Federal Court  Cour fédérale

Date: 20191210

Docket: IMM-3086-19

Citation: 2019 FC 1575

Ottawa, Ontario, December 10, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

SUN KYOUNG MOON

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Sun Kyoung Moon, is a citizen of the Republic of Korea (South Korea). A school in Coquitlam, British Columbia, accepted her son, Ruha (then 7 years old), as a student. Ms. Moon retained an immigration consultant to assist with a study permit application for Ruha and a visa application for her as an accompanying parent.

[2] The consultant submitted these applications in early November 2018. The consultant also applied for an electronic travel authorization [eTA] for Ms. Moon. She claims that she did not authorize this application and only found out that an eTA had been issued to her when Ruha's study permit was issued in early December 2018.

[3] Shortly after Ms. Moon and her son arrived in Canada, she discovered that the eTA application had not disclosed her criminal record. Correspondence between Ms. Moon and her consultant confirmed that she had not been aware of the eTA application, and that the consultant had simply guessed that she did not have a criminal record since she had previously obtained a visitor visa for New Zealand.

[4] In late December 2018, Ms. Moon and her son returned to South Korea to correct the error in the eTA application. Ms. Moon retained a new immigration consultant. The application for a second eTA disclosed Ms. Moon's criminal record arising from a traffic violation, but an officer [the Officer] at the Embassy of Canada in Seoul, South Korea, refused the application in a decision dated March 21, 2019.

[5] Ms. Moon has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the Officer's decision. She asks the Court to set aside the decision and return the matter for redetermination by a different officer. The question before the Court, therefore, is - should this relief be granted?

[6] For the following reasons, this judicial review application is granted.

I. Background

[7] Following receipt of the second eTA application, Immigration, Refugees and Citizenship Canada [IRCC] asked Ms. Moon to submit court records and police certificates concerning her criminal record. After receiving these documents, IRCC referred the application to an officer at IRCC's case processing center and to the Canadian Embassy in Seoul.

[8] The Global Case Management System [GCMS] notes show Ms. Moon had declared her criminal record in an application for criminal rehabilitation and in her husband's permanent resident application. The Officer remarked that Ms. Moon had failed to disclose her criminality in the previous eTA application. The Officer concluded that Ms. Moon was inadmissible to Canada for having previously withheld a material fact that induced an error in the administration of the *IRPA*.

[9] The Officer found Ms. Moon was a person described in paragraph 40(1)(a) of the *IRPA*:

> 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;
>
> 40(2) The following provisions govern subsection (1):
>
> > (a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of determination in Canada, the date the removal order is enforced;

[10] The Officer was not satisfied that Ms. Moon met the requirements of the *IRPA*; in that, she had not truthfully answered all questions put to her for the issuance of an eTA. The Officer thus refused Ms. Moon's application.

II. Issues

[11] Ms. Moon raises various issues which, in my view, boil down to these two questions:

1. Was the Officer's decision reasonable?
2. Did the Officer breach the duty of procedural fairness owed to Ms. Moon?

III. What is the Standard of Review

[12] The Officer's decision, including a finding of misrepresentation under paragraph 40(1)(a) of the *IRPA*, is subject to the reasonableness standard of review (*Punia v Canada (Minister of Citizenship and Immigration)*, 2017 FC 184 at para 20; *Tuiran v Canada (Citizenship and Immigration)*, 2018 FC 324 at para 10).

[13] The assessment of a misrepresentation is a mixed question of fact and law and is reviewable on a standard of reasonableness (*Brar v Canada (Citizenship and Immigration*), 2016 FC 542 at para 8).

[14] The reasonableness standard of review tasks the Court with reviewing an administrative decision for the existence of justification, transparency and intelligibility within the decision-making process, and determining whether the decision falls within a range of possible,

acceptable, outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[15] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[16] An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). The Federal Court of Appeal has observed that: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Was the decision reasonable?

A. *The Parties' Submissions*

1. Applicant

[17] Ms. Moon says the decision does not allow her to understand why the Officer found her inadmissible. In her view, the decision provides no insight into the Officer's reasoning process; the Officer merely stated his or her conclusion, without explanation. Ms. Moon contends that because the decision does not explain on what basis the Officer rejected the application, it is unreasonable.

[18] In Ms. Moon's view, it is impossible to pinpoint what aspects in the review process the Officer erred since there is no mention of any of the evidence. Ms. Moon says the decision is vague and generic, such that it is impossible for the Court to point to an error.

[19] According to Ms. Moon, she provided ample documentary evidence to support her assertion that the omission of her traffic violation in the first eTA application was not a misrepresentation because the consultant submitted the application without her knowledge or consent. Ms. Moon says the consultant's letters show that the consultant submitted the application without her knowledge, in a rush, and with the consultant guessing that she had no criminal record.

[20] Ms. Moon further says that since the Officer remained completely silent on the evidence, it is unclear from the decision whether the Officer reviewed or even looked at the evidence. In Ms. Moon's view, the Officer made a reviewable error by completely ignoring probative documentary evidence. According to Ms. Moon, if the Officer had reviewed the evidence,

especially relevant mitigating evidence such as the consultant's letters, a different outcome would have been reached.

[21] Ms. Moon notes that she had previously disclosed her criminal record twice to immigration authorities, once in her husband's permanent residence application and again in her criminal rehabilitation application. According to Ms. Moon, it would be irrational for her to lie about a fact she had already disclosed twice. Considering the totality of the circumstances, Ms. Moon contends that she innocently and reasonably believed she was not suppressing her traffic violation record.

[22] Ms. Moon says a finding of misrepresentation under section 40 of the *IRPA* is a serious matter and such a finding should be made only when there is clear and convincing evidence. According to Ms. Moon, a misrepresentation finding must be set aside if it is made without regard to the evidence. Ms. Moon notes that the seriousness of a misrepresentation is determined by various factors: namely, the nature and complexity of the misrepresentation; the deliberateness of the misrepresentation; the level of complicity of an applicant; and the impact of the misrepresentation on the integrity of the immigration system.

[23] Ms. Moon submits that there was no complexity in the alleged misrepresentation because the omission was due to the consultant's mistake. In Ms. Moon's view, the alleged misrepresentation was not deliberate and was an inadvertent mistake that does not reach the level of seriousness that warrants inadmissibility for five years. For the decision to be fair, Ms. Moon

says the degree of penalization must be justifiable in proportion to the seriousness of the misrepresentation.

[24] Ms. Moon says there are exceptions to inadmissibility where there exists an "honest and innocent mistake" or an inadvertent error. According to Ms. Moon, an officer should conduct a proper analysis as to the materiality of the alleged misrepresentation and a failure to do so is a reviewable error. In Ms. Moon's view, the Officer's failure to consider the mitigating evidence and to apply the innocent and inadvertent mistake exception renders the decision unreasonable.

2. Respondent

[25] According to the Respondent, the misrepresentation was directly material to an assessment of Ms. Moon's admissibility to Canada and resulted in an error in the administration of the *IRPA* by preventing a full examination of her criminal history. In the Respondent's view, the Officer considered Ms. Moon's explanation and documents in the GCMS notes that form part of the decision.

[26] The Respondent says there is a duty of candour on an applicant that requires full and complete disclosure to ensure proper and fair administration of the immigration system. According to the Respondent, the jurisprudence has recognized that an applicant need not intend to mislead immigration authorities to be found inadmissible; and section 40 of the *IRPA* should be given a broad and robust interpretation because its purpose is to deter misrepresentation and maintain the integrity of the immigration process.

[27] The Respondent submits that misrepresentation applies even if it is a third party, such as Ms. Moon's immigration consultant, who misrepresented a material fact.

[28] The Respondent says the exception to the rule, that subjective knowledge of the misrepresentation is not required for a finding under section 40 of the *IRPA*, is narrow. It only applies in extraordinary circumstances where an individual honestly and reasonably believed that they were not misrepresenting a material fact, and knowledge of the misrepresentation was beyond the individual's control. In the Respondent's view, Ms. Moon's attempt to rectify the initial misrepresentation does not bring her within the narrow exception to a finding of inadmissibility.

[29] The Respondent further says both the decision letter and the GCMS notes sufficiently set out all the evidence and circumstances considered by the Officer.

B. *Analysis*

[30] The Officer's decision does not offer any insight into the reasoning and the decision-making process that lead to the determination that Ms. Moon was inadmissible for misrepresentation (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 9; *Omijie v Canada (Citizenship and Immigration)*, 2018 FC 878 at para 28).

[31] The GCMS notes fail to show on what basis the Officer ignored the consultant's letters. Aside from these letters, Ms. Moon also submitted a copy of the consultant's invoice, which did

not include a fee for an eTA application. This corroborates her claim that she did not ask for, nor authorize, the consultant to submit the first eTA application.

[32] Despite the GCMS notes acknowledging that the consultant who acted in a hurry and did not ask the proper questions had filed the application, the Officer failed to demonstrate why that explanation, along with the documentary evidence, did not constitute a defence to the misrepresentation. The Officer did not indicate whether he or she doubted the veracity of these allegations or whether he or she even considered the letters that corroborate these allegations. The Officer simply stated that this was not a defence because Ms. Moon knew her criminality was an issue given her plans to immigrate to Canada and the prior disclosures.

[33] The Officer's decision is unreasonable and must be set aside because the reasons are unintelligible, in that they:

1. fail to address key evidence that contradicts the Officer's findings (*Cepeda-Gutierrez v Canada (MCI)*, [1998] FCJ No 1425 at para 17; *Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177 at para 38);

2. fail to properly justify the Officer's decision, especially because various facts were misconstrued in the GCMS notes. For example, the Officer claimed that Ms. Moon did not provide the consultant with the proper information, regardless of whether she knew the questions being asked. This is not accurate since the evidence (the veracity of which was not challenged) shows that Ms. Moon did not have any knowledge of the first eTA application for her to provide the consultant with the proper information; and

3. do not allow Ms. Moon to understand why the Officer refused the application. The Officer stated that Ms. Moon was aware of the need to disclose her criminality, having done so previously. This is an inadequate reason for the Officer's conclusion because it

> fails to acknowledge that Ms. Moon did not authorize, or consent to, the first eTA application.

[34] The definition of misrepresentation in paragraph 40(1)(a) refers to a direct or indirect misrepresentation. This paragraph encompasses a misrepresentation even if made by a third party, including an immigration consultant, without an applicant's knowledge (*Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 at para 35). The exception to this is narrow; it applies only "where an applicant honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control" (*Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28).

[35] In my view, Ms. Moon's circumstances fall within this narrow exception. She did not have any knowledge of the eTA application filed by the consultant and it was impossible for her to know she was misrepresenting. The misrepresentation was beyond her control since the consultant admitted to filing the application in a hurry and without asking the proper questions. It was unreasonable for the Officer not to have considered whether Ms. Moon's circumstances fell within this exception.

[36] The Officer's failure to assess the materiality of the misrepresentation also renders the decision unreasonable. "Such an assessment is necessary in order to properly evaluate whether a misrepresentation was material in accordance with section 40(1)(a) of the Act. The officer's failure to conduct such an assessment constitutes a reviewable error" (*Koo v Canada (Minister of Citizenship and Immigration*), 2008 FC 931 at para 29).

[37] The Officer's failure to address the mitigating evidence further renders the decision unreasonable. The Officer noted Ms. Moon's response to the procedural fairness letter but did not acknowledge the letters from the consultant corroborating her allegations. In doing so, not only did the Officer fail to assess the evidence properly and entirely, but he or she also failed to address the letters' mitigating effect (*Berlin v Canada (Citizenship and Immigration*), 2011 FC 1117 at para 22).

V. Did the Officer breach the duty of procedural fairness owed to Ms. Moon?

[38] It is unnecessary to address this question in view of the conclusion above that the Officer's decision was unreasonable.

VI. Conclusion

[39] In short, the Officer's decision lacks intelligible reasons that demonstrate how and why Ms. Moon was inadmissible for misrepresentation. The decision is unreasonable, and the outcome is not defensible in respect of the facts and law. The decision is set aside, and the matter returned to a different officer for redetermination.

[40] Neither party submitted a question for certification.

JUDGMENT in IMM-3086-19

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3086-19
STYLE OF CAUSE:	SUN KYOUNG MOON v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 6, 2019
REASONS FOR JUDGMENT AND JUDGMENT:	BOSWELL J.
DATED:	DECEMBER 10, 2019

APPEARANCES:

Katrina Bérubé	FOR THE APPLICANT
Edward Burnet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Katrina Bérubé Indigo Lawyers Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT