Federal Court Cour fédérale

Date: 20211022

Docket: IMM-5962-20

Citation: 2021 FC 1124

Ottawa, Ontario, October 22, 2021

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

KAI HOU LIN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Kai Hou Lin (Ms. Lin) brings an application for judicial review pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of the October 8, 2020 decision of a Visa Officer, stationed at the Consulate General of Canada in Hong Kong. The Visa Officer refused Ms. Lin's application for a study permit and declared her inadmissible to enter Canada

for a period of five years on the grounds of misrepresentation, pursuant to para. 40(1)(a) of the *IRPA.*

[2] For the reasons set out below, I dismiss the application for judicial review.

II. Relevant Facts

[3] Ms. Lin is a citizen of Taiwan. On March 6, 2020, she received a letter from Concordia University advising her that she had been accepted into the Master of Arts Educational Studies program.

[4] In and around May 2020, Ms. Lin engaged the services of YANG Jingci ("Yang"), a regulated Canadian Immigration Consultant to assist with the study permit application (the "application"). The Use of A Representative Form signed by Ms. Lin on or about May 24, 2020 reads in part as follows:

> I declare that I have fully and truthfully answered all questions on this form and any Attached Application (if applicable);
>
> I also declare that I have read and understood all the statements on this form, having asked and obtained an explanation for every point that was not clear to me.

[5] On or about June 1, 2020, Yang submitted the application, dated May 27, 2020, to Immigration, Refugees and Citizenship Canada (the "IRCC"). Ms. Lin, through her agent Yang said "no" to the following question: "Have you ever been denied a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" (the "relevant question").

[6] On or about June 2, 2020, the IRCC received Ms. Lin's Application. In the process of reviewing the Application, a Visa Officer noted that Ms. Lin had answered "no" to the relevant question. The response was contrary to information in the possession of IRCC which demonstrated that Ms. Lin had previously been removed from the United States, and denied entry to the United States and its' territory of Guam.

[7] On June 11, 2020, the IRCC sent a procedural fairness letter to Ms. Lin advising her that it had concerns that she had not truthfully answered all questions in her Application, noting her encounters with the US Immigration Authority. The IRCC provided Ms. Lin an opportunity to respond to the concerns raised and to submit additional material if necessary. The relevant excerpt from IRCC's procedural fairness letter reads as follows:

> I have concerns that you do not meet the requirements for a study permit.
>
> Specifically, I am not satisfied that you has (*sic*) met the requirement of A16(1) of the Act. You failed to declare your previous travel histories and your encounters with the US Immigration Authority. There is information available that you might have been removed from the States before.
>
> I would like to give you an opportunity to respond to these concerns. Your response and any relevant documents must be received in our office within 90 days from the date of this letter.

[8] On August 18, 2020, in response to IRCC's procedural fairness letter, Ms. Lin, through her solicitor, admitted to her previous encounters with US Immigration and stated they were accidently omitted by Yang, her immigration consultant. Yang had previously reported this omission as early as July 8, 2020 in the following language:

> For the background question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other

> country or territory?", I had checked "NO" without verifying this with the Applicant, and without letting her review the form before submission. I admit that I made a stupid mistake by not checking with the Applicant, and there was never any intention, whether directly or indirectly, to withhold information from the IRCC.

[9] Ms. Lin admitted that she was removed from the United States on March 29, 2008 for not being in possession of the proper paperwork, and that, as a result, she became inadmissible to the United States for 5 years. Additionally, Ms. Lin admitted that in November 2013, her United States' visa application was denied because she had attempted to visit the United States territory of Guam in November 2011. Ms. Lin expressed regret and apologized for her "innocent omission". The relevant excerpts from Ms. Lin's response read as follows:

> I was removed from the United States on 29 Mar 2008 for non-compliance with [the US *Immigration and Nationality Act*]. I was thus inadmissible to the US for 5 years until Mar 2013 […].
>
> In Nov 2011, I had entered to visit Guam, not realizing that my administrative ban to the US extended to the territory. […]
>
> Unfortunately, the Guam incident caused me to be refused a US visa in Nov 2013 when I applied for one while in Hong Kong.
>
> I deeply regret the failure to disclose the above. My Study Permit application was drafted by my previous representative without verifying the accuracy of the information with me. I have no intention of withholding the above information. Unfortunately, my representative did not have me review the application before she submitted it on my behalf.

III. Decision Under Review

[10] On or about October 8, 2020, a visa officer reviewed Ms. Lin's response to the procedural fairness letter. The Visa Officer considered Ms. Lin's contention that the misrepresentation had been an innocent mistake made by her previous representative. The Visa

Officer rejected that contention. The Visa Officer concluded it was unreasonable for Ms. Lin not to review the Application for accuracy before submitting it. Moreover it was unreasonable that someone who was previously banned for 5 years from the United States would "somehow forget to disclose" it on the Application. Recall that the previous immigration issues included deportation from the United States, a refusal to enter Guam in 2011 and a refusal to enter the United States in 2013. Based on a review of the file, the Visa Officer determined that the misrepresentation was intentional and the information was material since it could have led to an error in the administration of the *IRPA*.

IV. Relevant Provisions

[11] The relevant provisions are ss. 11(1), 16(1), 40(1)(*a*) and 40(2) of the *IRPA* as set out in the Schedule below.

V. Issues

[12] Ms. Lin contends she is the victim of a breach of procedural fairness. The Minister contends the alleged breach of procedural fairness is a new issue, which was not raised in the leave application for judicial review and ought not to be heard. This Court will examine whether the issue of procedural fairness constitutes a "new issue", whether it should allow such an issue to be raised in the present application, and, in the affirmative, whether the Visa Officer did, in fact, breach procedural fairness.

[13] Ms. Lin also contends that the Visa Officer's decision is unreasonable, alleging that there was proof that her failure to disclose her previous encounters with the US Immigration Authority is based on an innocent omission from her representative. This Court will examine whether the innocent misrepresentation exception applies in the present circumstances, and will consequently determine whether the Visa Officer's conclusion that Ms. Lin's misrepresentation was intentional is reasonable.

VI. Analysis

A. *Standard of Review*

[14] Ms. Lin and the Minister agree that the applicable standard of review of the Visa Officer's decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 at para 25).

[15] Procedural fairness issues are subject to a correctness review. The Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

B. *Does the allegation of breach of procedural fairness raise a new issue?*

[16] Ms. Lin contends she was not made aware of concerns about misrepresentation pursuant to para. 40(1)(*a*) of the *IRPA* or their consequences, in the procedural fairness letter. She says that she was not afforded a meaningful opportunity to respond to the Visa Officer's concerns

expressed in the Visa Officer's notes. She argues that a finding of misrepresentation, which not only denies the visa, but also makes her inadmissible to Canada for five years, warrants a higher degree of procedural fairness (*Asanova v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1173 [*Asanova*] at para 30).

[17] Ms. Lin relies on *Ge v Canada (Citizenship and Immigration)*, 2017 FC 594, wherein the Court concluded that if an officer has a concern that an applicant is not being truthful in his or her responses, the officer has an obligation to put this concern to the applicant and provide an opportunity to respond, before denying the application and finding the applicant inadmissible to enter Canada.

[18] The Minister says that the issue of procedural fairness is a new one raised by Ms. Lin in her further memorandum. The Minister contends the new issue could not have been reasonably anticipated since Ms. Lin's notice of application for judicial review, the supporting affidavits and the memorandum at leave are silent on that issue.

[19] In *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22, 315 FTR 1 at para 12 [*Al Mansuri*], this Court sets out a non-exhaustive list of factors relevant to the exercise of discretion about whether to allow issues to be raised for the first time in a party's further memorandum of fact and law:

> A. were all the facts and matters relevant to the new issues (or available with reasonable diligence) at the time the leave application was filed;

B. is there any suggestion of prejudice to the opposing party if the new issue is considered;

C. does the record disclose all of the facts relevant to the new issue;

D. is the new issue related to those in respect of which leave was granted;

E. what is the apparent strength of the new issue; and

F. will allowing the new issue to be raised unduly delay the hearing.

[20] I am satisfied the alleged breach of procedural fairness is a new issue. It was not raised in the leave application, nor was it addressed in the leave submissions. The judge who heard the leave application could only grant leave on the strength of the application before him or her. However, when I consider the *Mansuri* test, I see no reason why I should not exercise my discretion in favour of allowing the issue of procedural fairness to be raised. All of the facts necessary to resolve that issue are found in the Certified Tribunal Record. The issue is one that is regularly argued before this Court in connection with such applications for judicial review. The Minister is, in my view, not prejudiced and has had ample opportunity to respond to the allegations. Finally, allowing the new issue to be raised will not result in any delay in the hearing or disposition of this matter.

C. *Did the Visa Officer breach procedural fairness?*

[21] The Minister contends that the procedural fairness owed to an applicant seeking a study permit is at the lower end of the spectrum, even where issues of misrepresentation arise and a potential order of inadmissibility arises (*Tuiran v Canada (Citizenship and Immigration)*, 2018 FC 324 [*Tuiran*] at paras 14 and 19). For the reasons set out below, I am satisfied that the

requirements of procedural fairness were met in the circumstances, whether one accepts that a higher degree of procedural fairness is owed to the applicant (*Asanova* at para 30) or a lower one (*Tuiran* at para 14).

[22] The procedural fairness letter clearly stated the Visa Officer's concern that Ms. Lin had failed to meet her obligation under s. 16 of the *IRPA*. The Visa Officer specifically stated that the concerns related to Ms. Lin's previous encounters with the United States Immigration Authority. The absence of any reference to para. 40(1)(*a*) of the *IRPA*, regarding the possible consequences of the failure to answer truthfully, did not breach Ms. Lin's right to procedural fairness. The letter set out the Visa Officer's concerns and notified Ms. Lin of the case she had to meet. In addition, Ms. Lin's reply to the procedural fairness letter cites *Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931, [2009] 3 FCR 446 [*Koo*]. In *Koo*, the applicant's permanent resident visa application was refused on the basis that he had misrepresented or withheld material facts within the meaning of para. 40(1)(*a*) of the *IRPA*. Like Ms. Lin, Mr. Koo had retained the services of a consultant to prepare and submit his application. The Visa Officer had concerns that Mr. Koo had not disclosed material facts. Consequently, his application for permanent residence was refused and he was declared inadmissible to Canada for 5 years. Given her response to the procedural fairness letter and her reference to *Koo*, it is clear Ms. Lin knew or ought to have known the consequences of para. 40(1)(*a*) of the *IRPA*. I am satisfied that there was no breach of procedural fairness.

D. *Reasonableness of the Visa Officer's Decision*

[23] Ms. Lin submits that the Visa Officer failed to provide rational reasons for concluding that her “innocent omission” was intentional. According to her, proof of the innocence of the misrepresentation is evidenced by the fact the Application was not signed by her and the fact her immigration consultant admitted submitting the Application without providing her an opportunity to confirm its accuracy.

[24] In *Alkhaldi v Canada (Citizenship and Immigration)*, 2019 FC 584 at para 19, this Court sets out the two part test necessary to establish the innocent misrepresentation exception:

1. The subjective test where the decision-maker asks whether or not the applicant honestly believed he/she was not making a misrepresentation; and
2. The objective test, where the decision-maker asks whether or not it was reasonable on the facts that the applicant believed he/she was not making a misrepresentation.

[25] Although Ms. Lin admitted to the omission and stated that it was unintentional, she provides little explanation as to how the error came about and why she did not review the application. The Visa Officer did not accept that Ms. Lin “just forgot to disclose her travel history” and determined that she was responsible for ensuring that the Application was accurate and correct, even if it was submitted by a representative on her behalf. Moreover, the Visa Officer found that it was not objectively reasonable that Ms. Lin would believe that she was not making a misrepresentation.

[26] The Visa Officer's decision is consistent with the jurisprudence regarding misrepresentation and the innocent misrepresentation exception. This Court has repeatedly stated that an applicant has a duty of candour, and is to provide complete, accurate, honest and truthful information when applying for entry to Canada (*Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 38; *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at para 40). Moreover, this Court has found that where a third party misrepresents a material fact, para 40(1) of the *IRPA* still applies (*Wang v Canada (Citizenship and Immigration)*, 2015 FC 647 at para 25). An applicant is always responsible for the content of their application, and the belief that he or she was not misrepresenting a material fact is not reasonable where they fail to review their application and ensure its completeness and veracity (*Goburdhun v Canada (Citizenship and Immigration*), 2013 FC 971, 439 FTR 210 at para 28; *Haque v Canada (Citizenship and Immigration*), 2011 FC 315 at para 16).

[27] The innocent misrepresentation exception is very narrow and only applies to truly extraordinary circumstances. An applicant must demonstrate that he or she honestly and reasonably believed that they were not misrepresenting a material fact and that knowledge of the misrepresentation was beyond the applicant's control (*Patel v Canada (Citizenship and Immigration)*, 2017 FC 401 at para 64; *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 107 at para 32).

[28] Ms. Lin signed the Use of a Representative Form in which she declared the truthfulness of that set out in the form and any attached application. The application for a study permit was, in this case, the attached application. She, having made a declaration in the Use of a

Representative Form, had a high duty to ensure the accuracy of the attached form. She, having had experience successfully entering the United States, and having been deported from the United States and refused entry twice to that country and its territories, knew or ought to have known the extremely high duty of candour owed to immigration authorities. I am satisfied the innocent mistake exception to s. 40 is not applicable and the decision is reasonable. The Visa Officer's conclusion that Ms. Lin failed to demonstrate that she honestly and reasonably believed that she was not misrepresenting a material fact, or that it was beyond her control, is reasonable.

[29] The Visa Officer's analysis meets all the hallmarks of reasonableness, including those set out in *Vavilov* at para 85, and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 47 to 49. Namely, the Visa Officer's decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the legal and factual constraints that bear on the decision". It can also be said that the Visa Officer's decision is transparent and intelligible, falling "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law". In such circumstances, a reviewing court must defer to the administrative decision-maker's decision.

[30] I dismiss the within application for judicial review.

VII. Conclusion

[31] The application for judicial review is dismissed without costs. The parties were asked whether they were suggesting a question to be certified for consideration by the Federal Court of Appeal. They offered none. I conclude there is no serious question of general importance which

would be dispositive of this matter on appeal (s. 74(d) of the *IRPA*; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89, 318 NR 365 at para 11). It follows that no question is certified for consideration by the Federal Court of Appeal.

JUDGMENT in IMM-5962-20

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without costs. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

SCHEDULE

Immigration and Refugee Protection Act, S.C. 2001, c. 27	*Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27*
Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
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	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un

that induces or could induce an error in the administration of this Act;	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;
(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.	b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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