Federal Court Cour fédérale

Date: 20230628

Docket: IMM-9292-22

Citation: 2023 FC 904

Toronto, Ontario, June 28, 2023

PRESENT: Madam Justice Go

BETWEEN:

MANMEET SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Manmeet Singh, is a citizen of India. He and his wife along with their two children submitted an Electronic Travel Authorization [eTA] application in August 2022 for a short visit to Canada.

[2] The Applicant provided information regarding his employment and salary, as well as bank statements and income tax returns [ITRs] to demonstrate that he has sufficient funds to support his family's trip.

[3] On August 19, 2022, an immigration officer sent the Applicant a procedural fairness letter [PFL] stating their concern that the Applicant has not fulfilled the requirement under subsection 16(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*] and explaining that:

> Specifically, I have concerns that you may be inadmissible for misrepresentation. The 2022-2023 Indian Income Tax Return that you submitted in support of your application was verified and confirmed to be fraudulent.

[4] After receiving the Applicant's response to the PFL, including additional documentation, the officer forwarded the matter for a review by a Delegated Decision-Maker [Officer]. Based on the review, the Officer found on a balance of probabilities that the Applicant made a misrepresentation in his application that would have induced an error in the administration of the *IRPA,* and that he failed to disabuse the Officer of the concerns raised in the PFL. Accordingly, the Officer concluded that the Applicant is inadmissible for misrepresentation under paragraph 40(1)(a) of *IRPA* [Decision].

[5] The Applicant seeks judicial review of the Decision. I grant the application as I find the Officer breached procedural fairness by failing to provide sufficient clarity to the Applicant in the PFL in order to give the Applicant an opportunity to address their concerns.

II. Preliminary Issues

[6] Before turning to the Decision in question, I will first address two preliminary issues.

A. *Certified Tribunal Record*

[7] The issue before the Officer was the sufficiency of funds to support the family's trip. As noted above, the Applicant submitted among other things, his ITRs with his application.

[8] One day prior to issuing a PFL to the Applicant, an officer conducted a verification of the application and entered the following note in the Global Case Management System [GCMS]:

> Verifications reviewed. Based on the information gathered through fact-finding verifications, I have grounds to believe that the Indian Income Tax Returns (ITRs) provided are fraudulent. PFL to be sent BF 10 days PLEASE ENTER NOTE BELOW IN PFL TEMPLATE Specifically, I have concerns that you may be inadmissible for misrepresentation. The 2022-2023 Indian Income Tax Return(s) that you submitted in support of your application was/were verified and confirmed fraudulent.

[9] The Applicant takes issue with the Certified Tribunal Record [CTR] produced for the purpose of this judicial review and submits that it is incomplete. Specifically, the CTR is missing a GCMS note that shows ***how*** the 2022-2023 ITR was verified and determined to be fraudulent. The missing disclosure, dated August 18, 2022, was included in the Application Record and stated as follows:

> ***DO NOT DISCLOSE*** The enclosed information is intended for use in the administration of the Immigration & Refugee Protection Act (IRPA) and/or Citizenship Acts. The content of the information is exempt under section 16(1)(c) of the Access to Information Act as disclosure could reasonably be expected to be

> injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigation. After performing visual checks, the 2022-2023 ITRs have adverse findings. The barcode was unable to be scanned. These are standard visual fraud detection checks. Therefore, I am satisfied the ITRs are fraudulent.

[10] The Applicant submits that he received this GCMS note as part of the written reasons with the Decision. The Applicant asserts that this section of the record was intentionally omitted from the CTR by the Respondent.

[11] The Respondent does not appear to object to the inclusion of this GCMS note as part of the record, nor does the Respondent provide any explanation for its omission.

[12] I am not convinced that the omission of this particular GCMS note was intentional. But I agree with the Applicant that the missing note is the “most significant part of the tribunal records because it goes to the core of the contention by the parties”, and as such, ought to have been included in the CTR.

[13] Regardless of the reason why the GCMS note in question was not disclosed, its omission could have potentially robbed the Applicant of the opportunity to fully understand the reasons for the refusal of his eTA, while hindering the ability of this Court to properly review the Decision. I will consider this GCMS note even though it is not included in the CTR.

B. *New Evidence*

[14] The Applicant also submits as part of the Application Record three additional documents that were not before the Officer. These are:

A. A copy of a letter requesting verification of the ITR, which the Applicant sent to the Income Tax Office in India, to confirm the authenticity of the ITR;

B. A copy of the ITR duly notarized by a Notary public of the Government of India; and

C. The sign-in details for the Applicant's online tax portal.

[15] The Applicant further states in his written submission that he advised in his Application Record that the Indian Income Tax Office has indeed sent a verification email to Immigration, Refugees and Citizenship Canada regarding his ITR, but notes that he was unable to obtain a copy of the correspondence as it is an internal document of the Indian Tax Department. Having reviewed the Application Record, I am unable to see any reference to the verification email from the Indian Income Tax Office, other than what is pleaded in the Applicant's written submission. I will therefore disregard this particular aspect of the Applicant's submission.

[16] I admit the additional documents submitted by the Applicant. I do not do so to "debunk" any negative findings against the Applicant, as suggested by him in reliance on *Dimgba v Canada (Citizenship and Immigration)*, 2018 FC 14 at para 10. Rather, I find that this case falls under one of the exceptions to the general rule that Courts should only review the evidentiary record that was before the decision-maker, in light of the procedural fairness issues raised:

Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 at paras 19-20.

III. Issues and Standard of Review

[17] The Applicant argues that the Decision was reached in a procedurally unfair manner because he was not given an opportunity to fully and fairly respond to the Officer's concerns through the PFL. The Applicant also argues that the Decision is unreasonable because the Officer ignored the evidence he provided in response to the PFL, provided insufficient reasons for the Decision, and failed to conduct adequate verification of the ITR.

[18] I find the breach of procedural fairness to be determinative of this application.

[19] In the context of a visa application, the Respondent asserts that the level of procedural fairness owed to applicants is on the low end of the spectrum: *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (CA) at para 41. The Respondent however acknowledges that when there is a finding of misrepresentation, the level owed is higher due to the associated consequences. I find support for this position in *Chahal v Canada (Citizenship and Immigration)*, 2022 FC 725 at para 22.

[20] As confirmed in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56, the Court's role is to determine ultimately whether an applicant knew the case to be met and had a full and fair chance to respond, and whether the procedure was fair

having regard to all the circumstances. I will follow the Federal Court of Appeal's guidance in this case.

IV. Analysis

[21] The Applicant argues that the Officer breached their duty of procedural fairness by failing to provide an adequate opportunity to respond to the concerns relating to his application, especially as they "border" on his credibility: *Opakunbi v Canada (Citizenship and Immigration)*, 2021 FC 942 [*Opakunbi*] at para 8, citing *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24.

[22] Rather than providing adequate information to the Applicant regarding the concerns surrounding the ITR, the Applicant asserts that the PFL was treated as a mere formality. The Applicant notes that the purpose of providing a PFL is to provide an opportunity to respond to concerns raised by a reviewing officer. The Applicant submits that this Court has confirmed that a PFL "should identify the issues with sufficient clarity and particularity for an individual to have a meaningful opportunity to address them": *Pham v Canada (Citizenship and Immigration)*, 2022 FC 793 at para 32, citing *Kaur v Canada (Citizenship and Immigration)*, 2020 FC 809 [*Kaur*] at para 42.

[23] I find *Opakunbi* distinguishable as the Applicant was provided with a PFL, unlike the applicant in *Opakunbi*. Instead, I look to *Kaur*, where Justice Norris provides some helpful instructions on how to assess the adequacy of a procedural fairness letter:

> …when a procedural fairness letter has been sent, a functional approach should be taken to assessing its adequacy. 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, the question is: Does the letter inform the affected party of the decision maker's concerns? To serve this purpose, the 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, and *Toki* at para 25.

[24] Applying *Kaur*, I agree with the Applicant that the PFL ought to have clearly specified why the reviewing officer suspected that the ITR was fraudulent in order for the Applicant to fully respond to the Officer's concerns.

[25] I disagree with the Respondent that the PFL provided "ample information" stating *what* the concern was based upon, and *how* that concern came to light. With respect, both the "what" and the "how" only came to light after the Applicant filed his leave for judicial review, and when he received the GCMS notes as part of the reasons for the Decision. Moreover, as stated previously, the particular GCMS note with the relevant information was not included in the CTR, on the basis that it would be injurious to the enforcement of the law.

[26] The Respondent submits that the Officer was under no obligation to "coax further information" from the Applicant on a concern already raised, especially if it pertained to statutory requirements of the application. The Respondent analogizes the case at bar to *Suri v Canada (Citizenship and Immigration)*, 2020 FC 86 [*Suri*], where the Court found no breach of procedural fairness after the applicant took advantage of the opportunity provided to respond to concerns surrounding a fraudulent investment certificate: at para 20. The Respondent also cites

Kong v Canada (Citizenship and Immigration), 2017 FC 1183 [*Kong*] at paras 26-36, where the Court sets out parameters pertaining to the authenticity of financial documents, and officers' obligations in the verification of such documents: at paras 26-36.

[27] Both of these cases, in my view, are distinguishable. In *Suri*, the applicant did not dispute the officer's determination that the financial document was fraudulent and their response did not address this material finding: at paras 20-21. Here, the Officer's allegation of the fraudulent ITR seemed to be based solely on a visual check without further verification, and the Applicant continues to dispute the Officer's finding.

[28] Also, in *Kong*, the officer verified the document by contacting the bank in question, and the applicant's response to the procedural fairness letter revealed that she understood the concern arose from the verification code: at para 17. Here, there was no indication that the Officer contacted the Government of India to verify the ITR, or made the Applicant aware that the issue stemmed from the Officer's inability to scan the bar code.

[29] Based on the above, I find the Officer committed a breach of procedural fairness that justifies the setting aside of the Decision. I need not consider the remainder of the Applicant's arguments, other than to emphasize that upon redetermination, I expect a new decision-maker to dutifully consider all the documents and submissions provided by the Applicant to date – as well as new evidence, if any – before making a final decision.

V. Conclusion

[30] The application for judicial review is allowed and the matter is returned for redetermination by a different officer.

[31] There is no question to certify.

JUDGMENT in IMM-9292-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different officer.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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