Federal Court Cour fédérale

Date: 20210810

Docket: IMM-2613-20

Citation: 2021 FC 828

Fredericton, New Brunswick, August 10, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

GAGANDEEP SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Gagandeep Singh, seeks review of the decision of a Visa Officer (the Officer) on April 27, 2020, that found him inadmissible to Canada for misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act* (*IRPA*). For the reasons that follow, this judicial review is granted.

Background

[2] The Applicant is a citizen of India who applied for a spousal open work permit to unite with his wife in Canada. The Applicant answered "yes" to the question "have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" He disclosed that a previous Canadian work permit application was refused but he failed to disclose a US tourist visa application in 2015.

[3] In a procedural fairness letter of March 9, 2020, the Officer advised the Applicant that he "did not declare visa refusals from other countries or territories" and he was asked to provide copies of documentation and refusal letters.

[4] The Applicant responded on March 11, 2020, stating that he had committed an error by not disclosing the refusal of the US tourist visa he applied for in 2015. However, the Applicant claims that during his interview at the New Delhi Embassy for the tourist visa, the interviewer advised him that his application was being returned.

Decision Under Review

[5] During the review of the application, the Officer noted that the Applicant had immigration history in the USA that was not disclosed. The Officer states:

> …the applicant has responded to the letter but has failed to disabuse me of the concerns presented. In my opinion, on a balance of probabilities, the applicant was not truthful on his application form and failed to disclose that he has derogatory immigration history in the USA. This could have caused an error in the administration of the Act and Regulations as it could have

> satisfied an officer that this applicant met the requirements of the Act with respect to having a genuine temporary purpose for travel to Canada and that he would abide by the conditions of entry to Canada. I am therefore of the opinion that the applicant is inadmissible to Canada under section 40 of the Act.

[6] The Officer denied the application stating:

> - I am not satisfied that you have truthfully answered all questions asked of you.
>
> - You have been found inadmissible to Canada in accordance with paragraph 40(1)(a) of the IRPA 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 the IRPA. In accordance with paragraph A40(2)(a), you will remain inadmissible to Canada for a period of five years from the date of this letter or from the date a previous removal order was enforced.

Issues

[7] There are two issues that arise on this judicial review:

a. Is the Applicant's affidavit admissible?

b. Is the Officer's decision reasonable?

Standard of Review

[8] The Applicant and the Respondent agree that the Officer's decision is reviewable on the reasonableness standard. In applying the reasonableness standard, the Supreme Court in *Canada (Citizenship and Immigration) v Vavilov,* 2019 SCC 66 states that "the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency, and

intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (para 95). It must be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85). A decision will be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision-maker's reasoning on a critical point (*Vavilov* at para 103).

Analysis

A. *Is the Applicant's affidavit admissible?*

[9] The Applicant seeks to tender into evidence an Affidavit dated September 19, 2020. The Respondent objects to the Court considering the Affidavit as it was not before the Officer at the time of the decision in April 2020.

[10] In these circumstances, as this evidence was not before the Officer, I agree that it is not appropriate for the Court to consider the Affidavit. In any event, for the reasons outlined below, it is not necessary for the Court to consider the contents of this Affidavit in determining this judicial review application.

B. *Is the decision reasonable?*

[11] The Applicant argues that the Officer failed to consider or engage with the explanation he provided in response to the procedural fairness letter. Specifically, the Officer failed to consider whether the non-disclosure of the US Visa history by the Applicant is an innocent misrepresentation.

[12] The parties are largely in agreement on the applicable law on innocent misrepresentation which was explained as follows in *Appiah v Canada (Citizenship and Immigration),* 2018 FC 1043 at para 18:

> The innocent misrepresentation exception is narrow and shall only excuse withholding material information in extraordinary circumstances in which the Applicant honestly and reasonable believed he was not misrepresenting a material fact, knowledge of the misrepresentation was beyond the Applicant's control, and the Applicant was unaware of the misrepresentation…Courts have not allowed this exception where the Applicant knew about the information, but contended that he honestly and reasonably did not know it was material to the application; such information is within the Applicant's control and it is the Applicant's duty to accurately complete the application

[13] In his original application, the Applicant answered "yes" to the question: "have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" The fact that he answered "yes" suggests that he did not intend to deceive or avoid disclosing information.

[14] In response to the procedural fairness letter the Applicant states, in part, as follows:

> This is in response to the letter I received on March 09, 2020, regarding your concerns and the possibility of misrepresentation on my current application due to failure in providing details of visa refusal on the application submitted to USA immigration authorities.

[15] The Respondent argues that the Applicant's inconsistent choice of language in his response is indicative of an intention to mislead. The Applicant describes the treatment of his US visa as "rejected", "refused" and "returned". The Respondent argues that the Applicant's

vacillating position on the US visa application indicates that the Applicant was aware of his misrepresentation and therefore the innocent misrepresentation exception does not apply.

[16] In my view, the Applicant's response needs to be considered in the context within which it was provided; namely, responding to a procedural fairness letter. In that context, I do not interpret the Applicant's use of the terms "refused", "rejected" or "returned" as demonstrating that the Applicant had subjective awareness that he misrepresented his history on the application. Rather, it is possible that he used these phrases as an attempt to address the issues noted by the Officer. In his own words, the Applicant says that he was "under the apprehension that the application was only returned and not refused."

[17] In any case, this Court need not determine what the Applicant "honestly and reasonably" believed in relation to his US tourist visa. Nor does the Court need to assess the interpretation or meaning to be attached to the words used by the Applicant in his response to the procedural fairness letter. Rather, the issue is if the Officer reasonably considered the Applicant's response to the procedural fairness letter. On this, the Officer simply finds as follows:

> The applicant has responded to the letter but has failed to disabuse me of the concerns presented. In my opinion, on a balance of probabilities, the applicant was not truthful on his application form and failed to disclose that he has derogatory immigration history in the USA.

[18] The challenge for this Court on review is the Officer's terse treatment of the Applicant's response. On a reasonableness review, it is difficult to assess if or how the Officer considered the Applicant's explanation. While I acknowledge the duty of the Officer to provide reasons is not onerous, an intelligible decision requires the Court to be able to understand why the Officer

was not “disabused” of his concerns. Here, however, it is impossible to discern from the Officer’s words why the Applicant’s response “failed to disclose that he has derogatory immigration history in the USA” when the Applicant provided his explanation of the US Visa application.

[19] This leaves the Court unable to assess if the Officer turned his mind to whether the Applicant honestly and reasonably believed that he had submitted a truthful application. Again, while there is no obligation on the Officer to recite the test or to even acknowledge a test exists, where additional information was requested by the Officer in the procedural fairness letter, the Officer was obligated to assess the responding information. Based upon the decision of the Officer, it is impossible to ascertain if the Applicant’s explanation was assessed in any manner.

[20] In my view, this renders the Officer’s decision unreasonable and this judicial review is therefore granted.

JUDGMENT IN IMM-2613-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision of the Visa Officer is set aside and the matter is remitted for redetermination by a different officer;

2. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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