Federal Court Cour fédérale

Date: 20200129

Docket: IMM-1542-19

Citation: 2020 FC 159

Ottawa, Ontario, January 29, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

ZAKARI ABUBAKAR KYARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The issue in this case is whether an applicant should have been afforded an oral hearing prior to a visa officer making a negative credibility finding in the context of an application for rehabilitation.

[2] The Applicant challenges the decision of a visa officer refusing his application for rehabilitation [the 2013 Rehabilitation Application] in respect of a serious conviction entered against him while he resided in the United States [U.S.] over 19 years ago. The Applicant argues that the decision is unfair because he was not offered an opportunity to respond to the visa officer's credibility concerns. He also argues that the decision is unreasonable because the visa officer failed to consider evidence of rehabilitation and evidence relating to the circumstances under which the offence was committed.

[3] The Respondent submits that the visa officer considered all of the evidence, and did not commit a breach of procedural justice.

[4] For the reasons that follow, I grant the present application for judicial review.

II. Facts

[5] The Applicant is a citizen of Nigeria. In December 1999, the Applicant travelled to the U.S. to pursue his undergraduate studies and live with his brothers in Florida. At first, the Applicant's parents paid for their children's tuition and living expenses. However, later, their parents stopped supporting their sons because of an economic downturn in Nigeria. The Applicant and his brothers were in a difficult position as they were left to support themselves financially.

[6] In 2001, while in the U.S., the Applicant was arrested and later convicted of credit card fraud and impersonation for attempting to purchase over US$20,000 in diamonds using customer

credit card receipts he stole from his brother's garage. It would seem that one of the Applicant's brothers started a home-based online business selling electronics as a way to make ends meet. The Applicant found some discarded documents that contained credit card numbers, and used these credit card numbers to purchase jewellery with the intent of reselling the jewellery for profit. The Applicant was 26 years old at the time of his arrest.

[7] The Applicant pleaded guilty and received a sentence of one year and one day of custody, and two years of supervised release. The Applicant also received a fine of US$100.

[8] On March 31, 2003, before the completion of his supervised release, the Applicant was removed from the U.S. and returned to Nigeria. The Applicant has lived in Nigeria ever since his departure from the U.S.

[9] Back in Nigeria, the Applicant lived an incident-free life. The Applicant graduated *summa cum laude* with a degree in accounting. The Applicant then married his wife in 2007.

[10] The Applicant completed one year with the Nigerian National Youth Service Corps and volunteered for a non-governmental organization, a foundation established by his late mother. The Applicant also became an ordained minister of the Gospel at his local church in Nigeria. Since 2005, the Applicant has worked as a financial analyst for three companies and incorporated his own real estate holding company.

[11] In 2009, the Applicant and his wife decided to travel to Canada to visit family and evaluate possible investment opportunities. They both successfully applied for temporary resident visas [the 2009 Visa Application].

[12] However, in the 2009 Visa Application, the Applicant did not declare his 2001 criminal conviction in the U.S. Upon arrival in Canada, the border agent noticed that the criminal conviction in the U.S. was not disclosed on the 2009 Visa Application. The Applicant and his wife were allowed to withdraw their 2009 Visa Application and voluntarily depart and return to Nigeria. Since then, the Applicant's wife has been declaring her husband's inadmissibility on her visa applications whenever she travels to Canada.

[13] In 2011, the Applicant's wife applied for and received a temporary visa to visit family in Canada. While in Canada, she gave birth to the couple's twins. It would later be determined by the visa officer in respect of her husband's 2013 Rehabilitation Application that she "used her temporary resident visa to give birth in Canada."

[14] In April 2013, the Applicant submitted the 2013 Rehabilitation Application. It contained lengthy submissions on the Applicant's factual circumstances and eligibility for rehabilitation.

[15] In the 2013 Rehabilitation Application, the Applicant included: (i) written submissions from counsel indicating the equivalent offence in Canada (identity fraud, section 403 of the Canadian *Criminal Code*, RSC 1985, c C-46), the underlying circumstances of his arrest and his rehabilitation efforts; (ii) a personal narrative that highlighted changes in his personal,

professional and spiritual life; (iii) letters of support from his family, employers, friends and members of his community; (iv) documents relating to the offence, the conviction and his removal from the U.S.; (v) evidence of his investment properties and bank accounts; (vi) copies of his certificates and diploma in accounting; (vii) documents of incorporation and other documents related to his holding company; and (viii) a Nigerian police character certificate.

[16] Although the submissions do mention the Applicant's "attempted visit in 2009," they do not, however, elaborate on what transpired during that visit, nor does the Applicant explain why he did not disclose his criminal conviction in the U.S. on his 2009 Visa Application. These omissions would prove costly.

[17] The Applicant was twice asked to provide additional documentation following the 2013 Rehabilitation Application. In November 2013, the Applicant submitted an Additional Family Information form (IMM 5406) in response to an Immigration, Refugees and Citizenship Canada request.

[18] Three and a half years later, in February 2017, the Applicant submitted an updated Application for Criminal Rehabilitation form (IMM 1444), an updated Additional Family Information form (IMM 5406), an updated original police certificate from Nigeria and any other country where he had lived for at least six consecutive months since 2013, and an additional $800 rehabilitation fee.

III. Decision Under Review

[19] The Applicant's 2013 Rehabilitation Application was refused on January 16, 2019, some six years after the initial application. The letter indicates that the Applicant is inadmissible to Canada pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[20] The Applicant was not invited to an interview or given a procedural fairness letter so that he could address the visa officer's concerns. The Global Case Management System's [GCMS] notes indicate that the visa officers placed considerable weight on the Applicant's failure to disclose his criminal conviction in the U.S. in his 2009 Visa Application and on the nature of the criminal conviction. However, the GCMS notes do not specify an intentional misrepresentation finding (pursuant to section 40 of the IRPA) with respect to the 2009 Visa Application.

[21] As part of the present application for judicial review, the Applicant attributes the omission to disclose his criminal history to a misunderstanding. According to the Applicant, a lawyer from the U.S. advised him that his criminal records had been expunged and, therefore, he did not need to declare the conviction in his visa application. There is no supporting or corroborating evidence on this issue.

IV. Issues

[22] This case involves two issues:

(1) Did the visa officer commit a breach of procedural fairness?

(2) Did the visa officer render an unreasonable decision?

V. Standard of Review

[23] The first issue involves an alleged breach of procedural fairness and is reviewable on the correctness standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 at paras 37-56; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43; *Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 at para 19). The choice of this standard for procedural fairness questions is unaffected by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (see *Ntamag v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 40 at para 7; *Trboljevac v Canada (Citizenship and Immigration)*, 2020 FC 26 at para 29; *Adnani v Canada (Citizenship and Immigration)*, 2020 FC 21 at para 12).

[24] The second issue involves an assessment of a determination made within the context of a rehabilitation application and is reviewable on the standard of reasonableness (*Vavilov* at para 23). A reasonable decision is one that is based on an internally coherent reasoning and justified in light of the legal and factual constraints on administrative decision-making (*Vavilov* at paras 99-101).

VI. Analysis

A. *Did the visa officer commit a breach of procedural fairness?*

[25] The Applicant submits that he should have been given an opportunity to respond to the visa officer's concerns about the credibility, accuracy, and genuineness of the provided evidence as it relates to two determinations.

[26] First, the visa officer determined that the Applicant was not forthcoming because he failed to disclose his criminal history in the 2009 Visa Application. Second, the visa officer found that the Applicant's wife lacked credibility in her reasons for visiting Canada, writing that it "[s]eems that the larger purpose of that visit was to have children born in Canada. Not credible that she would not have known about her pregnancy when she travelled."

[27] According to the Applicant, these determinations were made without an opportunity to respond and, therefore, breached procedural fairness (citing *Kok v Canada (Minister of Citizenship and Immigration)*, 2005 FC 77, and *Yaqoob v Canada (Citizenship and Immigration)*, 2015 FC 1370). If he had been given an opportunity to respond, the Applicant argues that he could have explained his reasons for not disclosing the criminal conviction in the 2009 Visa Application.

(1) Failure to disclose the criminal conviction in the 2009 Visa Application

[28] The Applicant submits that he was never provided an opportunity to explain that he never intentionally failed to disclose his criminal conviction in the 2009 Visa Application. The Applicant was not invited to an interview or given a procedural fairness letter so that he could address the visa officer's concerns. The Applicant also notes that multiple GCMS entries suggest that an interview was supposed to be held.

[29] The Respondent submits that the Applicant had the opportunity in his submissions in support of the 2013 Rehabilitation Application to be forthcoming about his omission and mention his criminal conviction in his 2009 Visa Application, but failed to do so.

[30] The Respondent is of the opinion that the Applicant's repeated failure to do so is a simple case of "doubling down" on a misrepresentation, citing *Tahhan v Canada (Citizenship and Immigration)*, 2018 FC 1279 at paras 22-23 [*Tahhan*]. The Respondent argues that this type of misrepresentation is especially relevant in this case because fraud and dishonesty underlie the very offences that gave rise to the rehabilitation application (i.e., fraud and impersonation).

[31] I disagree with the Respondent. This is not a situation of "doubling down". Rather, this seems to me to be a situation where the Applicant and the visa officer were working at cross-purposes: the Applicant was focused on his criminal conduct in the U.S., while the visa officer was focused on the Applicant's state of mind in not disclosing such criminal conduct in his 2009 Visa Application.

[32] The failed attempt to enter Canada in 2009 is mentioned twice in the material filed in support of the Applicant's 2013 Rehabilitation Application.

[33] First, a letter from the Applicant's counsel mentions that the Applicant and his wife "voluntarily [withdrew] their application to enter Canada on account of [the Applicant's] criminal inadmissibility." The Applicant does not elaborate on the reasons for the refused travel visa application, or provide an explanation for why he failed to disclose the criminal conviction in 2009.

[34] Second, in his written submissions, the Applicant mentions the "attempted visit in 2009," without addressing the circumstances relating to that visit to Canada or, more importantly, the reason why the Applicant failed to disclose his conviction in the U.S. at that time.

[35] Clearly, any misrepresentation in the 2009 Visa Application would have been justification for denial of a travel visa at that time, and whether or not the Applicant "intended" to misrepresent his criminal background would not normally have been seen as relevant.

[36] However, the "intent" to possibly misrepresent his criminal background at the time of his 2009 Visa Application is relevant in the context of the 2013 Rehabilitation Application.

[37] As was stated by Mr. Justice Mosley in *Lau v Canada (Citizenship and Immigration)*, 2016 FC 1184 [*Lau*], "the most important factor in the context of a rehabilitation application" is "whether or not the foreign national will re-offend" (*Lau* at para 24; see also *Thamber v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 177 at paras 14-18).

[38] The Applicant's failure to disclose his criminal conviction in 2009 is a relevant consideration when determining rehabilitation, especially when the original offence involved dishonesty. It is clear that his failure to disclose would come up as an issue in his criminal rehabilitation application because the failure to adhere to immigration regulations is a relevant consideration when assessing the risk of recidivism within the context of a rehabilitation application (*Tejada v Canada (Citizenship and Immigration)*, 2017 FC 933 at para 20 [*Tejada*]; *Yu v Canada (Citizenship and Immigration)*, 2018 FC 1280 at paras 23-24).

[39] In fact, the Applicant's "intent" in the 2009 Visa Application was front and centre in the visa officer's mind during his/her review of the 2013 Rehabilitation Application.

[40] The visa officer's determination of inadmissibility stems from the Applicant's failure to disclose his criminal conviction in the 2009 Visa Application:

> Applicant is inadmissible to Canada for serious criminality. The crime he committed is considered serious both in the country it was committed (USA) and Canada. He was sentenced to a term in prison which is also very serious. Applicant applied for a Canadian visa and was issued having failed to disclose his criminality. His criminal history only came to light when he appeared at a Port of Entry and a NCIC search was completed. <u>Clearly the applicant was not intending to be truthful or divulge his criminal history. This fact negates his stated responsibility for his actions and remorse</u>.
>
> [Emphasis added.]

[41] The 2013 Rehabilitation Application did not address the issue of the 2009 Visa Application in any substantial way, but rather only focused on the U.S. conviction, the reasons for his criminal actions at the time, and the efforts made since then to rehabilitate himself.

[42] In his/her decision, the visa officer only made a passing remark to having considered, "all of the facts before [him/her], including the positive factors outline[d] in the officer notes." The focus of the decision seems, for the most part, to have been the failure on the part of the Applicant to disclose his criminal conviction during his 2009 Visa Application.

[43] In ascribing *mala fides* to the Applicant and finding that he "clearly" was not intending to be truthful in 2009, the visa officer was making a veiled credibility finding on an issue that was not the focus of the Applicant's submissions in his 2013 Rehabilitation Application.

[44] I agree with the Respondent that the application for rehabilitation process is at the lower end of detail and formality, and that the duty of fairness in the visa application process is relaxed. However, a visa officer is nonetheless required to provide an opportunity for an applicant to address his or her concerns in certain circumstances (*Egheoma v Canada (Citizenship and Immigration)*, 2016 FC 1164 at paras 12, 14; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at paras 25-28; *Khwaja v Canada (Citizenship and Immigration)*, 2006 FC 522 at paras 16-17; *Hafiz v Canada (Citizenship and Immigration)*, 2018 FC 1273 at para 24).

[45] In *Ekpenyong v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1245, I summarized some of the situations in which such a duty arises:

> [37] Additional communication with a visa applicant may be appropriate in certain circumstances, say where the visa officer harbours doubts as to the credibility of the evidence provided or the sincerity of testimonial evidence, or if the officer relies on extrinsic evidence that is outside the visa officer's general expertise or relies on overly broad generalizations or stereotypes (see *Salman v Canada (Citizenship and Immigration)*, 2007 FC 877 at para 12; *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501 at para 24).
>
> [38] The *Wang* case is one such situation in which a telephone call may well have been appropriate. In that case, this Court found that the visa officer should have provided the Applicant with an opportunity to respond to concerns about the "sincerity of [the Applicant's] cousin's offer of support, and [the Applicant's] *bona fides* as a temporary visitor to Canada" (*Wang* at para 13).
>
> [39] A visa officer should also inform the Applicant of his or her concerns when he or she obtains extrinsic evidence that may be used to support the final decision (*Ali v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7681 (FC) at para 20).
>
> [40] This Court has also held that visa officers may not justify their decisions on cultural or regional generalizations without allowing the applicant to respond: *Yuan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1356 at paragraph 12; *Hernandez*

> *Bonilla v Canada (Minister of Citizenship and Immigration)*, 2007 FC 20 at paragraphs 25-27.
>
> [41] With those exceptions, this Court has consistently rejected the argument that an applicant has the right to clarify his or her application or respond to the merits of the visa officer's decision: *Ling v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1198 at paragraph 16; *Li*; *Wen v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1262.

[46] It seems to me that this is not a situation where the Applicant is providing evidence and the visa officer doubts its credibility. In fact, no evidence of the state of mind of the Applicant was provided as the Applicant failed to explain the misrepresentation in the 2009 Visa Application. Nor is this a situation where the Applicant tried to avoid addressing the 2009 Visa Application in the hopes it would be missed by the visa officer. In fact, the Applicant specifically made mention of his attempted visit to Canada in 2009.

[47] This is, however, a situation where the visa officer questioned the sincerity of the Applicant's evidence on the basis of a failure to address the reason for the misrepresentation in 2009 in his submissions in support of the 2013 Rehabilitation Application.

[48] The case of *Tejada* is distinguishable. In that case, the issue was that the applicant had in the past continuously failed to disclose his criminal record in his applications for temporary visas to Canada as well as in his application for permanent residence. There was never any question as to the intent of the applicant to misrepresent his criminal background to immigration authorities. That is not the case here.

[49] The Respondent argues that the Applicant had an opportunity in his submissions in 2013 to come clean and address head-on the reason why he failed to disclose his U.S. conviction back in 2009, but failed to do so.

[50] I disagree. As I stated earlier, the focus of the 2013 Rehabilitation Application was the U.S. conviction. Although evidence of past disrespect for Canada's immigration laws is relevant in this context, it seems to me that the situation called for procedural fairness and before the visa officer could ascribe "intent" to the Applicant's omission in 2009, the visa officer should have given the Applicant an opportunity to address that issue.

[51] To paraphrase Mr. Justice Diner in *Tahhan*, the visa officer in this case certainly had the discretion to find the Applicant not yet rehabilitated, however, as a minimal duty, the officer had to apply the necessary legal considerations and owed the Applicant an opportunity to address any concerns the visa officer had as regards the Applicant's alleged intentions to deceive back in 2009, in particular as those concerns related to the primary issue of whether the Applicant will reoffend going forward (*Tahhan* at para 24).

VII. Conclusion

[52] It seems to me that this was a determinative issue in the visa officer's decision. As such, his/her decision cannot withstand judicial review and will have to be set aside (*Vavilov* at para 100). Given my findings, I need not address the remaining issues raised by the Applicant.

JUDGMENT in IMM-1542-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is returned to a different visa officer for redetermination.

2. No question has been submitted for certification.

"Peter G. Pamel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1542-19
STYLE OF CAUSE:	ZAKARI ABUBAKAR KYARI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 11, 2019
JUDGMENT AND REASONS:	PAMEL J.
DATED:	JANUARY 29, 2020

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