Federal Court  Cour fédérale

Date: 20180126

Docket: IMM-1051-17
IMM-1754-17

Citation: 2018 FC 88

Ottawa, Ontario, January 26, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ABDRANOVA ZHAMILA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] These two applications for judicial review involve the same parties, arise from the same sequence of events and were heard together. Accordingly, this Judgment and Reasons will deal with both applications and a copy will be placed on both Court files.

[2] In Court file IMM-1051-17, the Applicant seeks to challenge a decision by a visa officer dated February 17, 2017, wherein the visa officer determined that the Applicant is inadmissible for a misrepresentation under s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, (IRPA or the Act) for submitting an altered document. In the second Court file, IMM-1754-17, the Applicant seeks judicial review of the refusal of the visa officer, dated March 10, 2017, to reconsider the February 17, 2017 decision.

[3] For the reasons that follow, the applications are dismissed.

II. Background

[4] The Applicant is a citizen of Kazakhstan who came to Canada to study English in 2009. She continued her studies and obtained a Master of Science degree in Information Science and Systems from Carleton University in 2013. She was then issued a post-graduate work permit which was valid until June 12, 2016. In early 2016, the Applicant applied for entry through the Federal Skilled Worker Category and was granted a bridging work permit valid until June 14, 2017.

[5] On July 11, 2016, the Applicant applied for a Temporary Resident Visa (TRV) to travel to Kazakhstan. As Kazakhstan is not a visa exempt country, without a valid TRV, the Applicant would not have been able to re-enter Canada if she had left. On September 2, 2016, the Canada Border Services Agency‘s (CBSA) National Document Centre issued a Notice of Seizure of Identity Documents indicating that the Applicant's passport contains an altered Canadian counterfoil. The TRV’s expiry date, located in the passport, was altered from 2016 to 2018. This

change was visible to the naked eye and confirmed with a specialized light source, according to the CBSA.

[6] On September 12, 2016, the Applicant submitted an Application for the Return of Seized Identity Document(s) to the CBSA. The CBSA did not return the altered TRV to the Applicant.

[7] On October 24, 2016, the visa officer issued a "fairness letter" to the Applicant, advising her of the altered counterfoil and allowing her to respond to their concerns. The Applicant provided a response which included a scanned copy of her original, unaltered TRV.

[8] On February 17, 2017, the visa officer notified the Applicant that her application for a TRV had been refused for misrepresentation pursuant to s 40(1)(a) of the IRPA. This is the decision for which judicial review is sought in the first Court file IMM-1051-17. The officer was not satisfied by the Applicant's explanation in response to the altered document and the fairness letter:

> The explanation provided is not sufficient to address concerns that the Applicant misrepresented a material fact, namely the expiry date of a previously-issued TRV. This could have induced an error in the administration of the Act by creating the incorrect impression that the Applicant held a valid TRV, and that she was authorized to travel to Canada and seek re-entry, when in fact, this was not the case. For these reasons, on balance I have determined that the application is a person described in paragraph 40(1)(a) of the Act [...]

[9] On February 23, 2017, the Applicant wrote to the visa officer requesting reconsideration of the decision regarding material misrepresentation. In her request, the Applicant asserted a right to disclosure of the altered TRV and noted her consistent compliance with immigration

requirements since coming to Canada. Until this point, the Applicant did not have the assistance of counsel.

[10] In her submissions, the Applicant stated that there was new evidence that warranted consideration. The Applicant alleged that her landlord broke into her apartment and altered the document. The Applicant provided a copy of a statement of claim which was used for proceedings before an Ontario landlord and tenant tribunal. It was submitted on her behalf that it "is reasonable to conclude that the landlord altered the alleged TRV as he has access to her documents and as such it was beyond control of our client."

[11] On March 10, 2017, the visa officer denied the Applicant's request for a reconsideration of the previous decision, including her request for the disclosure of the altered document. The visa officer's notes to file state the following:

> As previously noted, subsequent to the refusal of this application the applicant has engaged the services of a representative. The rep has submitted the reconsideration request and has noted that "As you are aware, [the Applicant] was not represented and it is evident that she was not well versed in immigration procedure. This is clear from the fact that she did not property address the issues of this case in response to your fairness letter of October 24. 2016. She advises that she received a letter before October 2016 regarding her seizure of passport and when she replied to that she thought that her submissions were sufficient and carried over for the purposes of the fairness letter. As such, we respectfully submit that you review our submissions today in support of the fairness letter." While I will address the issue or fairness that the representative raises in the recon request, the final decision on this application was made on the basis of the information on file at that time. The fairness letter provided the applicant with a time frame (15 days) to review and respond to the allegations (which she did). The applicant chose not to engage a representative at that time. I will therefore not review new or additional information now being presented by the rep. One of the key issues presented by the

> representative is that of fairness – that a scanned copy of the altered counterfeit had not been presented to the applicant, this constituted a breach of fairness. As the rep states "How can a person defend themselves properly and how can a person property address a fairness letter when they have not been presented the evidence against them?" I have reviewed the fairness letter sent to the applicant on October 24, 2016. I note that this letter specifically stated: "With your application, you submitted a copy of your previous Canadian TRV, bearing serial number […]. The electronic copy of the visa that you submitted indicated that it was issued on 15 August 2013 and that it expired on 12 June 2016. On 13 July 2016, you were requested to submit your Original Passport in order for us to continue the processing of your current TRV application: your passport was subsequently received by the Case Processing Centre in Ottawa on 25 July 2016. However, a review of the passport you submitted […] allowed that the Canadian TRV mentioned above had been altered. Specifically, the expiration date had been altered to read 12 June 2018," Having reviewed the paragraphs above. I therefore find that the representative's statement ("they have not been presented the evidence against thorn") is not accurate. While it is correct that no copy or scan of the altered counterfoil was presented to the applicant, the text of the fairness letter was clear. The specific alteration and concerns were presented to the applicant, simply not as an image or a scan. For these reasons, I have declined to re-open and re-assess this application.
>
> [Emphasis added]

[12] This is the decision for which judicial review is sought in second Court file IMM-1754-17.

III. Standard of Review

[13] The parties have agreed and I accept that the visa officer's decisions regarding misrepresentation and the reconsideration request are reviewable on a standard of reasonableness as they deal with questions of mixed fact and law: *Patel v Canada (MCI)*, 2017 FC 401 at para 14 [*Patel*]; citing *Rahman v Canada (MCI)*, 2016 FC 793 at para 6.

[14] In Court file IMM-1754-17, the Applicant raised the additional issue of fettered discretion which is a matter of procedural fairness attracting the standard of correctness: *Patel*, above, at para 16; citing *Canada (MCI) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Thamotharem v Canada (MCI)*, [2008] 1 FCR 385, 2007 FCA 198 at para 38.

[15] The Applicant presented the refusal to release the passport to her as a matter of procedural fairness calling for the correctness standard. At the hearing, Respondent's counsel pointed out that this was a decision made by the CBSA, and not by the visa officer. An application for judicial review of that decision had not been made and the Minister responsible for CBSA was not a Respondent before the Court. Nonetheless, the Respondent had relied on the CBSA assessment that the document was altered in making the finding of misrepresentation. Accordingly, I considered that the CBSA decision was part of the continuing sequence of events that resulted in the denial of the TRV.

IV. Issues

[16] The two applications raise the following questions:

A. Did the Applicant have a right to disclosure of the altered document?

B. Is the visa officer's decision that the Applicant is inadmissible for misrepresentation under s 40(1)(a) of the IRPA reasonable?

C. Did the visa officer fetter his discretion or otherwise err by failing to recognize that he had the power to re-consider his refusal and inadmissibility decision?

V. Relevant Legislation

[17] The following sections of the IRPA are relevant:

Obligation — answer truthfully	**Obligation du demandeur**
16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	**16 (1)** L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.
Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
[…]	[…]
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

VI. Analysis

A. *Did the Applicant have a right to disclosure of the altered document?*

[18] The Applicant contends that she was denied procedural fairness in the decision-making process by the refusal of the Respondent to return her passport with the allegedly altered TRV so that she might conduct her own examination of the document and respond more effectively to the fairness letter. In support she cites *Natt v Canada (Citizenship and Immigration)*, 2009 FC 238 [*Natt*].

[19] In *Natt*, the Court found that the duty of procedural fairness was breached when an officer failed to disclose x-rays, on request, which had been relied upon to make a finding of misrepresentation. It was alleged by the officer that the x-rays in question were not those of the applicant but of another person. The Court held that the officer had a duty to provide the applicant with the alleged evidence and afford him an opportunity to respond.

[20] It was arguable that an examination of the x-rays might have revealed an error in the officer's finding. In those circumstances, the Court found, the request for production was reasonable. The Court was also concerned with the Respondent's lengthy delay in relying to the request for copies and the response ultimately provided which was that the applicant should make an "access to information request". Proceeding in that manner would have compounded the already lengthy delay in processing the application.

[21] *Natt* does not stand for the proposition, in my view, that there will be a breach of procedural fairness in any case in which a request for the return of submitted documents or other evidence tendered in support of an application is not granted. Each case must be determined on its own facts.

[22] In a subsequent decision, *Slaeman v. Canada (Attorney General)*, 2012 FC 641 at para 38, the Court, referencing *Natt*, held that the requirements of procedural fairness were met when a visa officer outlined the perceived misrepresentations in a fairness letter and provided the applicant with an opportunity to respond, as occurred here.

[23] Here, the Applicant was given a fair opportunity to present her response to the allegation and to participate meaningfully in the decision-making process: *Chawla v Canada (Citizenship and Immigration)*, 2014 FC 434 at paras 17 and 19; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 30; *Bhagwandass v Canada (Citizenship and Immigration)*, 2001 FCA 49 at para 22.

[24] The issue of the altered document was put to the Applicant and the Applicant's reply to the fairness letter did not address any of the elements under s 40(1)(a) of the IRPA. It is noteworthy that the Applicant, in her reply to the fairness letter, did not dispute that the visa in her passport had been altered. This was considered by the officer who recorded the following observations in his notes:

> Applicant does not directly address why the expiry date of the original counterfoil in her passport has been amended; the response instead speaks extensively to the process PA followed to scan her documents and submit them as part of the TRV application. The

> explanation provided is not sufficient to address concerns that the Applicant misrepresented a material fact, namely the expiry date of a previously-issued TRV.

[25] The altered document appears in black and white scanned images in the records submitted to the Court. While the alteration is apparent in those images, at the hearing, and with the agreement of counsel for the Applicant, the Court was provided with a colour copy of the document by counsel for the Respondent. It did not take a "specialized light source" for the alteration to be obvious to the naked eye.

[26] The Applicant did not assist the Court with an explanation of what she might have done with the altered document had it been returned to her. There was no evidence, for example, that a forensic examination might have disclosed that the document was not, in fact, altered or disclose the identity of the person who made the change. This was not a sophisticated alteration. It was a simple change of a "6" to an "8". In the result, while it is not for the Court on judicial review to make findings of fact, it seems to me to be incontrovertible that the TRV had been altered.

[27] In the circumstances, I am unable to accept that the Applicant had a right to the return of the document or to find that she was denied procedural fairness.

B. *Is the visa officer's decision that the Applicant is inadmissible for misrepresentation under s 40(1)(a) of the IRPA reasonable?*

[28] The visa officer found the Applicant inadmissible for a material misrepresentation pursuant to s 40(1) (a) of the IRPA. In making that decision, the visa officer must be satisfied that (1) the Applicant has directly or indirectly misrepresented or withheld material facts relating

to a relevant matter and (2) that the misrepresentation induces or could induce an error in the administration of the IRPA: IRPA s 40; *Brar v Canada (MCI)*, 2016 FC 542 at para 10. *Cao v Canada (MCI)*, 2010 FC 450 at para 28 [*Cao*]; *Jiang v Canada (MCI)*, 2011 FC 942 para 31; *Singh Dhatt v. Canada (MCI)*, 2013 FC 556 at para 24 [*Dhatt*].

[29] A finding of misrepresentation must meet the evidentiary burden on the balance of probabilities and must be based on clear and convincing evidence: *Chughtai v Canada (MCI)*, 2016 FC 416 at para 29 [*Chugthai*]; *Xu v Canada (MCI)*, 2011 FC 784 at para 16.

[30] The Federal Court has held that section 40 of the IRPA is to be interpreted broadly and that applicants have a "duty of candour", which is required to maintain the integrity of the immigration system: *Bodine v Canada (MCI)*, 2008 FC 848 at paras 41–42 [*Bodine*]; *Kobrosli v Canada (Minister of Citizenship and Immigration)*, 2012 FC 757 at para 46.

[31] An exception applies where an applicant "honestly and reasonably believed they were not misrepresenting a material fact": *Sayedi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 420 at para 33; *Baro v. Canada (MCI)*, 2007 FC 1299 at para 15; *Medel v. Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345, [1990] FCJ No 318 (FCA).

[32] The Applicant submits that she did not have knowledge of the altered document and did not knowingly commit a misrepresentation. Even if there was a misrepresentation, she submits, the misrepresentation was not material. She says that she applied to renew her TRV in July 2016 in the genuine belief that it had expired the previous month. Thus she had no reason to alter the

document, had no knowledge of the alteration when she submitted her passport and could not, therefore, have committed a misrepresentation.

[33] The Applicant relies on a policy document used by visa officers at Immigration, Refugee and Citizenship Canada (IRCC), "ENF 2/OP 18 — Evaluating Inadmissibility", at s 10.6 "Fraudulent documents":

> Verification of documents sometimes reveals that documents submitted by Applicants are fraudulent; this does not automatically lead to inadmissibility. These documents may not be material and/or relevant and/or may not induce an error in the administration of the Act. Officers should consider and be guided by the following principles: […]
>
> Was the document provided to make a misrepresentation? Sometimes fraudulent documents are obtained to support true facts that cannot be verified because records are otherwise unobtainable or difficult to obtain. In these circumstances, if the facts are otherwise established to the satisfaction of the officer, it is questionable that the misrepresentation could have induced an error.

[34] Although not binding, this Court has found that these Guidelines "are a good indication in a judicial review proceeding of what an immigration official might reasonably find to constitute misrepresentation of a material fact related to a relevant issue": *Mai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 101 at para 20.

[35] The Applicant relies on *Dhatt*, above, which involved the use of a fraudulent birth certificate for an adopted child. The Court concluded that the fraudulent certificate could not, in and of itself, form the basis for a finding of misrepresentation as nothing suggested that it was used for the purposes of misrepresentation. The adopted status of the child had never been

concealed by the applicant and was declared from the outset. Thus the fraudulent birth certificate was not used to induce an error in the administration of the Act but rather to support true facts that could not be verified because records were otherwise unobtainable or were difficult to obtain – a situation contemplated by the passage from the guidelines quoted above. A birth certificate was required and one was produced. But no one was misled.

[36] In this instance, the officer may well have assumed that it was the Applicant who altered the document. The officer cannot be faulted for that assumption, in my view, as it was a reasonable inference to draw from the facts presented to the officer. No one, other than the Applicant, stood to gain from altering the document. The duty to ensure that the information submitted on her application was accurate, true and complete rested with the Applicant: IRPA s 16; *Bodine*, above, at paras 41–42; *Haque v Canada (Minister of Citizenship and Immigration)*, 2011 FC 315 at paras 13–15.

[37] Unfortunately for the Applicant, she finds herself in the situation described by Justice Mainville in *Cao*, above, at para 31: "[t]he Applicant signed her temporary residence application and consequently must be held personally accountable for the information provided in that application. It is as simple as that." The visa officer was not required to speculate about how or why the TRV came to be altered. The Applicant bore the onus to satisfy the requirements under IRPA and failed to do so.

[38] In the alternative, the Applicant argues, the alteration is not material as a scanned copy of the unaltered TRV was provided to the officer in response to the fairness letter and prior to the

final determination being made. Again, unfortunately for the Applicant, the Court has consistently dismissed the argument that a material misrepresentation is no longer material if it was corrected before a final decision: *Jiang v Canada (MCI)*, 2011 FC 942 para 35–38; *Khan v Canada (MCI)*, 2008 FC 512 at para 27; *Gordashevskiy v Canada (MCI)*, 2016 FC 1349 at para 49; see also *Haque*, above, at paras 12–17.

[39] In this instance, the visa officer found that the altered date was material. This, the officer stated, "could have induced an error in the administration of the Act by creating the incorrect impression that the Applicant held a valid TRV and was authorized to travel to Canada and seek re-entry, when in fact, this was not the case."

[40] In my view, it is reasonable to conclude that the alteration of an official document, such as the date of a TRV found in a passport, is a material misrepresentation. The Applicant was entitled to leave Canada at any time. But she was not authorized to seek re-entry without a valid TRV. An alteration to a previously issued TRV to extend its apparent duration could affect the ability of a visa officer to determine the legal status of a person seeking to enter Canada. Whether it was used for this purpose or not, the alteration of the date could have clearly induced the misadministration of the Act.

[41] In the result, I am satisfied that the officer's decision was reasonable and that the Court should not intervene.

C. *Did the visa officer fetter his discretion or otherwise err by failing to recognize that he had the power to re-consider his refusal and inadmissibility decision?*

[42] The Applicant submits that the officer erred in concluding that he was without discretion to reconsider his earlier decision. The officer's response to her request demonstrates that he believed that a final decision was taken on the merits of the application and that there was no availability of an "appeal" from that decision. His notes to file indicate that he believed that his only discretion was to determine whether there had been a breach of procedural fairness.

[43] The Applicant points to an email sent to the representative (not her present counsel) whom she had by then retained, on March 13, 2017, which states among other things:

> The decision is final and there are no provisions for appeal to this office.

[44] Administrative decision makers such as visa officers do have discretion, in appropriate circumstances, to reconsider their decisions: *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 3 [*Kurukkal*]. What circumstances are appropriate will depend on the facts of the case.

[45] There is a distinction to be drawn between a decision which fails to recognize that a prior determination can be reconsidered and one that refuses to reconsider that determination. The first would constitute an error of law while the second would fall within the visa officer's discretion if exercised reasonably: *Kurukkal*, above, at para 3–4.

[46] The visa officer's GCMS notes form part of his decision: Rahman v Canada (MCI), 2016 FC 793 at para 19; see also Cabral v Canada (Minister of Citizenship and Immigration), 2018 FCA 4 at paras 27–31. In my view, the notes in this case clearly demonstrate that the officer knew that he had the discretion to reconsider the previous decision but declined to do so. The visa officer considered the request "in light of the fairness letter" and the opportunity given the Applicant to provide an explanation for the altered TRV:

> The fairness letter provided the applicant with a time frame (15 days) to review and respond to the allegations (which she did). The applicant chose not to engage a representative at that time. I will therefore not review new or additional information now being presented by the rep.

[47] Notwithstanding this statement, the officer then proceeded to consider the statements offered in support of the Applicant by the representative. In an entry dated March 10, 2017, the visa officer wrote that the Applicant's statements were "not accurate" and noted that he had declined to reconsider the previous decision:

> Having reviewed the paragraphs above, I therefore find that the representative's statement ("they have not been presented the evidence against them") is not accurate. While it is correct that no copy or scan of the altered counterfoil was presented to the applicant, the text of the fairness letter was clear. The specific alteration and concerns were presented to the applicant, simply not as an image or a scan. For these reasons, I have declined to re-open and re-assess this application.

[48] As I have discussed above, the Applicant had an opportunity to respond to the fairness letter but chose not to directly address the officer's concerns. Her representative acknowledged this in his communications with the visa officer. The visa officer did not fail to realize or

understand that he has the discretion to reconsider a decision even if a final determination has already been made. The visa officer considered the request, exercised his discretion and refused to reconsider the previous decision. While this might be considered harsh in the circumstances, it was within the officer's discretion and his exercise of that discretion was not fettered: *Thelwell v Canada (AG)*, 2016 FC 134 at para 24; *Kanthasamy v Canada (MCI)*, 2015 SCC 61 at para 32.

[49] The submissions received from the Applicant's representative consisted for the most part of fanciful speculation that a conflict between the Applicant and her former landlord had resulted in an unauthorized entry to her apartment during which a person or persons unknown had found and altered the TRV in her passport. To support these claims, the Applicant's representative provided a statement of claim from a landlord and tenant tribunal. In the circumstances of this case, I am satisfied that the officer reasonably exercised his discretion to refuse to reopen and reassess the application on the basis of the supposed new evidence. The allegations were not worthy of any credit nor supported by any evidence in the record.

[50] For these reasons, the second application must also be dismissed.

[51] I can't help but observe in conclusion, that these events have had a major impact on the life of a young woman who appears to have made a great effort to improve her education and to establish herself in Canada. It is not for the Court to advise the Minister on how to exercise the humanitarian and compassionate discretion afforded that office by Parliament but it seems to me that if a thoughtless mistake was made by a young person in such circumstances, Canada could be generous enough to provide her with a second chance.

[52] The parties have proposed no questions for certification and the Court agrees that none are warranted as these applications turned on their facts.

[53] The style of cause will be amended in both files to reflect the current title of the Respondent Minister.

JUDGMENT IN IMM-1051-17 AND IMM-1754-17

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in Court files IMM-1051-17 and IMM-1754-17 are both dismissed;

2. A copy of these Reasons for Judgment and Judgment will be placed on each file;

3. The name of the Respondent in the style of cause in both files is amended to read THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP; and

4. There are no questions for certification.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1051-17 & IMM-1754-17
STYLE OF CAUSE:	ADRANOVA ZHAMILA V THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
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