Federal Court  Cour fédérale

Date: 20180706

Docket: IMM-4638-17

Citation: 2018 FC 690

Vancouver, British Columbia, July 6, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

SELVARAJAH THEDCHANAMOORTHY

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 an Immigration Officer of the High Commission of Canada in Colombo, Sri Lanka [the Officer], refusing the Applicant's application for a temporary resident visa, because the Officer concluded that the Applicant had misrepresented material facts in his application [the Decision]. The Officer therefore found that

the Applicant was inadmissible to Canada under s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for five years from the date of the Decision.

[2] As explained in greater detail below, this application is allowed because I have found that the Officer's concerns, arising from a perceived inconsistency between the Applicant's employment as a naval radio officer and his answer to a question about past military and similar service, gave rise to a procedural fairness obligation to allow the Applicant to respond to such concerns before making the misrepresentation and inadmissibility finding.

II. **Background**

[3] The Applicant, Selvarajah Thedchanamoorthy, is a 68-year-old citizen of Sri Lanka. He and his wife have four children, all of whom reside in Canada. In 2011, one of their daughters, Menakha Thayananthan, sponsored the couple for permanent residence in Canada under the Family Class. This application has yet to be approved or denied.

[4] In August 2017, the Applicant and his wife applied for temporary resident visas [TRVs] to come to Canada to be with Ms. Thayananthan for the birth of her third child. The Applicant was provided with a procedural fairness letter [PFL] which identified concern that he may have misrepresented his immigration history by omitting the fact that he had on three previous occasions been refused a visa to visit the United States. The PFL highlighted the potential consequences of a finding of misrepresentation and indicated that the Applicant had seven days to respond to the concerns expressed in the letter.

[5] Ms. Thayananthan replied on her father's behalf, stating in a Statutory Declaration that it was she who completed her parents' TRV applications and that she had been unaware of the American visa refusals. She also referenced the forms for her parents' permanent residence application, which she had prepared for their review and signature. The American visa refusals had been omitted from those forms too, but Ms. Thayananthan stated that that an amendment had recently been submitted. She attributed her father's error to his bad memory and the fact that he had travelled extensively for his work as a naval radio officer. She asserted that the omission was an innocent error.

[6] While the Applicant's wife's application for a TRV was approved, his application was denied in the Decision now under judicial review.

III. **Officer's Decision**

[7] The September 27, 2017 letter conveying the Decision states that the Officer found the Applicant inadmissible to Canada based on misrepresentation (s 40(1)(a) of IRPA) and held that he would remain so for five years (s 40(2)(a) of IRPA). The Officer noted that the Applicant had answered "no" to the question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?", which represented a failure to disclose his three American visa refusals. The Officer referred to the Applicant's submissions in response to the PFL but did not accept that the misrepresentation was simply a mistake, because he had signed his application declaring that he had answered all questions fully and truthfully.

[8] The Officer also stated that immigration history is a material fact, relevant to whether an officer will be satisfied that an applicant will comply with the conditions of his/her visa and leave Canada at the end of his/her stay, which could have induced errors in the administration of IRPA because it could have foreclosed an avenue of investigation into the immigration history and a visa could have been issued based on incomplete information.

[9] The Global Case Management System [GCMS] notes provide further explanation of the consideration given to Ms. Thayananthan's response to the PFL. An entry dated September 27, 2017 observes that the Applicant did not submit a reply himself. In the absence of such evidence, the Officer considered Ms. Thayananthan's response to be speculation and was not satisfied that the omission was simply inadvertent or a mistake. The Officer also considered the wording of the question about visa refusals to be clear and observed that the Applicant is personally responsible for the application on which he declared that all the questions were answered fully and truthfully, even if it was completed by another person.

[10] The same GCMS entry also notes the reference to the Applicant having worked as a naval radio operator and the fact that he had answered in the negative to the following question on his TRV application: "Did you serve in any military, militia or civil defence unit or serve in a security organization or police force (including obligatory national service, reserve or volunteer units)?". The Officer considered this to raise further questions about the reliability of the information in the Applicant's application.

[11] The GCMS notes then record the Officer being satisfied that the Applicant had misrepresented his immigration history information and failed to answer all questions truthfully in an attempt to improve the chances of obtaining a TRV. The Officer states that immigration history, including prior visa refusals, is a material fact going to whether an officer will be satisfied that the applicant will comply with the conditions of the visa and leave Canada at the end of the authorized stay. The GCMS entry concludes with the Officer's finding that the Applicant is inadmissible for misrepresentation.

IV. **Issues and Standard of Review**

[12] The Applicant raises the following issues for the Court's consideration:

A. Was there a breach of natural justice due to failure of the Officer to advise the Applicant of all the Officer's concerns?

B. Was the Decision unreasonable?

[13] For the sake of completeness, I note that at the leave stage of this application, the Respondent also raised as a preliminary issue the position that the application for judicial review should fail because the Applicant did not file a personal affidavit in support of the application. At the hearing of this application, the Respondent's counsel confirmed that, leave having been granted, the Respondent is not pursuing this issue, although submitting that the lack of a personal affidavit is still relevant to the substantive issues raised for the Court's consideration.

[14] As to those issues, the Applicant submits that the issue surrounding natural justice/procedural fairness is governed by the standard of correctness, and the issue of the reasonableness of the decision is, as suggested by the articulation of that issue, governed by the standard of reasonableness. I agree with this characterization of the standard of review, which I do not understand the Respondent to be disputing. I do, however, acknowledge and accept the Respondent's position, in relation to the first issue, that an application for a temporary resident visa attracts a minimal standard of procedural fairness (see *Li v Canada (Minister of Immigration, Refugees and Citizenship)*, 2018 FC 87 at para 20).

V. **Analysis**

[15] My decision to allow this application for judicial review turns on the Applicant's procedural fairness argument. That argument surrounds the portion of the GCMS notes which identifies the Officer's concerns about the Applicant having answered in the negative the question on service in the military or other similar organizations. The Applicant submits that the Officer was obliged by principles of procedural fairness to notify him of this concern and give him an opportunity to address it, before relying on that concern in the Decision rejecting his TRV application and finding him inadmissible.

[16] The Respondent takes the position that this portion of the GCMS notes gives rise to no procedural fairness obligations, as the basis for the Officer's rejection of the TRV application and inadmissibility finding was the omission of the information about the US visa refusals, not the Applicant's response to the question about military and similar service.

[17] It is trite law that, in a matter such as this one, the GCMS notes are considered to form part of the reasons for the Decision (*Rahman v Canada (Citizenship and Immigration)*, 2016 FC 793 at para 19). However, the parties disagree on the significance to be attributed to the paragraph in those notes related to the Applicant's employment as a naval radio operator. Reproduced in full, that paragraph reads as follows:

> I also note that the host states in her affidavit that the applicant was employed as a "naval radio operator". The applicant has answered "no" to stat question 4 "Did you serve in any military, militia or civil defence unit or serve in a security organization or police force (including obligatory national service, reserve or volunteer units)?" This raises further concern about the reliability of the answers provided in the application.

[18] In support of his position that the Officer's misrepresentation finding related in part to the question referenced in the above paragraph, the Applicant relies on the ensuing paragraph in the GCMS notes, in which the Officer states:

> I am satisfied, on a balance of probabilities, that the applicant misrepresented her/his immigration history information and failed to answer all questions truthfully in an attempt to improve the chances of obtaining a TRV. Immigration history, including prior visa refusals, is a material fact going directly to the relevant matter of whether an officer will be satisfied that the applicant will comply with the conditions of the visa and leave Canada at the end of an authorized stay.
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> [Applicant's emphasis]

[19] The Applicant notes the reference in this paragraph to failing to answer all questions truthfully, which he submits refers to both the answer to the question on visa refusals and the answer to the question on military service. He therefore submits that the Officer's concerns

surrounding the answer to the latter question contributed directly to the misrepresentation finding.

[20] As an alternative interpretation of the GCMS notes, the Applicant submits that what the Officer regarded as an inconsistency between the Applicant's employment as a naval radio officer and his answer to the question about military service gave rise to a credibility concern, which contributed to the Officer's rejection of the explanation, provided by Ms. Thayananthan in response to the procedural fairness letter, that the omission of the US visa refusals was an innocent mistake. The Applicant also submits that the Officer misunderstood the nature of his employment, which involves service on merchant vessels, not military vessels, and that he could have disabused the Officer of this misunderstanding had he been provided an opportunity to address the Officer's concern.

[21] The Respondent acknowledges that the concern about the Applicant's response to the military service question informed the Officer's Decision but takes the position that such concern was not central to the Decision and was not a basis for the refusal or the misrepresentation finding. The Respondent interprets the words "and failed to answer all questions truthfully", in the paragraph of the GCMS notes reproduced above, as relating solely to the question about visa refusals. The Respondent argues that this interpretation is supported by the fact that other paragraphs in the GCMS notes reference accurate declaration of immigration history as the basis for the misrepresentation finding, which the Respondent submits must relate to the visa refusals and not to the Applicant's employment history. Similarly, the Respondent notes that the

September 27, 2017 letter conveying the Decision references only the US visa refusals as the misrepresented material facts.

[22] In my view, it is difficult to interpret from the GCMS notes the precise role that the Officer's concern about the answer to the military service question played in the analysis resulting in the Decision. Based on the surrounding paragraphs in the notes and the refusal letter itself, I tend to agree with the Respondent's interpretation that the misrepresentation found by the Officer was solely related to the US visa refusals. However, this does not mean that the concern about the military service question was not significant in the Officer's thought processes leading to the Decision.

[23] The Applicant's interpretation alternative may be correct, that this concern contributed to the Officer's rejection of the explanation, in response to the procedural fairness letter, that the omission of the US visa refusals was an innocent mistake. However, regardless of its precise significance, I note the Respondent's acknowledgement that this concern informed the Decision. Indeed, it is difficult to reach any conclusion other than that it informed in some manner the Officer's conclusion that the Applicant had misrepresented material facts and had not done so innocently. In the absence of a more clearly articulated thought process in the GCMS notes, my conclusion is that this concern sufficiently influenced the Decision that the Court must consider whether it engaged procedural fairness obligations on the part of the Officer.

[24] Turning to that question, I note the Respondent's reliance on my recent decision in *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 [*Alalami*], at paragraphs 11 to

13, in which I rejected an argument that the applicant in that case had been deprived of procedural fairness:

> [11] Mr. Alalami argues that he was deprived of procedural fairness because the Officer based the Decision on a negative credibility determination without affording him an opportunity to respond to the Officer's credibility concerns.
>
> [12] I note that the parties agree that the Decision should be read as demonstrating that the Officer did not believe Mr. Alalami's explanation that he had misread the question on the application form about visa refusals as only applying to Canada. Rather, the Officer concluded that Mr. Alalami had intentionally failed to disclose the fact that he had been refused a US visa. I agree with the parties' interpretation of the Decision.
>
> [13] However, I disagree with Mr. Alalami's position that the Officer was obliged to advise him that he disbelieved the explanation provided and to give him a further opportunity to comment. I accept that the principles of procedural fairness must be applied before findings of misrepresentation are made. However, after what appeared to be a misrepresentation in Mr. Alalami's application form was identified, he was sent the PFL, which explained the issue and afforded him an opportunity to respond. Mr. Alalami then provided his explanation. I do not consider the principles of procedural fairness to require the Officer to have advised Mr. Alalami that he did not accept the explanation and to have afforded him a further opportunity to comment before arriving at the Decision. The PFL was sufficient to put Mr. Alalami on notice of the issue, including the possibility that the resulting explanation would not be accepted.

[25] The Respondent also notes that *Alalami* was subsequently followed by Justice Strickland in *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 [*Wang*], at paragraph 24.

[26] I agree with the Applicant's submission at the hearing that both *Alalami* and *Wang* are distinguishable from the present case. Those authorities stand for the proposition that a procedural fairness letter, placing an applicant on notice of a possible misrepresentation finding

and providing an opportunity to respond, also serves to alert the applicant to the possibility that any resulting explanation may not be accepted. The fact that an explanation is not accepted does not automatically translate into a requirement for additional procedural fairness. However, this does not mean that a further procedural fairness obligation cannot arise in such a circumstance, depending on the reason why the explanation is not accepted.

[27] In the present case, following receipt of the response to the procedural fairness letter, the Officer developed concern about the Applicant's answer to the question about military service. The GCMS notes refer to "further concern about the reliability of the answers provided in the application". As this concern forms part of the Officer's analysis, it demonstrates more than simply not accepting the Applicant's explanation that he had made an honest mistake. Rather, the Officer's concern about the reliability of the information provided by the Applicant resulted from what the Officer appears to have considered to be an inconsistency between the Applicant's employment as a naval radio officer and his statement that he had not been engaged in military or similar service. Whether described as an issue of reliability or credibility, a concern of this nature, based on a perceived inconsistency in information provided by the Applicant or on his behalf, is in my view the sort of circumstance where a procedural fairness obligation is engaged.

[28] As previously noted, the Applicant submits that the Officer misunderstood the nature of his employment, misinterpreting the role of a naval radio officer as necessarily involving service on military vessels, when his seaman's record book, which was in the record before the Officer, demonstrates service on merchant vessels. I express no conclusion on this point, as this argument was not made before the Officer. However, the point does underline the role of the procedural

fairness obligation in circumstances such as this one, where the Officer did not have an opportunity to consider the submission that employment as a naval radio officer is consistent with service on commercial ships, because the Officer's concern about the inconsistency was never put to the Applicant.

[29] While conscious that an application for a temporary resident visa attracts a minimal standard of procedural fairness, my conclusion is that the circumstances of this case did engage a procedural fairness obligation which was not met. I will therefore allow this application for judicial review and return the matter to another officer for redetermination. Given this result, I express no conclusions on the Applicant's arguments surrounding the reasonableness of the Decision that is being set aside.

[30] Neither party proposed any question for certification for appeal, and none is stated.

[31] Finally, as a housekeeping matter, I note that the Application for Leave and for Judicial Review incorrectly names the Respondent as the Minister of Immigration, Refugees and Citizenship. The correct name of the relevant minister is the Minister of Citizenship and Immigration. My Judgment will accordingly correct the style of cause.

JUDGMENT in IMM-4638-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, and the matter is remitted to another officer for redetermination.

2. No question is certified for appeal.

3. The style of cause is hereby amended to reflect the correct respondent, the Minister of Citizenship and Immigration.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Clarisa Waldman	FOR THE APPLICANT
Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman Professional Corporation Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT