Federal Court Cour fédérale

Date: 20220531

Docket: IMM-2968-20

Citation: 2022 FC 795

Ottawa, Ontario, May 31, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JENNIFER RAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision addresses an application for judicial review of an April 27, 2020 decision of an officer [the Officer] at the Visa Section of the High Commission of Canada in New Delhi, India [the Decision]. The Officer refused the Applicant's work permit application under s 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], on the basis of a misrepresentation related to a previous visa refusal from the United States of America [US].

[2] As explained in greater detail below, this application is dismissed, because the Applicant has failed to demonstrate that the Decision is unreasonable or that she was denied procedural fairness in the process leading to the Decision.

II. **Background**

[3] The Applicant is 38 years old and a citizen and current resident of India. Her husband moved to Canada in October 2018 on a study permit. He also received a work permit and an extension of his study permit and intended to stay in Canada after his studies through the Post-Graduate Work Program.

[4] In December 2019, with the help of her former consultant, the Applicant applied for an open work permit under the International Mobility Program on the basis that her husband was a student in Canada. She asserts that, in order to complete the relevant application forms, the consultant read the application questions to her over the phone and she misheard a background declaration question. While that question asks, "[h]ave you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory", she understood the question to concern only Canada and answered "no", notwithstanding that she had previously been refused a visa by the US.

[5] The Applicant further asserts that she did not have an opportunity to review a paper or electronic version of her application before her consultant submitted it to the Respondent and that, while her husband met in-person with the consultant prior to submission, he also did not

have the opportunity to review the prepared application forms. The Respondent received the application on December 14, 2019.

[6] On January 22, 2020, the Applicant received a Procedural Fairness Letter [PFL] from the Respondent, alleging that she had failed to declare visa refusals from other countries. The PFL requested an explanation and further documentation concerning her previous refusals. With the assistance of her previous consultant, the Applicant submitted a response, which explained the manner in which her application had been completed.

[7] By letter dated April 27, 2020, the Respondent conveyed the Decision that is the subject of this application for judicial review, in which the Officer found the Applicant inadmissible to Canada for five years due to misrepresentation.

III. **Decision Under Review**

[8] The record before the Court includes Global Case Management System [GCMS] notes from April 17, 2020 and April 27, 2020, which relate to the Decision under review and, respectively, read as follows:

> Response to PFL reviewed: Applicant failed to declare previous US visa refusal for which a Procedural Fairness Letter was sent on 22 Jan 2020. In response to the PFL, PA states that she did not properly hear the stat question when it was read to her over the phone by her rep. She therefore did not declare her previous US refusal from 2015. I do not find PA's response to PFL adequate. PA is responsible for ensuring application form is complete and accurate before signing and submitting. Based on the information on file and the applicant’s response to the procedural fairness letter, I am of the opinion that PA intentionally withheld information regarding his refusal and that the misrepresentation or

> withholding of this material fact could have induced errors in the administration of the Act. I am forwarding this application to the senior officer for further review of misrepresentation.
>
> ….
>
> 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. I have reviewed the application, supporting documents and notes on this application. The applicant applied for a work permit to work temporarily in Canada. During the course of the review of the application, the officer noted that the applicant had immigration history in the USA that was not disclosed. A procedural fairness letter was sent to the applicant providing an opportunity to disabuse the officer of their concerns. The procedural fairness letter outlined the concerns as well as the consequences of a finding under A40 including a five year bar from entering Canada. The applicant has responded to the letter but has failed to disabuse me of the concerns presented. In my opinion, on the balance of probabilities, the applicant was not truthful on his application form and failed to disclose that he has derogatory immigration history in the USA. This could have caused an error in the administration of the Act and Regulations as it could have satisfied an officer that this applicant met the requirements of the Act with respect to having a genuine temporary purpose for travel to Canada and that he would abide by the conditions of entry to Canada. I am therefore of the opinion that the applicant is inadmissible to Canada under section 40 of the Act. This application is refused on A40 grounds. Pursuant to subsection A40(2)(a), a permanent resident or a foreign national determined to be inadmissible for reasons of misrepresentation continues to be inadmissible for a period of five years following, in the case of a determination made outside Canada, the date of the refusal letter.

IV. **Issues and Standard of Review**

[9] The Applicant's arguments raise the following issues for the Court's consideration:

A. Did incompetence of the Applicant’s former consultant result in a breach of procedural fairness?

B. Is the Decision reasonable?

[10] As suggested by the articulation of the second issue, it is governed by the reasonableness standard of review. The procedural fairness issue is subject to the standard of correctness.

V. **Analysis**

A. *Did incompetence of the Applicant’s former consultant result in a breach of procedural fairness?*

[11] The Applicant asserts that her former consultant was incompetent or ineffective in failing to provide her with a physical or electronic copy of her work permit application for her review before electronically submitting it to the Respondent. She submits that she was therefore deprived of the opportunity to confirm that the information provided in the application was true and accurate and that, but for the consultant’s incompetence, she could have identified the inaccurate response and would have avoided the Officer’s misrepresentation finding.

[12] As the Applicant correctly submits, there is authority for ineffective assistance of counsel constituting a breach of natural justice (see, e.g., *Miah v Canada (Citizenship and Immigration)*, 2015 FC 36 at para 28), which can represent a basis for judicial review. The Applicant acknowledges that the test for incompetent or negligent counsel is very high, requiring an applicant to show: (a) that the representative’s alleged acts constitute incompetence; (b) that there was a miscarriage of justice in that, but for the alleged conduct, there is a reasonable

probability that the result would have been different; and (c) that the representative has been given a reasonable opportunity to respond (see, e.g., *Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 16).

[13] The third branch of this test is informed by the *Protocol Re: Allegations Against Counsel or Other Authorized Representatives in Citizenship, Immigration and Protected Person Cases before the Federal Court,* issued by the Federal Court on March 7, 2014 [the *Protocol*]. The Applicant's submissions reference the *Protocol* and note that, on September 30, 2020, her current counsel provided her former consultant with written notice regarding her concerns as to the consultant's failure to provide her with the application for review before it was submitted to the Respondent. I accept that this notice represents one of the steps contemplated by the *Protocol*.

[14] However, the *Protocol* also contemplates that, if the Court decides to grant leave in the matter where the alleged incompetence is raised, current counsel will provide a copy of the Order granting leave to the former counsel or representative whose competence is impugned, so that the former counsel or representative has an opportunity to make a motion for leave to intervene in the application for judicial review. In the present case, the Order granting leave was issued on February 28, 2022. I have not identified in the record before the Court any indication that this step of the *Protocol* has been performed. When I inquired about this point at the hearing of this application, the Applicant's counsel provided no submissions.

[15] In the absence of evidence that the *Protocol* has been followed, such that the Applicant's former consultant was provided an opportunity to participate in this proceeding, I am not prepared to conclude that the consultant's approach to the Applicant's representation constitutes incompetence.

[16] Before leaving the issue of procedural fairness, I note that the Applicant's arguments include a submission to the effect that the finding reflected in the GCMS notes that she was "not truthful" represents a negative credibility finding. She argues that, before arriving at this finding, procedural fairness required the Officer to raise the credibility concern with the Applicant and afford her an opportunity to respond. The Applicant relies on *Bao v Canada (Citizenship and Immigration)*, 2019 FC 268 [*Bao*], where the Court found that a visa officer had credibility concerns regarding information provided by an applicant in her response to a PFL and was therefore obliged to raise those concerns directly with the applicant (at para 21).

[17] While *Bao* refers to the duty of procedural fairness owed by visa officers being at the low end of the spectrum (at para 22), the Applicant also refers the Court to recent jurisprudence referring to a requirement to afford a high degree of procedural fairness to individuals facing a possible finding of inadmissibility (see, e.g., *Lin v Canada (Citizenship and Immigration)*, 2019 FC 1284 at para 25). However, even applying this higher standard, I agree with the Respondent's submission that the facts of this case do not represent a circumstance where the Officer had a duty to provide the Applicant with an additional opportunity to respond.

[18] The PFL provided the Applicant an opportunity to address the alleged misrepresentation about which the Officer was concerned. The Officer's conclusion that the Applicant was not truthful relates to that misrepresentation, not to new information that was provided by the Applicant in her response to the PFL. After the Applicant provided her response, the principles of procedural fairness did not require the Officer to advise her that he did not accept the explanation and afford her a further opportunity to comment before arriving at the Decision. The PFL was sufficient to put the Applicant on notice of the point at issue, including the possibility that her response would not be accepted (see *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 [*Alalami*] at para 13).

B. *Is the Decision reasonable?*

[19] In challenging the reasonableness of the Decision, the Applicant first submits that the Officer erred by failing to consider the application of the innocent error exception to findings of inadmissibility due to misrepresentation. As explained in *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299, while even an innocent failure to provide material information can result in a finding of inadmissibility, an exception arises where applicants can show that they both honestly and reasonably believed that they were not withholding material information (at para 15). As the Applicant correctly asserts, it can be reviewable error for a visa officer to fail to conduct a meaningful analysis of the innocent error exception where there is evidence supportive of its application (see, e.g., *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 [*Berlin*] at para 22).

[20] However, in the case at hand, the Officer did not accept the Applicant's explanation that she honestly believed that she was not withholding material information. This is evident from the Officer's conclusion that the Applicant was not truthful in her application. If the Applicant's explanation had been accepted, the Officer may have been required to consider the innocent error exception to assess the reasonableness of that explanation. However, the exception has no potential application in the absence of a conclusion that the error was indeed innocent. There is no therefore no basis for a finding that the Officer erred in the manner identified in *Berlin* (see *Alalami* at para 16).

[21] Of course, the Court must also assess the reasonableness of the Officer's failure to accept the Applicant's explanation. She submits that she had nothing to gain by withholding her past US visa refusal and that the fact her husband had generated a positive immigration history in Canada, having been issued work and study permits and a subsequent extension of his study permit, should have reflected positively on her own application.

[22] While this is evidence that could support a conclusion that the misrepresentation was innocent, decision-makers are not obliged to refer to every piece of relevant evidence in the record. Rather, they are presumed to have considered all the evidence before them in reaching their decision (see, e.g., *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at para 47). In a case where evidence that is contrary to the decision-maker's finding has not been referenced in a decision, the more important the contradictory evidence, the easier it may be to rebut the presumption that all the evidence has been considered and to infer that the contradictory evidence has been overlooked (see *Cepeda-Gutierrez v Canada (Minister of*

Citizenship and Immigration), [1999] 1 FC 53 at paras 16-17, 157 FTR 35). However, the evidence upon which the Applicant's submission relies is not sufficiently compelling that the absence of an express reference to it in the Decision undermines the reasonableness of the Decision.

[23] Finally, the Applicant challenges the reasonableness of the Officer's materiality analysis. As she correctly submits, the failure to conduct an analysis of the materiality of an alleged misrepresentation can constitute a reviewable error (see, e.g., *Koo v Canada (Citizenship and Immigration)*, 2008 FC 931, at paras 29 and 38).

[24] In support of her position, the Applicant points out that the Officer was clearly aware of her US immigration history, as it appears in the GCMS notes, apparently as a result of information sharing with the US. She therefore argues that it is tenuous to conclude that the alleged misrepresentation foreclosed inquiries by Canadian immigration authorities. I find no merit to this argument, as the jurisprudence is clear that the materiality of a misrepresentation is not undermined by the fact the Canadian authorities have the ability to catch, or actually catch, the misrepresentation (see, e.g., *Goburdhan v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhan*] at para 43).

[25] The Applicant also argues that the Decision does not disclose a rational chain of analysis allowing the Applicant or the Court to understand how the Officer arrived at the materiality conclusion. As the Applicant notes, the Officer concluded that the misrepresentation could have satisfied an officer that the Applicant met the requirements of *IRPA* with respect to having a

genuine temporary purpose for travel to Canada and abiding by the conditions of entry to Canada. The Applicant submits that this case is comparable to *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 [*Gill*], where the Court concluded that a visa officer had not adequately explained how the omission of a refusal of a US tourist visa might have affected the process or the administration of *IRPA* (at para 29).

[26] However, as the Applicant points out in her written submissions, the Court's conclusion in *Gill*, that the officer's reasons inadequately explained the materiality of the US tourist visa refusal, is expressed in the context of the fact that the applicant in that case had disclosed six prior Canadian visa refusals (at para 29). In other words, as the applicant had put immigration authorities on notice of several other visa refusals, the Court found that the officer had not provided a comprehensible explanation as to how the failure to disclose this one additional refusal might have affected the process or administration of *IRPA*.

[27] Consistent with that analysis, the Court in *Gill* rejected the Minister's assertion that a foreign visa refusal is invariably material to a visa application (at para 30) regardless of the factual circumstances. I accept that proposition. However, the case at hand is distinguishable from *Gill*, in that the omission of the US visa refusal in the Applicant's application does not benefit from a similar context of other refusals having been disclosed.

[28] In contrast, the Respondent relies on *Goburdhan*, in which the Court accepted that a failure to disclose a prior US visa refusal was material. *Goburdhan* explains that, to be material, a misrepresentation need not be decisive or determinative. It will be material if it is important

enough to affect the process (at paras 39-40). In considering the respondent's submission that the misrepresentation could have prevented the officer from undertaking an appropriate investigation and verification process, the Court in *Goburdhan* noted that the officer did not specify what investigation and verification process potentially could have not been bypassed but concluded that the absence of such a detailed explanation was not fatal to the decision (at paras 42-43).

[29] Guided by *Goburdhan,* and this Court's jurisprudence to the effect that visa officers are not required to provide detailed reasons for misrepresentation findings (see, e.g., *He v Canada (Citizenship and Immigration)*, 2012 FC 33 at para 39), I am satisfied with the reasonableness of the Officer's materiality finding.

VI. **Conclusion**

[30] Having considered the arguments raised by the Applicant, and finding no basis for a conclusion that the Decision is unreasonable or was made without affording the Applicant requisite procedural fairness, this application for judicial review must be dismissed.

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

JUDGMENT IN IMM-2968-20

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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