015 FC 327 at para 17). While I am sympathetic to the Applicant's efforts to ensure that her application was complete, one line in one letter cannot shift this onus. If that were the case, every applicant would include a generic closing statement to the effect of "please get back to me if you notice something missing" or "I assume this completes my application" with any application or response, effectively disburdening themselves of their onus.

[19] Further, it is not clear in this case that the Applicant failed to receive the Letter. As noted above, the onus is on her to demonstrate that the document was not received, given the evidence that letters to that mailing address had been received both prior to and after the Letter was sent. The Applicant responded to some of the Letter's requests. Even if the Response was the result of a phone call from CIC, and not the Letter, it is reasonable to infer that the agent would have also informed the Applicant of the documents required. In summary, I do not find that the Applicant

has rebutted the presumption that she received the documents, and see no breach of procedural fairness in this case.

[20] I would, however, encourage the Applicant to re-apply. I wish her the best of luck in making Canada her home.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No questions are certified. No costs are ordered.

"Alan Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7324-13

STYLE OF CAUSE: SHAMAILA KHAN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 5, 2015

**REASONS FOR JUDGMENT
AND JUDGMENT:** DINER J.

DATED: APRIL 20, 2015

APPEARANCES:

John Savaglio FOR THE APPLICANT

Nadine Silverman FOR THE RESPONDENT

SOLICITORS OF RECORD:

John Savaglio FOR THE APPLICANT
Barrister and Solicitor
Pickering, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada
Ottawa, Ontario