Federal Court  Cour fédérale

Date: 20170619

Docket: IMM-5295-16

Citation: 2017 FC 606

Toronto, Ontario, June 19, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

RAMANJEET SINGH TOKI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [Act] of a visa officer from the High Commission of Canada in Colombo, Sri Lanka [Officer]. The Officer refused Mr. Toki's application for permanent residence under the Federal Skilled Worker Program on November 3, 2016 [the Decision], finding Mr. Toki inadmissible for misrepresentation per section 40 of the Act.

[2] For the reasons that follow, I am granting this judicial review.

[3] Mr. Toki is an Indian citizen and claimed to be working as a computer engineer in New Delhi. He applied for permanent residence under the Federal Skilled Worker class in October 2014.

[4] In March 11, 2016, Canadian authorities conducted an onsite visit of what they believed to be his workplace, at the address listed on his employer's letterhead. Upon arrival, they found a woman, who redirected the Canadian officials to a second location, after having told them that the location on the letterhead was her residence.

[5] At the second location, the authorities then met Mr. Toki's employer's father, who informed the officials that the office had moved a year ago to another location. The officials believed this alleged place of work to be fraudulent, and prepared a visit report dated March 11, 2016 to that effect [Report].

[6] On April 27, 2016, Mr. Toki submitted a Case Specific Inquiry to Canadian officials, providing a new work address.

[7] On July 12, 2016, Mr. Toki received a procedural fairness letter [PFL] from the Officer stating that he had concerns with respect to misrepresentation of work experience. The Officer informed Mr. Toki that he had 30 days to respond.

[8] Mr. Toki, with the assistance of counsel, responded on July 26, 2016 [Response] that he was unsure of the exact nature of the Officer's concerns, but believed they may be related to the March 2016 site visit. In written submissions, Mr. Toki stated that he was working in another office at a client site on the day of the visit.

[9] Included in his Response, Mr. Toki provided an employment contract, three letters of support corroborating his version of the events (including from his employer), remuneration documentation, invoices for work performed, a copy of a receipt for a computer mouse purchase, the Case Specific Inquiry from April 2016, and receipts for parking charges from the client site from the day of the site visit (March 11, 2016).

[10] In his negative Decision, the Officer stated that Mr. Toki deliberately misrepresented his employment experience. This made him inadmissible to Canada for five years under section 40 of the Act. The Officer noted some inconsistencies and preferred evidence gathered on the day of the site visit, as opposed to the documentation submitted by Mr. Toki, including in his Response.

[11] Mr. Toki now challenges the Decision by way of this judicial review.

II. Analysis

[12] Mr. Toki argues that the Officer (1) violated procedural fairness and (2) unreasonably assessed the evidence in making his inadmissibility finding.

[13] The parties agree, as do I, that the applicable standard of review is correctness for issue 1 (*AB v Canada (Citizenship and Immigration)*, 2013 FC 134 at para 51 [*AB*]), and reasonableness for issue 2 (*Chughtai v Canada (Citizenship and Immigration)*, 2016 FC 416 at para 11 [*Chughtai*]).

A. *Procedural Fairness*

[14] Mr. Toki relies on *AB* paras 53 and 55 to argue that by failing to put the Report before him, the Officer breached procedural safeguards. Mr. Toki says that this case is akin to *AB* because the concerns expressed in the PFL were broad and general in nature. Mr. Toki says that he was left guessing as to what concerns or clarifications the Officer was looking for. While Mr. Toki correctly "guessed" that the Officer was referring to the March 2016 site visit, he says if the Officer had disclosed the nature of his concerns, Mr. Toki would have been able to provide a full and detailed response, beyond what Mr. Toki submitted in response to the procedural fairness letter.

[15] The Respondent counters, relying on *Li v Canada (Citizenship and Immigration)*, 2012 FC 1099 at paras 11-13 [*Li*], that since Mr. Toki was aware of the onsite visit, and given an opportunity to respond to the PFL, there can be no violation of procedural fairness. The Respondent also relies on *Bhatti v Canada (Citizenship and Immigration)*, 2017 FC 186 at para 45 [*Bhatti*], contending the Officer was under no obligation to provide Mr. Toki a further opportunity to respond to his continuing concerns.

[16] In terms of the content of procedural fairness, the Respondent observes that the Officer's obligations are at the lower end of the spectrum (*Asl v Canada (Citizenship and Immigration)*, 2016 FC 1006 at para 23 [*Asl*]). The Respondent further submits that the Officer provided Mr. Toki with an opportunity to meaningfully participate in the process, thus fulfilling his obligations.

[17] While I agree with the general observations about the existence of the duty of fairness and that its content is lower than in various other contexts in the spectrum of immigration proceedings, it is nonetheless heightened when a potential consequence that will flow from the refusal is a finding of misrepresentation, and a 5 year bar.

[18] The PFL was undoubtedly vague; upon a plain and simple reading of the PFL, I cannot agree with the Respondent that Mr. Toki knew what exact concerns were at issue. It reads as follows:

> We have concerns regarding the information you have provided in your application with regard to your work experience. In your application form, you have indicated that from 2012 to date you work as a Computer Engineer at the Digital Computer Lab. However, upon verification concerns exist with respect to your employment and work experience. (PFL, Certified Tribunal Record [CTR] at 52)

[19] In Mr. Toki's Response, his counsel noted:

> […] Please note that while your letter does not outline any specific concerns, we have been advised that on March 11, 2016, officials from your office conducted a site visit at Mr. Toki's workplace during which Mr. Toki was not present due to field work. We believe that this site visit is the origin of your concerns. We respectfully request that if the site visit is not the concern or [is] incorrect, please let us know. In order to respond to your letter, and

> for fairness purposes, our client requires details regarding your specific concerns [CTR at 48].

[20] There was never any response to this letter or the request for specific information. The next correspondence that arrived from the visa Officer was the Refusal. The Report that listed the details regarding the concerns surrounding employment and work experience was only sent to Mr. Toki's counsel's office after the Refusal. I therefore agree, based both on the context of this decision and the detailed Report that was only seen by Mr. Toki after the hearing, that Mr. Toki was left guessing as to what and how to respond.

[21] As is evident above, Mr. Toki's counsel specifically stated in submissions to the Officer – rather than simply before this Court – that his client Mr. Toki was unsure as to the nature of the concerns expressed in the PFL. In my view, the fact that Mr. Toki guessed correctly does not alleviate or otherwise excuse the fact that the nature of the Officer's concerns was not communicated to Mr. Toki. For instance, had he understood the nature of the concerns, he could have potentially gone to extra lengths, which he might have questioned the utility of, while he was unsure of the nature of the concerns.

[22] Turning to the case law relied upon by the Respondent, I find that it is readily distinguishable from the case at hand. First, in *Bhatti* (see para 41), the applicant's position was that the tax certificates were not specifically set out as a concern in the PFL. However, the tax returns were not the source of the refusal, and thus did not affect the procedural fairness aspect of that decision. That is distinct from this case, where the details of the concern were not disclosed in the first place (e.g. – the employer's father's statements, as per the Report).

[23] Second, as correctly stated by Mr. Toki, a similar distinction occurred in *Li* (see para 4). For instance, in that case, even though the applicant was advised that the concern was about the authenticity of property certificates, the officer erred in failing to disclose the evidence on which this concern was based, and thus failed in the obligation to provide an opportunity to respond to the concerns.

[24] As for *Asl* at para 23, while Justice Gagné did note that "that the procedural fairness owed by visa officers is on the low end of the spectrum", she also held that "[o]f course, the duty of fairness in this context still 'require[s] visa officers to inform applicants of their concerns so that an applicant may have an opportunity to disabuse an officer of such concerns' (*Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 at para 21)". Moreover, in that case, the issue was clearly put to the applicant (see para 30). Here, that was not the case for Mr. Toki. He simply did not know – but rather had to guess in the dark – as to the case against him.

[25] As noted in both *AB* and *Asl*, an officer is required to provide more than general concerns, which the Officer failed to do here. Failure to do so means that the applicant cannot have a meaningful participation in the fairness process – which is entirely the purpose of the PFL, and for which the underlying policy and doctrinal goals of the opportunity to answer the case against you exists in administrative law. In other words, this error is fatal in and of itself.

[26] In any event, even if Mr. Toki wouldn't have submitted additional documents had the Officer expressed the nature of his concerns in more detail, at the very least citing his reliance on the Report in the PFL, Mr. Toki's submissions may have been more focussed and geared to the

Officer's specific concerns. In failing to do so, procedural safeguards were not respected. In this regard, I would turn by analogy to *Johnson v Canada (Citizenship and Immigration)*, 2017 FC 550, where Justice Gleeson wrote at paragraph 18 - albeit in the context of a spousal interview by a visa officer - "[h]ad Mr. Johnson and his spouse been given adequate notice of the nature of the interview their answers may indeed have been more focussed, less confused and the outcome may have been different."

[27] Finally, the Respondent counters the procedural fairness point on the basis that Mr. Toki received a copy of the Report, but did not provide any evidence in response to it, to back up his contention that he could have provided more specific information had he been fairly notified of the nature of the specific concerns of the Officer.

[28] Indeed, as noted above, the Report was eventually provided to Mr. Toki, but that only came after the Decision which refused his application in 2016. Any other documents provided in response to it would have been inappropriate to place before the Court, as Mr. Toki points out: generally one cannot produce new evidence on judicial review, because the Court reviews whether the errors were made in the Decision based on the record before it.

[29] For instance, Mr. Toki's counsel, at the hearing, provided in oral evidence various points of information knowing what was in the Report to explain what answers would have been given had Mr. Toki been advised. However, as noted by Mr. Toki's counsel herself, that was all irrelevant for the purposes of the judicial review, because the evidence would not have been properly before the Court – as it would not have been considered by the decision-maker.

[30] In sum, the efforts of the Respondent were a case of too little, too late. Had the Officer genuinely wanted to be fair to Mr. Toki, one of three things could have happened with minimal effort: the Officer could have (i) confirmed the nature of the concerns in reply to counsel's Response; (ii) provided specifics regarding those concerns in reply to counsel's Response; and/or (iii) provided the Report in a timely manner, which would also have satisfied counsel's Response.

B. *Assessment of Evidence*

[31] Even if my procedural fairness analysis is wrong then, for the following reasons, I agree with Mr. Toki's argument that the Officer's assessment of the evidence was deficient. This issue, while assessed on a reasonableness standard as referenced previously, and thus while different in nature from the fairness analysis above, is inextricably linked to the process followed, including the information exchange in this matter. I have already observed that the stakes are higher when the consequences of refusal are more than just a denial of the application itself. Here, the Officer decided to proceed with a refusal that led to a bar on any application for several years. A proper and fulsome analysis of the evidence is required.

[32] The Respondent counters in saying that reasons do not have be adequate, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 21-22 [*Newfoundland Nurses*]; *Narang v Canada (Citizenship and Immigration)*, 2016 FC 863 at para 38 [*Narang*]. In short, the Respondent argues that it was open to the Officer to make a finding that Mr. Toki deliberately and willingly misrepresented his

employment experience; as *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-49 dictates that deference be applied, the Decision here was reasonable.

[33] While I agree with all of the above, and the fact that the Officer is owed deference, I do not find that the Decision (namely - the refusal letter combined with related "GCMS" computer notes) rises to the standard of intelligibility, transparency and justification required by the case law: I cannot say that the Officer's assessment of the evidence presented, including in response to the PFL, rose to that standard.

[34] What the Officer does instead, is to recount some of the evidence, and notes that there are some discrepancies between the Report and Mr. Toki's submissions in response to the PFL. The Officer notes that there were no business offices where Canadian officials undertook their site visit in March 2016, and that there were no computer labs where they went next.

[35] However, what was not mentioned was evidence, including the floor of the office (see page 72 of the CTR) and the fact that Mr. Toki stated - from the outset - that he worked at a different location. In addition, in response to a Case Specific Inquiry dated April 27, 2016, Mr. Toki provided a different employment addresses, i.e. before the July 12, 2016 PFL. The Decision did not mention this evidence – which may have fed into the Decision – but one is left to guess if so and how.

[36] In terms of the lack of work experience claimed, reliance was simply placed on statements of the business owner's father, with no opportunity for Mr. Toki to respond. Even had

there been evidence that the owner's father had special knowledge of the skills of the employees, then, as explained above, Mr. Toki should have been given a chance to respond, because he had provided evidence of his skills, knowledge, and work experience.

[37] Ultimately, the Officer concludes: "Where there are inconsistencies, I prefer the spontaneous information gathered during the verification to the information and documents produced specifically in response to the PFL and give them more weight" (CTR at 12).

[38] As stated in *Xu v Canada (Citizenship and Immigration)*, 2011 FC 784 at para 16, the consequences of deliberate misrepresentation are serious. Consequently, the evidence supporting such a finding must be clear and the Officer's reasons must reflect this. This includes explaining why evidence which counters such a conclusion is, at minimum, acknowledged.

[39] The Respondent argued that the Court should follow *Narang*, and not reweigh the evidence and step into the shoes of the Officer. However, the facts in this case differ from those in *Narang*, where first of all, the applicant was contacted by the visa officer to follow up on concerns – which is exactly what Mr. Toki here is stating should have happened. Second, the treatment of evidence also differed in that case. Therefore, *Narang* is of no assistance to the Respondent, both in terms of the assessment of evidence and procedural fairness arguments raised herein.

[40] In sum, even after considering the principles set out by the Supreme Court of Canada in *Newfoundland Nurses*, I am unable to understand how the Officer came to the conclusion that

clear and compelling evidence existed to find that Mr. Toki deliberately mispresented his work experience.

[41] The Officer's assessment of the evidence is, in my view, non-transparent, thus failing to pass the scrutiny of this Court on a reasonableness standard.

III. Conclusion

[42] In light of the above, this application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted and the matter will be sent back to a different officer for redetermination.

2. Counsel presented no questions for certification, nor do any arise.

3. No costs will be ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5295-16
STYLE OF CAUSE:	RAMANJEET SINGH TOKI v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 14, 2017
JUDGMENT AND REASONS:	DINER J.
DATED:	JUNE 19, 2017

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