Federal Court  Cour fédérale

Date: 20220630

Docket: IMM-7071-19

Citation: 2022 FC 977

Ottawa, Ontario, June 30, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ADEFUNKE AISHAT AKINTUNDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the November 11, 2019, refusal of their Federal Skilled Worker (FSW), Express Entry, permanent residence application (the Decision) by a Visa Officer (the Officer). The Applicant included as dependants their spouse, who has lived in Canada since September 2016 on a student visa, and their 11 year old daughter who lived with the Applicant.

[2] The Applicant applied as a lawyer and Quebec Notary. The application was refused for inadmissibility on the ground of misrepresentation by their spouse who did not disclose their employment with Edu-fount Consult.

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

II. **General Background Facts**

[4] The Applicant and their spouse are both lawyers. They run their own law firm in Ibadan, Nigeria.

[5] The Applicant's spouse arrived in Canada on August 31, 2016 to pursue an LLM at Dalhousie. They have been in Canada on a post-graduate work permit since November 7, 2018.

[6] On February 22, 2018, the Applicant submitted their application for permanent residence under the Express Entry program.

[7] On June 11, 2018, after examining the documents submitted in support of the application, a visa officer noted they were satisfied the Applicant met the selection criteria. It was also noted that the information was consistent with the information provided by the spouse in their Study Permit application and in the Applicant's Work Permit application.

[8] Visas were approved and issued, but not printed, for the period August 28, 2018 to January 18, 2019.

[9] The Applicant's spouse was convoked by London Immigration on June 3, 2019 to appear for an interview in Halifax on June 20, 2019. The interview was conducted by telephone with the Officer in London.

[10] As they were not advised of the purpose or nature of the interview, the Applicant's spouse made inquiries by contacting an immigration customer care representative, their former MP - who confirmed various checks and all eligibility requirements were passed - and, they followed up frequently. None of these inquiries illuminated the reason for the interview.

[11] At the interview, the Applicant's spouse was advised, and discussed with the Officer, that a separate investigation had revealed that their credit card was used to pay visa application fees for clients of Edu-fount Consult.

[12] On July 16, 2019, after the interview, a Procedural Fairness Letter (PFL) was sent to the Applicant in Nigeria advising them of the concern that their spouse had misrepresented their employment history by not including their work as an educational consultant. The letter set out that they had provided evasive answers during the interview when questioned about the number of clients they worked with.

III. **The Decision**

[13] The Applicant's application for permanent residence was denied on the basis that they withheld or misrepresented material facts by failing to declare their spouse's work experience as a founder and consultant with Edu-fount Consult.

[14] The Officer found that the misrepresentation was contrary to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act,* SC 2001, c-27 [*IRPA*] resulting in a finding of inadmissibility for a period of five years following a final determination pursuant to paragraph 40(2)(a) of the *IRPA*. Because the Applicant's spouse is inadmissible, the Applicant is also inadmissible for a period of five years further to paragraph 42(1)(a) of the *IRPA* which specifies that a foreign national, other than a protected person, is inadmissible if their accompanying family member is inadmissible.

[15] The Decision was delivered by way of a letter stating that the Applicant's spouse provided contradictory answers in their written response to the letter of procedural fairness as well as in the interview.

[16] Specifically, the Applicant's spouse admitted to founding and running a business which involved "not less than 10" clients.

[17] The Officer advised the Applicant's spouse during the interview that they had been linked to dozens of applications where they paid the application fees. The Officer noted that counsel for the Applicant stated that their spouse did not receive fees or payments. The Officer found that undermined the overall credibility of the Applicant and could have hindered the Officer's ability to make an effective admissibility assessment.

IV. **Issues**

[18] The Applicant raises two issues, each of which contain four sub-issues as grounds.

[19] The first issue is that there was a breach of procedural fairness as: (i) the certified tribunal record (CTR) and the supplementary tribunal record were incomplete; (ii) the Applicant's spouse was not apprised of the purpose of the interview, despite three verbal requests for particulars; (iii) the Officer demonstrated a reasonable apprehension of bias by noting "DO NOT DISCLOSE" in the GCMS notes; (iv) extrinsic evidence concerning another investigation has never been disclosed to the Applicants despite a request for the same and is not relevant to the Applicant's FSW application.

[20] The second issue is that the Decision is not reasonable as it is not transparent or intelligible because: (i) in the refusal letter the Officer states "I was not able to make an effective admissibility assessment" yet refused the application on admissibility; (ii) the Officer's definition of work contradicts the definition set out in section 2 of the *Immigration and Refugee Protection Regulations* SOR/2002-27 [*IRPR*] thus there is no omission; (iii) if there was an omission, the Officer did not address that Edu-fount Consult was previously disclosed in 2017 and that Edu-fount Consult was volunteered during the June 20, 2019 interview with the Officer and why the omission was not an honest mistake; (iv) if there was an omission, the Officer did not identify what was material with the omission as no points were awarded for the spouses' involvement with Edu-fount Consult.

V. **Standard of Review**

A. *Procedural Fairness*

[21] Mr. Justice Rennie reviewed and confirmed the core principles of procedural fairness in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*]. He

concluded that whether there has been procedural fairness does not require a standard of review analysis but "a court must be satisfied that the right to procedural fairness has been met." In that respect, the ultimate question is whether the Applicant knew the case to be met and had a full and fair chance to respond: *CPR* at paras 49-50, 56.

B. *Reasonableness Review*

[22] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2015 SCC 65 at para 23 [*Vavilov*]. While this presumption is rebuttable, none of the exceptions to the presumption are present here.

[23] A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker. It does not attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem: *Vavilov* at para 83.

[24] The decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

VI. **Analysis of the Procedural Fairness Arguments**

A. *Incomplete CTR*

[25] The Applicant submits that despite the release of the CTR and supplementary CTR, neither contain a copy of the application containing the omission which forms the basis of the misrepresentation or the previous work permit application referenced by the visa officer who initially approved the Applicant's visa.

[26] The Respondent's answer, which I accept, is that the CTR is not incomplete. Under the Express Entry system, there are no paper forms. All the information submitted online is automatically transferred to the GCMS notes. Since there are no paper application forms, the GCMS report contains all of the information submitted and is the reason why the CTR produced looks different than that of paper applications

[27] The Applicant also alleges that the CTR is incomplete as it does not contain a copy of the Applicant's previous work permit applications that were mentioned in the GCMS notes.

[28] The CTR is not incomplete for failing to contain a copy of a different work permit application made by the Applicant. Rule 17, of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* requires the production of documents relating to the decision being challenged in the application for judicial review. The only decision being challenged in this application is the November 11, 2019, refusal of the Applicant's Federal Skilled Worker, Express Entry, permanent residence application. It does not encompass any of the Applicant's previous applications.

B. *Purpose of the Interview*

[29] It has been established that given the severe consequences of a finding of misrepresentation, namely ineligibility to apply to come to Canada for a 5-year period, a higher degree of procedural fairness is required to ensure that such findings are made only where there is clear and convincing evidence of misrepresentation: *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 26 [*Likhi*] and cases cited therein.

[30] The Applicant submits the Court has found that procedural fairness is breached when an interview is requested without specifying the precise subsection at issue prior to the interview: *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326, at paras 28 - 30 [*Mohammed*].

[31] While that is stated in *Mohammed*, it also states at para 32 of *Mohammed*, that procedural fairness requires an opportunity to provide submissions after an interview if notice of specific concerns was not given in advance.

[32] In other words, there are two ways to meet the higher degree of procedural fairness to ensure that an Applicant called in for an interview knows the case to be met and has a full and fair chance to respond to it. One way is to provide the Applicant with advance notice of the purpose of the interview. The other way is to provide the Applicant with an opportunity to respond after the interview to any concerns raised during the interview: *Likhi* at para 35.

[33] The Officer alerted the Applicant's spouse to their concerns during the interview and sent the PFL to the Applicant after the interview.

[34] Although the Applicant's spouse would have preferred notice in advance of the interview, it is nonetheless procedurally fair that they were provided with the opportunity to address the concerns during the interview. The Applicant also provided, through counsel, post-interview submissions to the Officer in response to the PFL.

[35] The Applicant directed the Court to examine the Officer's own internal policies on procedural fairness written in the Enforcement Manual, specifically S5.1 of the current ENF 6: Review of reports under subsection A44(2). With respect, I have looked at ENF 6 and there is no S5.1. Nor do I see any reference to procedural fairness as a topic.

[36] The Applicant also extracted a section from ENF 2 as set out in *Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931, at paragraph 19. The relevant part of the extract is "With respect to procedural fairness, the Manual indicates that an individual should always be given the opportunity to respond to concerns about a possible misrepresentation." As noted above, that process was followed when the PFL was sent.

[37] A second extract from ENF 2 was also set out that "honest errors and misunderstandings sometimes occur". The Applicant noted that the original officer who approved the application under review specifically reviewed both the Study Permit of the Applicant's spouse and the Applicant's Work Permit prior applications and found the information consistent.

[38] Although not in the record before the Court, it appears that the Applicant's Work Permit file disclosed Edu-fount Consult and included the incorporation documents. The Applicant notes that this information existed, was also noted in the interview and raised in the reply to the PFL.

[39] The Applicant concludes from the above that they made an innocent misrepresentation.

[40] I disagree. The innocent misrepresentation exception is narrow and shall only excuse withholding material information in truly extraordinary circumstances in which an applicant honestly and reasonably believes they are not misrepresenting a material fact, knowledge of the misrepresentation was beyond the applicant's control, and the applicant was unaware of the misrepresentation. Some cases have applied the exception if the information given in error could be corrected by reviewing other documents *submitted as part of the application*, suggesting that there was no intention to mislead: *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28. (my emphasis)

[41] Considering this jurisprudence, I reject the Applicant's contention that the Officer should have determined there was an innocent misrepresentation. The Applicant has not drawn the Court's attention to any case where reviewing documents submitted by an applicant in a different file was accepted to show than an applicant had no intention to mislead as they had made an innocent mistake. In this case, having previously submitted the information, the Applicant could not be unaware of the misrepresentation nor was knowledge of it beyond their control.

[42] I find the Applicant has not shown the process followed by the Officer was procedurally unfair. The Officer provided the Applicant's spouse with opportunities to make submissions

during and after the interview and sent the PFL to Applicant's spouse. This approach is fully supported by the jurisprudence.

C. *Possible bias of the Officer and extrinsic evidence*

[43] The Applicant alleges there is evidence of bias in the GCMS note dated September 18, 2018 because it states ***DO NOT DISCLOSE***.

[44] The note states, in part, that the information not disclosed "is exempt under section 16(1)(c) and/or 19(1) of the *Access to Information Act*. Disclosure could reasonably be expected to be injurious to the enforcement of any law of Canada . . ." Reference is then made to the investigation of the use of the Applicant's credit card, which use is referred to in more detail in my discussion of the reasonableness of the Decision.

[45] Complying with the legal obligation imposed by the *Access to Information Act* does not constitute evidence of bias or a reasonable apprehension of bias.

[46] The Applicant objects that evidence in the investigation is extrinsic evidence of which they were "unaware because it comes from an outside source".

[47] The evidence not extrinsic. It is known to the Applicant as it concerns the use of the credit card belonging to the Applicant's spouse.

[48] I conclude, based on all the foregoing, that the Applicant has failed to meet their burden to show the Officer acted in a procedurally unfair manner.

D. *The Decision was Reasonable*

[49] This issue involves a consideration of whether the Officer reasonably found there was a misrepresentation by the Applicant's spouse and that it was material.

[50] The Applicant submits that the Officer did not make out that there was a misrepresentation, did not address that it was previously disclosed nor state why the omission was not innocent and did not address the materiality of the Edu-Font omission in the application.

[51] Regarding the Applicant's prior disclosure of Edu-Font, the Officer attested to not having consulted the previous applications for two reasons: (1) it is up to the Applicant to provide accurate information in their application; and, (2) Officers do not have time to consult prior applications for unrelated visas to look for missing information.

[52] I find those statements are reasonable.

[53] Applicants should not expect an officer to keep a running tally of all documents ever submitted by an applicant nor expect an officer to do an applicant's work for them. Visa officers are busy processing current applications. The Officer has attested to not having time to look for missing information in prior applications. The Applicant has not shown that it would be reasonable to expect an officer to cull through prior applications because an applicant says "I submitted that information before." If something was previously disclosed, but is relevant to a question on a current application, then the onus is on the Applicant to disclose it again.

[54] In *Patel v Canada (Citizenship and Immigration)*, 2017 FC 401, Mr. Justice Russell discussed what factors make a misrepresentation material:

> [23] . . . visa officers must provide a materiality analysis; that is, they must make an assessment of the false information and provide some basis for the conclusion that the information is material. A misrepresentation is material if it is important enough to affect the process. In other words, the misrepresentation must be relevant to a matter that was actively considered by the visa officer upon reviewing the file. If the misrepresentation relates to a matter that could not have affected the outcome of the officer's review, then it is not material.

[55] I would add to the above the observation in *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428, at paragraph 25 that "to be material, a misrepresentation need not be decisive or determinative. It will be material if it is important enough to affect the process."

[56] The Officer found that the failure of the Applicant's spouse to disclose their employment with Edu-Font Consulting was material.

[57] I have carefully reviewed the GCMS notes dated November 11, 2019 beginning at the bottom of page 200 of the Supplementary CTR. This portion of the GCMS notes is extensive - 800 words long - so I will not reproduce them all here. I will set out the statements made by the Officer that address why the failure to disclose employment with Edu-Fount Consult was material and thus support the reasonableness of the Decision.. These are:

> [A] separate investigation into Nigerian study permit applications that included similar or identical documentation – including bank statements and letters of intent – linked these files together by a credit card used to pay the application fees. Mr Akintunde is the cardholder in question.
>
> This was a concern, as on a balance of probabilities, these study permit applicants had misrepresented the funds they had available

for their studies in Canada as they re-used the same bank statements across multiple applications.

Mr Akintunde was presented these facts at interview. He admitted to having paid for the applications with his credit card. He stated that he had worked as an education consultant having co-founded Edu-fount Consult. This work history was not declared on his forms.

When asked how many clients he had assisted, Mr Akintunde struggled to come up with a figure. Much prodding was required and he only was able to declare, rather vaguely, “not fewer than ten”.

Following the interviuew, (*sic*) the applicant was given further opportunity to comment in writing to the concerns raised at interview. In response, Mr Akintunde’s representative has stated that Mr Akintunde did not declare his work experience as an educational agent because he did not receive any commission or fees for advancing payments for student tuition or government fees. She further stated that the principal applicant had “no knowledge of any changes with Edu-fount other than it was not making any money and as such was not employment.”

I find this explanation problematic on two fronts. First, the payment of a commission or fee is not a pre-requisite for declaring employment; nor is the profitability of one’s own company. Mr Akintunde stated at interview that he is an “entrepreneur” and Edu-fount was his business.

His explanation for not including it on his form was that he was doing this “on the side” and that he did not think he had to declare it since he was not the principal applicant. These explanations do not overcome concerns given the question posed on the relevant form.

Second, and in contradiction to what his consultant stated, from his answer to a specific question posed at interview it appears that Mr Akintunde did, in fact, collect fees from his clients. When I asked “how many clients did you accept a fee from,” Mr Akintunde answered “not fewer than 10”. Thus, on the one had (*sic*), the (*sic*) Mr Akintunde admits to founding and running his business, acting as a consultant and collecting fees from clients, while on the other his representative is stating that he did not receive fees or payments.

> This contradiction undermines the overall credibility of the applicant and I am not satisfied that Mr Akintunde is being truthful regarding his employment history. I am, however, satisfied that the work Mr Akintunde (*sic*) was relevant to the application and should have been included on the form.
>
> [A]ccurate employment history is critical for assessing the admissibility of all applicants, both principal applicants and dependents. A visa may not be issued unless an officer is satisfied that a foreign national is not inadmissible.
>
> Because I am not satisfied that the applicant has been truthful regarding his employment history I am unable to make an effective admissibility assessment. On a balance of probabilities, I am satisfied that Mr Akintunde has misrepresented his employment history and is inadmissible as per section 40(1)(a) of IRPA. The principal applicant is found inadmissible as per section 42(1)(a).
>
> Application refused.

[58] Saying there is an error on the face of the record, the Applicant is challenging the Officer's concluding statements "I am unable to make an effective admissibility assessment. On a balance of probabilities, I am satisfied that Mr. Akintunde has misrepresented his employment history and is inadmissible as per section 40(1)(a) of IRPA."

[59] The Applicant submits no explanation was given as to why the Officer believed the Applicant was not truthful. The explanation is found in the GCMS notes, which serve as part of the reasons: *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368, at para 9.

[60] As extracted above, the GCMS notes indicate the Officer found inconsistencies between the Applicant's spouse and the Applicant's representative concerning whether fees were paid. The Officer reasonably found the contradiction undermined the Applicant's credibility.

[61] Finally, the Applicant also challenges the reasonableness of the Decision saying the Officer's definition of work contradicts the definition set out in section 2 of the *IRPR* which is that "work means an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market".

[62] I find no error with the Officer's definition of work. During the interview, the Applicant's spouse stated they were an entrepreneur and said many times that they worked for Edu-Font. Edu-Font had also been disclosed in prior applications as employment history. Though later denied by Applicant's counsel in their submissions, the Applicant stated at the interview that they did in fact collect fees from a number of clients. Contrary to the Applicant's argument, this does meet the section 2 definition of work. I find that as an entrepreneur and owner of Edu-Font Consult, it was reasonable to expect the Applicant to disclose its existence regardless of whether profit is earned consistently, as it is an activity engaged in for a profit business. The Officer's credibility concerns and finding of inadmissibility based on non-disclosure of the Applicant's business was a reasonable finding based on the evidence before them

VII. **Conclusion**

[63] The Applicant has not convinced me that the Decision was unreasonable or procedurally unfair.

[64] The Decision is internally coherent and there are no exceptional circumstances that justify my interference with the Officer's factual findings. As a result I must refrain from

"reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

[65] The application is dismissed.

[66] The is no serious question of general importance for certification.

JUDGMENT in IMM-7071-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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