Federal Court  Cour fédérale

Date: 20221125

Docket: IMM-2521-21

Citation: 2022 FC 1625

Ottawa, Ontario, November 25, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

OLATUNJI SAMUEL AFOLAYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, a citizen of Nigeria, brings this application to set aside a decision made on November 25, 2019 by a Migration Officer (Officer) at the Canadian Embassy in London, England (Decision).

[2] The Officer found the Applicant was inadmissible to Canada under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induced or could induce an error in the administration of the *IRPA*.

[3] For the reasons that follow, this application is denied.

II. **Background Facts**

[4] The Applicant had the misfortune to hire a travel agent (Agent) to complete and submit his application for a Work Permit so that he could join his wife who was studying in Canada.

[5] The misfortune was that the Agent applied for a Temporary Resident Visa (TRV), not a Work Permit, and they supported it with a fraudulent bank statement.

[6] On receipt of the Agent's documents, the processing office in Lagos sent the bank statement to the named bank for verification that it was authentic. The reply received was that the name on the statement (the Applicant's name) did not match the name on the bank's records.

[7] The London office sent a Procedural Fairness letter (PFL) to the address on record, which was the agent's address, not the Applicant's.

[8] The letter indicated the Officer was concerned that the Applicant had not met the requirement of subsection 16(1) of the *IRPA* to "answer truthfully all questions put to them for the purpose of the examination".

[9] The PFL further stated that the specific concern was that "the bank statement(s) which you have provided in support of your application is fraudulent."

[10] The PFL included the warning that if the Applicant was found to have engaged in misrepresentation when submitting the TRV, he could be found to be inadmissible for a period of five years according to paragraph 40(2)(a) of the *IRPA*.

[11] The Agent did not send the PFL, or communicate the contents of it, to the Applicant.

[12] The Applicant first learned of the various problems noted above on March 12, 2021 when he received a package of documents in response to an Access to Information and Privacy Request he made on February 11, 2021.

[13] On April 12, 2021, the Applicant retained counsel to pursue this judicial review of the Decision.

III. **The Decision**

[14] The Decision states the Applicant has been found inadmissible to Canada pursuant to paragraph 40(1)(a) of the *IRPA* for directly or indirectly misrepresenting or withholding material

facts relating to a relevant matter that induced or could induce an error in the administration of the *IRPA*.

[15] The Decision also advised the Applicant that pursuant to paragraph 40(2)(a) he would remain inadmissible for a period of five years from the date of the letter.

[16] The Global Case Management System notes (GCMS) accompanying the letter provide the reasons for the Decision.

[17] The GCMS notes indicate that a Procedural Fairness letter (PFL) was sent on November 25, 2019 seeking to have the Applicant address concerns of fraudulent information provided in the application.

[18] As no reply to the PFL was received, the application was determined based on the information on file. The application was refused and the Applicant was found inadmissible for misrepresentation for a period of 5 years.

IV. **Preliminary Issue**

[19] The Respondent notes the Application Record contains evidence that was not before the decision-maker and much of it post-dates the Decision.

[20] The Respondent submits the evidence does not come within any of the exceptions to the general rule that evidence not before the decision-maker will not be considered on judicial

review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para. 20.

[21] I agree with the Respondent that evidence post-dating the Decision and information not related to the processing of the TRV application as well as personal information concerning the Applicant and his wife all of which was not before the Officer, is inadmissible and will not be considered.

[22] Evidence relating to the Applicant's relationship with the travel agent and any communications with Immigration, Refugees and Citizenship Canada is admissible as it goes to the issue of procedural fairness.

V. **Issues**

[23] The Applicant raises three issues: (1) what is the appropriate standard of review; (2) was the Applicant denied procedural fairness; (3) did the Officer err by failing to consider the exceptional circumstances of a misrepresentation that was honestly and reasonably beyond the Applicant's control?

[24] The last issue is, at best, a sub-issue of the second issue.

VI. **Standard of Review**

[25] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23.

[26] The focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and at least as a general rule, to refrain from deciding the issue themselves: *Vavilov* at para 83.

[27] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85. (Emphasis added)

[28] Mr. Justice Rennie reviewed and confirmed the core principles of procedural fairness in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*]. He concluded that assessing procedural fairness does not require a standard of review analysis but "a court must be satisfied that the right to procedural fairness has been met." In that respect, the ultimate question is whether the Applicant knew the case to be met and had a full and fair chance to respond: *CPR* at paras 49-50, 56.

VII. **Analysis**

[29] The Applicant argues that the Agent was incompetent and, but for that fact, there was a reasonable probability the Decision would have been different. He claims to have had a reasonable and honestly held belief that the Agent, to whom he was introduced by a friend, was processing his application for a Work Permit and the delay in receiving it was caused by the Covid-19 pandemic.

[30] The Respondent points out that while the Applicant may have subjectively believed an honest mistake was made he could not have reasonably believed that a misrepresentation had not occurred as the Applicant:

1. did not review the application before it was submitted;
2. was not aware that a TRV had been applied for; and,
3. was not aware that a fraudulent bank statement had been submitted on his behalf.

[31] I would add to that list the fact that the Applicant did not receive a copy of the application or access to the online portal, and he had an oral agreement with the Agent.

[32] There is no evidence that the Applicant reported the Travel Agent's actions to any authority.

[33] In this Court, when dealing with allegations of incompetent counsel – lawyers or immigration consultants – there is a protocol to follow. No such protocol exists for other professionals.

[34] Unfortunately, the Applicant put his blind faith in the Agent.

[35] The facts of this case parallel those found in *Haghighat v Canada (Citizenship and Immigration)*, 2021 FC 598 other than the fact that an immigration consultant was involved there.

[36] In dismissing the application, Mr. Justice Manson said the following:

> [21] The circumstances of this case are unfortunate. The Applicant placed her trust in an immigration consultant and was deceived. However, these circumstances do not absolve the Applicant from the consequences of her misrepresentation.
>
> [22] The GCMS notes indicate that the procedural fairness letter was provided to the Applicant on January 16, 2020. The fact that the Applicant did not receive the procedural fairness letter lies with her and her immigration consultant. The immigration consultant applied through the on-line portal on the Applicant's behalf and denied her access to this on-line portal. While the circumstances are unfortunate, it cannot be said that the Officer breached a duty of procedural fairness in such circumstances. The Officer was not required to respond to the Applicant via her personal email address.

[37] Having hired the Agent to prepare and file an application for a Work Permit, the Applicant placed his trust in that person. That his trust was misplaced is extremely unfortunate but, having made a bargain with the Agent, the Applicant is sadly now saddled with the result.

VIII. **Conclusion**

[38] The Decision is reasonable. It is transparent, intelligible and justified on the facts and law.

[39] It is internally coherent and there is a rational chain of analysis that is justified in relation to the facts and law.

[40] The Applicant has not shown the Decision was procedurally unfair to him. The Officer cannot possibly address arguments that were not before them. For the same reason they cannot be raised in this Court.

[41] I recognize this outcome is personally unfair to the Applicant, and his family. However, it is not procedurally unfair to them legally.

[42] If the Applicant had retained an immigration consultant or a lawyer and the same events had transpired then it would have been procedurally unfair based on their incompetence. However, much as I would like to, I cannot extend the law to include an incompetent, dishonest travel agent. Nor can the facts before the Officer be changed through hindsight and the receipt of information that was not before the Officer at the time the Decision was made.

[43] For all the foregoing reasons, this application is dismissed, no question is certified.

JUDGMENT in IMM-2521-21

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. There is no question to certify.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2521-21
STYLE OF CAUSE:	OLATUNJI SAMUEL AFOLAYAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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