Federal Court  Cour fédérale

Date: 20190628

Docket: IMM-3929-18

Citation: 2019 FC 875

Ottawa, Ontario, June 28, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

PRIYA SOOROOJEBALLY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a migration counsellor with the High Commissioner of Canada, Immigration Section, in Sri Lanka [Officer], refusing the Applicant's permanent residence application, made in the Federal Skilled Worker Class, and finding that the Applicant was inadmissible to Canada for misrepresentation pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Background

[2] The Applicant, Priya Sooroojebally, is a citizen of the Mauritius. In support of her application seeking permanent residence in Canada under the Federal Skilled Worker Class as an interpreter/translator (NOC 5125), she provided two letters of reference. The first, on Mauritius High Commission letterhead, was from Jevin Pillay Ponisamy, Head of Mission, dated December 18, 2014. This letter describes the Applicant's employment at the High Commission as a researcher/secretary with proficiency as a translator/interpreter, and lists her employment duties as including 35 hours a week of translation/interpretation services and 5 hours per week as researcher/secretary duties. In relation to the Applicant's employment at the Hotel Mehar Castle, she submitted a November 10, 2014 letter stating that she had provided interpretation services to hotel guests, which letter was signed by Jagdish Chander Bhasin, the Applicant's father-in-law.

[3] An immigration officer determined that a field investigation was required to verify the Applicant's employment at the Hotel Mehar Castle as well as telephone verification of her employment at the Mauritius High Commission in Delhi.

[4] An Assessment Unit Anti-Fraud report was prepared based on a visit to the Hotel Mehar Castle. It found that, due to a recent management change-over, most of the current hotel staff had not been employed at the hotel at the time the Applicant claimed to have worked there. However, those who did remember her identified her as the owner's daughter-in-law and advised that she had not worked at the hotel and that the hotel had never had a translator.

[5] A letter from the Mauritius High Commission was received, dated September 7, 2016, which states that the Applicant's designation was secretary/researcher and

that her duties were secretary to the Trade Adviser posted at the Mauritius High Commission in New Delhi. The Global Case Management Case notes [GCMC Notes] indicate that in response to a follow-up email, the Mauritius High Commission advised, "Further to your e-mail dated 07 September 2016, kindly note that the previous experience of Mrs. P. Sooroojebaly is not available as per her CV."

[6] As a result, the Applicant was sent a letter dated May 16, 2018 in which the Officer advised that she was concerned that the Applicant had misrepresented her employment experience as an interpreter/translator at the High Commission of Mauritius and at Hotel Mehar Castle [Procedural Fairness Letter]. The letter advised that those concerns arose from investigations which found that the High Commission of Mauritius was unable to confirm independently that the Applicant had any experience as an interpreter/translator, stating that the Applicant was employed only as a researcher/secretary. Further, that she was never employed at the Hotel Mehar Castle in any capacity and that the hotel had never employed an interpreter/translator.

[7] The Applicant provided written submissions in response by way of a letter from her counsel dated May 15, 2018, attaching additional documents. Specifically, copies of the hotel's Payment Registers; a June 7, 2018 letter from the Applicant's father-in-law explaining that the Hotel Mehar Castle had undergone a change in management and, as such, the current management team may not have been in a position to attest to the Applicant's employment experience; and a related lease agreement for the hotel. In relation to the Applicant's employment with the Mauritius High Commission, three additional letters from former

diplomatic staff were provided: a June 15, 2018 letter from Joyker Nayeck; a June 12, 2018 letter from Jevin Pillay Ponisamy; and, a June 14, 2018 letter from Suresh Seeballuck.

[8] The Applicant's application was subsequently refused.

Decision Under Review

[9] By letter dated July 10, 2018, the Officer denied the Applicant's application [Refusal Letter]. The Officer advised that she had concluded that the Applicant was inadmissible to Canada under subsection 40(1)(a) of the IRPA because she misrepresented or withheld material facts concerning her employment as an interpreter/translator at the High Commission of Mauritius and at the Hotel Mehar Castle. The letter stated that this conclusion was based on investigations which found that the High Commission of the Mauritius was unable to confirm independently that the Applicant had any experience as an interpreter/translator, stating that their records showed that she was employed as a researcher/secretary. Further, that the Applicant was never employed at the Hotel Mehar Castle in any capacity and the Hotel Mehar Castle never employed an interpreter/translator.

[10] These misrepresentations or the withholding of these material facts could have induced errors in the administration of IRPA, and although the Applicant was given the opportunity to respond to these concerns, a review of the Applicant's response failed to displace them.

[11] The reasons provided in the Refusal Letter are supplemented by the GCMS Notes.

Issues and Standard of Review

[12] In my view, the issues arising in this matter are captured as follows:

i) Was the Officer's misrepresentation finding reasonable?

ii) Was there a breach of the duty of procedural fairness?

[13] The first question is reviewable on a standard of reasonableness (*Bao v Canada (Citizenship and Immigration)*, 2019 FC 268 [*Bao*]). This standard is concerned with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The second question is reviewable on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Clement v Canada (Citizenship and Immigration)*, 2019 FC 703 at para 11.

Preliminary Issue – Affidavit Evidence

[14] The Applicant and the Respondent have each filed affidavit evidence in connection with this application for judicial review. Specifically, the Applicant filed a November 23, 2018 affidavit [Applicant's Affidavit], a November 22, 2018 affidavit of Jevin Pillay Ponisamy [Ponisamy Affidavit], and a November 21, 2018 affidavit of Joyker Nayeck [Nayeck Affidavit]. The Respondent filed an April 4, 2019 affidavit of Kristin Erickson [Erickson Affidavit], an April 4, 2019 affidavit of Shalini Hosalli [Hosalli Affidavit], and an April 4, 2019 affidavit of Shirani Mahagedara [Mahagedara Affidavit].

[15] As a general rule, the evidentiary record before the Court on judicial review is restricted to the record that was before the decision-maker. There are recognized exceptions to this general rule, including the acceptance of an affidavit that: provides general background in circumstances where that information might assist the Court's understanding of the issues relevant to the judicial review; brings to the attention of the Court procedural defects that cannot be found in the evidentiary record; or, highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19, 20 [*Association of Universities and Colleges*]).

[16] Ms. Hosalli is a program assistant who was involved in the processing of the Applicant's permanent resident application. The Hosalli Affidavit explains that, due to inadvertence, documents attached to that affidavit were not included in the certified tribunal record [CTR]. The affidavit is admissible as it simply provides information that should have been included in the CTR, it helps the Court to understand that there was an omission and, to have the complete record that was, or should have been, before the decision-maker. In this sense it is general background information.

[17] Ms. Mahagedara is an immigration officer who prepared the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, Rule 9 record. The Mahagedara Affidavit describes the preparation of the Rule 9 record, which, at the leave stage, is to provide a copy of the decision that is the subject of the application for judicial review and the written reasons therefore, and identifies that there is a discrepancy between the content of the Rule 9 record and the content of the CTR (the former did not provide a complete copy of the

GCMS Notes). It goes on to state that there are "several reasonable explanations" for the discrepancy, such as that a printer may have run out of paper, but, while the affiant prepared the Rule 9 record, she states she has no knowledge of why it did not provide the complete record. This affidavit is inadmissible and unnecessary. The Erickson Affidavit confirms that Ms. Erikson compared the Rule 9 "reasons" (GCMS Notes) to the CTR "reasons" and confirms that the latter are complete.

[18] The Erickson Affidavit addresses the CTR and Rule 9 discrepancy and is admissible to that extent. However, Ms. Erickson also identifies that she was the decision-maker in this matter. She states that she has no recollection of reviewing a September 7, 2016 email request from the High Commission of Canada to the High Commission of Mauritius in New Delhi as referenced in the GCMS Notes (Exhibit "A" of the Hosalli Affidavit) and states that therefore she did not rely on that email in making her decision. Concerning a September 7, 2016 emailed letter from the High Commission of Mauritius to the High Commission of Canada found in the CTR and which references an email from the High Commission of Canada to the High Commission of Mauritius dated September 1, 2016 (Exhibit "B" of the Hosalli Affidavit), Ms. Erickson states that she has no recollection of reviewing a written request from Canada to Mauritius and thus, in making her decision, she did not rely on Canada's September 1, 2016 email. Further, as to a July 6, 2016 email from the High Commission of Mauritius to the High Commission of Canada found in the CTR and referencing an email from the High Commission of Canada to the High Commission of Mauritius dated June 27, 2016 (Exhibit "D" of the Hosalli Affidavit), Ms. Erickson again states that she has no recollection of reviewing a written request from Canada to Mauritius in determining the matter, thus, in making her decision, she did not rely on the June 27, 2016 email.

[19] In my view, it is not open to a decision-maker to file an affidavit explaining that they do not recall reviewing specific documents and asserting, therefore, that they did not rely on those documents in making the decision. Moreover, by filing an affidavit asserting that specific documents were not relied upon in the decision-making process, Ms. Erickson is in essence attempting to explain or to bootstrap her decision. This is impermissible (*Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 45– 47 [*Sellathurai*]).

[20] The Erickson Affidavit then goes on to address the content of the Procedural Fairness Letter and a May 16, 2018 GCMS entry which Ms. Erickson made and which she states set out her many concerns identified by verification employees and her assessment of those concerns. She states that the determinative concerns are specifically stated in the Procedural Fairness Letter. As to a GCMS Notes entry of July 10, 2018, which she made summarizing the reasons for her decision, she states these are specifically stated in the Refusal Letter. Again, in my view, it is not open to the decision-maker to supply affidavit evidence explaining her decision and deposing to what she viewed as determinative (*Sellathurai*). And, while not raised by the Applicant, this could be viewed as an effort by Ms. Erickson to distance herself from her earlier GCMS Notes entry in which she expressed concern that there may have been collusion between the Applicant and friendly employers at the High Commission of Mauritius to misrepresent her employment duties there, and between the Applicant and her father-in-law concerning her employment at the Hotel Mehar Castle. Given the foregoing, other than addressing the CTR and Rule 9 discrepancy, the Erickson Affidavit is not admissible.

[21] The Applicant's Affidavit primarily sets out the events that are evident from the record. To the extent that it is argument or adds information that was not before the decision-

maker, other than that which supports the assertion of a breach of procedural fairness, I afford it little weight. The Ponisamy Affidavit primarily describes the correspondence that the affiant provided concerning the Applicant's employment, which is evident from the record. The Ponisamy Affidavit was not before the decision-maker, it does not fall within any of the exceptions and it is not admissible. I reach the same conclusion for the same reasons about the Nayeck Affidavit.

Issue 1: Was the Officer's misrepresentation finding reasonable?

[22] The Applicant submits that there were errors made in the verifications conducted at the request of the High Commission of Canada and that these were compounded by an unreasonable assessment of her response to the Procedural Fairness Letter. She submits that the Officer preferred the evidence provided by way of the flawed on-site verification at Hotel Mehar Castle and the email verification with the High Commission of Mauritius to the evidence she provided in response to the Procedural Fairness Letter because of unfounded credibility concerns held by the Officer. The Applicant submits that the Officer determined that the Applicant's father-in-law and her supervisors at the High Commission of Mauritius had colluded in support of her permanent resident application by providing falsified information but provided no reasoned assessment or analysis in support of such finding. Neither the reasons, the record, nor the Erickson Affidavit present any reasonable basis or explanation in support of this conclusion.

[23] The Respondent submits that the Officer justifiably found that the Applicant had directly or indirectly misrepresented material facts relating to a relevant matter that might have induced an error in the administration of the IRPA, within the meaning of paragraph 40(1)(a) of the IRPA. The Officer reasonably assessed the evidence provided by the Applicant against that

obtained independently by the verification team and reasonably concluded that, on the balance of probabilities, the Applicant had misrepresented her work experience.

Analysis

[24] In relation to the Applicant's work experience at the Hotel Mehar Castle, the Officer recorded in the GCMS Notes that, in response to the Procedural Fairness Letter, the Applicant submitted that her experience at Hotel Mehar Castle was not material because she was not relying on it to obtain the requisite points required under the Federal Skilled Worker Program. Rather, her previously submitted evidence (employment letters from her father-in-law and payslips) and the evidence submitted with her response to the Procedural Fairness Letter (hotel payment registers) served to confirm her employment there.

[25] The Officer also acknowledged the Applicant's submission that the current hotel management team may not be in a position to confirm the Applicant's experience as an interpreter there, as supported by an updated employment letter from her father-in-law, and a copy of a November 2016 lease agreement for the hotel. The Officer found, however, that contrary to the assertion of the Applicant's father-in-law, which suggested that the new managers had only one month experience, when the investigators conducted the site visit, they had spoken to the hotel manager who had considerable knowledge and experience of the hotel's operation as well as with an employee who had been with the hotel long before the change in management.

[26] I note that the Risk Assessment Unit, Anti-Fraud Site Visit Report indicates that when the team visited the hotel, the front desk employee confirmed that he had only been with the hotel a few days, he could not identify a photo of the Applicant and asked the investigators to

wait for the owner of the hotel. However, one of the staff standing at the reception recognized the photo and stated that the Applicant was the previous owner's younger son's wife. Further, the family used to reside next to the hotel but had recently moved to Canada. The staff member was then asked by the front desk employee to refrain from speaking with the investigators. The current manager then attended and confirmed that the hotel had been previously owned by the Applicant's father-in-law and his son, Raju Bhasin (the Applicant's spouse), both of whom had moved to Canada in August 2017. Another son had been in Canada for the past 10 years. Prior to taking on the hotel, the manager had operated a transport business. He stated that he knew the family well as he had been a business associate for many years and provided taxi services to their guests. When asked if female family members were involved in the running of the hotel, he stated that both daughters of the owner were married and busy with their respective families. Further, that the Applicant was not involved with or working in the hotel in any capacity. He also noted that her father was a police commissioner and he identified her place of work. When asked if the hotel had provided the services of a translator, he stated that one was not required as most guests spoke English or Hindi.

[27] When asked if the investigators could speak to any old staff, the manger advised that only the person that they had spoken to earlier at the front desk, and a guard, remained. The investigators then spoke with the guard who stated that he had been working at the hotel for the past 15 years, that he knew the family well and that they were presently all in Canada. When shown photos of the Applicant, he identified her as the owner's daughter-in-law and stated that she had never worked in the hotel in any capacity and he had never seen her come to the hotel.

[28] Entries in the GCMS Notes indicate concern that a small, 24 room hotel, would need to employ an interpreter on a full time basis. The site report also confirmed that the hotel has only 24 rooms and no conference room or office.

[29] Although the reply to the Procedural Fairness Letter asserts that the Applicant had provided sufficient evidence to demonstrate her employment as an interpreter at the hotel between September 2008 and December 2012, the Officer concluded that, in weighing the evidence provided by the Applicant against the evidence gathered by the site visit team, she preferred the evidence of the site visit team as set out in their report – which had concluded that it appeared that the Applicant had misrepresented her work experience as a translator in the hotel. The Officer stated that she was satisfied on a balance of probabilities that the Applicant was never an employee at the hotel in any capacity. The representation of that material fact was related to admissibility and was an attempt to foreclose an avenue of investigation into the Applicant's personal activities during that period and could have induced an error in the administration of the IRPA and, on that basis alone, the Officer found the Applicant to be inadmissible to Canada.

[30] Based on the record before the Officer, it is apparent that the Officer preferred the evidence gathered by the Risk Assessment Unit and contained in the Anti-Fraud Site Visit Report as it represents information obtained from persons who had no interest in the outcome of the Application and no reason to misrepresent the Applicant's employment history. Moreover, two of the persons interviewed clearly knew of the Applicant and had longstanding relationships with the hotel and its operations.

[31] While I agree that the Officer's reasons were brief, the Officer was not required to blindly accept the response to the Procedural Fairness Letter (*Lamsen v Canada (Citizenship and Immigration)*, 2016 FC 815 at para 17). Moreover, as the Officer pointed out, while the Applicant's father-in-law asserted that one of the managers had only one month experience – stating in his updated letter that and this and a change in clientele "justifies as to why their comments only reflect their currently reality" – in fact three persons were interviewed and two of the three had more than one month prior experience and were familiar with Applicant and her family-in-law. That is, the Officer acknowledged the Applicant's evidence submitted in response to the Procedural Fairness Letter concerning her employment at the hotel but found that it was contradicted by the findings of the investigator's report. The Officer was entitled to prefer the latter.

[32] This is not a case where the Officer overlooked or misapprehended evidence as to the Applicant's alleged employment at the hotel. Rather, the Officer preferred the independent evidence captured by the investigator's report, as found in the record, which contradicted the evidence provided in response to the Procedural Fairness Letter. While the Officer did not make an explicit finding that the supporting employment documents (pay slips and hotel payment registers) were fraudulent, it is apparent that, regardless of the existence of those documents, the Officer did not find them to be reflective of actual employment.

[33] As to the materiality of the misrepresentation, contrary to her current submissions, the Applicant did initially rely on her experience at the Hotel Mehar Castle when making her application for permanent residence. Specifically, in her submissions dated December 22, 2014, the Applicant's then-counsel listed her calculation of the Applicant's points in accordance with

sections 78–83 of the IRPA. In that exercise, she allocated 15 experience points to the Applicant for her 6 years of experience accumulated at both the Hotel Mehar Castle and the High Commission of Mauritius, achieving 74 points and thereby exceeding the pass mark of 67.

[34] While the Applicant now claims that she is no longer relying on this experience in making her application, this does not serve to erase and remove it from consideration in the context of misrepresentation. This is analogous to circumstances where an applicant makes a misrepresentation that is caught by the authorities and then attempts, prior to a decision being made, to explain it away. In such circumstances, the misrepresentation can, and will generally, be held to amount to a material misrepresentation (see, for example, *Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at para 25 [*Khan*]). As I noted in *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at paragraph 29, 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 application (*Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at paras 12 and 17; *Khan* at paras 25, 27, 29; *Shanin v Canada (Citizenship and Immigration)*, 2012 FC 423 at para 29; *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 15).

[35] While I agree with the Applicant that the Officer's treatment of the evidence concerning her employment at the High Commission of Mauritius was unreasonable, I need not address this given my finding above as to the reasonableness of the material misrepresentation made concerning her employment at the Hotel Mehar Castle. The Officer's finding of misrepresentation in that regard is determinative.

Issue 2: Was there a breach of the duty of procedural fairness?

[36] The Applicant also submits that the Officer's decision was procedurally unfair because it was based on a conclusion that the various Mauritian diplomats colluded with the Applicant in order to bolster her application for permanent residence and that this penultimate finding foreclosed any meaningful investigations, such as verifying the Applicant's work experience by contacting Mr. Ponisamy or contacting the Applicant's father-in-law. Nor did the Officer put her collusion concerns to the Applicant in the Procedural Fairness Letter.

[37] While the GCMS Notes do indicate that the Officer was concerned about potential collusion, her ultimate decision was not made on that basis nor am I persuaded that her reasons were tainted by that concern as the Applicant submits. Further, the Procedural Fairness Letter identified that the Officer had concerns that the Applicant misrepresented her employment experience as an interpreter/translator at the High Commission of Mauritius and at the Hotel Mehar Castle. It stated that the concern arose from the High Commission of Canada's investigations, which found that the High Commission of Mauritius was unable to confirm independently that the Applicant had any experience as an interpreter/translator, stating that she was employed only as a researcher/secretary; the Applicant was never employed at the Hotel Mehar Castle in any capacity; and, the hotel had never employed an interpreter/translator. The Procedural Fairness Letter was not vague, and it alerted the Applicant to the Officer's concerns.

[38] Moreover, this is not a situation such as *Shah v Canada (Citizenship and Immigration)*, 2016 FC 1012, where the officer was aware that the person contacted was not the applicant's employer, that person gave contradictory information but later filed an affidavit confirming that he was not the employer and stating that questions should be directed to the

employer. There this Court found that the failure to address the affidavit and either contact the employer or explain why he was not contacted undermined the transparency and intelligibility of the decision. Here, however, the Applicant's father-in-law claimed to be the employer, his evidence was submitted by the Applicant and was acknowledged by the Officer. Further, the High Commission of Canada directly contacted the High Commission of Mauritius seeking verification of her employment by that entity. The Officer was not compelled to contact the Applicant's former supervisors and, in any event, the evidence of Mr. Ponisomy was before the Officer and was repeated in his and other's subsequent letters.

[39] In my view, the Applicant knew the Officer's concerns and had an opportunity to respond to them. I am not persuaded that there was a breach of procedural fairness in these circumstances.

JUDGMENT in IMM-3929-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is denied;

2. No question of general importance is proposed for certification and none arises;

3. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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