Federal Court  Cour fédérale

Date: 20180321

Docket: IMM-1991-17

Citation: 2018 FC 324

Ottawa, Ontario, March 21, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ANA MILENA DEVIA TUIRAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of a Visa Officer stationed at the Canadian Embassy in Bogota, Colombia [Officer], dated April 5, 2017, refusing the Applicant's application for a Temporary Resident Visa [TRV] made pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] The Applicant is a citizen of Colombia. She is married to a Canadian citizen living in the province of Quebec. The couple met in January 2015. Between April and August 2015, the Applicant applied twice for a TRV, first in the visitor class and then in the student class. Both applications were denied. The Applicant married on March 5, 2016, and shortly thereafter, applied for permanent resident status in Canada. She was sponsored by her husband.

[3] Meanwhile, the Applicant visited the United States [US] on a valid US visa from May 24 to June 4, 2015, and from September 28, 2015 to January 21, 2016, during which she resided in Malone, New York. She returned to the US from June to August 2016, while waiting for her permanent resident status application to be processed. During her temporary stays in the US, her husband and his children visited her regularly.

[4] On September 6, 2016, the Applicant attempted to return to the US but was refused entry because she had no return ticket and because the authorities had doubts regarding the reasons for her stay. The next day, she was found inadmissible to the US and signed an "Order to be removed" indicating that she was barred from the US for a period of five years. A week later, while in Colombia, she reported to the authorities that her passport, which contained her US visa, had been stolen.

[5] On February 8, 2017, the Applicant submitted the TRV application that is at the basis of the present judicial review. The Applicant answered "Yes" to the question, "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or another country?" but she only referenced the refusals of the two Canadian TRV applications she had made in 2015.

[6] In March 2017, subsequent to receiving confirmation from the US authorities that the Applicant's US visa had been cancelled, the Respondent determined that procedural fairness required an interview. An immigration officer therefore called the Applicant on March 22, 2017, about her answer to the question on her February 8, 2017, TRV application form, "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or another country?"

[7] On March 28, 2017, the Applicant and her husband went to the Canadian Embassy in Bogota. Their request to meet with an immigration officer was refused, however, they were permitted to submit additional documentation. The documents submitted by the Applicant included a letter from her husband, co-signed by the Applicant, wherein he attempted to clarify the Applicant's travels to the US. It also included a copy of the US Department of Homeland Security's Determination of Inadmissibility. In his letter, the Applicant's husband explained that in filling out the Applicant's TRV application, he purposely only listed her previous refused TRV applications to Canada and chose not to mention the Applicant's trip to the US during which her visa was cancelled because he believed that it was her choice to return to Colombia rather than stay in the US. He further explained that despite having the US Inadmissibility Determination in her possession, the Applicant never wanted to look at those documents because they brought back "sour memories."

[8] On April 5, 2017, based on the information provided in the Applicant's TRV application, the phone interview and the documents submitted by the Applicant and her husband after the phone interview, the Officer concluded that the Applicant is inadmissible for misrepresentation in having failed to mention in her TRV application form that her US visa had been cancelled.

The Officer examined section 16(1) of the Act which requires visa applicants to answer all questions truthfully and section 40(1)(a) which makes a foreign national inadmissible for misrepresentation should they withhold material and relevant facts that could induce an error. The Officer determined that the misrepresentation was material to the consideration of the Applicant's TRV application. Furthermore, during the phone interview, the Applicant did not acknowledge the cancellation of her US visa, claiming that she was confused by the question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or another country," as she thought it related only to Canada. The Officer was satisfied that the misrepresentation was not due to a simple error on the Applicant's part.

II. Issues and Standard of Review

[9] This case raises the following two issues:

(1) Did the Officer breach the duty of procedural fairness owed to the Applicant?

(2) Was the Officer's decision reasonable?

[10] There is no dispute between the parties as to the applicable standard of review for each issue. As is well settled, the correctness standard of review applies to questions of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43) whereas the decision itself is subject to the reasonableness standard of review (*Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 at para 20 [*Punia*]; *Rahman v Canada (Citizenship and Immigration)*, 2016 FC 793 at para 6; *Patel v Canada (Citizenship and Immigration)*, 2017 FC 401 at para 14).

[11] This means that no deference is owed to the Officer as to the way he handled the Applicant's TRV application from a procedural fairness standpoint. On the other hand, the standard of reasonableness requires a more deferential approach on the part of the Court, meaning that the Court will only interfere with the Officer's decision if it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New-Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

III. Analysis

A. *Procedural Fairness*

[12] The Applicant submits that the duty of procedural fairness owed to her was breached because she was not given an adequate opportunity to respond to the Officer's concerns regarding the misrepresentations made in her TRV application. The Respondent argues that the Officer had no obligation to send a fairness letter or otherwise provide the Applicant or her husband the opportunity to respond through a further interview. The Respondent stresses the fact that it did interview the Applicant by telephone and examined the written submissions made by the Applicant and her husband after the interview when making its decision.

[13] The Applicant insists that letters or interviews are required when serious issues of credibility arise. However, it is not the Applicant's credibility that is at issue in the present case but her failure to mention in her TRV application form that her US visa had been cancelled. In such context, the Respondent submits that the degree of procedural fairness given to the Applicant was sufficient.

[14] I agree with the Respondent that the duty of procedural fairness owed to a TRV applicant is on the lower end of the spectrum, even if the TRV is sought in conjunction with an application for permanent residence or concerns of misrepresentations were raised during the processing of the application (*Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 238 at para 27; *Sepehri v Canada (Citizenship and Immigration)*, 2007 FC 1217 at para 3). This is generally so because the person affected - a non-citizen - has no right to enter or remain in Canada and faces neither detention nor removal from Canada. This is also the case because decisions dismissing TRV applications filed from abroad by foreign nationals are highly discretionary and that the consequences for failed applicants, although they may be serious, do not normally engage their rights under the *Canadian Charter of Rights and Freedoms* (*Jahazi v Canada (Citizenship and Immigration)*, 2010 FC 242 at para 32).

[15] But what exactly does the lower end of the spectrum entail? At its basis, procedural fairness is a participatory right and is very much context-specific (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 30). In the present case, the Applicant's right to procedural fairness entails informing her of the Officer's misrepresentation concerns and giving her the opportunity to respond (*Ghasemzadeh v Canada (Citizenship and Immigration)*, 2010 FC 716 at paras 27, 29, and 31 [*Ghasemzadeh*]). In my view, this is exactly what occurred.

[16] Though the parties disagree as to what exactly was discussed during the phone interview, the interview provided sufficient notice to the Applicant that there were misrepresentation concerns relating to whether she was expelled from or denied entry to a country other than Canada. The Applicant claims that the telephone interview was too brief, and that she was in a

noisy public place which meant she did not concentrate on her answers, but it is clear from the factual overlap between the affidavit she signed in support of the present judicial review application and the Global Case Management System [GCMS] notes that the Applicant was informed of the consequences of misrepresentation and asked whether she had been expelled from or denied entry to a country other than Canada. The Applicant provided an explanation as to why she had not included information on countries other than Canada, but it did not remedy the misrepresentation.

[17] The Applicant claims in her affidavit that the question of the US visa was not specifically put to her at the interview. This, in my view, is difficult to reconcile with the events following the telephone interview. As indicated previously, when, after the telephone interview, the Applicant and her husband presented themselves at the Canadian Embassy in Bogota requesting an in-person interview, their request was refused but they were informed that they could submit further documents, which they did. It is evident from the letter submitted with those documents that the Applicant was aware that her US visa was the basis of the Officer's misrepresentation concerns. In the letter, the Applicant's husband states that its purpose is "to clarify the events with relation to [the Applicant's] previous travels to USA" (Certified Tribunal Record [CTR] at 42) and attached to the letter are the documents given to the Applicant when her visa was cancelled (CTR at 44, 51-58). In particular, he discusses in detail the circumstances that surrounded the filling in of the TRV application form and the reasons why the US removal order was not, on purpose, mentioned in the response.

[18] It is beyond me that the Applicant and her husband would have gone through the process of submitting a letter to the "Canada Visa Application Center" at the Canadian Embassy in Bogota offering an explanation for the answer given to the question relating to whether the Applicant was expelled from or denied entry to a country other than Canada if that issue had not specifically been raised as a misrepresentation concern during the telephone interview held a week prior. I believe this is a case where greater weight should be given to the GCMS notes than to the Applicant's recollection of events. As is well settled, GCMS notes often carry more weight than an applicant's testimony as they are contemporary to the events whereas an applicant's affidavit is often made several months after the events (*Singh v Canada (Citizenship and Immigration)*, 2016 FC 904 at para 38; *Oei v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 466 at para 42; *Sidhu v Canada (Citizenship and Immigration)*, 2017 FC 1139 at para 13).

[19] Given that the Respondent determined that procedural fairness required further follow-up with the Applicant, that the Applicant received a telephone call informing her of the Officer's concerns relating to whether she had been denied entry to a country other than Canada and of the consequences of misrepresentation, that the Applicant and her husband were permitted to submit further documents at the Canadian Embassy in Bogota on March 28, 2017, that these documents contained an explanation for the Applicant's failure to disclose the cancellation of her US visa and that these documents, as evidenced by the GCMS notes, were considered by the Officer, I am satisfied that the duty of procedural fairness owed to the Applicant in the circumstances of the present case was met.

B. *Reasonableness*

[20] Section 16(1) of the Act requires visa applicants to answer all questions truthfully and produce all relevant documents and evidence reasonably required when making an application under the Act. The purpose of the misrepresentation provisions in the Act is "to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry into Canada" (*Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 at para 36; *Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at paras 26-29; *Wang v Canada (Citizenship and Immigration)*, 2005 FC 1059 at paras 57-58, affirmed in 2006 FCA 345 [*Wang*]).

[21] Section 40 of the Act sets out the legislative framework for misrepresentation applicable to the Applicant:

Misrepresentation	**Fausses déclarations**
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;
[…]	[…]

Application	**Application**
(2) The following provisions govern subsection (1):	(2) Les dispositions suivantes s'appliquent au paragraphe (1):
(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and	a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;
Inadmissible	**Interdiction de territoire**
(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).	(3) L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.

[22] The Officer found the Applicant inadmissible for misrepresentation because she failed to mention that the US visa in the copy of her passport submitted in support of her TRV application had been cancelled. The Applicant claims that she did not intend to mislead, had misunderstood the question when filling in the form, was unaware that her US visa had been cancelled and only became aware of that fact when, after her telephone interview, she looked over the papers she had been given by the US immigration authorities when she was refused entry in the US in September 2016. She argues that the Officer's decision was unreasonable because it failed to consider that she had made an innocent mistake.

[23] The Respondent contends that the Officer had reasonable grounds to believe that the Applicant had misled Canadian authorities by not disclosing that her US visa had been cancelled and is therefore inadmissible pursuant to paragraph 40(1)(a) of the Act. It submits that paragraph 40(1)(a) applies even in cases where the misrepresentation is made by another party, where there is no intention to mislead Canadian officials, and where the misrepresentation is corrected prior to the decision and that the Applicant's situation does not fall into the narrow exception of innocent misrepresentation.

[24] It is undebatable that the Applicant did not mention in her TRV application materials that her US visa had been cancelled and that she could not re-enter the US for five years. However, was it reasonable for the Officer to determine that the Applicant was inadmissible as a result? I find that it was.

[25] In *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 [*Kazzi*], Justice Denis Gascon summarized as follows the general principles arising out of this Court's jurisprudence on paragraph 40(1)(a) of the Act:

> [38] […] the general principles arising out of this Court's jurisprudence on paragraph 40(1)(a) of the IRPA have been well summarized by Madame Justice Tremblay-Lamer in *Sayedi* at paras 23-27, by Madame Justice Strickland in *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhun*] at para 28 and by Mr. Justice Gleeson in *Brar* at paras 11-12. The key elements flowing from those decisions and that are of particular relevance in the context of this application can be synthesized as follows: (1) the provision should receive a broad interpretation in order to promote its underlying purpose; (2) its objective is to deter misrepresentation and maintain the integrity of the Canadian immigration process; (3) any exception to this general rule is narrow and applies only to truly extraordinary circumstances; (4) an applicant has the onus and a continuing duty

> of candour to provide complete, accurate, honest and truthful information when applying for entry into Canada; (5) regard must be had for the wording of the provision and its underlying purpose in determining whether a misrepresentation is material; (6) a misrepresentation is material if it is important enough to affect the immigration process; (7) a misrepresentation need not be decisive or determinative to be material; (8) an applicant may not take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application; (9) the materiality analysis is not limited to a particular point in time in the processing of the application; and (10) the assessment of whether a misrepresentation could induce an error in the administration of the IRPA is to be made at the time the false statement was made.
>
> [39] I emphasize that it does not matter that the authorities may have the ability to catch the misrepresentation or not. What matters is whether the misrepresentation induced or could have induced an error in the administration of the IRPA. As stated many times in the jurisprudence, an applicant may not take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application (*Goburdhun* at para 28; *Sayedi* at para 27; *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 [*Khan*] at paras 25 and 27). In other words, paragraph 40(1)(a) of the IRPA cannot be interpreted so as to reward those who managed not to get caught until the assessment of their application and to give an absolution for a false statement because it ultimately did not work.

[26] In addition to the principles in *Kazzi*, section 40 of the Act requires no intent to mislead on the part of the visa applicant (*Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15 [*Baro*]) and such applicant can reasonably be determined to be inadmissible even though the misrepresentation was made by another party, such as, for example, the applicant's spouse as is the case here (*Wang* at paras 50-53, 55, 58).

[27] There is, however, an exception to the application of section 40(1) of the Act, the innocent mistake (*Baro* at para 15; *Punia* at para 67), an exception that applies in limited

circumstances where "knowledge of the misrepresentation was beyond the applicant's control" (*Suri v Canada (Citizenship and Immigration)*, 2016 FC 589 at para 20 [*Suri*]; see also *Ghasemzadeh* at para 13). In *Baro*, where the applicant had been previously married but his first wife had disappeared and been declared dead, the Court found that failing to disclose a previous marriage on a marriage check was not an innocent misrepresentation.

[28] A good example of the innocent mistake exception can be found in *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126, where DNA testing indicated that the applicant's husband was not her son's biological father, despite being listed as such on the birth certificate. The Court found that the applicant and her husband both believed her husband was the father and he had always acted as such; their lack of knowledge of the material fact meant that they were not found inadmissible for misrepresentation. Less clear on this issue is *Punia*, where the Court held that the inadmissibility finding for misrepresentation was unreasonable because it was unchallenged that the applicants honestly believed that they were not withholding information and the officer failed to consider whether the applicants fell within the exception to the duty of candour (*Punia* at paras 68 and 70).

[29] Regardless of whether the Applicant misunderstood the question when filling in her TRV application form or intended or not to misrepresent the status of her US visa, it is simply not plausible that she had no idea that her visa had been cancelled. The Applicant's situation is analogous with that of the applicant in *Baro* because the form specifically requested the information, which was in the Applicant's possession, and she did not provide it. The question

clearly indicates “Canada or any other country” and the onus was on the Applicant to provide accurate information, as required by section 16 of the Act.

[30] The innocent mistake exception to section 40(1) of the Act applies when the knowledge of the misrepresentation is beyond the applicant’s control (*Suri* at para 20). This is not the case here. The Applicant knew that there were issues with her last attempt to visit the US as she was detained and interviewed, an experience she described as traumatizing (Applicant’s Memorandum at para 12). She also knew that she was given papers to sign before she was permitted to leave the US. These papers were in her possession and, even if her English is, as she claims, not at a high enough level to understand the contents, she made no attempt to have her husband look at the papers or to have them translated by someone else. The Applicant has a high level of education and has previously applied for visas for Canada and other countries. She can be expected to have some understanding of how the process works, including the importance of providing accurate and complete answers. In short, the Applicant should have known that her US visa had been cancelled; willful ignorance, which is not a valid excuse, is the only way she could have been unaware.

[31] Furthermore, according the Applicant’s husband letter of March 28, 2017, the couple discussed the US September 2016 events when they filled in the TRV application form. Apparently, the Applicant did not want to read the documents she was handed by the US immigration authorities or even share them with her husband, “because of the sour memories.” One wonders, if these events were as traumatizing as the Applicant claims, why she did not share the whole story, including the documents she signed, with her husband at the earliest

opportunity. I am at a loss as to why she did not, given the impact these events had on her relationship with her husband and the couple's ability to meet occasionally in the US pending the outcome of the Applicant's sponsored permanent residency application.

[32] Given that the Applicant submitted a copy of her passport containing a valid US visa, but failed to mention that it had been cancelled, and given that she was present when it was cancelled and signed documents to that effect, which were in her possession, it was reasonably open to the Officer, in my view, to conclude that the misrepresented facts were not due to a simple error and that the Applicant was therefore inadmissible to Canada for misrepresentations. Based on the evidence before the Officer, I fail to see how the Officer could have possibly reached a different conclusion. I am satisfied, therefore, that the Officer's decision was reasonable as it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

[33] Neither party advance that this case raises an issue of general importance for appeal. I agree.

JUDGMENT IN IMM-1991-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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