Federal Court  Cour fédérale

Date: 20160718

Docket: IMM-5815-15

Citation: 2016 FC 815

Ottawa, Ontario, July 18, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

KENELY ANN BAUA LAMSEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a November 11, 2015 decision by a Unit Supervisor [the Supervising Officer] at the Immigration Section of the Canadian Embassy in Manila, Philippines [the Visa Office] to refuse the Applicant a permanent residence visa under the Federal Skilled Worker [FSW] class on the basis that she had misrepresented her work

experience. For the reasons explained below, the decision is unreasonable and this judicial review will therefore be granted.

[1] The Applicant is a 30-year old citizen of the Philippines. Her mother, father, and brother are permanent residents of Canada.

[2] On September 15, 2014, the Applicant applied for permanent residence as a member of the FSW class. She did so under National Occupation Classification [NOC] unit group 3011, or "Nursing co-ordinators and supervisors", on the basis of her work experience as a Head Nurse in an Intensive Care Unit of the Dr. Ester R Garcia General Hospital [the Hospital]. In the Employment History section of her IMM 0008 application form, the Applicant stated that she had been employed as a Head Nurse since April 2010 and thus noted that she had over 4 years of relevant experience under NOC 3011. She provided a certificate of employment from the Hospital in the form of a letter as evidence of that fact, signed by then-Chief Nurse Angeline Cornejo and dated September 8, 2014.

[3] On February 9, 2015, the Applicant married Percival Dannug, her partner of over a year and an ER Head Nurse at the Hospital. On March 28, 2015, she updated her application, listing him as a dependent. As part of the supporting documentation for that update, the Applicant completed a "Spouse/Partner Questionnaire" [the Spousal Questionnaire]. When asked "When and how did you meet your spouse?", the Applicant responded:

> My husband and I met at Ester R. Garcia Medical Centre, Inc. We are employed as staff nurse of the said institution. We met on April 9, 2012... We met because we worked at the same area/department at some point of my stay at Ester R. Garcia Medical Hospital Inc.

> Before I was promoted as head nurse on ICU, and my husband was promoted at ER head nurse.

[4] A Visa Office staff member, identified as HLO2950 in the Global Case Management System [GCMS] notes associated with this file, confirmed receipt of the Spousal Questionnaire on October 8, 2015.

[5] On October 16, 2015 – eight days after receipt of the Spousal Questionnaire – a visa officer, identified as JFO2931 in the GCMS notes [Officer JFO], phoned the Hospital to verify the Applicant's work history there. Officer JFO spoke to Angelica Padilla of the Hospital's human resources [HR] department to enquire about the Applicant's start date and position and to confirm the information contained in Ms. Cornejo's letter. Ms. Padilla advised Officer JFO that Ms. Cornejo had resigned a year prior as Chief Nurse. She also stated that the Applicant was an ICU Head Nurse. Officer JFO asked when the Applicant started in that role. After checking some paperwork, Ms. Padilla noted the Applicant's start date as April 15, 2012. Officer JFO asked if the Applicant had worked as a staff nurse prior to that date and Ms. Padilla answered in the negative.

[6] As a result of this call, Officer JFO then sent the Applicant a Procedural Fairness Letter [PFL] stating that she appeared to have submitted a falsified employment certificate and misstated facts on her application form.

[7] On October 26, 2015, in response, the Applicant's representative provided various documents [the PFL Response] including a letter from Ms. Padilla, who explained that she had

provided Officer JFO incorrect dates of employment because of an error in the Hospital's record-keeping system. She then confirmed that the Applicant was indeed employed as a Nurse Reliever (or "staff nurse") from April 5, 2010 to April 15, 2012 and then promoted after that to Head Nurse, a position she occupied to that day. Ms. Padilla attached a new employment certificate from the Hospital to confirm these facts, along with all of Applicant's payslips from the Hospital dating back to April 2010.

[8] Officer JFO considered the Applicant's PFL Response before forwarding it to the Supervising Officer for review, determining that:

> [The Applicant's] PFL reply did not address my concerns of misrepresentation. She declared on her application form and submitted an emp cert showing that she has 5 yrs of work exp under NOC 3011. This would give her a total of 68 points allowing her application to be eligible for processing. However, her PFL reply confirms my initial findings that she has 3 yrs only of work exp under her qualifying NOC occupation, i.e., from April 2012 to present. With 3 yrs only of work exp, PA would get a total of 66 points only which does not meet minimum program requirements. I note that PA did not list any other NOC codes for consideration.

II. Decision

[9] In a letter to the Applicant dated November 11, 2015, the Supervising Officer determined that the Applicant was inadmissible under paragraph 40(1)(a) of the Act, which states that:

> 40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation
>
> (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.

[10] The Supervising Officer, in the Decision, first noted that, according to HR at the Hospital, the Applicant had worked as a Nurse Reliever for a two-year period before being promoted to ICU Head Nurse, whereas her application form stated that she had been ICU Head Nurse for that entire time.

[11] The Supervising Officer then stated that the Applicant's possibly falsified original employment certificate and the misstatement of her employment history on her application may be considered direct misrepresentations of material facts relating to a relevant matter that could induce an error in the administration of the Act:

> [The Applicant] did not accurately declare the duration of her work experience as the ICU Head Nurse at Dr. Ester R. Garcia Medical Center Inc. This information was only determined as a result of conducting a telephone interview with the applicant's employer, which is a deviation from routine application processing. This misrepresentation would have led to an error in the administration of the [Act] potentially resulting in the issuance of a visa to the [Applicant] that is not entitled.

[12] The Supervising Officer observed that the Applicant failed to address this concern in her PFL Response, which ultimately "confirmed our initial findings that you have only three years of work experience and not five years in your qualifying occupation of NOC 3011".

[13] The Supervising Officer concluded that the Applicant was inadmissible for misrepresentation and that, as per paragraph 40(2)(a) of the Act, she may not enter Canada as an immigrant or as a visitor for the next five years without written permission from the Minister to do so.

III. Analysis

[14] The Applicant argues that the Supervising Officer breached his or her duty of procedural fairness in failing to provide the opportunity to respond to concerns resulting from the PFL response. The Applicant further alleges that the misrepresentation finding was unreasonable.

[15] Issues of procedural fairness attract a correctness standard and thus merit no deference from this Court (*Sharma v Canada (Citizenship and Immigration)*, 2015 FC 1253 at para 26). Otherwise, the standard of review that applies when reviewing the determination of an applicant's FSW application is reasonableness (*Suri v Canada (Citizenship and Immigration)*, 2016 FC 589 at para 17). As such, if the Officer came to a conclusion that is transparent, justifiable, and intelligible and within the range of acceptable outcomes, this Court shall not intervene (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

A. *Did the Supervising Officer Breach his or her Duty of Procedural Fairness?*

[16] On the issue of procedural fairness, the Applicant argues that, because of the severe effects of an inadmissibility finding, a "high degree of fairness is required in misrepresentation determinations" (*Ni v Canada (Citizenship and Immigration)*, 2010 FC 162 at para 18). As a result, the Applicant asserts that the Supervising Officer had an obligation to consider the explanation she provided in the PFL Response – that the original information provided by the Hospital employee was in error – and then to take steps to verify that explanation. The Applicant argues that, had the Supervising Officer truly engaged with the contents of her PFL Response, any remaining concerns would have been addressed.

[17] I disagree. The Applicant was, in the circumstances, treated fairly: she was provided a letter outlining the Supervising Officer's concerns about misrepresentation and an opportunity to respond. The jurisprudence requires that a visa officer send a procedural fairness letter expressly raising his or her concerns and permitting the applicant to file a response, but does not require that the officer blindly accept the response to the fairness letter without question (*Ni* at para 18). Furthermore, the duty of procedural fairness owed to a visa applicant falls on the low end of the spectrum, regardless of the potentially serious consequences of a misrepresentation finding (*Mehfooz v Canada (Citizenship and Immigration)*, 2016 FC 165 at para 12).

B. *Was the Misrepresentation Finding Unreasonable?*

[18] The Applicant argues that the Supervising Officer erred by (i) failing to properly consider the evidence provided in the PFL Response and (ii) failing to acknowledge that she lacked any intent to misrepresent herself.

[19] First, the Applicant argues that she did not misrepresent the length of her work experience as a nurse since she mentioned her promotion from Nurse Reliever to Head Nurse in 2012 in her Spousal Questionnaire, a promotion that was later confirmed by the Hospital. The Applicant admits that she made a technical error as to her title in the first questionnaire, but she provided accurate details in both the Spousal Questionnaire and in her PFL Response.

[20] Second, the Applicant cites *Osisanwo v Canada (Citizenship and Immigration*) 2011 FC 1126 at paras 9-15 for the proposition that, since she had no *mens rea* to mislead, she did not

actually engage in misrepresentation. She also argues that the misrepresentation was immaterial since, in the end, her work experience all ultimately related to nursing.

[21] The Respondent counters that the Supervising Officer fully considered and addressed the Applicant's submissions and came to a reasonable conclusion. Even if the Applicant honestly believed that she was not misleading the Visa Office when she wrote in her forms that she worked as a head nurse from April 2010 to April 2012 when in fact she was only a staff nurse, this belief was not reasonable and thus cannot be considered an innocent error. Furthermore, misrepresentation does not require intent and has no *mens rea* component.

[22] After considering the respective positions pleaded before the Court, I find the decision unreasonable. This is because I do not find that the Supervising Officer adequately considered the totality of the application. It is true that the Applicant misstated the length of her tenure as a head nurse by two years in one part of her application (the IMM 0008 form). However, she correctly detailed her promotion to head nurse from staff nurse in another (the Spousal Questionnaire). This was then confirmed in the evidence provided in her PFL Response.

[23] A visa application must be considered in its totality (*Koo v Canada (Citizenship and Immigration)*, 2008 FC 931 at para 29). It cannot be compartmentalized, particularly when making a finding of misrepresentation carries such serious consequences (*Xu v Canada (Citizenship and Immigration)*, 2011 FC 784 at para 16).

[24] In this case, there is no assessment of or comment on the contents of the Spousal Questionnaire in the copious GCMS notes associated with the file. This strikes me as a significant omission.

[25] Furthermore, the analysis of the PFL Response is extremely limited. The refusal only stated that the "response [the Applicant] provided was not satisfactory", without explaining why, in light of its contents, the Supervising Officer concluded that the employment certificate from Ms. Cornejo was "falsified", or how the PFL Response dates were inconsistent with information in the application. This is particularly problematic considering the fact that the dates in Ms. Padilla's follow-up letter were consistent with those provided in the Spousal Questionnaire. An officer has a duty to explain why documentary evidence is "not satisfactory", as Justice Tremblay-Lamer found in similar circumstances in *Rong v Canada (Citizenship and Immigration)*, 2013 FC 364:

> [27] The officer's focus on the information provided by Mr. Han to the exclusion of the documentary evidence suggests a closed mind with disregard for the documentary evidence and an absence of any true weighing of the positive and negative evidence (*Paulino v Canada (Citizenship and Immigration)*, 2010 FC 542 at paras 59-62).
>
> …
>
> [31] Moreover, it was unreasonable for the officer to not contact the representatives of the company on the basis that the letters signed by the company representatives were provided after the applicant received the fairness letter.

[26] This Court's recent decision in *Chhetry v Canada (Citizenship and Immigration)*, 2016 FC 513 is also applicable, where Justice Strickland found that 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".

[27] In the case of Ms. Lamsen, there was no discussion of the information contained in the Spousal Questionnaire at any point, other than the acknowledgement that it was received by the Visa Office on October 8, 2015. The Spousal Questionnaire contained important clarifying information regarding her work experience. The reasons should have provided at least some minimal explanation as to why this information was not satisfactory.

[28] The same can be said about the contents of the PFL Response: the Applicant provided documentary evidence confirming her work record as listed in the Spousal Questionnaire and explaining why the Hospital initially failed to confirm her employment history. As a result, something more than a template refusal from the Supervising Officer was required.

[29] The Supervising Officer, in reaching a finding of misrepresentation, needed first to address the information that was thereafter provided both before the PFL was sent (in the Spousal Questionnaire) and again confirmed in the PFL Response (in the letter from Ms. Padilla and accompanying payroll records).

[30] I will conclude the analysis where it began: Officers must be vigilant that the misrepresentation findings are sound, given their serious and lasting consequences. Justice Shore recently emphasized as much in *Seraj v Canada (Citizenship and Immigration),* 2016 FC 38, a decision which he commenced with the following admonition:

> [1] Findings of misrepresentation must not be taken lightly. They must be supported by compelling evidence of misrepresentation occurred by an applicant; thereby, an applicant faces important and long lasting consequences in addition to having his/her application rejected.

[31] For all the reasons explained above, Justice Shore's comments are directly applicable to this case. I do not find that the Supervising Officer's conclusion that the Applicant had engaged in misrepresentation under paragraph 40(1)(a) of the Act to be reasonable.

IV. Conclusion

[32] In conclusion, I find that the Supervising Officer's determination that the misstatement on the IMM 0008 form amounted to misrepresentation is unreasonable. The Supervising Officer failed not only to acknowledge the evidence that was provided in the Spousal Questionnaire, but also then failed to address the documentary evidence in the Applicant's PFL Response, which appears to have confirmed what was in the Spousal Questionnaire.

V. Certified Question

[33] At the hearing, Respondent's counsel requested that the following question be certified:

> Notwithstanding clear evidence of misrepresentation on the record of facts within an Applicant's subjective knowledge, material to the outcome of the decision, can a visa officer be held to have acted reasonably or procedurally unfairly for failing to apply the innocent error exception?

[34] Respondent's counsel also filed post-hearing submissions in support of this certification, and while I commend counsel's very able representation of her client's position, this issue was not dispositive to the outcome of these written reasons, and is thus inappropriate for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. There is no award as to costs.
3. There are no questions for certification.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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