Federal Court  Cour fédérale

Date: 20181011

Docket: IMM-305-18

Citation: 2018 FC 1020

Ottawa, Ontario, October 11, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

TREVOR CLIVE MONTGOMERY SMITH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Smith is a citizen of Bermuda who was denied an electronic Travel Authorization (eTA) by Immigration, Refugees and Citizenship Canada (IRCC) because he responded "no" to a question in the on-line application form when he should have responded "yes". Despite his claim that it was an honest mistake, he was found inadmissible to Canada for misrepresentation pursuant to s. 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

This decision has unfortunate consequences for Mr. Smith who is the father of Canadian-born triplets; however, there are no grounds for this Court to intervene in this decision.

Background

[2] In February 2016, Mr. Smith completed an on-line application for an eTA. He responded "no" to the question, "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?", and he was issued an eTA thereafter.

[3] Mr. Smith should have responded "yes" to this question since he had been charged with criminal offences in both the United States (US) and Bermuda.

[4] In November 2016, his eTA was cancelled and his application was re-opened. A procedural fairness letter was sent to Mr. Smith advising him of the potential misrepresentation and providing him with an opportunity to explain. Mr. Smith explained that he misunderstood the question and believed that he did not need to disclose his dismissed US charge and his expunged Bermudan criminal record.

[5] On March 2, 2017, the Officer found Mr. Smith inadmissible for misrepresentation pursuant to s. 40(1)(a) of *IRPA*.

[6] The only issue in this judicial review is if the Officer reasonably considered that Mr. Smith made an innocent mistake in his misrepresentation.

Analysis

[7] Mr. Smith argues that the Officer erred by not considering his explanation and by not considering if the innocent mistake exception should apply to his circumstances. Specifically, he argues that because the US charge was dismissed and because his Bermudan criminal record was expunged, he did not believe it was necessary to declare these matters in response to the question on the eTA.

[8] Mr. Smith points out that the IRCC operational instructions and guidelines acknowledge that, "It must be recognized that honest errors and misunderstandings sometimes occur in completing application forms and responding to questions" (Citizenship and Immigration Canada, *Evaluating Inadmissibility*, ENF 2/OP 18, "10.3 Principles").

[9] Mr. Smith relies upon *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 [*Baro*] where the court states at paragraph 15, "An exception arises where applicants can show that they honestly and reasonably believed that they were not withholding material information." In *Baro*, the applicant failed to disclose his previous marriage as he believed his wife to be deceased. The application form in *Baro* did not specifically ask about the applicant's marital history, but the court decided that the tribunal was reasonable in determining that this was a material fact to disclose for an application of permanent residency to be with a married partner in Canada.

[10] However, the case law is clear that even where the omission is an honest omission it can still fall within the purview of misrepresentation because s. 40(1) of *IRPA* has been held to encompass innocent failures to provide material information (*Paashazadeh v Canada (Citizenship and Immigration)*, 2015 FC 327 at para 18 and the cases cited therein).

[11] In *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126 [*Osisanwo*] the mother of a child had an extra-marital affair and listed her husband as the father on the birth certificate. Although the husband and wife believed the child to be theirs, the biological father turned out to be the man with whom the mother had an extra-marital affair. In these circumstances, the court accepted that this was an innocent mistake.

[12] The Court in *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at paragraph 32 notes, "A few cases have carved out a narrow exception to this rule, but this will only apply for truly exceptional circumstances, where the applicant honestly and *reasonably* believed they were not misrepresenting a material fact [emphases in original]."

[13] The issue is if Mr. Smith's circumstances are "truly exceptional". Mr. Smith points out that he had travelled to Canada on many occasions so he did not feel he had any encumbrances on his travel. He also points out that he does not have a criminal record. In effect, what Mr. Smith is arguing is that his past criminal brushes with the law are not material to the eTA because they have not encumbered his travel in the past. However, the issue of the materiality of the omission was addressed in *Paashazadeh* at paragraph 26 where the court notes that, "A misrepresentation need not be decisive or determinative to be material; it must only be important

enough to affect the process…." Here Mr. Smith's misrepresentation was indeed important enough to affect the issuance of the eTA.

[14] Mr. Smith argues that the Officer over-emphasized the clarity of the question and did not accept his explanation for the mistake. I agree that in certain cases an officer may have an obligation to consider in more detail the surrounding circumstances, such as where the question at issue could be subject to various interpretations or where the unique circumstances are not responsive to the question at issue. Here, however, I agree with the Officer that the question in this case — "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?" — is not vague or misleading.

[15] On judicial review it is not the role of the court to re-weigh the evidence provided that the officer's decision is reasonable (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61). Here the decision is reasonable and was within the Officer's exercise of discretion and is therefore owed deference by this Court.

JUDGMENT in IMM-305-18

THIS COURT'S JUDGMENT is that

1. The judicial review of the March 2, 2017 decision of Immigration, Refugees and Citizenship Canada is dismissed; and

2. No serious question is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mario D. Bellissimo	FOR THE APPLICANT
Tessa Cheer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bellissimo Law Group PC Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT