

Federal Court



Cour fédérale

Date: 20180917

Docket: IMM-4793-17

Citation: 2018 FC 923

Ottawa, Ontario, September 17, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

IEVGEN AGAPI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ievgen Agapi (the “Applicant”) is a 49 year old citizen of the Ukraine. In 2015, he was sponsored to come to Canada through the Manitoba Provincial Nominee Program (“MPNP”) but an Immigration Program Manager (the “Manager”) with Immigration, Refugees and Citizenship Canada believed that the Applicant’s English language test results were not authentic, and notified the Applicant that he could be rejected under section 40(1)(a) of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 (“IRPA”) for misrepresentation. The Applicant then provided evidence to establish that his alleged misrepresentation was honestly and reasonably made (an exception to section 40(1)(a)) but the Manager rejected his application.

[2] The Applicant has now applied for judicial review of this decision. Because the Manager failed to consider whether the alleged misrepresentation was honestly and reasonably made, I find that the decision is not reasonable and I will set it aside.

II. Facts

A. *The Applicant*

[3] The Applicant is a 49 year old citizen of the Ukraine. He is married to Maryna Agapi, and together they have two sons: Andrii and Olkesiy. They are from Snizhne, in the Donetsk region of the Ukraine. Prior to the outbreak of conflict in the Ukraine, the Applicant ran a successful transportation company.

[4] During the conflict, the Applicant says that Russian separatists forced him and his sons to participate in hostilities. On one occasion, he was forced to stay in a bomb shelter for three weeks, and was not released until his co-captives staged a hunger strike. On another occasion, he was forced to dig and fill mass graves. In July and August 2014, separatists forced the Applicant and one of his sons to leave their home and move to Kiev.

[5] Wanting to leave behind the conflict, the Applicant applied to become a permanent resident of Canada. In June 2015, he was hired by Bison Transport (a trucking company in Manitoba). As part of the MPNP process he provided a copy of his 2013 International English Language Testing System (“IELTS”) exam results to demonstrate his English language proficiency.

[6] In 2016, before the Applicant moved to Canada, an MPNP official asked the Applicant for updated IELTS results. The Applicant enrolled in a language school called “Speak Up” for a six week training course, which involved 108 sessions of 90 minutes each. The owner of the school, Alexander Kolesnikov (“Mr. Kolesnikov”), guaranteed that he would pass the IELTS exam or have his money refunded.

[7] In May 2016, after completing his studies, the Applicant travelled to the British Council testing centre in Kiev for the exam. In order to obtain the exam results, the Applicant gave his passport to Mr. Kolesnikov, who went to collect the exam results in Kiev (as he did for other students). This was the same process used by the previous school the Applicant had studied at in 2013. When Mr. Kolesnikov gave the Applicant a copy of his results, he was pleased because they were high enough to qualify for the MPNP.

B. Acceptance into MPNP & Verification Process

[8] On August 3, 2016, the Applicant received his “Confirmation of Nomination” for the MPNP. He applied for and received a multiple entry visa, and contacted his employer to make arrangements to move to Canada. He then submitted his permanent resident application in

December 2016, and obtained a work permit when he arrived in Canada on February 8, 2017. He contacted his employer, passed the requisite driving exams, and the company formally hired him in May 2017.

[9] On May 30, 2017, the Canadian visa office in Kiev emailed the Applicant, and requested that he attend to their Kiev offices for an interview. It did not contain the reason for the interview. The Applicant asked to relocate the interview to Winnipeg because he now lived and worked in Manitoba. The Manager's notes state that the Applicant "was advised by e-mail the the (*sic*) interview will be conduct[ed] at the Embassy of Canada in Ukraine as the application is processed by that office." The Applicant also says he sent a follow-up email, outlining the hardship he would face in attending an interview in Kiev, including losing income that he wanted to send to his father (who had suffered from a stroke), to cover medical expenses. The Applicant says he did not receive a response to this email.

[10] Instead of an interview in Kiev, the Applicant was sent a procedural fairness letter dated June 22, 2017. It outlined that, following verification with the British Council, there were concerns that his 2016 IELTS results were fraudulent, and that consequently he might be inadmissible to Canada for misrepresentation. Without success, the Applicant and his family members tried to contact Mr. Kolesnikov on multiple occasions to obtain additional information or his original test results, but apparently the Speak Up language school has closed. The Applicant then responded to the procedural fairness letter by way of email dated July 23, 2017, explaining how he obtained the copy of his results, why he was not suspicious about their authenticity, and his unsuccessful attempts to obtain the original document to verify his results.

III. Decision Under Review

[11] In a letter dated September 11, 2017, the Manager informed the Applicant that he was inadmissible to Canada for misrepresentation under section 40(1)(a) of the IRPA. The letter states that his IELTS results are non-authentic, and that he is inadmissible to Canada for 5 years. It further explains that the Manager reached this determination after verification with the IELTS issuing authority (the “British Council”).

IV. Issues

[12] The Applicant submits that three issues arise on this application for judicial review:

- Did the Manager fail to consider whether the alleged misrepresentation was honestly and reasonably made?
- Was the procedural fairness letter deficient?
- Did the Manager fail to consider the totality of the evidence?

V. Standard of Review

[13] A finding of inadmissibility under section 40(1) of the IRPA is reviewable on the standard of reasonableness: *Brar v Canada (Citizenship and Immigration)*, 2016 FC 542 at para 8.

VI. Analysis

A. *Did the Manager fail to consider whether the alleged misrepresentation was honestly and reasonably made?*

[14] The Applicant points out that section 40 of the IRPA does not apply to misrepresentations made honestly by an applicant who reasonably believes they did not withhold material information (*Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345, *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15, and *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at para 33). The Applicant submits that his response to the procedural fairness letter provided evidence that this exception applies to his alleged misrepresentation; he explained that the knowledge of the potential fraud was beyond his control and in his view he reasonably and honestly believed that he was not misrepresenting any material facts. Despite his response to the procedural fairness letter, the Applicant submits the Manager failed to consider whether any alleged misrepresentation was honestly and reasonably made.

[15] The Respondent submits that the Applicant is merely “blaming” a third party for his misrepresentation and argues that efforts to get the original results were not before the decision-maker. The Respondent acknowledges that there is a “narrow exception” for innocent misrepresentation, but reiterates that it only applies in exceptional and narrow circumstance. The Respondent cites a line of jurisprudence for the proposition that misrepresentation made by a non-party to an application, without the applicant’s knowledge, does not save an application from an inadmissibility finding under section 40 of the IRPA. The Respondent also takes the position that the Applicant’s response to the procedural fairness letter did not meet the high standard to warrant such an exception.

[16] I agree with the Applicant that the Manager failed to consider whether the Applicant honestly and reasonably believed he was not withholding material information. The Applicant’s

response to the procedural fairness letter explains, in detail, the reasons for which he could not provide an original copy. For example, it explains that he relied upon the results as presented, because the procedure was consistent for those outside Kiev. It explains that he was not suspicious of the copy he obtained, because he had no need for originals. Finally, it explains that he took measures to obtain explanations from the language school. Yet the Global Case Management System notes are brief and only state that “PA was given an opportunity to respond to our concerns via [a procedural fairness letter], but the information PA provided failed to alleviate my concerns.” None of the Applicant’s evidence is addressed in the reasons.

[17] But taken together, the evidence ought to have raised the possibility of innocent misrepresentation in the mind of the Manager. Indeed, it is oft repeated that decision-makers are experts and presumed to know the law, and the narrowness of the innocent misrepresentation exemption to section 40 of the IRPA does not mean that it did not merit consideration. The Manager’s final decision does not address the possibility of the exception at all, leaving the Applicant and the Court to wonder why this possibility was not squarely contemplated and addressed. As such, the Manager’s decision is unreasonable.

[18] Having determined that the decision is unreasonable, it is unnecessary to consider the remaining issues that arise in this case.

VII. Certification

[19] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VIII. Conclusion

[20] The application for judicial review is allowed.

JUDGMENT in IMM-4793-17

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4793-17

STYLE OF CAUSE: IEVGEN AGAPI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: JULY 25, 2018

JUDGMENT AND REASONS: AHMED J.

DATED: SEPTEMBER 17, 2018

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