Federal Court  Cour fédérale

Date: 20190507

Docket: IMM-3175-18

Citation: 2019 FC 584

Ottawa, Ontario, May 7, 2019

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ABDULLAH HASSAN A ALKHALDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant was denied a Temporary Resident Visa (TRV) by an unnamed officer at the Canadian Consulate in New York. The Officer also found the Applicant inadmissible to Canada for five years for misrepresentation for not declaring a previous visa refusal in response to a procedural fairness letter. The Applicant seeks judicial review of the Officer's decision.

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] Mr. Alkhaldi is a citizen of Saudi Arabia. He is the Chief Operations Officer at a Canadian firm that he co-founded in 2015. He is married and has four children. He first came to Canada on a TRV with his family in March 2014. In November 2017, the Applicant applied to renew the TRVs on behalf of himself and his family.

[4] In December 2017, the Officer sent the Applicant a procedural fairness letter indicating that he had been untruthful when he declared in his application that he had never been refused a visa to any country. The letter asked that the Applicant provide information related to this allegation and advised that he could face a five-year ban for misrepresentation. In his response, the Applicant first explained that he had forgotten to declare that he mistakenly crossed into the United States at the Niagara border after taking a wrong turn in 2016. The Applicant indicated that he was uncertain whether this constituted a "refusal." Shortly thereafter, he sent a second response stating that he had just remembered he was refused a US visa in 2015 due to "insufficient ties in Canada."

[5] It appears from the record that the Applicant's wife and children were granted TRVs in June 2018.

III. **Decision under review**

[6] On February 14, 2018, the Officer rejected the Applicant's TRV application due to misrepresentation under *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] paragraph 40(1)(a). Associated with that finding was a five-year period of inadmissibility under paragraph 40(2)(a).

[7] In the Officer's notes recorded in the Global Case Management System dated February 14, 2018, the Officer wrote that in addition to what the Applicant recalled in his responses to the procedural fairness letter, he was also refused a US visa while in Canada in 2017 and in Saudi Arabia in 2013. As the Applicant had not addressed these in response to the procedural fairness letter, the Officer was not convinced the Applicant was being truthful.

IV. **Issues**

[8] As a preliminary matter, I would note that the Applicant submitted an affidavit for the purpose of this judicial review that contains information that was not before the Officer when he made his decision. I accept that the affidavit is admissible under the test in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19–20. It provides context regarding the Applicant's knowledge (or lack thereof) of his prior US visa refusals which is therefore relevant to his arguments that his misrepresentation was innocent and that he was denied procedural fairness.

[9] Having considered the parties' submissions, the issues which I consider need to be addressed are the following:

A. Did the Officer breach procedural fairness by failing to mention specific concerns in the procedural fairness letter?

B. Does the Applicant's omission fall under the innocent error exception?

C. Was the Officer's decision reasonable?

V. **Relevant Legislation**

Obligation — answer truthfully	**Obligation du demandeur**
16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	**16 (1)** L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.
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;	**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;

VI. **Analysis**

A. *Standard of review*

[10] The jurisprudence has satisfactorily determined that an officer's assessment of an application for temporary visas, including misrepresentation findings under *IRPA* paragraph 40(1)(a), involves questions of mixed fact and law and is reviewable under the standard of reasonableness: *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 at paras 9–10.

[11] The standard of review is correctness for issues of procedural fairness, including for issues regarding whether the Applicant was denied an opportunity to respond to *IRPA* paragraph 40(1) concerns: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

B. *Did the Officer breach procedural fairness?*

[12] The Applicant submits that the procedural fairness letter was deficient in that it failed to refer to the two US visa refusals, particularly the one in 2013. He contends that he was unaware of the 2013 refusal until he received the Officer's decision, as he had not been informed of it by the US authorities. Lacking such information, the Applicant submits, he was unable to know the case to be met or to respond to the Officer's allegation of his untruthfulness: *Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 at para 62 [*Punia*]; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at paras 25–28. He was left to engage in a "guessing game" and to determine on his own which aspect of the application was inaccurate.

[13] In light of the serious consequences of a misrepresentation finding, the Applicant contends, officers should employ a high standard of procedural fairness: *Ni v Canada (Citizenship and Immigration)*, 2010 FC 162 at para 18. They must ask appropriate questions where there are concerns regarding an applicant's credibility and the accuracy of information provided in the application: *Muthui v Canada (Citizenship and Immigration)*, 2014 FC 105 at para 47 [*Muthui*]. A procedural fairness letter is only fair, the Applicant argues, when an applicant is informed of the officer's concerns and not left to figure out by himself or herself what aspect of the application was inaccurate: *Punia* at para 62.

[14] As stated by Justice LeBlanc in *Tuiran v Canada (Citizenship and Immigration)*, 2018 FC 324 at paragraph 14, 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. This is so, Justice LeBlanc explained, because the person affected – a non-citizen – has no right to enter or remain in Canada and faces neither detention nor removal from Canada. Also, decisions dismissing TRV applications filed from abroad by foreign nationals are highly discretionary and the consequences for failed applicants, although they may be serious, do not normally engage their rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See also *Sepehri v Canada (Citizenship and Immigration)*, 2007 FC 1217 at para 3; *Li v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 87 at para 20.

[15] The Officer must put the applicant on notice of their concerns and give them an opportunity to respond: *Punia* at para 72. The duty of fairness requires an officer to ask appropriate questions when there are concerns about the credibility, accuracy, or genuine nature of the information provided by the applicant that otherwise would be sufficient, if believed: *Muthui* at para 47.

[16] In this case, the Officer had specifically advised the Applicant that he may not have been truthful about his past visas and permits. An immigration applicant exercising normal due diligence should have sought to clarify the status of an application he had made some years ago. Alternatively, the Applicant could have simply mentioned his other application. The Applicant had a duty to answer truthfully and cannot rely on the fact that he did not know of the *decision* in his 2012 visa application to explain why he never disclosed the fact that he had made it upon receipt of the Officer's concerns. This is not a case, such as *Punia*, where it was evident from the

record that the Applicant was confused about the information required and clearly failed to understand that a prior application for permanent residence was a "visa application."

[17] As for whether the Officer's reasons for decision were sufficient, a visa officer has a minimal duty to give reasons for a denied TRV application, as long as the reviewing court can understand why the officer made the decision: *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 21; *Singh v Canada (Citizenship and Immigration)*, 2009 FC 621 at para 9. In this case, the reasons, while succinct, are adequate to explain why the application was denied.

C. *Does the Applicant's omission fall under the innocent error exception?*

[18] It is trite law that an applicant for permanent residence has a duty of candour to disclose all material facts during the application process and after a visa is issued: *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15. An exception arises where applicants can show that they honestly and reasonably believed that they were not withholding material information: *Medel v Canada (Employment and Immigration)*, [1990] 2 FC 345 at 349–350, [1990] FCJ No 318 (CA) (*Medel*).

[19] The test for the innocent misrepresentation exception is whether an applicant can show that they honestly and reasonably believed that they were not withholding material information. This involves (i) a subjective test, where the decision-maker must ask whether the "person honestly believed that he is not making a misrepresentation"; and (ii) an objective test, where the decision-maker must ask whether "it was reasonable on the facts that the person believed that he

was not making a misrepresentation": *Canada (Citizenship and Immigration) v Robinson*, 2018 FC 159 at para 6.

[20] The Applicant submits that he falls under the innocent error exception. His situation, he argues, is similar to the applicants in *Punia* at para 6 and to those described in *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 [*Berlin*]. As he only learned of the 2013 refusal when he received reasons in this judicial review application, he could not have declared the refusal on his forms or in his response to the procedural fairness letter. Similar to *Medel*, the Applicant contends, he honestly and reasonably believed that he was not withholding information regarding his US visa refusal in 2013.

[21] In *Punia,* there were a number of extenuating circumstances lending credence to the Applicant's contention that she had made an innocent mistake. *Medel* involved an unusual set of facts. The applicant, who was initially sponsored by her husband, "reasonably believed" that she was not withholding information relevant to her application. In fact, she was unaware that her husband had withdrawn the sponsorship application after she returned to her country of origin. In *Berlin,* the applicant had failed to disclose the existence of two adopted children from a previous marriage because he did not consider them to be dependents. The children had been disclosed in earlier immigration documents.

[22] Madam Justice Tremblay-Lamer considered the jurisprudence in *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428, and concluded, at paragraph 32, that the exception to the general rule "will only apply for truly exceptional circumstances, where the applicant

honestly and reasonably believed they were not misrepresenting a material fact" (emphasis in the original).

[23] It was clearly within the Applicant's control to know or find out whether his 2012 visa had been refused. He says now that he completely forgot to mention this application but is certain about the dates when he did follow up on it and the information he was given in 2013 and 2014. The Applicant is a sophisticated businessman and had experience with immigration procedures in Canada and elsewhere. He could have followed up on the status of the 2012 visa application again, or mentioned in his TRV application that he was unsure of its status. It is difficult to accept that in 2017 and 2018 he could have believed that the application was still in progress.

[24] In the circumstances, I do not see the Applicant's explanation as falling within the innocent exception to the duty of candour.

D. *Was the Officer's decision reasonable?*

[25] The omission to disclose the refused US visas was material in that it would not allow the Officer to investigate facts relevant to the application: *Mohseni v Canada (Citizenship and Immigration)*, 2018 FC 795 at paras 39–41, 46–47.

[26] The Applicant submits that to make a misrepresentation finding when the applicant had no reason to believe he was misrepresenting a material fact would be unreasonable: *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126 at paras 9–15. Therefore, he argues, the

decision was unreasonable as the Officer failed to consider that the innocent error exception would apply to the Applicant and that he lacked the intent to mislead.

[27] I agree with the Respondent that *IRPA* paragraph 40(1)(a) is intended to ensure that applicants provide complete, honest and truthful information in every manner when applying to enter Canada: *Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 at paras 33, 36; *Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at paras 25, 29; *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 at paras 15–16.

[28] The Applicant's obligation to provide truthful answers is also stated explicitly in *IRPA* subsection 16(1): "[a] person who makes an application must answer truthfully all questions put to them for the purpose of the examination…".

[29] It is irrelevant whether the 2013 visa refusal was due to "administrative purposes." Given the broad interpretation of *IRPA* section 40, to promote its purposes and objectives of deterring misrepresentation and maintaining the integrity of the immigration system, applicants must make full disclosure. The scheme of the Act is that the question of what is relevant in the application is left to the officer to determine.

[30] While the consequences may be harsh to the Applicant, the decision was within the range of acceptable outcomes defensible on the facts and the law and the reasons provided are intelligible, transparent and justified.

[31] No questions have been proposed for certification.

JUDGMENT IN IMM-3175-18

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

No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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