Federal Court  Cour fédérale

Date: 20171206

Docket: IMM-2891-17

Citation: 2017 FC 1114

Vancouver, British Columbia, December 6, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SERGEY REZVYY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks the judicial review of the decision of the Immigration Division [ID] of June 14, 2017, which found him to be inadmissible by reasons of misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA]. The judicial review application is made in accordance with section 72 of IRPA.

[2] I note that given the exclusion order that was issued by the ID, Mr. Rezvyy has left this country.

I. Facts

[3] It is not disputed that the applicant answered “no” to the question whether he had ever been arrested, charged or convicted of a criminal offence when he sought to have the study permit he received in 2013 extended. That took place on June 30, 2016. The parties did not supply to the Court when the study permit was to expire at the time a renewal was sought as well as how many renewals had been granted by June 30, 2016. The studies for which the applicant sought a renewal were completed less than two months after the renewal was sought, on August 20, 2016 and less than 3 weeks after the said permit was issued, on August 2, 2016. Nevertheless, the study permit was valid until September 30, 2020, when it was issued.

[4] The answer to the question was not accurate. Mr. Rezvyy had been arrested and charged on March 22, 2016, for the offences of “break and enter” and “sexual assault”. He would claim that he committed an innocent mistake when he answered the question of whether he was charged or arrested three months after his arrest by arguing that he misunderstood the question.

[5] With the completion of the studies on August 20, 2016, the study permit issued on August 2, 2016, and valid until September 30, 2020, would become invalid 90 days later, that is on or around November 20, 2016 (regulation 222 of the *Immigration and Refugee Protection Regulations*, SOR 2002/227 [Regulations]).

[6] On July 6, 2016, an officer of the Canada Border Services Agency [CBSA] interviewed the applicant. The issue of the inaccurate response to the question about having been arrested or charged was raised in the course of the interview and the applicant was advised that the matter would be pursued. In fact, the matter of the inadmissibility of the applicant was referred to the ID. A hearing for the purpose of determining whether the applicant had become ineligible for misrepresentation was scheduled for November 28, 2016. It is through a process that engages sections 44 and 45 of IRPA that the matter of the inadmissibility is referred by the Minister of Public Safety and Emergency Preparedness [Minister] to the ID. The referral, it appears, was made the subject of a judicial review application on November 25, 2016. Thus, the inadmissibility hearing due to take place on November 28, 2016, was postponed.

[7] In the meantime, the applicant made an application "to change conditions, to extend his stay or to remain in Canada as a worker" on November 15, 2016. By then, the charges laid on March 22, 2016 had been stayed [October 13, 2016]. Thus, Mr. Rezvyy stated on the form for the work permit that "(i)n March 2016 I was wrongfully accused in something I did not commit", after answering the question, "Have you ever committed, been arrested for or been charged with or convicted on any criminal offense in any country?". This time, the applicant answered: "Yes".

[8] An immigration officer issued the work permit on December 12, 2016. It is to be valid until April 18, 2018.

[9] The inadmissibility hearing that was to occur on November 28, 2016, but was postponed because the referral to the ID by the Minister was being challenged before this Court went ahead

on May 19, 2017, after the leave application with respect to the referral to the ID was denied, on April 10, 2017. The decision, which is the subject of this judicial review application, was rendered on June 14, 2017.

II. Position of the parties

[10] The main argument made on behalf of the applicant is that entertaining an admissibility hearing before the ID constitutes an abuse of process. That is because the immigration officer, in issuing a work permit, already disposed of the inadmissibility issue. It must have been, goes the argument, that the applicant was ruled not inadmissible since the immigration officer issued the work permit. The ID is being asked to make a different decision based on the same facts as those before the immigration officer.

[11] The respondent disputes that conclusion on the basis that the applicant knew there was an inadmissibility hearing that was pending; indeed, he sought an adjournment in November 2016, days after his application for a work permit (November 15), and less than three weeks before the work permit was issued (December 12, 2016). The effect was that the inadmissibility hearing occurred after the decision on the issuance of a work permit.

[12] However, the respondent did not articulate a legal argument, submitting instead that the Court should not accept that the granting of a work permit supersedes the inadmissibility hearing. Unfortunately, there was no authority offered in support of an articulation of an argument. At best, it was advanced that this would “not be consistent with the Canadian immigration scheme and policy” (memorandum of fact and law, para 28).

III. Analysis

i. *Abuse of process*

[13] In my view, this matter has to be sent back to a different panel of the ID in view of the deficient analysis concerning the abuse of process issue. As I read the decision under review, the analysis is limited to paragraph 35:

> [35] The Immigration officer who considered the work permit application would have had no grounds to refuse the application because by that time the charges had been stayed, and Mr. Rezvyy was not inadmissible at the time because the inadmissibility hearing had not proceeded.

It is as if the ID was concluding that the immigration officer could not have found the applicant to be inadmissible by reason of misrepresentation. There is no explanation provided by the ID as to why such would have to be the case. In fact, counsel for the respondent suggested at the hearing that the immigration officer could have ruled on the matter too. Nevertheless, the matter was left unresolved.

[14] The issue may well turn on the interpretation to be given to regulation 179 of the *Regulations*. The parties agree that the authority to issue the work permit is derived from that regulation and that it is regulation 179 (e) which finds application:

Issuance	**Délivrance**
179 An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign	**179** L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

national	
(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	**a)** l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(b) will leave Canada by the end of the period authorized for their stay under Division 2;	**b)** il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;
(c) holds a passport or other document that they may use to enter the country that issued it or another country;	**c)** il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;
(d) meets the requirements applicable to that class;	**d)** il se conforme aux exigences applicables à cette catégorie;
(e) is not inadmissible;	**e)** il n'est pas interdit de territoire;
(f) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and	**f)** s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);
(g) is not the subject of a declaration made under subsection 22.1(1) of the Act.	**g)** il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

[15] The applicant asserts that the immigration officer would have had the Global Case Management System [GCMS] notes that would have indicated the applicant was suspected of misrepresentation. In spite of my asking, the Court does not know if the immigration officer relied on the GCMS notes and if those notes were clear as to the inadmissibility for misrepresentation that was scheduled to be heard by the ID. To put it another way, it appears that the record is silent as to what may be a critical issue in view of paragraph 35 of the ID decision.

[16] The abuse of process argument must be predicated on contrary decisions made on the same available evidence. The ID seems to assume that it is the only one with jurisdiction in this case. The fact that the charges were stayed is not relevant as the issue is rather whether there was misrepresentation at the time the alleged misrepresentation took place. In other words, it is as if the ID assumed that regulation 179 did not allow the immigration officer to consider the ground for inadmissibility that is misrepresentation under section 40 of IRPA.

[17] For a decision to be reasonable, it must have the qualities that make it such. In *Dunsmuir v New Brunswick*, 2008 CSC 9, [2008] 1 SCR 190 (*Dunsmuir*), the Supreme Court speaks of the process of articulating the reasons (para 47). Reasonableness will be concerned with the existence of justification, transparency and intelligibility within that decision-making process. In my view, the decision fails on that account. It becomes impossible to decide whether the decision falls within a range of possible, acceptable outcomes. Without a modicum of analysis, the Court is left with nothing to review. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador*, 2011 SCC 62, [2011] 3 SCR 708, the Supreme Court found that "if the reasons allow the reviewing Court to understand why the tribunal made its decision and permit it to determine whether the conclusion is in the range of acceptable outcomes, the Dunsmuir criteria are met" (para 16). The parties in this case agree that the determination that there has been an abuse of process is subject to a standard of review of reasonableness. I have proceeded on that basis, but on redetermination, the matter should be addressed with authorities in support, which is lacking in this case.

[18] Accordingly, the new hearing will have to consider more fully the construction that should be put on regulation 179. It will also have to address what constitutes an abuse of process and who has jurisdiction to dispose of the issue. If the immigration officer can make a determination pursuant to regulation 179(e) that the applicant is not inadmissible, was such determination made? If such determination was made, can the ID make a new determination based on the same facts? Does the second determination made by the ID constitute an abuse of process? The issue of whether or not the determination of inadmissibility of the applicant constitutes an abuse of process is the only issue referred back to the ID.

ii. *Innocent mistake*

[19] The other matter raised by the applicant, that he committed an innocent mistake, is dismissed.

[20] The applicant's burden is to satisfy the Court, on a balance of probabilities, that the conclusion reached by the ID was not reasonable. This is a question of mixed facts and law which requires a standard of review of reasonableness (*Dunsmuir*, para 53).

[21] Here, the question was unambiguous. The applicant's explanation that he would have to answer yes to a question that asked if an applicant has been arrested for or been charged with or convicted of any criminal offence in any country only if he has been convicted or if he has spent time in prison was not accepted by the CBSA officer who referred the matter to the Minister. The Minister's delegate then sent it to the ID because, obviously, he did not believe the explanation either. The referral made pursuant to subsection 44(2) is made "(i)f the Minister is of the opinion

that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing…".

[22] The applicant's burden was to show that the outcome reached by the ID was not one of the possible, acceptable outcomes in view of the facts and the law. He has failed. That the applicant simply lied when he answered the question was a clear possibility that was acceptable in the circumstances, especially in view of the explanation that was given when confronted on July 6, 2016. The applicant did not just check the wrong box; he claimed that the question was not clear and that he would have had to check the "yes" box only if he had been convicted or spent time in prison. That is not an explanation that must carry the day.

[23] In a bizarre twist, the applicant argued that he "thereafter honestly and freely disclosed those charges to the CBSA Officer Dutton on July 6, 2016 in an interview" (applicant's further memorandum of fact and law, para 67). First, what counts is the misrepresentation on June 30, 2016 in the form filled out to extend the study permit. Second, it is only when confronted by officer Dutton that the applicant fessed up, albeit adding an explanation which was not believed.

IV. Conclusion

[24] The only matter before the Court in this case is the ID's decision which finds the applicant to be inadmissible on the basis of misrepresentation. Two arguments were raised: abuse of process and innocent mistake. The Court has concluded that only the abuse of process argument requires a redetermination.

[25] I note that the validity of the work permit was not challenged and is not before the Court. It follows that the work permit would appear to be at this stage still valid until April 18, 2018. As noted earlier, the applicant left Canada as a result of the exclusion order issued because of inadmissibility.

[26] Counsel for the applicant requested an order that would go further than what is provided for pursuant to subsection 52(2) of IRPA:

Return to Canada	**Retour au Canada**
(2) If a removal order for which there is no right of appeal has been enforced and is subsequently set aside in a judicial review, the foreign national is entitled to return to Canada at the expense of the Minister.	**(2)** L'étranger peut revenir au Canada aux frais du ministre si la mesure de renvoi non susceptible d'appel est cassée à la suite d'un contrôle judiciaire.

The applicant wished for the Court to direct the Minister to do all things necessary "to facilitate" the applicant's return in issuing a "post-graduate open work permit…valid for at least 10 months". The Court is not prepared to go beyond what is spelled out in subsection 52(2) of IRPA. In the words of the legislation, the applicant "is entitled to return to Canada at the expense of the Minister". As I indicated to counsel for the applicant at the hearing, the order is limited to the applicant's return to Canada. It does not cover any eventual return to the applicant's country of citizenship following a redetermination or the expiry of the work permit.

[27] Counsel for the respondent did not object to the order limited to subsection 52(2) of IRPA and she did not offer observations either. The parties did not suggest a serious question of general importance and none is stated.

JUDGMENT in IMM-2891-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;

2. The matter of the alleged abuse of process is returned for redetermination by a differently constituted panel of the Immigration Division;

3. For greater clarity, the argument concerning an alleged innocent mistake is dismissed;

4. Pursuant to subsection 52(2) of IRPA, the applicant is entitled to return to Canada at the expense of the Minister;

5. There is no serious question of general importance.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2891-17
STYLE OF CAUSE:	SERGEY REZVYY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 27, 2017
JUDGMENT AND REASONS:	ROY J.
DATED:	DECEMBER 6, 2017

APPEARANCES:

Mr. Fritz Gaerdes	FOR THE APPLICANT
Ms. Ashley Caron	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon & Associates Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT