Federal Court  Cour fédérale

Date: 20231016

Docket: IMM-7387-22

Citation: 2023 FC 1376

Ottawa, Ontario, October 16, 2023

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

MOHAMMED MANNAN SHAREEF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of a decision of a visa officer [Officer] refusing his application for a spousal open work permit. The Officer found the Applicant inadmissible to Canada under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for misrepresenting or withholding material facts relating to previous visa refusals from the United States [US].

[2] The parties filed “dueling” affidavits in this application concerning which work permit application form the Applicant submitted in March 2020, essentially drawing the Court into a credibility feud. The Applicant claims that he responded “yes” to the question on the application form: “Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?” On the other hand, the Respondent alleges that the Applicant submitted a form that checked “no” in response to that question.

[3] In my view, I need not determine which application form the Applicant filed in March 2020. Rather, it was incumbent on the Officer to contend with this critical issue in considering the Applicant’s admissibility. Based on the evidence in the record, the Applicant’s claim that he had filed an application form responding “yes” to the question about past visa refusals was squarely before the Officer. The Officer should have addressed this issue head-on and provided the Applicant an opportunity to explain himself before finding the Applicant inadmissible to Canada for five years.

[4] I am allowing this application because the Officer’s decision is both unreasonable and procedurally unfair in that the Officer failed to consider and assess the Applicant’s claim that he had disclosed prior visa refusals on his application form.

II. Background

A. *Work permit application*

[5] In March 2020, the Applicant, a citizen of India, filed a work permit application, seeking to accompany his wife for the duration of her studies in Canada. This is the Applicant's second work permit application. His previous application filed in October 2019 was refused based on concerns about the *bona fides* of the spousal relationship.

[6] The Applicant states that he answered "yes" to the question about prior visa refusals on the application form he submitted in March 2020. The application form he claims to have submitted further states: "I have clarified my rejections of F1 visa USA and two TRV visa of Canada in my last application, and on 22nd October 2019, my spouse dependent visa got refused under section 205(c)(ii)." In addition, the Applicant's March 4, 2020 cover letter explains that he had previously applied for a Canadian visitor visa and a US visa extension that were refused.

[7] On July 17, 2020, a visa officer sent a Procedural Fairness Letter [PFL] to the Applicant expressing concerns that he did not answer all the questions truthfully, contrary to section 16(1) of the *IRPA*. More specifically the letter stated that the Applicant failed to disclose his "previous US applications and refusals."

[8] On July 31, 2020, the Applicant responded explaining that he was unaware that he had to repeat information disclosed in his first application in 2019 [PF response letter]. He stated that:

> In March 2020 when I applied for the second time, I indicated very briefly in the application forms and had given the reference of last application of 2019. It is because, I thought that I have to be precise in making statement of purpose and I end up mentioning each point to clarify section R205(c)(2) without explaining reasons of my earlier refusals.

[9] After reviewing the Applicant's PF letter response, a visa officer determined that his response did not adequately "address why the disclosure was not made in the current application." The officer further found that "the applicant may be inadmissible to Canada under A40 for misrepresentation" and the case was forwarded to a unit manager for review and a final decision on August 6, 2020.

[10] According to the Applicant, after hearing nothing for a year and a half, his wife obtained the Global Case Management System [GCMS] notes through an access to information request. When he discovered that his application had been escalated to a unit manager for suspected misrepresentation and that no decision has been made yet, the Applicant engaged the services of an immigration consultant.

[11] The Applicant states that, by letter dated February 17, 2022, the immigration consultant filed procedural fairness submissions (including evidence) addressing the visa officer's misrepresentation concerns. Since a final decision was still pending, the consultant requested that the submissions be considered by the officer who would be reviewing the matter.

[12] At the same time, the consultant sent a letter providing updated information about the Applicant's wife's status, advising that she now holds a post-graduate work permit. As a result,

the Applicant was seeking to obtain a work permit as the accompanying spouse of a work permit holder. While this letter is recorded as having been received in the GCMS notes, the further procedural fairness submissions are not recorded in the GCMS notes.

[13] By email dated May 28, 2022, the Applicant inquired about the status of his work permit application and referred to having sent further procedural fairness submissions: “I reapplied for PFL with the updated documents. However, its [*sic*] been five months since I reapplied and I have not heard anything back from IRCC.”

[14] By letter dated July 7, 2022, the Officer refused the Applicant’s work permit application and determined that the Applicant was inadmissible for misrepresentation for a period of five years pursuant to paragraph 40(1)(a) of the *IRPA*. The Officer made no reference, in either the GCMS notes or the July 7, 2022 letter, to the Applicant’s further procedural fairness submissions.

B. *Dispute over which application form was filed in March 2020*

[15] In response to the Applicant’s leave application, the Respondent disputes that the Applicant submitted the “yes” application form in March 2020. The Respondent filed the affidavit of Han Duan, the Manager of the Students and Workers Unit at the High Commission of Canada in New Delhi, India, dated December 2, 2022. Mr. Duan attached a different work permit application form, attesting that this was the one filed by the Applicant in March 2020. On that form, “no” is checked off in response to the question of whether the Applicant has ever been denied any visas.

[16] In his affidavit, Mr. Duan also states that the "yes" form included in the Applicant's application record was only provided as part of the Applicant's PF response letter in July 2020. Mr. Duan's affidavit neither addresses the cover letter that the Applicant claims he submitted with his application form in March 2020 nor the immigration consultant's procedural fairness submissions dated February 17, 2020.

[17] The Applicant filed an affidavit dated July 10, 2023 responding to Mr. Duan's affidavit. The Applicant attests that he did not know where the "no" application form came from: "I also saw the exhibit purporting to be the application form I sent with no refusals indicated. I have no clue where the form produced by the visa officer in his affidavit came from."

[18] The Respondent filed a Certified Tribunal Record [CTR] on February 15, 2023 that included the Applicant's cover letter dated March 4, 2020 and the "yes" application form the Applicant claims he submitted. The Respondent then submitted an Amended Certified Tribunal Record [ACTR] on February 17, 2023 that included those documents, as well as the "no" application form the Respondent alleges the Applicant filed in March 2020. The further procedural fairness submissions were not included in either the CTR or the ACTR.

III. Issues and Standard of Review

[19] In my view, the determinative issue is the Officer's failure to engage with relevant evidence and submissions in finding the Applicant inadmissible for misrepresenting his visa refusal history. This issue raises both questions of reasonableness and procedural fairness.

[20] As enunciated by the Supreme Court 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": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100. Furthermore, the court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100.

[21] Where breaches of procedural fairness are alleged, no standard of review is applied but the Court's reviewing exercise is "best reflected on a correctness standard": *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]. When assessing whether procedural fairness was met, a reviewing court asks whether the "procedure was fair having regard to all of the circumstances": *CPR* at para 54.

[22] As I raised at the hearing, I found the state of the certified tribunal record concerning. The disorganized nature of both the CTR and the ACTR hampered the Court's review of this matter. Both records were poorly organized, with documents out of order. For instance, while the Respondent's affiant alleges that the application form checked "yes" was submitted with the Applicant's PF response letter, the said application form appears separately in the CTR and the ACTR. In both records, it precedes the PF response letter and the application form checked "no."

[23] As this Court has previously stated, the Respondent "controls the record that is put before the Court": *Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 1999 CanLII 7833 (FC), 168 FTR 103 at para 9. The onus was therefore on the Respondent to ensure that the Court has an accurate and complete record.

IV. Analysis

A. *The Officer failed to grapple with the contradictory application forms*

[24] A misrepresentation finding under subsection 40(1) of the *IRPA* carries serious consequences, namely a five-year ban from Canada: *Shah v Canada (Citizenship and Immigration)*, 2022 FC 1741 at para 25; *Lin v Canada (Citizenship and Immigration)*, 2019 FC 1284 at para 24; *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 273 at para 13. It was incumbent on the Officer to grapple with the contradictory application forms on the record and provide the Applicant with an opportunity to explain himself before determining that he had misrepresented his visa refusal history and was inadmissible to Canada.

[25] The difference in application forms was only raised by the Respondent on judicial review. As set out above, the Respondent filed an affidavit disputing that the Applicant submitted the form responding "yes" in March 2020. In its Memorandum of Fact and Law, the Respondent further alleges that the Applicant misrepresented which application form he originally submitted before this Court:

> 36. In his judicial review application, the Applicant has misrepresented which application form he originally submitted. In the paper application form originally submitted to the VAC, the Applicant did not disclose the previous visa refusals. As part of his

> procedural fairness response, the Applicant submitted a second application form disclosing the visa refusals. The Applicant has included the second form as part of his Application Record, purporting it to be the application form he submitted originally to the VAC, which is misleading. The Applicant had an obligation to provide accurate information to the Court in his Application Record. [Emphasis added]

[26] I do not accept the Respondent's argument that the Applicant has misled this Court. Based on the evidence before this Court, the Applicant has consistently taken the position that he submitted the "yes" application form in March 2020. It was not until the matter was brought before this Court that the Applicant was confronted with the "no" application form. The Applicant claims that he does not know where it came from.

[27] According to the ACTR and the Respondent's affidavit, both application forms were on the record before the Officer. As a result, the Court can only conclude that either the Officer was aware of the two different application forms at play, but failed to raise the matter with the Applicant, or the Officer overlooked this evidence altogether. In either case, the Officer erred in failing to grapple with the discrepancy between the two application forms and this error vitiates the decision.

[28] The Respondent's affiant asserts that the "yes" application form was only submitted by the Applicant in July 2020, as an attachment to his PF response letter. Given the disorganized nature of the certified tribunal record, the Court is unable to glean from the record when the "yes" application form was submitted. In the CTR and the ACTR, the "yes" form appears separately and precedes both the PF response letter and the application form checked "no." Regardless, even if the "yes" form was submitted with the PF response letter, the Officer should

have recognized that the Applicant was relying on a different form and should have addressed the discrepancy at that time.

[29] Furthermore, the Applicant's PF response letter clearly states that he did mention some of the previous visa refusals in his March 2020 application form:

> In March 2020 when I applied for the second time, I indicated very briefly in the application forms and had given the reference of last application of 2019. It is because, I thought that I have to be precise in making statement of purpose and I end up mentioning each point to clarify section R205(c)(2) without explaining reasons of my earlier refusals. [Emphasis added]

[30] This statement, coupled with the fact that the Applicant attached the "yes" application form to his PF response letter, should have alerted the Officer to a discrepancy or a contradiction in the evidence. If the Applicant's position was inconsistent with the materials the Officer was privy to, particularly the application form and the information that was disclosed therein, the Officer should have engaged with this evidence. The jurisprudence is clear that a decision-maker is required to address relevant evidence that may contradict their findings: *Begum v Canada (Citizenship and Immigration)*, 2017 FC 409 at para 81; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), [1999] 1 FC 53 at para 15.

[31] Moreover, while a decision-maker is not required to mention every piece of evidence or argument bearing on an issue, the more significant the unmentioned evidence is, the more willing the Court is to infer that the officer unreasonably failed to account for the evidence: *Vavilov* at paras 125-127. Here, the overlooked evidence pertaining to the application form submitted by

the Applicant was central in assessing whether the Applicant misrepresented his visa refusal history.

[32] Notwithstanding this error alone is enough to overturn the Officer's decision, I address two other errors in the Officer's decision below.

B. *The Officer failed to address the Applicant's March 4, 2020 cover letter*

[33] Of further concern is the evidence regarding the Applicant's March 4, 2020 cover letter. While asserting that the application form checked "yes" was not the form the Applicant submitted in March 2020, neither the Respondent nor their affiant make mention of the Applicant's cover letter. This is despite it being included in both the CTR and the ACTR.

[34] Given its presence in the certified tribunal record, the letter is presumed to have been before the Officer at some point before they made their decision. However, there is no indication on the record as to when it was received, which further reflects the challenges the Court faced with the state of the record in reviewing the Officer's decision.

[35] Notably, the cover letter mentions some of the Applicant's previous visa refusals:

> I would like to mention that it's part of my hobbies to explore countries and to gain western work experience and just because of that reason I applied for temporary resident visa for Canada which got refused. I work for myself and so is the reason for exploring world so that I can apply that unique western work experience on my businesses and can flourish it back in my home country. I have applied for USA visa extension which got refused and clarification for that I had provided in my last application. [Emphasis added]

[36] Regardless of when the cover letter was submitted, the Officer should have engaged with it. If the cover letter was submitted in March 2020, as claimed by the Applicant, the Officer should have considered whether the disclosure of some visa refusals in that letter was enough to conclude that the Applicant did not intend to mislead the immigration authorities about his visa refusal history. Given the relevance of these potential disclosures to the misrepresentation finding, the Officer should have turned their mind to this consideration in their decision on inadmissibility.

[37] This Court has held that an officer must consider the totality of a visa application in determining whether there has been a misrepresentation for the purpose of inadmissibility under paragraph 40(1)(a) of the *IRPA*: *Xu v Canada (Citizenship and Immigration)*, 2011 FC 784 at para 16; *Koo v Canada (Citizenship and Immigration)*, 2008 FC 931 at para 29 [*Koo*]. Where an applicant discloses the correct information in another part of their application form, this may militate against a misrepresentation finding: *Lamsen v Canada (Citizenship and Immigration)*, 2016 FC 815 at paras 23-25; *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at para 20; *Koo* at para 23.

[38] If, on the other hand, the cover letter was submitted at a later date, it raises the same issues discussed above regarding the Applicant's PF response letter. The cover letter should have alerted the Officer to the Applicant's claim that he had disclosed his prior visa refusals. Instead of overlooking the cover letter altogether, the Officer ought to have addressed this claim.

C. *The Officer failed to consider the Applicant's further procedural fairness submissions*

[39] The Officer further erred in failing to consider the Applicant's further procedural fairness submissions before rendering a decision on the Applicant's admissibility. While the immigration consultant's submissions are not in the CTR or the ACTR, they are referenced in the Applicant's email of May 28, 2022 inquiring about the status of his work permit application. Notably, this email is included in both the CTR and the ACTR, indicating that it was before the Officer.

[40] If the immigration consultant's February 17, 2022 submissions had not been received, the Applicant's May 2022 email should have indicated to the Officer that the record was incomplete. In not seeking clarification from the Applicant regarding these further submissions, the Officer infringed the Applicant's right to procedural fairness: *Bizimana v Canada (Citizenship and Immigration)*, 2020 FC 288 at para 27.

V. Conclusion

[41] Based on the foregoing, I find that the Officer's decision was both unreasonable and procedurally unfair. The Officer failed to engage with the Applicant's claim that he disclosed his previous visa refusals, the contradictory application forms on the record, and the Applicant's further procedural fairness submissions. For these reasons, the decision is set aside and the matter is remitted to another officer for determination.

[42] The parties did not raise a question for certification and none arises in this case.

JUDGMENT in IMM-7387-22

THIS COURT'S JUDGMENT is that:

1. The application is allowed.
2. The Officer's decision dated July 7, 2022 is set aside and the matter is remitted for determination by another officer.
3. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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