Federal Court  Cour fédérale

Date: 20160506

Docket: IMM-4835-15

Citation: 2016 FC 513

Ottawa, Ontario, May 6, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

BINAY CHHETRY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a visa officer ("Visa Officer") dated August 24, 2015, finding the Applicant to be inadmissible, pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), for misrepresentation and refusing his application for permanent residence in Canada.

Background

[2] The Applicant is a citizen of Nepal. In October 2014, he applied for permanent residence in Canada in the Economic Class, under the skilled worker category, university professors and lecturers classification. When making his application, he was represented by Everest Immigration & Legal Services Inc, a registered immigration consultant ("Immigration Consultant").

[3] On April 10, 2015, the Applicant was notified in an email from the Canadian Embassy in Poland ("fairness letter") that open source information suggested that he had been employed at Jet Airways until 2012. If true, this information would conflict with the employment information he had provided in his application form which stated that: from September 2012 to the date of his application he was a lecturer at Nona Koirala Media College; from April 2011 to August 2012 he was a tutor at Birat Victoria Memorial Higher Secondary School; and, from January 2007 to August 2010 he was a public relations officer and writer with Zen Nepal Tours. On that basis, the author of the email stated that he or she believed that the Applicant had deliberately mispresented information and advised the Applicant that he or she was therefore considering a recommendation that the Applicant be found to be inadmissible. The Applicant was provided 30 days to respond to these concerns.

[4] On April 20, 2015, the Immigration Consultant responded with a letter explaining the missing employment information and attaching updated immigration forms. The Immigration Consultant stated that the significant errors in the originally submitted forms were the result of

administrative errors by his office employees which were unintentional and accidental. Further, that the Applicant had worked at Jet Airways as a Customer Service Assistant and at Zen Nepal Tours simultaneously. In August 2010, he left both positions to work on a cruise ship in Italy, returning in April 2011 when he began work as a tutor. The Immigration Consultant explained that the reference to Jet Airways on the Applicant's Facebook page, which the Immigration Consultant believed was the open source information referenced in the fairness letter, was not accurate. Further, that the Applicant had no role in making the errors and there was no attempt to misrepresent. Documentary evidence to substantiate the explanations was provided.

[5] In a May 19, 2015 entry in the Global Case Management System ("GCMS"), a processing officer noted that the new personal history provided in the Immigration Consultant's April 20, 2015 submissions stated that the Applicant worked with Jet Airways from March 2008 to August 2010 and on a cruise ship from August 2010 to March 20l1. However, the processing officer noted that the Applicant's Jet Airways employment contract contained a start date of September 23, 2008, that it was valid for five years and that the Applicant had provided no evidence regarding the length of his employment. Further, that the information provided conflicted with the updated Schedule A Background/Declaration. Based on this discrepancy, the processing officer was of the opinion that the Applicant had misrepresented material facts and recommended that he be found to be inadmissible.

[6] In a GCMS entry dated August 21, 2015, the Visa Officer noted that, upon review of the application, the verification of employment, the notes of the processing officer and the response to the fairness letter, it was reasonable to conclude that the Applicant did not have the

employment experience claimed and that this could have led to an error in the number of points awarded in assessing his application. A refusal letter was sent to the Applicant on August 24, 2105 stating that he had provided an inaccurate account of his employment experience history, which conclusion was reached based on open source information and the response to the fairness letter. The application was refused and the Applicant was found to be inadmissible.

Relevant Legislation

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	40 (1) Emportent interdiction de territoire pour fausses

inadmissible for misrepresentation	déclarations les faits suivants :
(a) 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 this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
…	…

Issue and Standard of Review

[7] The only issue arising in this matter is whether the Visa Officer's decision was reasonable.

[8] This Court has previously held that the reasonableness standard applies to a visa officer's assessment of whether an applicant made a material misrepresentation as described in s 40(1)(a) of the IRPA (*Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 12 [*Oloumi*]; *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 19 [*Goburdhun*]; *Singh v Canada (Citizenship and Immigration)*, 2015 FC 377 at para 12 [*Singh*]). Reasonableness is concerned with the existence of justification, transparency and intelligibility, and whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Analysis

Applicant's Position

[9] The Applicant submits that while s 40(1)(a) of the IRPA imposes a duty of candour which requires disclosure of material facts, an exception arises when the applicant can demonstrate that they honestly and reasonably believed that they were not withholding material information (*Medel v Canada (Minister of Citizenship and Immigration)*, [1990] 2 FC 345 [*Medel*]; *Tofangchi v Canada (Citizenship and Immigration)*, 2012 FC 427 [*Tofangchi*]). In this case, the Applicant did not knowingly misrepresent his employment history. He provided the details of his employment history that were relevant to the category in which he was applying, being teacher/lecturer. In this regard, he relied on the Immigration Consultant, who advised him to omit other irrelevant employment information. And, although the Applicant reviewed and signed the application, he honestly and reasonably believed the omission was not a misrepresentation because the information was not relevant to the class in which he was applying. Further, he had no onus to disclose all possibly relevant information (*Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299). And, although he did not believe that he had made an error, he had clarified the discrepancy when the concern was raised by the processing officer.

[10] The Applicant also submits that he should not be penalized for his Immigration Consultant's incompetence. Further, since he did not refer to his Facebook page in his application, it was unreasonable to expect him to ensure its accuracy and for the Visa Officer to use it to discredit the employment history established by his employment records.

[11] Further, the omitted information was not material as it did not affect the process (*Goburdhun* at para 37). It could not have induced errors in the administration of the IRPA because the application was complete and could have been processed without the additional employment experience which was irrelevant and extraneous.

[12] Finally, the Applicant points out, amongst other things, that the April 20, 2015 letter attesting to the term of his employment at Jet Airways, provided in response to the fairness letter, is signed by the same person who signed his employment contract and confirms that he worked with Jet Airways from March 23, 2008 to August 15, 2010. Further, although the contract stated that it was valid for a five year term, the Applicant resigned in 2010, as permitted under the contract. And, in August 2010 he started working with MSC International as a server on a cruise ship. The Applicant submits that this evidence explains the discrepancy in his employment history but was not addressed by the Visa Officer.

Respondent's Position

[13] The Respondent submits that much of the Applicant's Reply, made in response to the Respondent's written submissions, was improper and that a letter dated January 20, 2016 from an assistant manager at Jet Airways, attached to the Reply, was not properly submitted as an exhibit nor was it before the Visa Officer. Further, the Applicant's claims based on his Immigration Consultant's incompetence do not comply with the Federal Court's procedural protocol, dated March 7, 2014, on pleading allegations of misconduct against former counsel, which includes immigration consultants.

[14] The Respondent submits that the Applicant's misrepresentation was not honest and reasonable because his explanation – that he omitted information he thought was irrelevant – was not before the Visa Officer. Rather, the explanation given was that there had been administrative errors by the Immigration Consultant's employees. The Visa Officer could not evaluate an explanation that was never given. Further, the misrepresentation was not merely an omission. The Visa Officer found that even the updated information was unreliable because it was internally contradictory. Additionally, the application form instructs applicants to account for their activities over the last ten years and requires letters of reference from all employers during that period. Accordingly, the Applicant could not have interpreted this as permitting him to omit recent employment experience that he deemed irrelevant and, had this been the case, he would also have omitted his position at Zen Nepal Tours which was equally irrelevant to his application. Finally, even if the Applicant's explanation were accepted, he is still inadmissible as s 40(1)(a) of the IRPA does not require an applicant to have subjective knowledge of the misrepresentation (*Tofangchi*). Nor does the narrow exception to *Tofangchi* apply in this case.

[15] On the materiality of the misrepresentation, the Respondent submits that the Applicant misunderstands the Visa Officer's reasons. The Visa Officer found that he had misrepresented all of his employment, not just his employment with Jet Airways. The Visa Officer's initial concern arose from the fact that his only employment listed on his Facebook page was with Jet Airways. When confronted with this, the Applicant provided conflicting information about when he worked for Jet Airways. Further, the employment contract with Jet Airways ended in 2013, when he was supposedly working as a college lecturer. On this basis, and since the Applicant failed to offer a reasonable explanation for the initial omission, the Visa Officer concluded that

the Applicant misrepresented his employment history and does not have the employment experience he claims. The Respondent submits that this could have led the Visa Officer to award points where none were merited, leading to an error in the administration of the IRPA.

Analysis

[16] It is first necessary to address the Respondent's preliminary point, being that there are a number of improprieties contained in the Applicant's Reply. I agree with the Respondent that the alleged facts it has identified in the Applicant's Reply are not supported by any affidavit or other evidence. I therefore give them no weight. I also agree that the January 20, 2016 letter from Jet Airways, attached to the Reply, was not before the Visa Officer nor was it submitted to this Court by way of an affidavit. Therefore, I also afford it no weight. It is trite law that the record before this Court on judicial review is generally restricted to that which was before the decision-maker (*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19).

[17] On the second preliminary matter, the Respondent submits that the Court should not entertain the Applicant's allegations of misconduct and incompetence against his Immigration Consultant. I again agree with the Respondent. Because the Applicant did not provide any evidence that he followed the procedural protocol, the Court has insufficient information regarding the alleged incompetence, and, the Immigration Consultant has not been afforded the required opportunity to respond (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 67; *Rezko v Canada (Citizenship and Immigration)*, 2015 FC 6 at paras 6-9). In any event,

as discussed below, the onus is on the applicant to ensure the completeness and accuracy of his or her application.

[18] As to the merits of the matter, in the application form, Schedule A Background/Declaration, applicants are instructed to provide the details of their personal history for the past ten years including work, study, employment and to ensure that there are no unaccounted for gaps in time. In Schedule 3, Economic Classes – Federal Skilled Workers, of the application, under work experience, applicants are instructed to list their occupations for the ten years preceding the date of their application identifying the dates of employment, occupation, and other information. In my view, by failing to list his employment with Jet Airways and with MSC International, the Applicant misrepresented his employment history.

[19] The Applicant submits, in essence, that there was no misrepresentation because this employment was not relevant and, even if there was, it falls within the exception to the requirement to disclose material facts established by *Medel*, as he honestly and reasonably believed that he was not withholding material information.

[20] However, as I have previously found in *Goburdhun*, the *Medel* exception is narrow and has been held to require "subjective unawareness" of the material information (*Mohammed v Canada (Minister of Citizenship and Immigration)*, [1997] 3 FC 299; *Singh* at paras 39-40).

[21] This is not a circumstance where the Applicant was not aware of the information that was not disclosed, the Applicant clearly knew all of the details of his own employment history.

Rather, the Applicant claims that he did not think the omitted information, being his employment with Jet Airways and MSC International, was material to his application. On this point I would first note that when responding to the fairness letter, the Immigration Consultant ascribed the omissions as administrative errors of its employees. It did not state the nature of these errors or that the reason the information was omitted was because the employees deemed it not to be relevant. Therefore, I agree with the Respondent that the Visa Officer cannot be faulted for not considering an explanation that was not provided to him or her.

[22] Further, the Applicant's claim that he relied on his Immigration Consultant does not assist him. As I noted in *Goburdhun*:

> [32] In *Haque*, above, the applicants therein similarly argued that the misrepresentations were not intentional and that it was their consultant who erred in filling out the application. Justice Mosley rejected this argument and stated the following:
>
> > [15] […] Nonetheless, he signed the application and so cannot be absolved of his personal duty to ensure the information he provided was true and complete. This was expressed succinctly by Justice Robert Mainville at para 31 of *Cao, supra*:
> >
> > > The Applicant signed her temporary residence application and consequently must be held personally accountable for the information provided in that application. It is as simple as that.

[23] Here the Applicant chose to rely on a consultant and does not dispute that he signed the application himself and knew of its contents. Therefore, he was required to ensure its accuracy and completeness (*Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at paras 15-16 [*Haque*]; *Tofangchi* at paras 41-42).

[24] In any event, it is not the role of the Applicant to determine what is or is not relevant to his application. As stated by Justice Russell in *Singh*:

> [32] But the Decision is not really about culpability. It is about the integrity of the visa process and what is required to maintain that integrity. To put it bluntly, it is not for the Applicant, or any other visa applicant, to decide what is relevant. Applicants are required to make full disclosure and it is the role of the officer who examines the application to decide what is relevant and what weight to give to any particular fact that is disclosed. The system simply could not work if applicants, no matter how honest, were allowed to decide what is relevant for their application. If full disclosure is made, and an applicant believes that a visa has been unreasonably denied, then there is recourse before this Court. But the problem with misrepresentations is that they do not allow decisions to be made on the full facts by officers who have been fixed by Parliament with the power to make those decisions. That is precisely the problem in this application.

[25] Applicants are required to provide all of the information requested of them. If they choose not to do so, they assume the risk that their application will be denied. Based on the forgoing, I conclude that there was a misrepresentation and that the circumstances do not fall within the *Medel* exception.

[26] However, for the following reasons, I find that the Visa Officer's treatment of the evidence submitted by the Applicant in response to the fairness letter was unreasonable.

[27] It is well-established that GCMS notes form part of the reasons for the decisions of visa officers (*Singh* at para 52). In the GCMS notes in this matter the Visa Officer states that upon review of the documentation, information and the employment documents submitted with the application, together with the notes of the processing officer and the response to the fairness letter, "The response from the client has not disabused me of the concerns raised". This led the

Visa Officer to conclude that the Applicant did not have the employment experience that he claimed. Although the GCMS notes are brief, it appears that this is based, at least in part, on the processing officer's finding that the Jet Airways contract was valid for five years and that no evidence had been provided as to the length of the Applicant's employment. Thus, there was a perceived conflict between the dates in the Jet Airways contract and the dates provided by the Applicant for his other employment periods.

[28] In this regard the Respondent submits that the contract states that it expires in 2013, when the Applicant claims he was a lecturer, and that this contradiction calls into question the Applicant's entire reported employment history. However, I note that the contract provides for resignation or termination on one month's notice. Further, in response to the fairness letter, the Applicant provided a letter dated April 20, 2015, signed by the managing director of Jet Airways, stating that he worked as a Customer Service Assistant from March 23, 2008 to August 15, 2010. As the Applicant points out, the same managing director signed his original employment contract in 2008. Despite this, the processing officer found that there was "no evidence provided as to length of employment" and that the evidence submitted in response to the fairness letter conflicted with the information provided in Schedule A. This finding suggests either that the processing officer did not see the managing director's letter, which clearly stated the Applicant's period of employment, or failed to consider it.

[29] Further, the new personal history stated that the Applicant was employed by Jet Airways from March 2008 to August 2010 and worked on a cruise ship from August 2010 to March 2011. The period of work specified with Jet Airways is consistent with the period of employment set

out in the Jet Airways managing director's letter and a June 22, 2010 letter from the cruise line which stated that he started work there on August 22, 2010. The Applicant also provided letters and documents from each of his other employers corroborating the periods he claims to have worked with them. The Visa Officer, who reviewed the processing officer's notes as well as the other information noted, does not address this evidence or state why the response to the fairness letter did not disabuse him or her of the concerns raised.

[30] Further, a misrepresentation must also be material. To be material it need not be decisive or determinative, it is sufficient if it is important enough to affect the process. The wording of s 40 also confirms that a misrepresentation does not actually have to induce an error, it is enough that it could do so (*Tofangchi* at para 26; *Goburdhun* at para 37; *Oloumi* at paras 22 and 25; *Haque* at para 11; *Mai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 101 at para 18; *Nazim v Canada (Minister of Citizenship and Immigration)*, 2009 FC 471).

[31] In this case, the GCMS entry by the Visa Officer states that the information provided by the Applicant could have led to an error in the administration of the IRPA. The Visa Officer stated that the Applicant's misrepresentation could have led an officer to believe that the Applicant met the requirements of the IRPA with respect to employment and earned him unmerited points. However, contrary to the Visa Officer's conclusion, the additional evidence submitted by the Applicant and discussed above demonstrates that the previously omitted work with Jet Airways and the cruise line did not impact the employment included in the original application. The Immigration Consultant's letter also explains that the Applicant had worked with Zen Nepal Tours and with Jet Airways simultaneously. Thus it is unclear how that

employment conflicts with any of the Applicant's other claimed periods of employment or how it would impact his claimed employment as a tutor or lecturer which commenced after those employment periods. When appearing before me the Respondent submitted that the Applicant had failed to explain why the contract start date was not consistent with the employment contract start date. While this may be so, I do not accept that this alone would be sufficient to bring into question all of the Applicant's work experiences, particularly as the Visa Officer did not refer to the Jet Airways managing director's letter.

[32] The Visa Officer also did not question the credibility of the Applicant's documentary evidence. The fairness letter made reference to an unspecified open information source which indicated that he was employed at Jet Airways. While the processing officer did not identify that source, the Applicant surmised that it referred to his Facebook page. The GCMS notes of April 10, 2015 state that the only employment listed on his Facebook page is at Jet Airways which he left in 2012. A copy of a Facebook page, dated April 10, 2015, is contained in the Certified Tribunal Record but does not refer to any dates of employment at Jet Airways. The Applicant's response to the fairness letter addressed the concern, confirming that he had worked at Jet Airways but that the period of his employment there as indicated on the Facebook page was not accurate. As noted above, he also provided documentary evidence to support his corrected employment history. In my view, an applicant's Facebook page may give rise to a legitimate concern as to the accuracy of the information provided in an application. However, when this concern has been put to the applicant and the applicant provides an explanation supported by documentary evidence from his employers corroborating his employment for the periods he claims, the explanation and evidence must be considered.

[33] As the Applicant notes, the preliminary assessment of his application set out in the GCMS notes appears to find the employment reported in his original application sufficient to meet the required minimum to ensure he had a sufficient number of points. The evidence provided in response to the fairness letter suggests that the employment periods reported in the original application pertaining to the Applicant's work as a teacher/lecturer were not altered by his employment at Jet Airways and MSC International. It is, therefore, not apparent how the misrepresentation was material in these circumstances.

[34] The difficulty in this case is that neither the decision nor the record demonstrate that the Applicant's response to the fairness letter, including the assessment of the supplementary evidence, was reasonably assessed. The Visa Officer's apparent misapprehension or ignorance of some of the evidence seems to have led to a view that there was a conflict in the employment documentation. This, together with the lack of reasons for why the Visa Officer was not disabused of his or her concerns in the face of the explanation and evidence provided by the Applicant, brings the materiality of the omission into question as it is unclear how the misrepresentation could affect the process (*Goburdhun* at para 37).

[35] For these reasons, the decision is not reasonable as the process and the outcome do not fit comfortably within the principles of justification, transparency and intelligibility (*Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 59; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

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

3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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