Federal Court  Cour fédérale

Date: 20221215

Docket: IMM-3533-20

Citation: 2022 FC 1741

Ottawa, Ontario, December 15, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

YASH PINAKIN SHAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of a Visa Officer [Officer] in the Visa Section in New Delhi, India, dated March 8, 2019. The Officer refused the Applicant's application for a work permit based on a misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*].

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

II. **Background Facts**

[3] The Applicant is a citizen of India. In April 2018, he retained the services of a consultant to assist him with a work permit application under the International Mobility Program. The consultant agreed to assist the Applicant with upgrading his credentials, finding an employer in Canada and submitting the work permit application.

[4] In July 2018, the consultant advised the Applicant that he had secured an offer of employment and submitted the Applicant's work permit application based on that offer.

[5] The evidence shows that for months following the submission of the application, the consultant became evasive and refused to respond to simple questions about the status of his application.

[6] By November 2018, the Applicant had met his current spouse and he became highly suspicious of the consultant's evasiveness and refusal to disclose any information on the status of the work permit application. He requested the consultant withdraw the work permit application.

[7] On November 14, 2018, the consultant confirmed via email that the application would be withdrawn as instructed. On November 19, 2018, the consultant further confirmed via email that the application was indeed withdrawn.

[8] As it turns out, the application was never withdrawn.

[9] According to the Global Case Management System (GCMS) notes, the Officer reviewing the application indicated on November 14, 2018 that there were concerns that the Applicant had provided an invalid LMIAE number, which would make him inadmissible for misrepresentation under the Act. The Officer noted that they would provide the Applicant with an opportunity to respond to these concerns through a Procedural Fairness Letter (PFL) with 30 days to respond.

[10] The GCMS notes further indicate that on November 15, 2018, the PFL was "sent online". It is unclear from the Certified Tribunal Record precisely what delivery method or what destination the PFL was sent to.

[11] On March 8, 2019, the Officer rendered the Decision refusing the work permit application after concluding that the applicant provided a non-genuine LMIAE number.

[12] The Applicant states that he did not receive the PFL and therefore did not have an opportunity to respond to the Officer's concerns prior to a finding of inadmissibility for misrepresentation. The impugned decision only came to his attention on June 10, 2020 after receiving the results of an Access to Information request he had submitted to obtain information on the status of his spousal sponsorship application.

III. **The Decision**

[13] On March 8, 2019 the Officer refused the work permit application, concluding that the Applicant engaged in misrepresentation under paragraph 40(1)(a) of the IRPA. The Global Case Management System notes of the Officer state: "Case reviewed. I am not satisfied, on the balance of probabilities, that the applicant has provided a genuine LMIAE number. I am therefore of the opinion that the applicant misrepresented himself under A40(1)(a) and the non-genuine LMIAE may have led an officer to believe he qualified for a WP, which would have led to an error in the administration of IRPA. Refused and 5 year bar applies."

IV. **Issues and Standard of Review**

[14] The Applicant raises two issues: (i) the Decision is unreasonable and, (ii) the process followed by the Officer was procedurally unfair.

A. *Reasonableness standard of review*

[15] 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*, 2019 SCC 65 [*Vavilov*] at para 23.

[16] To set a decision aside, a reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of

justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

[17] 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.

B. *Procedural fairness standard of review*

[18] Issues of procedural fairness and natural justice involve a duty to act fairly. The reviewing Court is required to determine whether the Decision was the result of a fair process: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54.

[19] In *CPR*, the Federal Court of Appeal looked at whether a standard of review analysis is appropriate when addressing questions of procedural fairness. It determined that, although the terminology was awkward, and strictly speaking, no standard of review is applied, the review is "best reflected in the correctness standard": *CPR* at para 54.

[20] In any assessment of whether there has been a breach of procedural fairness, no deference is owed to the decision-maker. The question is whether the applicant knew the case to be met and had a full and fair chance to respond: *CPR* at para 56. The reviewing court must conduct its own analysis and determine whether the process the visa officer followed satisfied the level of

fairness required in all of the circumstances: *Kaur v Canada (Citizenship and Immigration)*, 2020 FC 809 at para 35.

V. **Analysis**

[21] The Applicant seeks to introduce new evidence, specifically the Affidavit of the Applicant, dated November 2, 2020, and the attached exhibits. I am allowing this evidence to be admitted as I find that it meets the recognized exception as general background information that assists this Court in understanding the issues relevant to the judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20.

[22] The Applicant submits that given the severe consequences of a finding of misrepresentation, a higher degree of procedural fairness is required to ensure that such findings are only made where there is clear and convincing evidence: *Canada (MCI) v Vavilov*, 2019 SCC 65 at paras 54, 133; *Likhi v Canada (MCI)*, 2020 FC 171 [*Likhi*] at paras 22-24, 27; *Singh v Canada (MCI)*, 2020 FC 109 at paras 11-12; *Ni v Canada (MCI)*, 2010 FC 162 at para 18; *Lin v Canada (MCI)*, 2019 FC 1284 at paras 24-25; *Kaur v Canada (MCI)*, 2012 FC 273 at para 13.

[23] The Respondent disputes that a misrepresentation finding carries “severe consequences”.

[24] I disagree.

[25] This Court has repeatedly stressed that the severe consequences of misrepresentation, namely ineligibility to apply to come to Canada for a 5-year period attracts a higher degree of procedural fairness: *Ni v Canada (Citizenship and Immigration)*, 2010 FC 162 at para 18; *Lin v Canada (Citizenship and Immigration)*, 2019 FC 1284 at paras 24-25 *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 273 at para 13. In *Likhi* at paragraph 27, this Court described the 5-year bar as a "harsh result" and one that "potentially reflects on the applicant's character".

[26] In this case, a finding of misrepresentation precludes the Applicant from re-applying for a 5-year period and has already resulted in a refusal of his spousal sponsorship application, depriving him of the ability to unite with his spouse in Canada.

[27] The Applicant asserts that he was not given notice prior to the Decision which resulted in his inadmissibility being rendered. Therefore, he could not adequately respond to the Officer's allegation of a non-genuine LMIAE. In support of his position, the Applicant points to the lack of evidence in the record demonstrating how the PFL was sent, whether it was through the online application portal or by email. The Applicant relies on *Lu v Canada* (Citizenship and Immigration), 2018 FC 1149 [*Lu*], at paras 17-18 for the proposition that the Respondent bears some responsibility for proving that the correspondence has been properly sent.

[28] The Respondent submits "there is no mystery in this case as to why the Applicant did not personally receive the fairness letter", laying the blame on the Applicant's choice of consultant.

The Respondent asks that this Court find that the PFL was sent to the email provided by the Applicant's consultant.

[29] The issue however, is that the evidence given by the Respondent was not conclusive as to how or where the PFL was sent. The only evidence on which the Respondent relies is an ambiguous notation in the GCMS notes which states: "procedural fairness letter sent online". This leaves the Court with the same lingering question as Justice Shore had in *Lu* at paragraph 16: was the letter actually sent?

[30] At the hearing of this review, I put the lack of evidence question to the Respondent. The Respondent referred again only to the vague GCMS note, conceding that there was some speculation as to precisely where the PFL was sent. I also note that the PFL itself bears no indication of the method of delivery. In fact, it appears to be addressed to a residential address, casting even further doubt as to where the PFL was actually sent.

[31] As the Respondent was unable to demonstrate that the PFL was sent, I am not satisfied the requirements of procedural fairness have been met in this case. Much like the case before this Court in *Kaur v Canada (Citizenship and Immigration)*, 2020 FC 244, there was no affidavit filed by the Respondent to clarify how and where the letter was delivered to the Applicant. There is certainly no evidence that contradicts the Applicant's affidavit attesting to the fact that the PFL was never received. Therefore, I find there was a breach of procedural fairness and that the Applicant was not given notice of the case to be met or an adequate opportunity to respond.

[32] Having determined there was a breach of procedural fairness, I find it is not necessary to consider the issue of the reasonableness of the Decision.

[33] The application is allowed. The Decision is quashed and the matter is to be remitted to a different officer for redetermination.

JUDGMENT in IMM-3533-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed, the Decision is quashed and the matter is to be remitted to a different officer for redetermination.
2. There is no question for certification on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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