Federal Court  Cour fédérale

Date: 20210609

Docket: IMM-7145-19

Citation: 2021 FC 579

Ottawa, Ontario, June 9, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

SALIM MUHAMMED ALI

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, dated October 29, 2019, made by a visa officer [the Officer] at the Canadian Embassy in Mexico City, Mexico, refusing the Applicant's application for a work permit in Canada and finding the Applicant inadmissible to Canada for five years under s 40(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], because he made a material misrepresentation in his application [the Decision].

[2] As explained in greater detail below, this application is allowed, because the Officer failed to conduct an intelligible analysis of the materiality requirement under s 40(1)(a) of IRPA.

II. **Background**

[3] The Applicant is a citizen of Pakistan. In June 2018, while living in Mexico, he applied for a Canadian temporary work permit. In his application, the Applicant responded "yes" to a question on the form asking, "Have you ever been refused a visa or permit, denied entry, or ordered to leave Canada or any other country or territory?" Below this response, he indicated that he was ordered to leave the United States [the US] in 2011 and returned to Pakistan. He also responded "yes" to the question, "Have you ever been arrested for, been charged with or convicted of any criminal offences in any country or territory?"

[4] The Applicant attached to his application a legal opinion that addressed the issue of criminal inadmissibility. That opinion disclosed that, on October 14, 1993, the Applicant was placed on five years probation in the US for two counts of child molestation and that his charges were *nolled* in 2003 after he satisfied his probation. The opinion also discussed removal proceedings in the US, instituted against the Applicant as a result of the aforementioned charges and his failure to disclose them to US immigration authorities, and attached copies of related documentation.

[5] The Applicant received a procedural fairness letter, dated October 9, 2019 [the PFL], informing him of concerns that he did not truthfully answer all questions asked of him in his application. Specifically, the visa officer considering his application was not satisfied that the

Applicant declared all previous enforcement interactions and previous US refusals in his application. That officer explained that, if the Applicant was found to have engaged in misrepresentations in submitting his application, he would be found inadmissible under s 40(1)(a) of IRPA and such a finding would render him inadmissible to Canada for a period of five years under s 40(2)(a) of IRPA.

[6] On October 16, 2019, the Applicant's counsel provided a letter in response to the PFL. Counsel acknowledged that the Applicant had not identified two waiver refusals from the US that post-dated his removal from the US in 2011. The response explained that the Applicant was under the impression that the waivers were not considered "visas or permits" as per the wording on the application form and, therefore, did not include them in his answer.

[7] The Applicant also provided a written response to the PFL. The Applicant reiterated that he did not purposefully hide or misrepresent information on his application. He explained his US removal proceedings, at the culmination of which he was removed in 2011. He identified that he filed two waiver applications to re-enter the US after he was deported, but both were refused. The Applicant also disclosed that he had been charged with theft by receiving stolen property in 1999 but that the charges were dropped. He explained that, because the 1999 criminal charge was dismissed and was a far lesser charge than the 1993 charge that was disclosed in his work permit application, he considered it not to have the same weight as the 1999 charge. The Applicant also provided an affidavit from his US counsel, describing his criminal and immigration history, and supporting documentation.

III. **Decision under Review**

[8] In the Decision that is the subject of this judicial review application, the Officer found the Applicant inadmissible to Canada under s 40(1)(a) of 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 IRPA. The Officer also advised the Applicant that he will remain inadmissible to Canada for five years in accordance with s 40(2)(a) of IRPA.

[9] The Decision is documented in a letter from the Officer dated October 29, 2019, as well as related Global Case Management System [GCMS] notes. The letter states that the Officer was not satisfied that the Applicant had truthfully answered all questions in the documents he submitted in support of his application, as required by s 16(1) of IRPA. Specifically, the Officer refers to the Applicant failing to declare multiple US refusals or enforcement actions.

[10] The GCMS notes provide background to the decision to send the PFL to the Applicant. They identify that Canadian authorities learned through information sharing that the Applicant had enforcements against him from 2005, 2011 and 2017 and that he made applications to the US in 2005, 2014 and 2015, but that he declared only one order to leave the US in 2011.

[11] The GCMS notes also capture points made by the Applicant and his representative in response to the PFL, following which the Officer provides the analysis underlying the Decision. The Officer comments that the Applicant was represented by an experienced lawyer and states the opinion that the Applicant should have known and understood the questions and implications

of the declarations made on his application forms. The Officer refers to having considered the Applicant's response to the PFL and taking that response into account. However, after canvassing the misrepresentation provisions of IRPA, the Officer concludes that they clearly apply in the present case because, if the Applicant's misrepresentation had been accepted as fact, the usual administrative procedures for processing the application, relative to the misrepresented information, would not have been followed.

IV. **Issues and Standard of Review**

[12] The Applicant raises the following issues for the Court's consideration:

A. Whether the Applicant was provided with a procedurally fair opportunity to respond to the Officer's concerns;

B. Whether the finding of misrepresentation under s 40(1) of the IRPA was unreasonable; and

C. Whether any alleged misrepresentation was material.

[13] The parties agree that the latter two issues are reviewable on a standard of reasonableness and that the standard of correctness applies to the first issue surrounding procedural fairness.

V. **Analysis**

[14] My decision to allow this application for judicial review turns on the Applicant's arguments surrounding the third issue identified above: whether any misrepresentation by the

Applicant was material. As both parties agree, in order for s 40(1)(a) of IRPA to apply, two requirements must be met: (a) there must be a misrepresentation; and (b) that misrepresentation must be material to the point of inducing an error in the administration of IRPA (see, e.g., *Zhang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1313 at para 17).

[15] The October 29, 2019 letter communicating the Decision to the Applicant does not expressly identify the particular misrepresentations on which the Decision turns. It states only that the Applicant failed to declare multiple USA refusals or enforcement actions. The GCMS do disclose further detail and, while even these notes are not abundantly clear in identifying the misrepresentations in question, I understand the parties to agree that the Decision turns at least significantly on failure to disclose the two US visa waiver refusals that the Applicant received after his removal in 2011.

[16] I concur with this interpretation of the Decision, as the GCMS notes identify the Applicant's explanation, in response to the PFL, that he was under the impression that the two US visa waiver refusals were not considered visas or permits of the sort that the wording of the relevant question in the application form completed by the Applicant in June 2018 required him to disclose. The notes subsequently set out the Officer's analysis that, as the Applicant is represented by experienced counsel who understand the requirements, the applicant should have understood the questions and implication of his declarations. I read this analysis as the Officer rejecting the Applicant's explanation of his failure to disclose the visa waiver refusals. This supports the conclusion that it was the failure to disclose those refusals upon which the Decision turned.

[17] However, with respect to the materiality of the failure to disclose these refusals, the analysis in the Decision is limited to the following entry in the GCMS notes:

> This clearly applies in the present case. If the misrepresentation had been accepted as a fact, the officer would not have followed usual administrative procedures for processing the application, relative to the misrepresented information.

[18] The Applicant submits that this conclusion lacks intelligibility, because it fails to engage with the fact that the US visa waiver refusals turned on the same facts in the Applicant's US criminal and immigration history as did the 2011 removal that he fully disclosed. The Applicant emphasizes that his original June 2018 application included significant detail surrounding that history. He submits that, from that application, the visa officer was in possession of the information necessary to conduct a fulsome inquiry into the Applicant's US history and consider his current admissibility to Canada. The Applicant therefore argues that it is unclear what administrative procedures for processing his application could have been missed as a result of his failure to disclose the US visa waiver refusals.

[19] The Applicant submits that these circumstances are similar to those in *Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931, which involved omissions of information in an application form, where that information had been disclosed to immigration authorities in other documentation. Justice de Montigny concluded that the officer failed to conduct a proper analysis to determine whether the omission was material, given that the information was on record and therefore available to the officer for her consideration (at para 26).

[20] I find this argument compelling. Perhaps there are steps or procedures that would have been followed if the visa officer had known about the visa waiver refusals in addition to the other information disclosed by the Applicant. However, the Decision provides no explanation of what those procedures would be or any analysis of that question.

[21] The Respondent emphasizes that a misrepresentation need not be decisive or determinative in order to be material. It will be material if it is sufficiently important to affect the process. What matters is whether untruthful or misleading answers have the effect of foreclosing or averting further inquiries, even if those inquiries may not reveal an independent ground of inadmissibility (see *Li v Canada (Citizenship and Immigration)*, 2018 FC 87 at para 13).

[22] The Respondent also cites authorities where these principles have been applied in the context of failure to disclose a previous US visa refusal. In *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhun*] and *Algohar v Canada (Citizenship and Immigration)*, 2019 FC 1364, the Court found that the failure of applicants for temporary resident visas to disclose previous US visa refusals constituted material omissions.

[23] I accept the principles canvassed in these authorities but agree with the Applicant's position that these cases are distinguishable, as they involved situations where the applicant had fully omitted his adverse immigration history. For instance, the decision in *Goburdhun* identifies that the officer concluded that the applicant's failure to disclose the previous visa refusals was a deliberate attempt to conceal both the refusals themselves and the reasons for them (at para 8). It was against that backdrop that Justice Strickland held that, while it would have been preferable

for the officer to have specified what investigation and verification process potentially could have been bypassed as a result of the misrepresentation, the absence of that explanation was not fatal to the officer's decision (at para 42).

[24] In contrast, in the present case, the Officer was aware of the reasons for the US waiver refusals (i.e. his misrepresentation to US immigration officials and resulting deportation from the US) through the Applicant's disclosure in his original June 2018 application. Therefore, in my view, the Officer was required to provide some explanation of the conclusion that the omission of those refusals would have resulted in particular procedures not being followed in the processing of the application.

[25] In *Goburdhun*, Justice Strickland also rejected the applicant's argument that his incorrect answer did not affect the process, because it was caught by immigration authorities before a decision was rendered (at para 43). Again, those circumstances are distinguishable from the case at hand, where the background to the waiver refusals was disclosed by the Applicant in his June 2018 application, not identified by the authorities through other means.

[26] In conclusion, I find the Decision wanting in intelligibility, and therefore unreasonable, in its assessment of the materiality requirement of s 40(1)(a) of IRPA. As such, this application for judicial review must be allowed, the Decision set aside, and the matter returned to a different visa officer for re-determination. Therefore, it is unnecessary for the Court to consider the other issues raised in this application.

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

JUDGMENT IN IMM-7145-19

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a different visa officer for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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