Federal Court  Cour fédérale

Date: 20170424

Docket: IMM-3150-16

Citation: 2017 FC 401

Ottawa, Ontario, April 24, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PRATHAM KETANKUMAR PATEL

Applicant

and

MINISTER CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*] for judicial review of the decision of an immigration officer in the Consulate General of Canada in New York [Visa Officer], dated June 6, 2016 [Decision], which denied the Applicant's application for a temporary resident visa [TRV].

II. BACKGROUND

[2] The Applicant is a 26-year-old citizen of India. He has previously resided in Canada under a student visa and a post-graduate visa.

[3] On August 17, 2013, the Applicant was charged with operating a motor vehicle while impaired under s 253 of the *Criminal Code of Canada*, RSC 1985, c C-46 [*Code*]. Shortly after, his prior application for a TRV was refused on January 15, 2014 [January 15 refusal]. The charges were subsequently withdrawn on May 29, 2014.

[4] The Applicant then commenced a new application for a TRV on November 26, 2015. Upon review of the second application, the reviewing officer had concerns regarding the Applicant's failure to declare both the arrest and the January 15 refusal on the application. Consequently, a procedural fairness letter addressing the Applicant's failure to fulfil the requirements of s 16(1) of the *Act* and potential inadmissibility for misrepresentation under s 40 of the *Act* was sent to the Applicant on January 5, 2016. The letter also requested the Applicant to provide a Royal Canadian Mounted Police [RCMP] police certificate.

[5] The Applicant's counsel responded by letter dated March 2, 2016 and requested an extension of 60 days. Citizen and Immigration Canada [CIC] granted a 30-day extension and a new deadline of April 6, 2016 was established. In order to provide an accurate response, on March 31, 2016, the Applicant's counsel requested a further 15-day extension as well as disclosure of all documentation relied upon to arrive at the conclusion for the Applicant's

potential inadmissibility. These requests were followed by another letter on April 4, 2016 to confirm the request for an extension of time and disclosure of documentation. The Respondent granted the 15-day extension and established a new deadline of April 21, 2016.

[6] On April 5, 2016, the Applicant's counsel sent a letter to indicate the Applicant had not misrepresented on his application or, in the alternative, the misrepresentation was due to inadvertence. The letter explained that the charges for impaired driving, which formed the basis of the January 15 refusal, were later withdrawn. Additionally, a copy of the Applicant's RCMP police certificate dated June 11, 2015 was included, with an explanation that a more recent police certificate would require up to 120 days or longer to obtain, in accordance with RCMP policy. Finally, the letter indicated that the explanation of the Applicant's failure to disclose the prior refusal for a TRV would follow once the requested documentation had been received.

III. DECISION UNDER REVIEW

[7] In a decision dated June 6, 2016, the Visa Officer determined that the Applicant did not qualify for a TRV under the requirements of the *Act*. The letter indicated that the Applicant was a member of an inadmissible class of persons described in the *Act* under s 40(1)(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 the *Act*.

[8] In the Global Case Management System [GCMS] notes, the reviewing officer noted the Applicant had indicated he had been arrested for impaired driving on a previous application for a TRV that was ultimately refused. However, the Applicant had answered in the negative to the

questions on the application that asked whether the Applicant had ever been arrested or refused a visa. The GCMS notes also indicated that a procedural fairness letter had been sent and three responses were received, two of which requested an extension of the deadline for a response to the procedural fairness letter.

[9] An entry dated June 6, 2016 in the GCMS notes states that the responses to the procedural fairness letter did not fully address the reviewing officer's concerns, namely the failure to disclose the arrest and the January 15 refusal in the application. Additionally, the extended deadline had passed without further responses or the RCMP police certificate. Consequently, the reviewing officer recommended a refusal of the application under s 40 of the *Act*.

[10] A misrepresentation review dated June 6, 2016 in the GCMS notes confirmed the refusal based on misrepresentation. The entry acknowledged that, although the charge for impaired driving was withdrawn, the failure to declare both the arrest and the January 15 refusal could have induced an error in the administration of the *Act* by creating the incorrect impression that there was no charge that needed further investigation in order to determine admissibility to Canada. Additionally, it was noted that information related to previous visa refusals is directly material to an officer's assessment of an applicant's *bona fides*. Consequently, the Applicant was determined to be inadmissible to Canada for a period of five years from the date of the refusal.

IV. ISSUES

[11] The Applicant submits that the following are at issue in this application:

(a) Whether the Visa Officer erred in law in finding that the Applicant had materially misrepresented himself by failing, *inter alia*, to consider the overall fact specific context of the putative misrepresentations in light of the criminal proceedings in juxtaposition to temporal aspects of the TRV applications, and by not providing a full analysis of the materiality of the misrepresentations to support the conclusions regarding the inadmissibility?

(b) Whether the Visa Officer erred in law and breached the principles of natural justice by failing to provide the Applicant with a fair opportunity to provide a response to his query and by failing to provide the Applicant the opportunity to provide his final submissions?

[12] The Respondent submits that the following is at issue in this application:

(a) Whether the Visa Officer made a reviewable error on any of the grounds set out in s 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7?

V. STANDARD OF REVIEW

[13] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[14] The first issue raised by the Applicant concerns the Visa Officer's finding of inadmissibility on the grounds of misrepresentation. A visa officer's assessment of an application

in the context of a decision regarding the issuance of a TRV is reviewable on a standard of reasonableness: *Rahman v Canada (Citizenship and Immigration)*, 2016 FC 793 at para 6.

[15] The Applicant, however, argues that the first issue is subject to the standard of correctness because it is a question of law and cites *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982. The Court disagrees.

[16] The second issue is a matter of procedural fairness as it concerns the failure to provide an opportunity to respond and is reviewable under the standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[17] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[18] The following provisions from the *Act* are relevant in this proceeding:

Obligation — answer truthfully

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.

…

Temporary resident permit

24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

Exception

(2) A foreign national referred to in subsection (1) to whom an officer issues a temporary resident permit outside Canada does not become a temporary resident until they have been examined upon arrival in Canada.

…

Serious criminality

36 (1) A permanent resident or a foreign national is inadmissible on grounds of

Obligation du demandeur

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.

…

Permis de séjour temporaire

24 (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

Cas particulier

(2) L'étranger visé au paragraphe (1) à qui l'agent délivre hors du Canada un permis de séjour temporaire ne devient résident temporaire qu'après s'être soumis au contrôle à son arrivée au Canada.

…

Grande criminalité

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

…

…

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;

…

…

Application	**Application**
(2) The following provisions govern subsection (1):	(2) Les dispositions suivantes s'appliquent au paragraphe (1):
(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and	a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;
(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.	b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

[19] The following provisions from the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] are relevant in this proceeding:

Issuance	**Délivrance**
179 An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national	179 L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(b) will leave Canada by the end of the period authorized	b) il quittera le Canada à la fin de la période de séjour

for their stay under Division 2;	autorisée qui lui est applicable au titre de la section 2;
(c) holds a passport or other document that they may use to enter the country that issued it or another country;	c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;
(d) meets the requirements applicable to that class;	d) il se conforme aux exigences applicables à cette catégorie;
(e) is not inadmissible;	e) il n'est pas interdit de territoire;
(f) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and	f) s'il est tenu de se soumettre à une visite médicale en application du paragraphe 16(2) de la Loi, il satisfait aux exigences prévues aux paragraphes 30(2) et (3);
(g) is not the subject of a declaration made under subsection 22.1(1) of the Act.	g) il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

VII. ARGUMENTS

A. *Applicant*

(1) Materiality of Misrepresentation

[20] The Applicant submits that the Visa Officer erred in finding he had made a material misrepresentation on his application. In arriving at the conclusion of misrepresentation, the Visa Officer failed to provide a sufficient materiality analysis and failed to consider the exceptional circumstances given the temporal sequence of events. Additionally, the Applicant contends that the information was not material because he was never convicted of the impaired driving charge.

[21] The Applicant makes several submissions on the law of misrepresentation.

[22] First, a finding of inadmissibility due to misrepresentation under s 40(1) must be established by the Minister on a balance of probabilities. Misrepresentations can be made by an oral or written representation as well as an omission. The Applicant concedes that applicants have a duty of candour to ensure all material facts related to their application for residency are disclosed in the application: *He v Canada (Citizenship and Immigration)*, 2012 FC 33 at para 17; *Cao v Canada (Citizenship and Immigration)*, 2010 FC 450 at para 28.

[23] Second, visa officers must provide a materiality analysis; that is, they must make an assessment of the false information and provide some basis for the conclusion that the information is material. A misrepresentation is material if it is important enough to affect the process. In other words, the misrepresentation must be relevant to a matter that was actively considered by the visa officer upon reviewing the file. If the misrepresentation relates to a matter that could not have affected the outcome of the officer's review, then it is not material. For example, in *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 166 [*Ali*], the Court quashed a decision that rejected the application on the basis that a fraudulent school record included in the application could have induced an error in the administration of the *Act*. The visa officer in *Ali* had not doubted the applicant's admissibility, age, identity, or family relationships prior to the detection of the misrepresentation but cited the fraudulent school record as the reason for the finding of inadmissibility. In paragraph 3 of the *Ali* decision, the Court noted: "The CAIPS notes do not reflect any analysis by the Visa Officer on the issue of the materiality of the misrepresentation under consideration."

[24] Third, there exists a narrow exception to the rule that the subjective knowledge of the misrepresentation is not required for a finding pursuant to s 40 of the *Act* when an individual honestly and reasonably believes they were not misrepresenting a material fact. The exception was applied in *Osisanwo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1126 [*Osisanwo*], when an applicant failed to declare that he was not biologically related to one of his children, whose true paternity was revealed after an immigration official at CIC had ordered DNA testing. The Court concluded that it was unreasonable to find the applicants inadmissible since they had no reason to believe they were misrepresenting a material fact. The Applicant interprets *Osisanwo* to support the contention that if the evidence establishes the applicant was not privy to a particular fact at the time the representation was made, the applicant reasonably should not have known and cannot be said to have engaged in a misrepresentation.

[25] However, this exception has been held to be truly exceptional and cannot be applied in most circumstances: *Goudarzi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 425 at para 33 [*Goudarzi*]. The Court distinguished *Goudarzi* from a prior decision where the exception had applied at paragraph 37:

> Furthermore, I emphasize that a determinative factor in the *Medel* case was that the applicant had reasonable believed that she was not withholding information from Canadian authorities. In contrast, in the case before this Court the applicants did not act reasonably—the principal applicant failed to review her application to ensure its accuracy.

[26] Fourth, not all credibility concerns are to be elevated to the level of misrepresentation. The ministerial guidelines indicate that inadmissibility should not be found in "…cases where a person answers truthfully at an interview without hesitation and it is reasonable to believe that

the person did not understand the question on the application form or forgot the relevant information at the time." This is exemplified in the case of *Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931 at para 35 [*Koo*], where the applicant had erred in characterizing his education credentials as equivalent to an apprenticeship but answered truthfully in a further questioning.

[27] In light of the law of misrepresentation and its applicability to the facts in the current case, the Applicant submits that the January 15 refusal was based on an error that tainted the Decision, including the finding of inadmissibility.

[28] The January 15 refusal was based on the Applicant's failure to satisfy an immigration officer that he was not criminally inadmissible to Canada, since he had not provided evidence of the court disposition with respect to the criminal charges for driving while impaired. However, since the charges were later withdrawn, the Applicant argues that the January 15 refusal was made in error because it misconstrued the charge with a conviction culminating in a putative inadmissibility for serious criminality under s 36 of the *Act*.

[29] Accordingly, the Applicant submits that the misrepresentation is not material because the Applicant has no criminal record or conviction inside Canada. The Visa Officer ignored the evidence before him and assumed that the Applicant had been convicted under s 253(1) of the *Code* instead of considering the error made by the decision-maker in the January 15 refusal.

[30] Next, the Applicant takes issue with the Visa Officer's failure to provide a materiality analysis. In the GCMS notes, the Visa Officer states:

> While the representative has stated that the charge was withdrawn, and that the failure to declare the information was unintentional, I note that the failure to declare both the previous refusal as well as the criminal charge, could have induced an error in the administration of the act by creating the incorrect impression that there was no charge that needed further investigation in order to determine admissibility to Canada. Information relating to previous visa refusals is directly material to an officer's assessment of an applicant's bona fides.
>
> [emphasis added]

[31] The Applicant argues that this decision is devoid of any analysis as to why information pertaining to a previous visa refusal is directly material to an officer's assessment of the Applicant's *bona fides* when the Applicant was not criminally inadmissible at the time of the prior decision. The Applicant also contends that the Decision is unclear as to the inferences and facts that were used to conclude the Applicant's failure to advise CIC about the January 15 refusal, which was based on alleged criminality that was later not proven. Additionally, the Decision is also unclear as to how the failure to advise that the Applicant had been charged for an offence that was later withdrawn would lead to an incorrect impression that no further investigation was required, particularly since the Applicant had submitted evidence that the charges had been withdrawn.

[32] The Applicant submits that the Visa Officer failed to consider the overall context of the Applicant's prior immigration and alleged criminal history in light of the ultimate conclusion of the criminal matter. This failure thwarted any consideration of the exceptional circumstances in

evaluating the Applicant's subjective intent and technical inadvertence by the Applicant, which results in an error of law similar to the errors identified in *Koo* and *Osisanwo*, both above.

(2) Procedural Fairness

[33] The Applicant cites several cases dealing with the principle of participatory rights as a principle of natural justice.

[34] In the immigration context, informed and active participation is mandatory and includes the right to know the case to be met and an adequate opportunity to address and refute any allegations made by the Minister as well as comment on any documentation upon which the decision-maker may rely: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 30; *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 22.

[35] In *Gargano v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1385 at para 16, the Court recognized that maximum safeguards applied when the consequences were very serious, such as in an appeal from a removal order. Justice Cullen quashed a decision in which the decision-maker had refused a request for an adjournment in order to retain counsel and conducted the hearing which resulted in a dismissal of the appeal.

[36] *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (CA), [1994] 1 FC 589 at para 10 confirmed that the basic component of the right to be heard includes notice of the case to be met in order to allow a person to prepare an adequate response to that case.

[37] The Applicant submits that he was not provided a further opportunity to provide additional materials and arguments in response to the Visa Officer's concerns. On June 3, 2016, the Applicant's counsel had written to CIC in regards to the January 15 refusal:

> I thank you kindly for the disclosed notice or rejection dated January 15, 2014, which appears to have then been predicated on his putative failure to provide documents pertaining to his pending proceedings in Criminal Court, which were ultimately resolved without the entry of a criminal record on May 29, 2014, when they were withdrawn by the Crown. As of January 15, 2014, Mr. Patel's matters were consequently pending as of that date, which meant that no decision was made relative to his innocence of guilt as the matter was set for trial.
>
> I assume that there were no other notices that were provided to Mr. Patel. Could you kindly confirm the same?
>
> I will be providing my final submissions in due course as I must follow up with one (1) query; and I have been advised by Mr. Patel that he has not received the requisite criminal records clearance to date that was sought by your offices in previous correspondence. I will follow up with your offices with an update in relation to that document as soon as practicable.

[38] The request was one of several made by the Applicant's counsel to request additional documentation and an extension of time. However, the Visa Officer ignored the Applicant's request and rendered the decision without responding to the queries regarding outstanding notices as well as the representation that further materials were forthcoming. The letter clearly indicated that the processing time for the requested RCMP police certificate would require up to 120 days.

[39] Additionally, the Applicant submits that no adverse inferences may be drawn against the Applicant from official court records since the charges against him were withdrawn. The Applicant also notes that the Visa Officer was provided with evidence of the withdrawn charges.

[40] In summary, the Applicant submits that procedural fairness was elevated in his case because of the interests at stake. He has now been declared inadmissible to Canada for five years.

B. *Respondent*

(1) Temporary Resident Visa vs. Temporary Resident Permit

[41] As a preliminary matter, the Respondent submits that although the Applicant says that his application for a temporary resident permit [TRP] was denied, the Applicant had applied for a TRV. The distinction is material because they are governed by different legislation and issued under different circumstances.

[42] TRPs are issued pursuant to s 24 of the *Act* when a foreign national is inadmissible and an officer is of the opinion that the circumstances justify the issue of the TRP. In contrast, a TRV is issued when a foreign national has been examined and has satisfied the officer that he or she has applied for a TRV as a member of the visitor, worker, or student class in accordance with the *Regulations*.

[43] Based on the record, the Respondent assumes that the Applicant challenges the June 6, 2016 decision refusing his application for a TRV and not a TRP.

(2) Misrepresentation

[44] The Respondent cites legislation and jurisprudence relating to misrepresentation.

[45] First, in accordance with s 16(1) of the *Act*, the onus was on the Applicant to truthfully answer every question in his application.

[46] Second, there is a recognized duty of candour on persons who make applications pursuant to the *Act*. This duty requires the disclosure of material facts. In *Bodine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 848 at paras 41 to 42, the Court states that there is an obligation to disclose information or produce relevant evidence in certain circumstances, and it is necessary to consider the surrounding circumstances in each instance to determine whether the withholding of information constitutes a misrepresentation. Similarly, the Court found in *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at para 15 [*Baro*] that a failure to disclose material information, even though innocent, may result in a finding of inadmissibility unless an exception can be made based on an honest and reasonable belief that material information was not withheld.

[47] Furthermore, this duty is not minimized in situations where the misrepresentation is caught by immigration officials prior to the final decision being made, as this would be contrary to the intent, objectives, and provisions of the *Act*: *Goburdhun v Canada (Minister of Citizenship and Immigration)*, 2013 FC 9714 at paras 19-20, 43 [*Goburdhun*].

[48] In the application of the law to the present case, the Respondent submits that the Applicant breached his duty of candour and engaged in misrepresentation by answering "no" to the questions of whether he had ever been refused a visa or arrested for any criminal offence. The Applicant was reminded of the legislative obligation to truthfully answer all questions in the

procedural fairness letter of January 5, 2016. The Applicant's argument that the misrepresentation was inadvertent or did not constitute a misrepresentation should be rejected because there is no argument to be made that the Applicant did not know he had been charged with a criminal offence or arrested. The letter dated April 5, 2016 by the Applicant's counsel indicates he was aware of the charges and candidly disclosed them. As the Applicant has not sworn an affidavit in regards to this matter, there is no evidence to establish that the failure to be candid was attributable to anything other than his own choice not to be.

[49] Additionally, the Applicant's argument that he did not know that he had been refused on a prior visa application should not be accepted because the Applicant included a copy of the January 15 refusal in his application. Since the Applicant has not sworn an affidavit in regards to this matter, there is no evidence to refute the Visa Officer's finding that the Applicant engaged in a misrepresentation contrary to s 40(1)(a) of the *Act*.

[50] The exception relied upon in *Osisanwo*, above, does not apply to the present case. In that case, the Court found that there was no *mens rea* on the part of the applicants to mislead the immigration authorities. In the present matter, the Applicant has not explained how he held an honest and reasonable belief that he was not charged with a criminal offence prior to his second application for a TRV and that he had not submitted a prior application for a TRV. Moreover, the Applicant had a full six months to address the concerns raised by the procedural fairness letter but chose to submit a preliminary response dated April 5, 2016 that stated there had been no misrepresentation or, in the alternative, the misrepresentation was inadvertent. There has been no

demonstration that the Applicant's circumstances fall within the circumstances set out in *Osisanwo*, above, and *Baro*, above, at paragraph 15.

[51] In his reliance on *Ali*, above, the Applicant argues that the misrepresentation was not material because there was no criminal record or conviction and that the information from the previous application was irrelevant to the current application given that he was not criminally inadmissible at the time of the January 15 refusal. However, the Respondent contends that it was for the Visa Officer to consider the factors that impacted the Applicant's inadmissibility to Canada. The information available at the time of the January 15 refusal indicated the charges against the Applicant were outstanding and the resolution of the Applicant's criminal matter does not invalidate the January 15 refusal. Furthermore, the January 15 refusal was never set aside on judicial review or replaced with a positive decision on a request of reconsideration. The January 15 refusal stands and the Applicant was therefore obligated to disclose it in his second application.

[52] The Visa Officer found that the information relating to the previous application was directly material to the assessment of the Applicant's *bona fides* and did not err in stating that the failure to disclose the previous criminal matters could have created the incorrect impression that there were no charges that required further investigation in order to determine inadmissibility to Canada. The Visa Officer could have been prevented from undertaking an appropriate investigation and verification process and could have erroneously determined that the Applicant met all the requirements of the *Act* if the Visa Officer had relied on the Applicant's denial of the January 15 refusal.

[53] Furthermore, the Visa Officer did engage in a materiality analysis prior to making the decision to refuse. The GCMS notes indicate that the Visa Officer noted that the Applicant's failure to declare his previous refusal and previous criminal charge could have led to an error in the administration of the *Act* and *Regulations*. Similar to *Brar v Canada (Citizenship and Immigration)* at paras 13-16, the breach of the duty of candour could have created the false impression that there was no reason to engage in further investigation to assess and determine the Applicant's inadmissibility to Canada.

(3) Procedural Fairness

[54] In the context of an application for a temporary worker visa, Justice Rothstein stated in *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815 at paragraphs 5 and 7:

> …There is no indication that working in Canada will be important to the Applicant in any material way, such as enhancing his career opportunities when he returns to China…there is no evidence that denying the applicant the opportunity for Canadian work experience will cause him hardship. In addition, in a case of a temporary worker's visa it is open to an Applicant to reapply and provide a visa officer with further information that will help to demonstrate that his intentions are indeed temporary…In such cases, the requirements for procedural fairness will be relatively minimal.
>
> Nor do I think it was incumbent on the visa officer to interview the Applicant to clarify the concerns that she had with respect to his intentions…The onus is on the Applicant…the onus does not shift to the visa officer to interview the Applicant or take other steps to satisfy her concerns arising from the documents he did furnish.

[55] Additionally, the case of *Nodijeh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1217 at para 3, supports the content of the duty of fairness owed to an applicant for a visitor visa to be at the low end of the spectrum.

[56] In regards to the present case, the Respondent submits that the same reasoning should apply. The Applicant applied for a TRV and there is no evidence that the Decision has any serious consequences to the Applicant. Indeed, there is no evidence at all from the Applicant to indicate that visiting Canada is important to him in any material way.

[57] The Visa Officer was not obliged to interview the Applicant. The Visa Officer had put her concerns to the Applicant in the form of a procedural fairness letter; this does not shift the onus to the Visa Officer to take additional steps, beyond the procedural fairness letter, to satisfy the concerns arising from documents that were furnished.

[58] Furthermore, the Respondent granted additional requests to extend the time required to address the concerns by a period of six weeks.

[59] Thus, the Respondent submits that the Applicant has not demonstrated that his right to procedural fairness has been breached.

(4) Weight of Evidence

[60] The Court's role does not involve substituting its decision for that of the Visa Officer, which has been stated numerous times: see, for example, *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 606 at para 9.

[61] Although the Applicant has argued that the January 15 refusal was an error, the Respondent rejects this argument. At the time of the January 15 refusal, the Applicant's criminal

charges had not been withdrawn. The January 15 refusal shows that the refusal was not based on a finding that the Applicant was criminally inadmissible to Canada; rather, it was based on the immigration officer's inability to determine whether the Applicant was inadmissible to Canada because the outstanding criminal matters had not been resolved. The immigration officer was unable to determine whether s 36 of the *Act* was applicable.

[62] The Applicant also submits that he was not required to disclose the past arrest and criminal charges on the second application for a TRV because he was never convicted under s 253 of the *Code*. The Respondent rejects this argument on the basis that the withdrawal of the charges does not vitiate the requirement for him to be truthful on his application. Section 16 of the *Act* required the Applicant to be truthful to all questions and s 40 of the *Act* deals with situations where an applicant is found to have relied on a misrepresentation that could lead to an error in the administration of the *Act*. The distinction between a criminal charge and conviction is irrelevant to the question of whether the Applicant engaged in misrepresentation when answering the questions on his most recent application for a TRV. The lack of conviction is therefore irrelevant to the onus imposed by s 16 of the *Act*.

[63] The Respondent submits that the Visa Officer's decision should not be disturbed as the decision falls within the range of possible, acceptable outcomes defensible on the facts and the law.

VIII. ANALYSIS

[64] The Court has stated the principles applicable to misrepresentation cases on numerous occasions. For instance, in *Godurdhun*, above, the Court provided the following summary:

> [28] In *Oloumi*, above, Justice Tremblay-Lamar [*sic*] describes general principles arising from this Court's treatment of section 40 of the IRPA which are summarized below together with other such principles arising from the jurisprudence:
>
> - Section 40 is to be given a broad interpretation in order to promote its underlying purpose (*Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 at para 25 [*Khan*]);
>
> - Section 40 is broadly worded to encompasses misrepresentations even if made by another party, including an immigration consultant, without the knowledge of the applicant (*Jiang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 942 at para 35 [*Jiang*]; *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at paras 55-56 [*Wang*]);
>
> - The exception to this rule is narrow and applies only to truly extraordinary circumstances where an applicant honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control (*Medel*, above);
>
> - The objective of section 40 is to deter misrepresentation and maintain the integrity of the immigration process. To accomplish this, the onus is placed on the applicant to ensure the completeness and accuracy of their application (*Jiang*, above, at para 35; *Wang*, above, at paras 55-56);
>
> - An applicant has a duty of candour to provide complete, honest and truthful information in every manner when applying for entry into *Canada (Bodine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 848 at para 41; *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at para 15);
>
> - As the applicant is responsible for the content of an application which they sign, the applicant's belief that he or she was not

> misrepresenting a material fact is not reasonable where they fail to review their application and ensure the completeness and veracity of the document before signing it (*Haque*, above, at para 16; *Cao v Canada (Minister of Citizenship and Immigration)*, 2010 FC 450 at para 31 [*Cao*]);
>
> - In determining whether a misrepresentation is material, regard must be had for the wording of the provision and its underlying purpose (*Oloumi*, above, at para 22);
>
> - A misrepresentation need not be decisive or determinative. It is material if it is important enough to affect the process (*Oloumi*, above, at para 25);
>
> - An applicant may not take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application. The materiality analysis is not limited to a particular point in time in the processing of the application. (*Haque*, above, at paras 12 and 17; *Khan*, above, at paras 25, 27 and 29; *Shahin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 423 at para 29 [*Shahin*]);

[65] In the present case, the record is clear that misrepresentations occurred because the Applicant provided negative responses to two questions on his TRV application:

> Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?
>
> …
>
> Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?

[66] The Applicant answered "no" to these questions even though he had been refused a TRV on January 15, 2014 and even though he had been arrested and charged with operating a motor vehicle while impaired under s 253 of the *Code*.

[67] There is nothing before the Court to suggest that the Applicant did not know about these misrepresentations, or that he made an innocent mistake. In fact, the Applicant has provided no personal affidavit for this application. So there is no acceptable evidence before the Court to suggest that the Applicant's failure to be candid was anything other than a deliberate choice. Instead, the Applicant has left his counsel to make other, more technical legal arguments.

A. *Materiality*

[68] The Applicant first argues that the misrepresentation as to his criminal charge is not material because he was never convicted of the offence he was charged with. He says that if the misrepresentation could not have affected the outcome of the Visa Officer's review then the misrepresentation is not material. He also says that the Visa Officer did not undertake an analysis of materiality or provide some basis for her conclusions.

[69] With regards to his January 15 refusal, the Applicant argues that it was irrelevant to his second TRV application because he was not criminally inadmissible at the time of the previous decision.

[70] The fact that the Applicant was not, in the end, convicted of the criminal offence did not impact the validity of his prior refusal of January 15, 2014 because the basis of that refusal was that, at the time of the decision, the Applicant could not satisfy the officer concerned that he was not criminally inadmissible to Canada. The criminal charges were withdrawn on May 29, 2014 which was four months after the January 15, 2014 decision. So the refusal was not made in error and that decision did not become immaterial simply because a conviction did not occur because

the charges were withdrawn. As the Decision makes clear, the Visa Officer may well have wanted to investigate the charges and the arrest herself. There is no evidence to show why the charges were withdrawn, and the Visa Officer would need to investigate this issue before deciding upon admissibility. In the context of TRPs and permanent residence applications, the Court has often upheld negative decisions where charges have been withdrawn, and I see no reason why withdrawing charges should not also remain material when a visa officer is dealing with a TRV application.

[71] For example, in *Gordashevskiy v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1349 [*Gordashevskiy*], the applicant was deemed inadmissible for misrepresentation by failing to declare the criminal charges against him in Russia in 2012, which charges were withdrawn in 2014. The applicant was aware of his charges but did not declare them as he worked to have them withdrawn. The visa officer's decision was upheld.

[72] In *Kazzi v Canada (Minister of Citizenship and Immigration)*, 2017 FC 153 [*Kazzi*], the applicant was deemed inadmissible for misrepresentation by failing to declare that he had been arrested and detained in Lebanon in 1989; the related charges were dropped in 2002 and he was granted amnesty. The applicant was aware of his charges but did not declare them because he mistakenly thought amnesty meant the charges and arrest had never happened. The visa officer disagreed and the decision was upheld.

[73] In *Bundhel v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1147, the applicant was deemed inadmissible for misrepresentation by failing to declare that he had been

arrested and charged in India; he was convicted but acquitted on appeal. The applicant was aware of his charges but did not declare them because he was acquitted. The visa officer's decision was upheld.

[74] When an officer is assessing materiality, he or she must decide whether the misrepresentation could have induced an error in the administration of the Act, but materiality is not limited to a particular point in time. As I point out in *Gordashevskiy* at para 49, "In other words, the materiality analysis is not limited to a particular point in time in the processing of the application. See *Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at paras 12 and 17; *Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at paras 25, 27 and 29; and *Shahin v Canada (Citizenship and Immigration)*, 2012 FC 423 at para 29." In response to the procedural fairness letter, the reply of Applicant's counsel dated April 5, 2016 provided the following explanation:

> I wish to provide the following preliminary submissions to your office that I anticipated making in support of the Applicant's position that the material misrepresentation in connection with the indexed questions, which has given rise to your section 16(1) *viz* section(s) 40(1) and 40(2), which are delinated [*sic*] in your letter of January 5, 2016. For the avoidance of any doubt, it will be Mr. Patel's position that no misrepresentation was made or in the alternative that it was the result of inadvertence.

[75] Applicant's Counsel also explained that the charges had been withdrawn:

> In the interim, I wish to provide you with the following preliminary information that pertains, in my submission, to question 3. As you may already know, Mr. Patel was charged with Impaired Driving and (colloquially put) "*Over 80*" pursuant to Sections 253(1)(a) and 253(1)(b) under the *Criminal Code of Canada*. The matter was set for trial by my office, I was his counsel, and I defended this Applicant on his charges. All charges were withdrawn against Mr. Patel on May 29, 2014. I have

> enclosed the Court Information and the Endorsements, which support the aforesaid contentions. Any potential inadmissibility under section 36 of the *Immigration and Refugee Protection Act* was avoided as a result of the Crown Prosecutors [*sic*] decision to withdraw all charges against Mr. Patel.

[76] So, before the Decision was made, the Visa Officer knew that the charges against the Applicant had been withdrawn on May 29, 2014. The application for a TRV was not signed by the Applicant, but it is dated November 26, 2015. So, at the time he made the application, the Applicant knew that the charges had been withdrawn, but this was not explained to the Visa Officer until the response to the procedural fairness letter. However, at the time she made the decision, the Visa Officer knew the charges had been withdrawn.

[77] As the jurisprudence cited above make clear, the materiality analysis is not limited to a specific point in the application process. A visa officer can look at the information at the time of the misrepresentation – in fact, the jurisprudence shows that if a misrepresentation is made before a procedural fairness letter and later clarified or corrected after the issuance of a procedural fairness letter, it still constitutes misrepresentation and the visa officer is entitled to refuse the application.

[78] In *Haque v Canada (Citizenship and Immigration)*, 2011 FC 315, the Court indicated as follows:

> [12] The applicant never "corrected" or "rectified" the misrepresentations, as he submits. They were only revealed when his previous TRV applications made some years ago were compared with the information provided in his permanent residence application. In any event, this Court has rejected the argument that paragraph 40(1) (a) is inapplicable where the misrepresentation is "corrected": *Khan v. Canada (Minister of*

> *Citizenship and Immigration)*, 2008 FC 512 at paras. 25, 27 and 29.
>
> …
>
> [17] The applicants' argument that Mr. Haque corrected his misrepresentations does not stand. Although paragraph 40(1)(a) is written broadly, it should not be read to mean that that it applies in all situations where a misrepresentation is clarified prior to a decision being rendered: *Khan*, *supra* at para. 25; *Cabrera v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 709, 372 F.T.R. 211 at para. 40. Thus, the attempted clarifications in this case do not change the reasonableness of the Officer's finding.

[79] In *Khan v Canada (Citizenship and Immigration)*, 2008 FC 512, the Court held as follows:

> [25] Paragraph 40(1)(a) is written very broadly in that it applies to any misrepresentation, whether direct or indirect, relating to a relevant matter that induces or could induce an error in the administration of the Act. I am of the opinion that this Court must respect the wording of the Act and give it the broad interpretation its wording demands. There is nothing in the wording of the paragraph indicating that it should not apply to a situation where a misrepresentation is adopted, but clarified prior to a decision being rendered.
>
> …
>
> [27] I acknowledge that this case presents a unique situation as the misrepresentation was clarified before the decision was rendered. However, to adopt the applicant's interpretation would lead to a situation whereby individuals could knowingly make a misrepresentation, but not be found inadmissible under paragraph 40(1)(a) so long as they clarified the misrepresentation right before a decision was rendered. I agree with the respondent that such an interpretation could result in a situation whereby only misrepresentations "caught" by the visa officer during an interview would be clarified; therefore, leaving a high potential for abuse of the Act.
>
> …

> [29] Moreover, to accept the applicant's interpretation would be to disregard the requirement to provide truthful information under the Act. In light of these findings, I am of the opinion that the visa officer correctly interpreted section 40.

[80] Likewise, in *Shahin v Canada (Citizenship and Immigration)*, 2012 FC 423, the Court held as follows at para 29:

> The fact that the misrepresentation was caught before the final assessment of the application does not assist the applicant. The materiality analysis is not limited to a particular point in time in the processing of the application—the fact that the principal applicant had submitted more recent language test results does not render the earlier misrepresentation immaterial. Such a result would reflect a narrow understanding of materiality that is contrary to the wording and purpose of section 40(1)(a) of the Act. The False Document was submitted and it was material.

[81] In my view, then, the jurisprudence indicates that a visa officer can still assess admissibility based upon the charges even if there is no eventual conviction – whether this occurs through withdrawal, amnesty, or acquittal.

[82] As Justice Gascon made clear in *Kazzi*, above, at para 26, withdrawn charges cannot be used against an applicant if the inadmissibility is based on criminality, but can be used if the inadmissibility is based on misrepresentation:

> I am ready to accept that events or arrests that were subsequently subject to an amnesty cannot be held against an applicant if the inadmissibility was based on *criminality*. Indeed, paragraph 36(3)(b) of the IRPA was drafted in such a way that "[c]onvictions [were] not to be taken into consideration where pardon has been granted or where they have been reversed" (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 [*Cha*] at para 30). However, the situation is different here, as Mr. Kazzi's inadmissibility was based on *misrepresentation*. Nothing in the IRPA precludes finding inadmissible for misrepresentation

> someone who omits to divulge a previous arrest, even when an amnesty or a pardon was granted. The fact that an amnesty was issued does not mean that Mr. Kazzi was relieved from his obligation, clearly enacted in subsection 16(1) of the IRPA, to provide truthful answers in his applications to the Canadian immigration authorities.
>
> (emphasis in original)

[83] Since the Applicant was determined inadmissible based on misrepresentation, the withdrawn charges can be considered.

[84] The Visa Officer also provides a full explanation as to why the failure to disclose the charges and arrest was material:

> While the representative has stated that the charge was withdrawn, and that the failure to declare the information was unintentional, I note that the failure to declare the previous refusal, as well as the criminal charge, could have induced an error in the administration of the act by creating the incorrect impression that there was no charge that needed further investigation in order to determine admissibility to Canada. Information relating to previous visa refusals is directly material to an officer's assessment of an applicant's bona fides.
>
> [emphasis added]

[85] It couldn't be clearer. The Applicant appears to be of the view that, because he was not convicted of the offence, this settles the admissibility issue, but it does not. An officer can investigate the facts surrounding the charge and the arrest and find an applicant inadmissible. The Visa Officer is clear that it is the failure to disclose the "charge" that is material.

B. *Innocent Misrepresentation*

[86] Even though the Applicant has submitted no personal affidavit, counsel has still attempted to raise the innocent misrepresentation exception. There is no evidence to support it, and it strains credibility to say that the Applicant didn't know he had been arrested and charged with a criminal offence. Even if the Applicant believed that the lack of a conviction rendered the previous refusal irrelevant, this does not make his misrepresentation innocent. It is for the Visa Officer to decide innocence and materiality, not the Applicant. This misrepresentation is not innocent because the Applicant deliberately chose not to disclose the charge and his previous refusal, knowing full well that they had occurred. His motive for this, his counsel (but not the Applicant) says, is because, given that he wasn't convicted, he didn't think they were material. Motive does not equate with innocence. The Applicant is simply deciding for himself what to disclose and what not to disclose. This is precisely what the rules on misrepresentation are there to prevent.

C. *Procedural Fairness*

[87] The Applicant also says that the Visa Officer breached the principles of natural justice and fairness by failing to provide him with a further opportunity to provide further materials and arguments in response to "CIC's putative allegations."

[88] The Visa Officer put his concerns to the Applicant in the form of a procedural fairness letter and provided a number of extensions to allow the Applicant to make a response. The Applicant's representative did submit a preliminary response. In the end, the Applicant was

given approximately six months to make any submissions he wished to make, yet he chose only to make the preliminary response of April 5, 2016. Extensions could not go on forever and there was no indication from the Applicant as to when he would make his final submissions. Also, given the failures to disclose, a full explanation could have been provided at any time. In these circumstances, it was not unfair for the Visa Officer to set a deadline and stay with it.

[89] There is nothing to suggest that the Applicant did not have a full opportunity to answer the Visa Officer's concerns. He now argues that the rules of natural justice are elevated in this case because of the interests at stake and the five-year bar. However, the Applicant has provided no evidence that the five-year bar will have any serious consequences for him at all. There is nothing before me to elevate the level of procedural fairness required, and there was nothing before the Visa Officer, which is the real issue. The Applicant was given an extended period of time within which to address the Visa Officer's concerns and simply failed to satisfy the Officer.

[90] There was no breach of procedural fairness in this case.

[91] Counsel concur that there is no question for certification and the Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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