Federal Court  Cour fédérale

Date: 20240725

Docket: IMM-7223-23

Citation: 2024 FC 1172

Ottawa, Ontario, July 25, 2024

PRESENT: Associate Chief Justice Gagné

BETWEEN:

AMEER MANSOOR ABDOOL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an Application for judicial review of a decision to refuse the Applicant's work permit application made abroad. The Applicant was found inadmissible to Canada for misrepresentation by failing to disclose the cancellation of a previous United States Non-Immigrant Visa. The Applicant alleges he voluntarily withdrew his US Visa application after

experiencing several negative encounters with United States Customs and Border Protection agents that he believes were racially motivated.

II. Facts

[2] The Applicant is a citizen of Trinidad and Tobago. He is 38 years old, married, and has one child.

[3] The Applicant's wife holds a valid Canadian study permit for her Masters in Business Administration at University Canada West.

[4] On August 23, 2022, the Applicant applied for a spousal open work permit from Trinidad and Tobago.

[5] The IMM 1295 form required the Applicant to answer Question 2(b), which reads as follows:

> "Have you ever been refused a visa or permit, denied entry, or ordered to leave Canada or any other country or territory?"

[6] The Applicant checked yes and provided the following explanation:

> I was denied a United States of America visa in 2009/2010 and re-applied successfully in 2017. I applied to enter Canada via applying for a visitor visa which was successfully issued in 2019.

[7] However, the Applicant did not disclose a more recent interaction he had with the US customs in January 2020.

[8] On October 7, 2022, Immigration, Refugees and Citizenship Canada [IRCC] sent the Applicant a letter requesting "an explanation for [his] failure to provide details regarding [his] USV revocation in section 2 d) of [his] application form…"

[9] On October 18, 2022, the Applicant responded and explained that he believed he voluntarily cancelled his US Visa in January 2020 and did not realise he needed to include it on the IMM form. The Applicant had travelled to the US on January 18, 2020 and was subjected to several hours of questioning and searches by US customs that he believes were racially motivated. Approximately 4-5 hours after arriving at customs, the Applicant alleges he voluntarily decided to inform the US officer that he wanted to return to his home country and was no longer interested in entering the US. The Applicant alleges the US customs officer told him his decision to cancel the visa would have no impact on his family and that he could re-apply for a new visa upon return to his home country.

[10] The Applicant attached transcripts to his response of the questioning conducted by US officials, which indicate that the US found the Applicant to be inadmissible and that the Applicant was not forthcoming during questioning.

III. Decision Under Review

[11] By letter dated January 24, 2023, the Officer refused the Applicant's work permit Application.

[12] 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 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.

[13] The Officer did not find it credible that the Applicant would think it was unnecessary to include information about his interaction with US authorities in his Application. The Officer found that the Applicant failed to provide information in his response to overcome these concerns.

IV. Issues and Standard of Review

[14] The issues are whether the decision under review was procedurally fair and reasonable.

[15] Issues of procedural fairness require the Court to determine whether the procedure was fair having regard to all of the circumstances; this is akin to a standard of correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). The IRCC officer's finding of misrepresentation, on the other hand, must be assessed by applying the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. Analysis

A. *Was the process fair?*

[16] The content of the duty of procedural fairness in the context of the refusal of work permits and misrepresentation findings does not require a full analysis of all five *Baker* factors. The factors inform the scope of the duty of procedural fairness, which is variable and must be determined in the specific context of each case.

[17] As held by Justice Kane in *Kaur v Canada (Citizenship and Immigration)*, 2022 FC 270, "the duty of procedural fairness owed with respect to applications for work permits is generally at the low end of the spectrum" (at para 24).

[18] Justice Kane also notes a higher level of procedural fairness may be owed where the refusal of a work permit is accompanied by a finding of misrepresentation and consequential inadmissibility to Canada for a five-year period (at para 24, *citing Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 27; *Lin v Canada (Citizenship and Immigration)*, 2019 FC 1284 at paras 24–25).

[19] Ultimately, Justice Kane does not agree with the applicant that a "high" level of procedural fairness is owed to her but, given the importance of the decision and the consequences of a finding of misrepresentation, Justice Kane accepts that a higher – i.e., more than the minimum – duty was owed (*Kaur* at para 27).

[20] In the present case, the IRCC letter to the Applicant requested an explanation for the Applicant's failure to provide details regarding his US Visa revocation.

[21] The Applicant argues this letter is not a real procedural fairness letter but rather a simple request letter that fails to highlight the consequences of a finding of misrepresentation. I have asked counsel for the Applicant whether he had authorities supporting the proposition that a procedural fairness letter had to mention the potential consequences of a finding of misrepresentation in addition to the concerns identified by IRCC; he could point to none.

[22] By way of a post-hearing letter, the Applicant referred the Court to its decision in *Asanova v Canada (Citizenship and Immigration)*, 2020 FC 1173, where, after having reiterated that in visa applications the requirements of procedural fairness fall at the low end of the spectrum, Justice John Norris goes on to state that:

> [29] Even so, at a minimum procedural fairness requires that an applicant for a visa have an opportunity to participate meaningfully in the application process. Consequently, the duty of procedural fairness can require that an applicant be given an opportunity to respond to a decision maker's concerns before a decision is made when those concerns go beyond simply whether the legislative or related requirements are met on the face of the application (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24). When, for example, an applicant for a visa may be unaware of the existence or the basis of the concern, procedural fairness can require prior notice of the concern before a decision is made so that the applicant has an opportunity to try to disabuse the officer of the concern. See *Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 at para 21; *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326 at paras 25-26; and *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at para 27.
>
> [30] Further, when the concern relates to misrepresentation, the importance of having a meaningful opportunity to meet it is obvious given the potential consequences of a finding of

> misrepresentation: see *Toki v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 606 at para 17, and *Ntaisi v Canada (Citizenship and Immigration)*, 2018 CanLII 73079 (FC) at para 10. If a finding of misrepresentation is made, an applicant will not only be denied the visa for which they applied; they will also be inadmissible to Canada for the next five years. Without question, this is an important consequence (cf. *Baker* at para 25). Consequently, a concern about [sic] triggers a higher level or degree of procedural fairness compared to that which is engaged in visa applications where this concern is absent: see *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 27.
>
> [31] Often on judicial review the issue is whether a procedural fairness letter should have been sent when one was not. In the present case, however, a procedural fairness letter was sent to the applicant. The question here, then, is whether that letter actually satisfied the requirements of procedural fairness. A functional approach should be taken in answering this question.
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> [32] The purpose of a procedural fairness letter "is to provide enough information to an applicant that a meaningful answer can be supplied" (*Ntaisi* at para 6). Thus, in assessing whether the requirements of procedural fairness were met, the governing question is: Did the letter inform the affected party of the decision maker's concerns? Only if it did can it be said that the letter gave the affected party a meaningful opportunity to address the concerns. What this means is that if the decision maker had specific concerns about aspects of an application, the procedural fairness letter must state more than general concerns. It must state the decision maker's concerns with sufficient clarity and particularity so that the affected party has a meaningful opportunity to address them. See *AB v Canada (Citizenship and Immigration)*, 2013 FC 134 at paras 53-54; *Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 at para 62; *Toki* at para 25; and my decision in *Kaur v Canada (Citizenship and Immigration)*, 2020 FC 809 at para 39.

[23] In *Asanova*, the applicant had filed two reference letters in support of her work visa application. The officer's procedural fairness letter simply stated that "[t]he information in [the applicant's] employment reference letters does not appear to be genuine", without further details. The applicant asked for clarification in order to be able to disabuse the officer of his concerns but

she was simply told that she could "submit any documents that [she] choose[s] in response to the concerns set out in [their] letter of yesterday."

[24] The facts before me are quite different. The Applicant understood that the Officer's concern was his failure to provide details regarding his US visa revocation and responded directly to the Officer's concern by explaining that he did not believe he had to disclose the US Visa refusal in question because he thought he voluntarily withdrew the application. The Applicant's response addressed the case to be met set out by the Officer. The Applicant's own evidence filed in support of his Application for judicial review establishes that he understood that the letter that was sent to him was a procedural fairness letter to which he duly responded. His affidavit evidence was affirmed with the assistance of counsel.

[25] The Applicant provided a detailed response to the Officer's letter and explained why he omitted the US Visa issue from his response to Question 2(b) of the IMM 1295 form. The Applicant knew the exact events of January 2020 that the IRCC officer was concerned about and addressed these concerns in detail in his response letter.

[26] Contrary to the Applicant's argument, a procedural fairness letter does not need to state what flows from the IRPA; for example that a visa applicant must answer truthfully all questions put to them (paragraph 16(1)) or that the consequence for misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of the IRPA is inadmissibility (paragraph 40(1)(a)).

[27] The determinative question is whether the Applicant knew the case to meet and had a full and fair chance to respond.

[28] The IRCC officer met the duty of procedural fairness by providing the Applicant a full and fair opportunity to explain his omission of his interaction with US customs in January 2020. The Applicant's arguments pertaining to the Officer's responsiveness to the Applicant's response, his weighing of the evidence, and the application of the "innocent misrepresentation" exception relate to the reasonableness of the decision.

B. *Is the decision reasonable?*

[29] Pursuant to paragraph 40(1)(a) of the IRPA, the test for misrepresentation is two-fold:

1. The Applicant must have directly or indirectly misrepresented or withheld material facts relating to a relevant matter; and

2. The misrepresentation must induce, or have the potential to induce, an error in the administration of the IRPA.

[30] In conducting reasonableness review, the Court's task is to develop an understanding of the IRCC officer's reasoning process to determine whether the decision as a whole is reasonable, looking specifically whether the decision is transparent, intelligible, and justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

C. *The wording of Question 2(b)*

[31] The Applicant states Question 2(b) is ambiguous, as it does not explicitly ask an applicant if they have had a visa “cancelled” nor does the question contain the word “cancelled”.

[32] The Applicant claims he was not aware he needed to disclose any visas he voluntarily cancelled and were not accompanied by a removal or departure order in responding to Question 2(b).

[33] However, the Applicant presents evidence that contradicts his assertion that he voluntarily cancelled his US Visa in January 2020. The questioning transcripts demonstrate that the Applicant was no longer able to voluntarily depart from the United States, having been found inadmissible by a US customs official.

[34] The alleged ambiguity of Question 2b) is therefore irrelevant in the Applicant’s case.

[35] Given this transcript evidence, it was reasonable for the IRCC officer to conclude that the Applicant did not voluntarily cancel his US Visa. As such, the IRCC officer’s conclusion that the visa was not cancelled voluntarily was reasonable. The wording of Question 2(b) is therefore irrelevant in this case.

D. *The Innocent Mistake Exception*

[36] The test for the innocent mistake exception is whether an applicant can demonstrate both an honest and reasonable belief that they were not withholding material information. There are two prongs to the test:

> (i) The first is subjective and asks whether the applicant honestly believed that they were not making a misrepresentation;
>
> (ii) The second is objective and asks whether it was reasonable, on the facts, that the applicant believed they were not making a misrepresentation;
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> (*Kaur v Canada (Citizenship and Immigration)*, 2024 FC 416 at para 12)

[37] The determinative aspect in this case is the second, objective, question. The Officer found that it was not reasonable on the facts that the Applicant believed he was not misrepresenting a fact relating to a relevant matter. Given the evidence of a misrepresentation finding by US Customs from the questioning transcripts, this was a reasonable conclusion for the IRCC officer to make.

[38] The Applicant refers to Justice Peter Pamel's decision in *Sbayti v Canada (Citizenship and Immigration)*, 2019 FC 1296. In that case, the issue was whether the misrepresentation finding was reasonable, and in particular, whether the officer should have turned his mind to whether the misrepresentation was innocent because the applicant honestly and reasonably believed that he was telling the truth (at para 37). Justice Pamel found that there was evidence to seriously suggest that the applicant answered the question correctly and therefore the officer

should have considered whether the applicant fell under the innocent misrepresentation exception.

[39] In the case before me, the Applicant's evidence suggests that the misrepresentation was not innocent. The transcript of the questioning indicates that the Applicant knew he could not voluntarily remain in the US and that US customs officials found him inadmissible for misrepresentations. The Applicant presents little evidence to support his assertion that his misrepresentation was innocent.

[40] The IRCC officer does not explicitly apply the test for the exception for innocent misrepresentation. However, he does note that he did not find it credible that the Applicant would think that interaction with US authorities was not germane to his Application. As such, the Officer was satisfied that the Applicant failed to provide complete and truthful information. Therefore, it is evident that the Officer considered the Applicant's claim that the misrepresentation was innocent. Given the transcript evidence, this case is distinguishable from *Sbayti* and it was reasonable for the IRCC officer to conclude that the exception did not apply.

[41] Moreover, where a visa officer does not accept an applicant's explanation for an omission, he or she is not necessarily required to consider the exception (*Chung v Canada (Citizenship and Immigration)*, 2023 FC 896, at para 14; *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328, at para 16; *Gallardo v Canada (Citizenship and Immigration)*, 2022 FC 1304, at paras 25-26; *Malik v Canada (Citizenship and Immigration)*, 2021 FC 1004, at paras

35-36; *Pal v Canada (Citizenship and Immigration)*, 2023 FC 502, at para 26; *Ram v Canada (Citizenship and Immigration)*, 2022 FC 795, at para 20).

E. *Materiality*

[42] In *Munoz Gallardo v Canada (Citizenship and Immigration)*, 2022 FC 1304, the applicant argued that the IRCC officer's reasons provided inadequate justification and were not transparent as they did not address the argument made in her response to the procedural fairness letter that an honest mistake was made, nor did they address whether the misrepresentation was material (at para 12). The reasonableness of the impugned decision turned on justification. Justice Angela Furlanetto held that the increased severity and potential impact of a misrepresentation finding might require the decision-maker's reasons to reflect the stakes and the perspective of the affected individuals (at paras 15-16). As such, the complete absence of any analysis on the issue of materiality – an essential element under paragraph 40(1)(a) of the IRPA – renders the Decision without sufficient justification and unreasonable (at para 35).

[43] In the present case, the Officer states that it is "[n]ot credible that PA would not think that interaction with US authorities was not germane to this application" and that the undisclosed information in the statutory questions "induces or could induce an error in the administration of the IRPA".

[44] In my view, this wording makes it clear the Officer finds the misrepresentation important enough to affect the process and the outcome of the Applicant's Visa Application.

[45] I am also of the view that it was reasonable to find the US officer's cancellation of the Applicant's visa and inadmissibility finding, for misrepresentation, material because the Applicant sought a similar temporary resident visa in Canada. The circumstances relating to that visa resulting in his denial of entry and order to leave the country are relevant to his work permit Application. It was reasonable for the Visa Officer to find that the materiality was obvious and that it was not credible for the Applicant to believe that information was neither relevant nor germane (or material) to his Visa Application.

VI. Conclusion

[46] The Application is dismissed. The parties have proposed no question of general importance for certification and no such question arises from the facts of this case.

JUDGMENT in IMM-7223-23

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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