Federal Court  Cour fédérale

Date: 20210928

Dockets: IMM-189-20
IMM-1660-20

Citation: 2021 FC 1009

Ottawa, Ontario, September 28, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

RALUCHUKWU NNAETO ONYEMELUKWE

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Raluchukwu Nnaeto Onyemelukwe [Dr. Onyemelukwe], seeks judicial review of two decisions by visa officers at the High Commission of Canada in London, United Kingdom, dated August 15, 2019, and November 13, 2019, refusing his applications for a temporary resident visa [TRV] on the ground that Dr. Onyemelukwe was inadmissible to Canada

on the basis of misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Dr. Onyemelukwe filed separate applications for judicial review of each decision: the August 15, 2019 decision (IMM-1660-20) and the November 13, 2019 decision (IMM-189-20). On July 7, 2020, Prothonotary Martha Milczynski ordered that both applications be consolidated.

[3] In short, I find that the visa officer failed to respect the principles of procedural fairness owed to Dr. Onyemelukwe; although the visa officer did identify the document which he/she characterized as invalid, the visa officer was not clear as to what he/she was expecting of Dr. Onyemelukwe by way of a response. I will therefore allow both applications for judicial review.

II. Facts

[4] Dr. Onyemelukwe is a Nigerian citizen. He is a medical doctor and the managing director of a Nigerian business engaged in the oil and gas industry, property development and insurance consultancy services. In April 2019, Dr. Onyemelukwe submitted an application for a TRV with various supporting documents, including a copy of a confirmed hotel booking from July 17 to July 27, 2019, corresponding to the duration of his visit to Canada.

[5] The visa officer conducted her/his own investigation and found that the hotel booking submitted by Dr. Onyemelukwe was not valid. On June 6, 2019, the visa officer sent Dr. Onyemelukwe a procedural fairness letter in which he/she shared her/his concerns regarding

the validity of the hotel booking, *to wit*, that the visa officer had "concerns that the hotel booking [Dr. Onyemelukwe] provided in support of [his] application is not valid, was not fully completed, or was subsequently cancelled." The procedural fairness letter continued by stating that as Dr. Onyemelukwe "provided a copy of a hotel booking which is not valid and [he] did not inform [Immigration Canada] of any changes or cancellations, [the visa officer is] satisfied that on a balance of probabilities [Dr. Onyemelukwe] misrepresented the travel information on file."

[6] The procedural fairness letter went on to specify that if Dr. Onyemelukwe is found to have engaged in misrepresentation in submitting his application, he may be found inadmissible to Canada for a period of five years; the letter also provided Dr. Onyemelukwe the opportunity to respond to this information.

[7] Dr. Onyemelukwe was in communication with the visa office via the portal and his online account set up for that purpose. Almost immediately upon receiving the procedural fairness letter, Dr. Onyemelukwe rebooked and submitted a copy of a new hotel booking, simply stating the following: "I have attached a copy of a new hotel reservation for your review."

[8] By letter dated August 15, 2019, the visa officer advised Dr. Onyemelukwe that his TRV application was refused on the grounds of inadmissibility "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 the IRPA." Dr. Onyemelukwe would remain inadmissible to Canada for a period of five years in accordance with paragraph 40(2)(a) of the IRPA.

[9] The letter of August 15, 2019, also informed Dr. Onyemelukwe that he is welcome to reapply if he feels that he can respond to the concerns expressed by the visa officer and can demonstrate that his situation meets the requirements; Dr. Onyemelukwe reapplied for a TRV in September 2019.

[10] On November 13, 2019, the visa officer informed Dr. Onyemelukwe that his second TRV application was refused as he had been found inadmissible to Canada for misrepresentation and that such inadmissibility would continue for five years.

III. Issues

[11] Dr. Onyemelukwe contests the reasonableness of the visa officer's decision regarding his first TRV application on account of failure to provide adequate reasons. However, I need not deal with that issue as I find that the visa officer breached procedural fairness by not providing sufficient explanations in the June 6, 2019, letter so as to allow Dr. Onyemelukwe to properly understand what the visa officer was expecting of him, i.e., the test that Dr. Onyemelukwe would have to meet in responding to the procedural fairness letter.

IV. Standard of Review

[12] The question when assessing a breach of procedural fairness is whether the applicant knew the case to meet and had a full and fair chance to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 33–56). The reviewing court must conduct its own analysis and determine whether the process the visa officer followed satisfied

the level of fairness required in all of the circumstances (*Kaur v Canada (Citizenship and Immigration)*, 2020 FC 809 at para 35).

V. Analysis

[13] A misrepresentation finding is a serious matter as the consequences are important to the affected individual, who becomes inadmissible to Canada for a period of five years. As stated recently by Mr. Justice McHaffie in *Ali v Canada (Citizenship and Immigration)*, 2021 FC 731 at paragraph 30:

> As this Court has noted, a misrepresentation finding is a serious matter, with serious consequences: *Chughtai v Canada (Citizenship and Immigration)*, 2016 FC 416 at para 29. The Supreme Court has underscored that reasons for a decision "must reflect the stakes" to an affected individual: *Vavilov* at para 133. In my view, a party facing a finding of misrepresentation that entails a five-year inadmissibility period is entitled to know with greater specificity the fact or document found to be misrepresented or withheld: see, by analogy to applications to vacate refugee protection based on misrepresentation, *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554 at para 29(c) . . .
>
> [Emphasis added.]

[14] I would add to the words of Mr. Justice McHaffie that in addition to an applicant being "entitled to know with greater specificity the fact or document found to be misrepresented or withheld", the visa officer must also make clear what she/he is seeking from the applicant so as to provide the applicant the opportunity to disabuse the visa officer of his/her concerns. As was stated in *Liao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1926 (TD) (QL) at paragraph 15:

> Visa officers have the duty to give an immigrant the opportunity to answer the specific case against him. This duty of fairness may require visa officers to inform an applicant of their concerns or negative impressions regarding the case and give the applicant the opportunity to disabuse them.
>
> [Emphasis added.]

[15] There is no doubt that the June 6, 2019, procedural fairness letter clearly identified the hotel booking as being the document of concern. The visa officer also underscored the consequences of misrepresentation in the visa application process. What the procedural fairness letter did not make clear, however, is what the visa officer was asking Dr. Onyemelukwe to do; it did not make it clear that the visa officer was looking for Dr. Onyemelukwe to provide an explanation for or address the apparent anomaly in the documentation, rather than simply treat it as a missing element in his application which he had to correct.

[16] Without sufficient clarity in what the visa officer was asking Dr. Onyemelukwe to address, it cannot be said that Dr. Onyemelukwe had a meaningful opportunity to respond. Dr. Onyemelukwe's instinctive and immediate (maybe a little too immediate) response to the procedural fairness letter is very telling. He responded the same day by submitting a new hotel booking, not even attempting to explain or address the visa officer's apprehension of misrepresentation. Dr. Onyemelukwe did not understand that the visa officer's concerns about the previous hotel booking were about his integrity and not about the lack of accommodation for his stay in Canada. Dr. Onyemelukwe simply understood that he had to correct the issue of invalidity of the hotel booking and provide a new reservation — which is precisely what he immediately did.

[17] This is not a case where Dr. Onyemelukwe was, say, looking to hide a past criminal record or a less than stellar immigration history. I cannot see, nor could the Minister come up with, any meaningful advantage that Dr. Onyemelukwe could have obtained with submitting a hotel booking which was later found to have been cancelled — Dr. Onyemelukwe's financial information could not reasonably have allowed for a finding that he did not have the financial means to book and maintain a hotel reservation.

[18] The evidence before this Court is that the booking may have been cancelled in error by the travel agent who had made the hotel arrangements. The trip to Canada was meant to be a side trip, tacked on to a longer trip which Dr. Onyemelukwe was planning to New York. No other misgivings were expressed by the visa officer as regards Dr. Onyemelukwe's visa application, nor in fairness would any be expected as the visa officer never got to the stage of the process of reviewing Dr. Onyemelukwe's financial information or extensive travel history; it was enough that the visa officer found Dr. Onyemelukwe to have misrepresented his arrangements for accommodations while in Canada.

[19] On the whole, I find that the lack of clarity in the procedural fairness letter prevented Dr. Onyemelukwe from properly understanding what was being asked of him, leading to an "unresponsive" response in the eyes of the visa officer. Consequently, there was a failure in procedural fairness. The August 15, 2019, decision is therefore unreasonable.

[20] As for the November 13, 2019 decision, the visa officer refused Dr. Onyemelukwe's second TRV application by relying on the August 15, 2019 decision, which I have found to be unreasonable. Therefore, it too must be set aside.

[21] I am therefore allowing both applications for judicial review and returning them back to different visa officers for fresh reconsiderations.

JUDGMENT in IMM-189-20 AND IMM-1660-20

THIS COURT'S JUDGMENT is that:

1. Both applications for judicial review are allowed.

2. The decisions are set aside and these matters are returned for redetermination by different visa officers.

3. There are no questions for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-189-20 AND IMM-1660-20
STYLE OF CAUSE:	RALUCHUKWU NNAETO ONYEMELUKWE v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 9, 2021
JUDGMENT AND REASONS:	PAMEL J.
DATED:	SEPTEMBER 28, 2021

APPEARANCES:

Dotun Davies	FOR THE APPLICANT
Nicholas Dodokin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davies Legal Mississauga, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT