Federal Court Cour fédérale

Date: 20210707

Docket: IMM-1591-20

Citation: 2021 FC 716

Ottawa, Ontario, July 7, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ANGELA DOS SANTOS ALVES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a February 20, 2020 Decision of an Officer refusing the Applicant's application for a study permit on the basis of misrepresentation, pursuant to subsection 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"].

II. Background

[2] The Applicant, Ms. Angela Dos Santos Alves, is a citizen of Brazil, residing in Ireland. She applied for a study permit on February 26, 2019, following her acceptance to Centennial College in Toronto, Ontario.

[3] In her application for a study permit, the Applicant had disclosed her most recent visa refusal from the United States in 2018. She responded “yes” to the binary question of “[h]ave you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?”. She further indicated “I have applied for the American student visa in 2018 and I’ve been denied”.

[4] On May 30, 2019, the Applicant received a procedural fairness letter, alleging that she had provided an incomplete disclosure of her immigration history in the United States. Specifically, the Applicant had failed to disclose that she was “ordered to leave/removed from the U.S.A. in 2015 and failed to provide relevant details”.

[5] In her response to the procedural fairness letter, the Applicant explained that she had previously lived and worked in the United States as an au pair. In December of 2015, she flew to visit her previous host family to care for the children over the Christmas holidays and was denied entry because she had “wrongly traveled there on a visitor visa instead of a work/au pair visa”.

[6] In explaining why she had disclosed the 2018 refusal, but not the events in 2015, the Applicant further stated:

> …Since this visa denial happened after the removal I thought I [*sic*] this was the best answer because it was more recent and it was related to removal. Since there was only a small space and 3 questions it wasn't clear how best to answer. I also thought there would be an interview and I could explain more clearly the situation in person than in a small box or in follow up questions.

[7] On February 20, 2020, the Officer refused the Applicant's study permit application and found her inadmissible for misrepresentation, pursuant to subsection 40(1)(a) of the *Act* [the "Decision"].

[8] The Applicant is seeking an Order that the Decision be quashed and remitted to a different Officer for reconsideration. The Applicant further seeks an Order as to costs.

III. Decision Under Review

[9] The Officer was not satisfied that the Applicant had truthfully answered all questions, as required by subsection 16(1) of the *Act*. Specifically, the Applicant had failed to declare her prior immigration history with the United States. She was found to be inadmissible in accordance with subsection 40(1)(a) of the *Act* "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 [*Act*]".

IV. Issues

[10] The issue is whether the Officer's Decision to refuse the study permit was reasonable.

V. Standard of Review

[11] The standard of review applied to a review of the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 17 [*Vavilov*]).

VI. Relevant Provisions

[12] Subsections 16(1) and 40(1)(a) of the *Act* provide:

Obligation — answer truthfully	**Obligation du demandeur**
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.	**16 (1)** L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.
Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :

(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;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

VII. Analysis

[13] The Applicant argues that the finding of misrepresentation was unreasonable in light of the fact that the Applicant had truthfully answered the binary background declaration question, even if having failed to provide a sufficient level of detail as Immigration, Refugees and Citizenship Canada would have preferred. The Officer failed to consider that an honest and reasonable mistake had occurred and assess whether the omission was nevertheless material.

[14] The Respondent posits that the Officer was not obliged to consider the "innocent error" exception to misrepresentation. This narrow exception is limited to truly exceptional circumstances. Further, the misrepresentation in this case was material and the Officer did not err in making such a finding.

[15] A finding of misrepresentation can only be made on the balance of probabilities, on the basis of "clear and convincing evidence" that an applicant has withheld material facts. The consequences of a finding of misrepresentation are more serious than a refusal, as an applicant remains inadmissible to Canada for a period of five years (*Borazjani v Canada (Citizenship and*

Immigration), 2013 FC 225 at para 11; *Chughtai v Canada (Citizenship and Immigration)*, 2016 FC 416 at paras 29-30).

[16] The Applicant argues that an exception to subsection 40(1)(a) of the *Act* should have been considered by the Officer in that the Applicant made an "honest and reasonable mistake" as it relates to the misrepresentation in issue. The Respondent relies on the Federal Court's decision in *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 [*Oloumi*], which emphasizes the exceptional nature of this narrow exception (*Oloumi*, above at paras 32, 35-36, 39). At paragraph 39, the Federal Court stated:

> [39] In keeping with this duty of candour, there is, in my opinion, a duty for an applicant to make sure that when making an application, the documents are complete and accurate. It is too easy to later claim innocence and blame a third party when, as in the present case, the application form <u>clearly</u> stated that language results were to be attached, and the form was signed by the applicants. It is only in exceptional cases where an applicant can demonstrate that they honestly and *reasonably* believed that they were not withholding material information, where "the knowledge of which was beyond their control", that an applicant may be able to take advantage of an exception to the application of section 40(1)(a)…

[17] This Court, however, has also considered the exception in circumstances where the information in issue was available to an officer elsewhere in the record and freely disclosed by the applicant when asked about it (*Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at paras 17-18, 20). In certain instances, this Court has also found that the particular circumstances of a case should have caused an officer to consider the exception (*Sbayti v Canada (Citizenship and Immigration)*, 2019 FC 1296 at paras 29-32).

[18] Subsection 40(1)(a) of the *Act* is worded broadly and captures fraudulent, negligent and innocent misrepresentations – even when made by another party, without the knowledge of an applicant (*Oloumi* at para 23).

[19] However, an officer must consider the totality of the evidence before the decision maker (*Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931 at para 23). The Officer, in this case, failed to recognize the potential significance of the mitigating evidence, as it relates to the finding of misrepresentation without meaningfully coming to grips with the facts before the Officer. Instead, the Officer broadly found that the Applicant had misrepresented. In the Global Case Management System, on December 31, 2019, the Officer further describes that the Applicant's explanations in response to the procedural fairness letter were unreasonable, dismissing the evidence without due consideration. This assessment falls short of establishing a finding of misrepresentation on the balance of probabilities, given the contradictory evidence was apparently readily dismissed.

[20] While the Applicant may have failed to provide sufficient specificity, she correctly answered the relevant question in the affirmative and referenced her adverse immigration status in the United States. The Officer failed to take into account this relevant evidence. On this basis, the Decision lacks the requisite degree of justification, transparency and intelligibility (*Vavilov*, above at para 86). The Decision simply does not "add up".

[21] Further, it is unclear how the Officer came to the conclusion that the misrepresentation was material. Notably, whether the misrepresentation was sufficiently important to affect the

process, foreclosing or averting further inquiries (*Oloumi* at para 25; *Li v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 87 at para 13). The Applicant answered "yes" to the single background declaration question, which asks whether the Applicant has adverse immigration history and disclosed her most recent refusal from the United States, which is connected to the 2015 events in question. It appears in such a case that the disclosure in question prompted the appropriate inquiries, as anticipated by the Applicant. The evidence does not justify the Officer's finding that the misrepresentation was material in this case.

VIII. Conclusion

[22] For the reasons above, this Application is allowed and the matter shall be remitted to a different Officer for reconsideration. There is no question for certification.

JUDGMENT in IMM-1591-20

THIS COURT'S JUDGMENT is that:

1. The Application is allowed and the matter shall be remitted to a different Officer for reconsideration;

2. No costs are awarded; and

3. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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