Federal Court Cour fédérale

Date: 20191030

Docket: IMM-6451-18

Citation: 2019 FC 1364

Ottawa, Ontario, October 30, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

YOUNUS ALGOHAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Younus AlGohar, is a citizen of the United Kingdom. His application for a Temporary Resident Permit [TRP] under subsection 24(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA] was refused on the basis that he did not disclose that he had been refused a visa to the United States. After reconsideration, the refusal decision was maintained.

[2] Mr. AlGohar now brings this application seeking judicial review of the reconsideration decision pursuant to subsection 72(1) of the IRPA. He raises four issues:

A. Were his procedural fairness rights breached?

B. Did the Officer err in concluding that the omission involved material facts relating to a relevant matter that induced or could induce an error in the administration of the IRPA?

C. Did the Officer err by failing to consider whether the misrepresentation was inadvertent?

D. Did the Officer otherwise err in failing to grant the TRP?

[3] I am not convinced that there was any breach of procedural fairness or that the refusal decision was unreasonable. For the reasons that follow the application is dismissed.

II. Background

[4] Mr. AlGohar describes himself as a spiritual leader, and is the Chief Executive Officer of the Messiah Foundation International [MFI], an organization that works to bring people of all faiths together to discuss divinity and interfaith harmony. In this role, Mr. AlGohar travels extensively to give lectures and interviews.

[5] In 2013, Mr. AlGohar was convicted of welfare fraud in the United Kingdom. As a result he is presumptively inadmissible to Canada pursuant to paragraph 36(1)(b) of the IRPA.

However, subsection 24(1) allows immigration officers to grant foreign nationals temporary residence notwithstanding inadmissibility where justified in the circumstances.

[6] On three occasions prior to the application in issue, Mr. AlGohar had obtained a TRP allowing him to visit Canada in his capacity as the CEO of MFI despite his criminal inadmissibility.

[7] Mr. AlGohar had planned to again visit Canada in October and November of 2018 to pursue activities relating to MFI. He applied for a TRP under subsection 24(1) of the IRPA. On this occasion he was requested to attend an interview.

[8] In the course of the interview Mr. AlGohar was asked if he had been refused a visa by any country other than Canada. He initially responded that he had not, an answer that was consistent with the information contained in his written application. After being advised that the Officer did not believe he was being truthful, Mr. AlGohar acknowledged that he had been refused a visa to the US. He explained that the refusal had not come to mind when the questions were previously asked and that in any event a US visa had ultimately been granted.

[9] In a decision dated October 22, 2018 the Officer concluded that the failure to disclose the visa refusal was a misrepresentation that involved material facts relating to a relevant matter that could have induced error in the administration of the IRPA. Mr. AlGohar's application was refused on October 22, 2018. The misrepresentation finding also resulted in a five year period of inadmissibility in accordance with subsection 40(2) of the IRPA.

[10] Mr. AlGohar then sought reconsideration of the refusal decision. In doing so, Mr. AlGohar made a number of points, including: (1) that he had been granted three prior TRP applications; (2) that he had complied with the terms of his stay on prior visits to Canada; (3) that he omitted the US visa refusal because he was confused and stressed in the interview; and (4) that he reported the US visa refusal when he recognized his error. By letter dated December 4, 2018 the refusal was maintained.

III. Preliminary Matter

[11] In the course of oral submissions counsel for the respondent noted that in the originating Notice of Application for Leave and Judicial Review [Notice] Mr. AlGohar had sought leave to review the October 22, 2018 decision. However, the Order granting leave for judicial review cites the December 4, 2018 reconsideration decision.

[12] The parties do not dispute that the decision before the Court is the December 4 decision. During oral submissions, counsel for the respondent confirmed that the Certified Tribunal Record before the Court was complete in relation to both the December 4 and October 22 decisions. The parties also acknowledged that review of the December 4 decision, of necessity, encompasses the October 22 decision. Neither party has been prejudiced by the reference to the October 22 decision in the Notice.

[13] Following the hearing, at the Court's request, Mr. AlGohar's counsel advised the Court by letter that the parties agree that the Notice should be amended. In my view a formal

amendment of the Notice is not necessary. Any defect in the Notice was cured by the Order granting leave to review the December 4 decision.

IV. Standard of Review

[14] In *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 the Federal Court of Appeal recently held that where fairness is in issue, a reviewing court is being asked to consider whether the process was "fair having regard to all the circumstances" and that "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond". The Court of Appeal acknowledged that there is an awkwardness in using standard of review terminology when addressing fairness questions and held that "strictly speaking, no standard of review is being applied" but the correctness standard best reflects the court's role (*Canadian Pacific Railway Company* at paras 52 – 56). In considering the fairness issue, I will consider whether the process was fair having regard to all of the circumstances.

[15] The remaining issues engage questions of fact or mixed fact and law that are reviewable against a standard of reasonableness (*Oloumi v. Canada (Citizenship and Immigration),* 2012 FC 428 at para 12; *Alalami v. Canada (Citizenship and Immigration),* 2018 FC 328 at para 10 [*Alalami*])

V. Analysis

A. *Were Mr. AlGohar's procedural fairness rights breached?*

[16] Mr. AlGohar argues that the failure to advise him, even in a general manner, of the Officer's misrepresentation concerns was procedurally unfair. In not providing some notice of

concerns relating to his prior US visa refusals Mr. AlGohar was unable to prepare for the interview and was taken by surprise when the issue was put to him. I disagree.

[17] The nature and extent of a decision maker's duty to act fairly is contextual and must be assessed on a case by case basis. The duty requires that an applicant be given an opportunity to respond to concerns a decision maker may have. Where that opportunity has been provided the duty will be satisfied (*Jahazi v Canada (Minister of Citizenship and Immigration),* 2010 FC 242 at para 52). In certain circumstances—for example, where the applicant is unaware of the information triggering a concern—the duty to provide an opportunity to respond may include an obligation to give prior notice. This was the case in *Chawla v Canada (Minister of Citizenship and Immigration)*, 2014 FC 434 upon which Mr. AlGohar relies, but it is not the case here.

[18] Mr. AlGohar's immigration history in relation to Canada and other countries was not unknown to him nor was he unaware that his history in this respect was relevant to his TRP application. He was required to disclose this history in his written application for the TRP, but did not.

[19] In the course of the interview Mr. AlGohar again failed to disclose the US refusal when asked about prior refusals. At this point the Officer advised Mr. AlGohar that he did not believe him and asked again. Ultimately Mr. AlGohar acknowledged the prior US refusal and provided an explanation for his failure to disclose. In these circumstances I am not convinced there was any breach of procedural fairness.

[20] However, if there was any unfairness arising from the failure to give pre-interview notice, I am of the opinion that this was remedied through the reconsideration process. In seeking reconsideration Mr. AlGohar not only restated his explanation for having failed to disclose the US visa refusal but also advanced his argument that having the matter raised in the course of the interview surprised and prejudiced him.

[21] In these circumstances Mr. AlGohar's procedural fairness rights were not breached.

B. *Did the decision maker err in concluding that the misrepresentation involved material facts relating to a relevant matter that induced or could induce an error in the administration of the IRPA?*

[22] Mr. AlGohar notes that a foreign national is inadmissible under paragraph 40(1)(a) of the IRPA where a misrepresentation relates to material facts. He relies on *Song v. Canada (Citizenship and Immigration),* 2019 FC 72 [*Song*] to submit that the Officer was required to address how the misrepresentation was material and the Officer's failure to do so renders the decision unreasonable.

[23] In *Song* the misrepresentation involved the inaccurate reporting of the name of the applicant's employer in an application for permanent residence. All other information, including the nature of the applicant's employment, was accurate and complete. On the basis of these facts Justice John Norris concluded that the failure to explain how an incorrect employer name was material and could have induced an error in the administration of the IRPA, rendered the decision unreasonable.

[24] The facts before me differ considerably. Mr. AlGohar's US visa refusals were not inaccurately represented—they were omitted. This despite the information being expressly requested in the written application. By omitting this information, Mr. AlGohar potentially deprived the Officer of the opportunity to inquire into and consider the refusal. The fact that the US visa was later granted does not cure this.

[25] A decision maker's reasons need not make an express finding on each constituent element supporting a final conclusion (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 16 [*Newfoundland Nurses*]). As Justice Yvan Roy has noted, the "very nature of the omission, that a visa had been denied recently, is material for an application to succeed to be granted a temporary resident visa" (*Mohseni v Canada (MCI)*, 2018 FC 795 at para 41). In this case, the material nature of the omission is evident. The Officer's failure to address the issue of materiality does not, on these facts, render the decision unreasonable.

C. *Did the Officer err by failing to consider whether the misrepresentation was inadvertent?*

[26] Mr. AlGohar relies on his explanation—that he had simply forgotten the refusal and that the US visa was ultimately granted—to argue that the Officer should have viewed the omission as an inadvertent error. He points to jurisprudence that recognizes a possible exception in cases where there has been an innocent failure to provide information (see, *Alalami* at para 15). He submits that the Officer's conclusion that his failure to report the US visa refusal amounted to a misrepresentation was unreasonable. It was not.

[27] Mr. AlGohar had a duty to disclose all material facts in his application. He did not. The application specifically requested that refusals from other countries be identified. The US refusal was not disclosed. The Global Case Management System [GCMS] notes indicate Mr. AlGohar was questioned on prior refusals from other countries more than once in the course of the interview before he acknowledged there had been a refusal. On these facts it was reasonable for the Officer to conclude that the omission was not inadvertent.

[28] Having considered and reasonably rejected Mr. AlGohar's explanation of inadvertent omission, any exception that might apply to innocent failures to provide information does not arise here.

[29] The Officer did not err by failing to consider whether the misrepresentation was inadvertent.

D. *Did the decision maker otherwise err in failing to grant Mr. AlGohar a TRP?*

[30] At the outset of the decision the Officer summarizes the purpose of a TRP and determines there are insufficient grounds to grant:

> While a Temporary Resident Permit is intended to allow entry to Canada in spite of criminal offences, it can be issued only in exceptional circumstances, or on occasion, when compelling Canadian interests are served. After a careful and sympathetic review balancing all the factors, I have determined that there are insufficient grounds to merit the issuance of a permit in your case.

[31] Mr. AlGohar notes that the Officer then proceeded to conduct a second and completely separate analysis, resulting in the finding that Mr. AlGohar was inadmissible for

misrepresentation. He submits this finding is unrelated to the TRP decision, does not form the basis of the refusal and that the TRP determination is therefore unreasonable.

[32] I agree with Mr. AlGohar's submissions to a point. The initial refusal decision is structured in a manner that suggests two distinct decisions were reached.

[33] Reasons, which in this case include the GCMS notes, must be read together with the outcome. As I have previously noted, reasons need not be perfect, nor must they include all arguments or details a reviewing judge may prefer to see addressed. Rather they must allow a reviewing court to understand why the decision was reached and whether the conclusion is within the range of acceptable outcomes. Where necessary a reviewing court may also look to the record (*Newfoundland Nurses* at paras 12 – 18).

[34] In this instance the Officer did reach two separate conclusions. While each may have been arrived at independently of the other, consideration of the reasons as a whole demonstrates that in this instance they were not isolated decisions. The Officer first concludes that the TRP was not merited and then proceeded to address the misrepresentations concerns. It is evident that the TRP was refused because of the misrepresentation finding.

VI. Conclusion

[35] There was no breach of procedural fairness. The reasons reflect the required elements of justification, transparency and intelligibility, and the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[36] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-6451-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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