Federal Court  Cour fédérale

Date: 20220106

Docket: IMM-3033-21

Citation: 2022 FC 10

Ottawa, Ontario, January 6, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ZHUOLUN DU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Zhuolun Du, seeks judicial review of a decision of a visa officer of the Embassy of Canada in Beijing, China (the "Officer"), dated April 22, 2021, refusing the Applicant's work permit application on the grounds that he is inadmissible to Canada pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the Officer's decision is unreasonable for a) determining that the Applicant omitted material facts related to his immigration history, and b) finding that the Applicant had submitted a fraudulent employment record and misrepresented his employment history. The Applicant further submits that his rights to procedural fairness were breached because the Officer's procedural fairness letter ("PFL") was misleading.

[3] For reasons set out below, I find the Officer's decision is reasonable and that there was no breach of procedural fairness. Accordingly, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 35-year-old national of China. He lived in Canada from October 2011 to August 2017.

[5] In November 2020, the Applicant hired an immigration consultant (the "Consultant") to help him submit an application for a work permit in Canada based on a job offer to work as a Food Service Supervisor at Dagu Rice Noodle, a restaurant in Edmonton.

[6] In his work permit application, the Applicant stated he worked as a Kitchen Supervisor for Sanshijia Restaurant (the "Restaurant") in China from December 2018 to the present.

[7] On January 11, 2021, the Officer requested that the Applicant provide records of his individual income tax payments, and a record of his social insurance contributions from 2017 to 2020. The Consultant submitted the requested documents on January 29, 2021.

[8] On March 12, 2021, the Applicant received a PFL from Immigration, Refugees and Citizenship Canada, raising concerns that the Applicant had not fulfilled the requirements under subsection 16(1) of the *IRPA*. Specifically, the letter stated:

> I have concerns that you have not fulfilled the requirement put upon you by section 16(1) of the Immigration and Refugee Protection Act, which states:
>
> > 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.
>
> 1. Specifically I have concerns that you have omitted to answer truthfully to background question 2 b) "Have you ever been refused a visa or permit, denied entry, or ordered to leave Canada, or any other country or territory?"
>
> 2. Your employment with Sanshijia restaurant as Kitchen Supervisor is not genuine.
>
> [Emphasis in original]

[9] On March 25, 2021, the Consultant responded to the PFL on behalf of the Applicant, explaining that the Applicant had made an innocent mistake and forgotten to include information about a 2015 refused US tourism visa. The Consultant also provided more information about the Applicant's employment at the Restaurant, including photographs and an Investigation Report

written by a law firm in China, confirming the genuineness of the Applicant's personal information and the employment letter from the Restaurant's owner (the "Investigation Report").

B. *Decision Under Review*

[10] By letter dated April 22, 2021, the Officer refused the Applicant's work permit application on the grounds that he is inadmissible to Canada in accordance with paragraph 40(1)(a) of the *IRPA*.

[11] In the Global Case Management System ("GCMS") notes, which form part of the reasons for the Officer's decision, the Officer found that the Applicant had failed to allay the concerns outlined in the PFL, and found, on a balance of probabilities, that the Applicant had submitted a fraudulent employment record and had withheld information related to his immigration history. The Officer noted the Applicant's acknowledgement that his omission of the 2015 US tourism visa refusal was an innocent mistake, yet found the Applicant had still failed to address a 2018 refusal of an application for permanent residency ("PR") in Canada. The Officer also found that the Applicant misrepresented his employment history at the Restaurant. Accordingly, the Officer determined that pursuant to paragraph 40(2)(a) of the *IRPA*, the Applicant will remain inadmissible to Canada for a period of five years from the date of the refusal.

III. **Preliminary Issue: Extrinsic Evidence in Affidavits**

[12] The Respondent objects to exhibits "N" and "O" of the affidavit sworn by Teina Wang, a legal assistant at the Applicant's counsel's law firm (the "Legal Assistant"). Exhibit "N" includes the first two chapters of the Social Insurance Law of the People's Republic of China and exhibit "O" is the Personal Income Tax Law of the People's Republic of China. The Legal Assistant, who relied on Google Translate, translated both exhibits to English. The Respondent asserts that these exhibits contain extrinsic evidence, which should have been before the Officer, and takes issue with the method used to translate the exhibits.

[13] The Applicant admits that exhibits "N" and "O" were not before the Officer, yet submits that they were not included as a legal opinion, but rather as background information to assist this Court in determining whether the Officer's decision was reasonable.

[14] I agree with the Respondent that the method of translation renders exhibits "N" and "O" of the Legal Assistant's affidavit inadmissible. The exhibits "N" and "O" of the affidavit of the Legal Assistant will therefore not be considered.

[15] The Respondent also submits that the Applicant's affidavit and the affidavit of his sister should be struck from the Applicant's Record because they contain information that is either extrinsic, an opinion or an argument. The Respondent submits that evidence that was not before the decision-maker cannot be considered by the reviewing court in an attempt to impugn the decision (*Singh v Canada (Citizenship and Immigration),* 2009 FC 11 at para 29).

[16] I find that the content of these affidavits provides an explanation for information that was not before the Officer, notably, the Applicant's reasons for not disclosing his 2018 Canadian PR application on his work permit application. Accordingly, the Applicant's affidavit and that of his sister will not be considered as they contain extrinsic evidence.

IV. **Issues and Standard of Review**

[17] I frame the issues in this application for judicial review in the following way:

A. *Whether the Officer's decision is reasonable.*

B. *Whether there was a breach of procedural fairness.*

[18] The parties agree that the standard of review with respect to an officer's decision to issue a work permit is reasonableness.

[19] I find that the applicable standard of review for the Officer's decision is reasonableness (*Zhang v Canada (Citizenship and Immigration)*, 2019 FC 764 at para 12). The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56). This conclusion accords with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17.

[20] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[21] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[22] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair, having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

V. **Analysis**

A. *Whether the Officer's decision is reasonable*

[23] Under paragraph 40(1)(a) of the *IRPA*, a foreign national is considered to be inadmissible to Canada "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 [the *IRPA*]." This Court's jurisprudence on paragraph 40(1)(a) of the *IRPA* was summarized by Justice LeBlanc (as he then was) in *Tuiran v Canada (Citizenship and Immigration)*, 2018 FC 324 ("*Tuiran*") (citing *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at paras 38 and 39). The Court in *Tuiran* confirmed the following key elements of the legal framework at paragraph 25:

1) [t]he provision should receive a broad interpretation in order to promote its underlying purpose;

2) its objective is to deter misrepresentation and maintain the integrity of the Canadian immigration process;

3) any exception to this general rule is narrow and applies only to truly extraordinary circumstances;

4) an applicant has the onus and a continuing duty of candour to provide complete, accurate, honest and truthful information when applying for entry into Canada;

5) regard must be had for the wording of the provision and its underlying purpose in determining whether a misrepresentation is material;

6) a misrepresentation is material if it is important enough to affect the immigration process;

7) a misrepresentation need not be decisive or determinative to be material;

8) an applicant may not take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application;

9) the materiality analysis is not limited to a particular point in time in the processing of the application; and

10) the assessment of whether a misrepresentation could induce an error in the administration of the *IRPA* is to be made at the time the false statement is made.

[24] An applicant can also be found inadmissible when the misrepresentation was made by another party (*Tuiran* at para 26).

(1) Omission of Relevant Immigration History

[25] In response to the question on his work permit application that asked about the Applicant's immigration history, the Applicant failed to list an application for a US tourism visa that was refused in 2015, and an application for Canadian PR that was refused in 2018. In the PFL sent to the Applicant, the Officer stated:

> "Specifically I have concerns that you have omitted to answer truthfully the background question 2 b) "Have you ever been refused a visa or permit, denied entry, or ordered to leave Canada, or any other country or territory?""
>
> [Emphasis in original]

[26] In his response on behalf of the Applicant, the Consultant provided information about the 2015 US tourism visa refusal, but failed to address the 2018 Canadian PR application refusal:

> Mr. Zhuolun Du applied for a US tourism visa in 2015, together with his family. They were planning a family trip to the US, unfortunately, his application was refused. It was not his intention to hide this information, he forgot about this rejection at the time we submit his application, and please forgive his innocent mistake.

[27] The Applicant asserts that his failure to disclose the 2018 PR application was an innocent mistake and that he honestly believed he was not making a misrepresentation. The Applicant relies on *Baro v Canada (Citizenship and Immigration),* 2007 FC 1299 at paragraph 15, in which this Court states: "[a]n exception arises where applicants can show that they honestly and reasonably believed that they were not withholding material information" (citation omitted).

[28] The Respondent submits that this argument is without merit, as it is trite law that an applicant is responsible for the content of their application (*Bodine v Canada (Citizenship and Immigration),* 2008 FC 848 at para 41; *Ji v Canada (Citizenship and Immigration),* 2019 FC 1219 at para 21). The Respondent asserts that the innocent misrepresentation exception applies only "[…] in limited circumstances where "knowledge of the misrepresentation was beyond the applicant's control"" (*Tuiran* at para 27, citing *Suri v Canada (Citizenship and Immigration),* 2016 FC 589 at para 20), and that there is no evidence of extraordinary circumstances in this case, beyond the Applicant's own inadvertence.

[29] I agree. I do not find that this is an exceptional situation where knowledge of the misrepresentation was beyond the Applicant's control (*Ahmed v Canada (Citizenship and Immigration),* 2020 FC 107 at para 32, citing *Goudarzi v Canada (Citizenship and Immigration),* 2012 FC 425 at para 40). The jurisprudence is clear that "[…] applicants seeking status in Canada have an obligation to ensure the information provided on their behalf is accurate and

complete" *(Ibe-Ani v Canada (Citizenship and Immigration)*, 2020 FC 1112 at para 29, citing *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at paras 53-58, aff'd 2006 FCA 345).

[30] I therefore find that it was reasonable for Officer to determine that the Applicant's omissions regarding his prior immigration history are relevant and material to the assessment of his work permit application, particularly since the Applicant was given an opportunity to respond to the concerns highlighted in the PFL.

(2) Record of Previous Employment

[31] The Officer raised the genuineness of the Applicant's employment at the Restaurant in the PFL. The Consultant's response to the PFL included photographs of the Applicant in the Restaurant and the Investigation Report confirming the genuineness of documents submitted by the Applicant, including an employment letter from the Restaurant's owner, and records of the Applicant's social insurance payments and income tax payment. Following the Applicant's response to the PFL, the Officer considered the Applicant's employment and education history, including the income tax payments and social insurance contributions from 2017 to 2020. The Officer noted that the Applicant made a back-payment of tax on January 18, 2021 for the 2017-2020 tax term and that the Applicant's employer from the Restaurant had not contributed to the Applicant's social security insurance, as required by law in China. The Officer's reasons state:

> It is the employer's responsibility to contribute to the social security insurance and pay employee's part on [their] behalf. And that's why the name of the employer would show on the form.

[32] The Applicant submits that the Officer's reasons erroneously suggest that the Restaurant did not employ the Applicant because he himself paid for his social securities and income taxes. The Applicant states that the Officer's concerns regarding the genuineness of his employment at the Restaurant are rooted in the Officer's understanding that the law in China requires an employer to contribute to the employee's social security insurance and pay tax on the employee's behalf. While the Applicant concedes that an officer is open to consider foreign law in assessing an application, he submits that the Officer in this case bears the burden of proving that their interpretation of the foreign law is correct when it is used to infer material facts.

[33] The Respondent submits that the Officer adequately assessed all of the evidence before them to arrive at their conclusion. Specifically, the Respondent argues that the Officer reasonably determined that the Applicant failed to provide reliable evidence of his employment at the Restaurant and did not address why there were no insurance or tax remittance made on behalf of the Applicant by the employer, as required by Chinese law.

[34] I find that the Officer was entitled to rely on their own knowledge of the local factors, including their understanding of foreign law, to assess an application (*Mohammed v Canada (Citizenship and Immigration)*, 2017 FC 992 at paras 7 and 8, citing: *Bahr v Canada (Citizenship and Immigration)*, 2012 FC 527 para 42). The Officer's expertise and understanding of local laws is owed deference. I therefore find that the Officer's conclusion with respect to the genuineness of the Applicant's employment is reasonable.

B. *Whether there was a breach of procedural fairness.*

[35] The Applicant submits that his rights to procedural fairness were breached because the PFL did not clearly disclose the Officer's concerns. The Applicant argues that it was misleading of the Officer to underline the words "refused a visa" and "or any other country" in the PFL. The Applicant states that because of these underlined words, the Consultant interpreted the question to be about whether the Applicant had ever been refused a visa from *other countries*, and did not focus his answer on the PR application refused by Canada. The Applicant also submits that "[f]or a procedural fairness letter to be fair, it has to allow an applicant to know what the concerns are" (*Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 ("*Punia*") at para 62), and that he did not know what information was needed to satisfy the Officer's concerns, including the Officer's specific concerns related to the Applicant's employment.

[36] In the case of *Punia*, in which the applicant had failed to mention a refused PR application on her application form, this Court found that the visa officer's PFL failed to specify which aspects of the applicant's record rendered her application inaccurate (at para 62). The applicant in *Punia* represented herself and sent a follow-up email suggesting that the officer verify her record to ensure she was correct in her response (para 59). The Court in *Punia* found that this effort was not suggestive of someone who intended to deceive or misrepresent, but rather was demonstrative of obvious confusion (para 63). Unlike the applicant in *Punia* who was self-represented, the Applicant in this case hired the Consultant to assist with his application. I therefore do not find the Applicant's reliance on *Punia* to be helpful.

[37] The Respondent submits that the duty of procedural fairness owed to a visa applicant falls on the low end of the spectrum (*Mehfooz v Canada (Citizenship and Immigration)*, 2016 FC 165 at para 12, citing *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 23), and that the Applicant was afforded procedural fairness throughout. Before the PFL was sent, the Applicant was asked to submit his income tax and social insurance records. The Respondent argues that this request made in the context of a work permit application would have reasonably put the Applicant on notice that his employment history was being assessed. The Respondent also asserts that the PFL clearly set out the Officer's concerns with the Applicant's application (*Bhamra v Canada (Citizenship and Immigration)*, 2014 FC 239 at para 43).

[38] I agree. I find that the PFL was sufficiently specific to give the Applicant a meaningful opportunity to address the Officer's concerns (*Kaur v Canada (Citizenship and Immigration)*, 2020 FC 809 at para 39). While I recognize that the emphasis on certain words in the PFL could be confusing, I do not find that the sentence suggests that only refused visas from other countries were the source of the Officer's concern. In fact, the first part of the phrase "Have you ever been refused a visa or permit" is quite clear, and underlining "refused a visa" suggests that this information was particularly important to address. A review of the GCMS notes also demonstrates that the Officer adequately considered the Applicant's response to the PFL.

[39] In my view, I do not find that there was a breach of procedural fairness in this case.

VI. **Conclusion**

[40] For the reasons above, I find the Officer's decision is reasonable. I do not find that there was a breach of procedural fairness. Accordingly, this application for judicial review is dismissed.

[41] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-3033-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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