Federal Court  Cour fédérale

Date: 20220713

Docket: IMM-2158-20

Citation: 2022 FC 1031

Toronto, Ontario, July 13, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

OMOLOLA TITILOPE BADMUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a March 27, 2020 decision [Decision] of an officer of Immigration, Refugees, and Citizenship Canada refusing an application for a work permit under the Temporary Foreign Worker Program [Application]. The Applicant was found to be inadmissible pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for misrepresenting information as to past visa refusals on her application form.

[2] As set out further below, I find that the Decision is unreasonable as the reasons lack sufficient justification in view of the explanation and documentation submitted by the Applicant. As such, the Application will be sent back to be redetermined by another officer.

I. Background

[3] The Applicant is a citizen of Nigeria. On November 20, 2019, she applied for a Spousal Open Work Permit under the Temporary Foreign Worker Program.

[4] On March 2, 2020, the officer reviewing the application sent the Applicant a procedural fairness letter [PFL]. The PFL read as follows:

> I have reasonable grounds to believe that you have not fulfilled the requirement put upon you by section 16(1) of the Immigration and Refugee Protection Act, which states:
>
> > *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.*
>
> **Specifically, you indicated "Yes" to:**
>
> **Question 2 (b) of the application form (IMM 5257) which states; 'Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?'**
>
> **However, I have reasonable grounds to believe you have been refused a visa from at least one other country. You have not been truthful and thus have lowered your credibility.**
>
> Please note that if it is found that you have engaged in misrepresentation in submitting your application for a temporary resident visa, you may be found to be inadmissible under section 40(1)(a) of the Immigration and Refugee Protection Act. A finding of such inadmissibility would render you inadmissible to Canada for a period of five years according to section 40(2)(a):

> …
>
> I would like to give you an opportunity to respond to this information. I will afford you 7 days from the date of this letter to make any representations in this regard. If you do not respond to this request within the time outlined above, your application will be refused.

[5] In response to the PFL, the Applicant explained that she had not been informed of certain refused visas that had been applied for on her behalf by her employer. The Applicant provided emails and other documents from her employer to explain the omissions.

[6] On March 27, 2020, the application was refused. The Decision stated:

> You have been found inadmissible to Canada in accordance with paragraph 40(1)(a) of the Immigration and Refugee Protection Act (IRPA) 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. In accordance with paragraph A40(2)(a), you will remain inadmissible to Canada for a period of five years from the date of this letter or from the date a previous removal order was enforced.

[7] In the Global Case Management System (GCMS) Notes, the following assessment was provided of the Applicant's response:

> PA's response is not credible. Not reasonable to think that PA did not know they were refused as they would have had to sign those applications and would have wondered what happened if they did not get their visa. PA is inadmissible to Canada for 5 years.

II. Issues and Standard of Review

[8] The Applicant raises two issues on this application:

1) Was the officer's Decision reasonable?

2) Was there a breach of procedural fairness because the officer did not disclose their credibility concerns?

[9] An officer's decision regarding a finding of misrepresentation on a work permit application is reviewable on the standard of reasonableness: *Singh v Canada (Citizenship and Immigration)*, 2021 FC 1243 at para 5; *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*]. None of the situations that would rebut the presumption of reasonableness review for administrative decisions is present: *Vavilov* at paras 16-17.

[10] In conducting a reasonableness review, the Court must determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A reasonable decision, when read as a whole and taking into account the administrative setting, bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[11] Issues of procedural fairness are best addressed by the correctness standard, although they are not strictly speaking subject to a standard of review analysis. Instead, such questions are to be reviewed from the perspective of whether the procedure followed by the decision-maker was fair and just: *Canadian Pacific Railway Company* v. *Canada (AG)*, 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Sangha v. Canada (Citizenship and Immigration)*, 2020 FC 95 at para 13.

III. Analysis

A. *Was the officer's Decision reasonable?*

[12] The Applicant argues that the Decision lacks transparency as the officer does not address the Applicant's explanation as to why certain visa refusals arising from applications made on her behalf by her company were not included in her Application. She argues that the officer's explanation that she would have to sign the applications is speculative and is not grounded in any evidence.

[13] The Respondent asserts that the Applicant's explanation was noted and considered, but was not accepted by the officer as it was not reasonable in the circumstances. It argues that sufficient explanation was provided in the GCMS notes as to the basis for the misrepresentation finding.

[14] Paragraph 40(1)(a) of the IRPA provides:

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;

[15] Section 40 is to be given a broad and robust interpretation: *Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 [*Jiang*] at para 35; *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 [*Oloumi*] at para 23. The purpose of paragraph 40(1)(a) is to ensure that applicants provide complete, honest, and truthful information when seeking to enter Canada: *Jiang* at para 36; *Cao v Canada (Citizenship and Immigration)*, 2010 FC 450 at para 28.

[16] In extraordinary circumstances, a narrow exception to a misrepresentation finding under paragraph 40(1)(a) may apply where an applicant is able to show that they honestly and reasonably believed that they were not withholding material information, and knowledge of that information was beyond their control: *Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345, [1990] FCJ No 318 (QL) (FCA); *Oloumi* at paras 35-39; *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhun*] at para 28; *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at paras 17-19.

[17] In this case, the Applicant indicated on her IMM 1295 form that she had been refused prior visas. She listed visa refusals from the UK on February 29, 2016 and December 9, 2016; the US on September 16, 2016 and November 1, 2016; and Canada on February 19, 2018 and August 9, 2018. However, the form did not identify visa refusals arising from applications made in Turkey (applied for on April 25, 2018), Germany (applied for on June 21, 2018) and Spain (refused on March 26, 2019) for conferences through the Applicant's workplace.

[18] Upon receiving the PFL, the Applicant reached out to her employer to confirm if there were any visa refusals that the employer had received from applications filed on her behalf. The

communication noted that the Applicant had previously made a request for this information in advance of her application, but that no information had been provided at that time. The correspondence stated:

> ...My husband and I have checked thoroughly for the past 4 days now to confirm we had truly not omitted any of such information to no avail. We agreed that I proactively asked you if there were any of such visa refusals gotten on my behalf as I am aware the visas I go through the office were stamped and I declared those. If there was any refusal on any application made to any country on my behalf, I wasn't sent any information by the HR regarding this and I will like to know if there was any please.

[19] The employer confirmed that applications were filed on behalf of the Applicant for the purpose of supporting her attendance at business conferences. A letter was subsequently provided with details of the missing visa refusals, acknowledging that it was the employer's fault that the information was not provided to the Applicant earlier:

> We ought to have communicated to you the various countries where your visa applications for business conferences were refused and for this we sincerely apologize.
>
> We hope the information shared within is enough to prove to the Canadian Embassy that the supposed misrepresentation was an error and oversight on our part as a company and not your fault as a staff.
>
> [...]
>
> Attached herewith the list of countries which we have applied on your behalf as a company with regards business conferences you were scheduled to attend.

[20] The information included details of the visa application requests which were provided in the Applicant's response to the PFL, along with the following explanation:

> I gathered from my current place of employment (Wadoye Nigeria Limited), that applications to countries where the company was invited for a conference was done on behalf of staff members. If

> the visa was granted and passport requested, the HR department will proceed to ask the staff for his/her passport for stamping at the embassy. However, in the event of a visa refusal, the company didn't bother to saddle the staff with such depressing information.

[21] In oral submissions, counsel for the Applicant raised an issue as to whether the GCMS notes from the officer reviewing the PF response could be used to support the Decision if it was made by a different administrator from the officer who rendered the Decision. As *Vavilov* instructs, the reasons of administrators must be read holistically and contextually with sensitivity to the administrative regime in which they were given: *Vavilov* at paras 97 and 103. In this context, as similarly found in *Hasham v Canada (Citizenship and Immigration)*, 2021 FC 881 at paragraph 29, it is clear that the analysis of the officer that reviewed the Applicant's response informed the decision-maker.

[22] In the GCMS notes, the officer states only that the Applicant's response "is not credible" as it was "[n]ot reasonable to think that [the Applicant] did not know they were refused as they would have had to sign those applications and would have wondered what happened if they did not get their visa."

[23] The Respondent argues that it was reasonable for the reviewing officer to infer that the Applicant would have known that visas were needed for conferences and when the Applicant did not attend those conferences that she would have known that such visas were refused.

[24] However, the assumption that the applications were signed by the Applicant is not supported by the evidence on the record. The visa application forms for the Turkish, German and

Spanish applications do not include a signature from the Applicant. Further, it is unclear from the documentation submitted how much the Applicant knew of the proposed conferences as the letter of invitation relating to the conference in Turkey was not addressed to the Applicant personally, and none of the other documents indicate whether the Applicant would have had personal knowledge of any proposed conferences in Spain and Germany.

[25] The evidence of the Applicant is that she did not know the details of any applications being made on her behalf nor, as admitted by the employer, was she provided with this information when it was requested.

[26] In light of the evidence conflicting with the officer's reasons, and the significant consequences to the Applicant (i.e., inadmissibility to Canada for 5 years), in my view it was incumbent on the reviewing officer to address the evidence filed and to provide greater analysis and justification for his assessment.

[27] I find the circumstances of this case to be different from those in *Oloumi*, *Goburdhun* and *Malik v Canada (Citizenship and Immigration)*, 2021 FC 1004, cited by the Respondent, where it was clear from the record that the applicant knew about the information that was missing and failed to properly review their application for accuracy. In this case, where such knowledge is not clear from the face of the record, and where signatures do not appear on the applications that were refused, some further explanation was required to support the assumptions made.

B. *Was there a breach of procedural fairness because the officer did not disclose their credibility concerns?*

[28] Although it is my view that the application should be allowed for the reasons set out above, I do not consider there to be any breach of procedural fairness associated with the communications in respect of the Decision.

[29] I adopt and apply the same reasoning set out by Justice Southcott in *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 [*Alalami*]. In that case, like this one, the applicant argued that he was deprived procedural fairness because the officer based the decision on a negative credibility determination without affording him an opportunity to respond to the credibility concerns. As stated by Justice Southcott at paragraph 13 of *Alalami*:

> 13. ... I disagree with Mr. Alalami's position that the Officer was obliged to advise him that he disbelieved the explanation provided and to give him a further opportunity to comment. I accept that the principles of procedural fairness must be applied before findings of misrepresentation are made. However, after what appeared to be a misrepresentation in Mr. Alalami's application form was identified, he was sent the PFL, which explained the issue and afforded him an opportunity to respond. Mr. Alalami then provided his explanation. I do not consider the principles of procedural fairness to require the Officer to have advised Mr. Alalami that he did not accept the explanation and to have afforded him a further opportunity to comment before arriving at the Decision. The PFL was sufficient to put Mr. Alalami on notice of the issue, including the possibility that the resulting explanation would not be accepted.

[30] As in *Alalami*, I disagree that the officer was obliged to advise the Applicant that they disbelieved the explanation she had given and to provide a further opportunity to comment. While it is my view that there was insufficient justification given for the Decision, this does not equate to a breach of procedural fairness.

[31] For the reasons set out above, the application is allowed and the Applicant's visa Application will be sent back to be determined by another officer.

[32] No question for certification has been raised by the parties and none arises in this case.

JUDGMENT IN IMM-2158-20

THIS COURT'S JUDGMENT is that

1. The application is allowed, the March 27, 2020 decision is set aside, and the Applicant's application for a work permit under the Temporary Foreign Worker Program is referred back to a different officer of Immigration, Refugees, and Citizenship Canada for redetermination.

2. There is no question for certification.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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