Federal Court Cour fédérale

Date: 20160414

Docket: IMM-175-15

Citation: 2016 FC 416

Ottawa, Ontario, April 14, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

UMAIR ALI CHUGHTAI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review of a decision, dated August 24, 2015, by an Immigration Officer [officer] of Citizenship and Immigration Canada [CIC] refusing his application for permanent residence as a skilled worker due to a finding that the applicant 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].

BACKGROUND

[2] The applicant is a citizen of Pakistan. He states that he was hired as an office manager by Dr. Khurrum Ashraf Dentistry [the employer] on August 18, 2007. An application for an Arranged Employment Opinion [AEO] was submitted to the Department of Human Resources and Skills Development Canada [HRSDC], and a positive AEO was issued on October 10, 2007.

[3] On or about July 29, 2008, the applicant submitted an application for permanent residence in Canada as a skilled worker. The application was subsequently processed under Ministerial Instructions issued on November 28, 2008, which were retroactively applied. The applicant included in his application for permanent residence the positive AEO, his Master's Degree from Premier College, and his Bachelor degree from the National College of Business Administration and Economics. The applicant has acknowledged that these institutions were not accredited at the time the credentials were issued; however, the National College of Business Administration and Economics has since been accredited.

[4] On April 1, 2010, the CIC visa office in Islamabad ceased processing economic permanent resident applications. The applicant's file was transferred to the Canadian High Commission in London, UK on June 9, 2010. On or about June 14, 2011, the applicant's former counsel received a procedural fairness letter [PFL1] from a Designated Immigration Officer, which stated that the officer was not satisfied that the applicant met the requirements of the AEO, nor that the AEO was genuine. The officer noted that the AEO stipulated the requirement of a college level degree or diploma, and that the applicant's educational credentials were not issued by accredited institutions and therefore did not meet this requirement.

[5] On or about July 12, 2011, the applicant submitted a response to PFL1, and in the course of this response, the employer also submitted a new letter indicating he was aware of the problems with the credentials but had determined that the applicant met the educational requirement as stipulated. The applicant also submitted his Bachelor of Business Administration degree from the National College of Business Administration and Economics issued on May 7, 2011, which he had obtained after further study in order to hold a degree from an accredited institution. On or about December 27, 2012, the applicant was informed that he was required to attend an interview at the Abu Dhabi visa office. The interview was held on February 18, 2013.

[6] On May 1, 2013, the applicant's former counsel received a second procedural fairness letter [PFL2], advising that the applicant could be inadmissible to Canada for misrepresentation. The officer stated that the AEO was not genuine, and that without the AEO the application was not eligible to be processed. On or about July 2, 2013, the applicant replied to PFL2. He submitted a new letter from the employer, indicating that the job offer was in fact genuine and that demonstrable need for the position existed.

[7] In an entry dated October 8, 2013, the Global Case Management System [GCMS] notes in the applicant's file indicate:

> In response to the procedural fairness letter, the applicant has forwarded on a response from the employer listed in the AEO. The employer states that he does charitable work and that he has a specialized practice that has three hygienists, two assistants, two front administration staff and three part time staff, and over 3500 patients. The employer states he is looking to expand the office space and to bring on another dentist, and potentially an anaesthesiologist, and a lab technician. Specific supporting evidence related to these stated plans, to the current size of the practice, or to show the staff currently employed, has not been

> provided. The employer states he would only trust family to take on the responsibility of this position. Beyond the letter, the applicant has not provided any supporting evidence to substantiate their potential employer's statement. The concerns as indicated to the applicant at interview and in the procedural fairness letter have not been adequately addressed. The employer states that he feels he has the right to bring a family member into his practice. The response provided appears to confirm that the job offer was provided in order to facilitate the applicant's immigration. Based on the responses at interview and evidence on file, I am not satisfied that if an unrelated individual had been located with similar work experience, skills, abilities, and the capacity to perform the duties of an office manager, that they would have been offered the position due to a genuine need to hire an office manager. A copy of the employer's previous correspondence regarding the applicant's degree and qualifications has again been provided. It appears the job offer was written so that the applicant would specifically qualify instead of based on need or hiring criteria, and when it appeared that the applicant did not meet the qualifications, it was stated that they were not essential, even without any apparent change in the job requirements or the duties the applicant would perform.

[8] In an entry dated December 13, 2013, the notes state:

> The interviewing officer had concerns that the job offer was not genuine. […] Given that the level of education requirements for the job offer were changed to match our assessment of the applicant's education credentials and the employer (PA's brother-in-law) has not provided sufficient reasons to explain why the job offer was made for an Officer Manager or why the offer was made to the applicant, other than a desire to employ a family member, I am not satisfied that this is a genuine job offer which has been made in order to assist the applicant's permanent residence application. The provision of a non-genuine job offer is direct misrepresentation that if accepted would lead to an error in the administration of IRPA. I am an officer designated under the Act to make a determination under A40. I am therefore satisfied that the applicant has misrepresented a material fact that if accepted would have led to an error in the administration of IRPA. Therefore the applicant is found inadmissible under A40 for misrepresentation.

[9] In an entry dated August 17, 2015, it is noted that the file was referred for review, and that in December 2013 there was an “incorrect determination of misrepresentation”. Reviewing the recommendation made by the interviewing officer, the officer who made the August 17, 2015 entry therefore concluded that the applicant’s job offer constituted a misrepresentation as defined in section 40 of IRPA. The entry goes on to state that the job offer was made to the applicant in order to facilitate his application, and notes:

> The job offer /Arranged Employment offer was then amended to fit the applicant’s educational backgrounds further to our concerns. The misrepresentation was certainly material because, applicant would not have been eligible to apply as a Skilled Workers [sic] under the Ministerial Instructions 1 (MI1) at that time without a job offer. The officer has determined that none of subject’s work experience is one of those in the listed occupations. As such, applicant needed a job offer to be eligible to submit an application under MI1.

[10] In a letter dated August 24, 2015, the applicant was informed that he had not met the requirements of IRPA, as he had misrepresented facts material to the assessment of his application for permanent residence. In particular, the officer reviewing the applicant’s file found that the applicant had submitted an AEO for a position that was not genuine, and that this submission was relevant to whether or not he met the selection criteria as a skilled worker under the Ministerial Instructions. This misrepresentation was material to the disposition of the application, and could have led to an error in the administration of IRPA. The applicant was therefore deemed to be an inadmissible foreign national pursuant to paragraph 40(1)(a) of IRPA, and his application for permanent residence was refused.

STANDARD OF REVIEW

[11] The applicant and the respondent agree that the determination of misrepresentation under paragraph 40(1)(a) of IRPA is factual in nature and calls for a deferential standard of review (*Kobrosli v Canada (Minister of Citizenship and Immigration)*, 2012 FC 757 at para 24). The decision should therefore be reviewed on a standard of reasonableness (*Khorasgani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1177 at para 8; *Singh v Canada*, 2015 FC 377 at para 12). This Court should not intervene if 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 [*Dunsmuir*]). In addition, the GCMS notes may form the basis for, or supplement reasons provided by, a visa officer in his or her decision (*De Azeem v Canada (Citizenship and Immigration)*, 2015 FC 1043 at para 27 [*De Azeem*]).

ANALYSIS

[12] I have considered the parties' submissions in their respective memoranda of fact and law, as well as the applicant's written reply, and the oral submissions made at the hearing by the parties' counsel. Their general positions and arguments are summarized below.

[13] Firstly, the applicant submits that contrary to the assertions of the officer, the employer did not alter the requirements of the AEO in response to PFL1. Rather, the employer simply disagreed with the assessment made by the officer – a fact that the applicant states is clear from the text of the letter. The applicant states further that the officer did not find at the time of PFL1 that the applicant had not met the requirements of the AEO, noting that at the subsequent

interview, the officer confirmed that the applicant had genuine work experience in a position that would qualify him for the programme, and also confirmed that his degree was genuine.

[14] With respect to PFL2, the applicant submits that the officer confused the applicant's apparent failure to satisfy the officer's concerns about the *bona fides* of the offer with a material misrepresentation. The applicant states that this "leap from insufficiency to misrepresentation" is unsupported by the evidence, and that a finding of misrepresentation must be established by objective facts rather than apparent belief (*Xu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 784 at para 16 [*Xu*]).

[15] The applicant notes that the legislative intent of the AEO is to facilitate an applicant's entry into Canada, as an applicant is much more likely to become economically established if he or she has a job waiting. As a result, the applicant submits that it would make little sense to bar an applicant from Canada for using the programme as it was intended. Furthermore, the applicant asserts that neither he nor the employer concealed that they were related by marriage, and notes that employers are permitted to hire relatives after they receive authorization from HRSDC. The applicant states that the Court has previously considered this issue as it pertains to live-in caregivers and has always found that the officer acted without reference to an objective concern (*Ouafae v Canada (Minister of Citizenship and Immigration)*, 2005 FC 459 at para 32 [*Ouafae*]; *Nazir v Canada (Citizenship and Immigration)*, 2010 FC 553 at para 23; *Palogan v Canada (Citizenship and Immigration)*, 2013 FC 889 at para 15 [*Palogan*]).

[16] Citing *Garcia Porfirio v Canada (Minister of Citizenship and Immigration)*, 2011 FC 794 at paras 33-37, the applicant also asserts that while assessment by HRSDC when issuing the AEO does not obviate the duties of the visa officer in making the assessment of whether an offer is genuine or not, it is inappropriate for a foreign visa officer to suddenly second guess the findings of HRSDC with respect to Canada's labour market and the question of whether a position is actually required. As the officer was not in a position to properly assess the employer's need for the position, nothing remained that would lead the officer to believe that the job offer was not genuine, therefore falling below the threshold needed to establish misrepresentation (*Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at para 21 [*Berlin*]).

[17] Finally, while the applicant concedes that a third party, such as the individual making the AEO, may be the party putting forward a misrepresentation, in the present case it is evident that both the applicant and the employer believed that the job offer was genuine, and provided all the information they believed was necessary to establish its *bona fides*. In refusing the application, the officer cited no objective evidence that the applicant or the employer concealed material facts. Yet, a misrepresentation finding cannot stand where the parties involved have been forthright (*Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15 [*Baro*]).

[18] On the other hand, the respondent maintains that the officer's decision is reasonable, and does not warrant the intervention of this Court. The respondent notes that as per the legislative scheme pertaining to federal skilled workers, immigration officers award applicants points on the basis of factors listed in paragraph 76(1)(a) of the *Immigration and Refugee Protection*

Regulations, SOR/2002-227 [*Regulations*] – namely, education, proficiency in English and French, experience, age, arranged employment and adaptability. Applicants must be awarded at least 67 points to be eligible for a federal skilled worker visa.

[19] Pursuant to paragraph 82(2)(c) of the *Regulations*, applicants from outside Canada are entitled to 10 points for arranged employment provided that the visa officer approves the job offer based on the opinion by the HRSDC. While the visa officer may take into account the opinion of HRSDC, the officer must ultimately be satisfied that the employment offer meets the requirements of subsection 203(1) of the *Regulations*, which explicitly includes a determination by the visa officer as to whether the employment offer is genuine. Subsection 200(5) of the *Regulations* sets out the factors that a visa officer must consider in making this determination. The respondent notes that the officer awarded the applicant zero points for arranged employment, as the officer was not satisfied that the job offer was genuine. The applicant had the opportunity to address the officer's concerns in an interview. Nevertheless, the officer remained unconvinced as to the genuineness of the offer. A subsequent fairness letter was sent, in order to allow the applicant an opportunity to provide further information supporting the genuineness of his job offer. The applicant submitted an updated letter from his employer, which the officer also considered.

[20] The respondent notes further that the officer found the AEO not to be genuine because:

- In 2007, at the time the offer was made, the applicant did not have the required educational credentials to qualify, as his degrees were from unaccredited institutions;

- In February 2013, at the time of his immigration interview, the applicant indicated that the employer's office was a small business, consisting of

only two other employees – a dental assistant and the applicant's sister; and

- At the time of his immigration interview, the applicant indicated that his employer had future expansion plans in mind, but nothing concrete. The Officer concluded that there was no pressing need to hire an Office Manager – particularly one whose experience was as an Area Credit Coordinator for a bank – given the current size of the business.

[21] In light of this information, the respondent submits that it was open to the officer to find that the AEO was not genuine, because the additional assistance of a full time office manager was not really required. The respondent recalls that visa officers are required to determine whether a job offer is genuine "on the basis of an opinion provided by the Department of Human Resources and Skills Development", the current version refers to the Department of Employment and Social Development pursuant to subsection 203(1) of the *Regulations*. While an officer is to consider HRSDC's opinion, that officer must make his or her own determination on the matter and must be satisfied that the job offer is genuine (*Ghazeleh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1521 at para 20 [*Ghazeleh*]; *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 21).

[22] The respondent notes that the information provided by the applicant as to the size of his employer's practice contradicted the information contained in the employer's letters. Furthermore, the respondent submits that the officer was justified in assessing the genuineness of the future employment position and the relationship between the applicant and the employer. The respondent points out that it was only in 2013 that the applicant indicated that the employer was his brother-in-law – a fact that was not mentioned in the employer's previous letters from 2007 and 2011. It was open for the officer to consider that the job offer had been made to facilitate the

applicant's immigration to Canada, as the position would likely not have been given to an unrelated candidate with similar skills and experience due to a genuine need to hire an office manager. In finding that the offer was not genuine, the officer reviewed the "overall picture" (*Bondoc v Canada (MCI)*, 2008 FC 842 at para 15 [*Bondoc*]).

[23] The respondent concludes that the determination by the officer that the AEO was not genuine falls within the range of possible outcomes within the context of the facts and the law, as the applicant failed to demonstrate that the findings made by the officer were not supportable by the evidence and that they were made in an unreasonable manner.

[24] In response to the respondent's submissions, the applicant submits that the respondent erred in stating that the officer refused to award the applicant points for his AEO, and that this caused the applicant to be refused for failing to meet the 67-point threshold under the eligibility requirements. In fact, the applicant asserts that he was refused because the officer found him inadmissible for misrepresentation pursuant to subsection 40(1) of IRPA. The respondent therefore misconstrued the refusal and ignored the substantive issues presented by the applicant. Indeed, the applicant was refused because the officer found that, on the balance of probabilities, the employment offer was fraudulent. The only evidence or omission of evidence that the officer used to support this misrepresentation finding was the prior finding that the employer may not have an actual business need for the position. The officer thus committed a reviewable error by failing to point to any objective evidence to support the misrepresentation finding (*Xu* at para 16).

[25] The applicant further submits that the respondent's arguments regarding the officer's legal entitlement to perform the final assessment of whether the offer was genuine are largely irrelevant, as this point is not in dispute. The cases cited by respondent's counsel, in particular *Bondoc*, *De Azeem* and *Ghazeleh*, are clearly distinguishable from the facts of this case. Rather, the applicant argues that there was no objective evidence or omission that could be construed as supporting the finding that the applicant had submitted a fraudulent offer of employment. All the concerns with respect to the number of employees and the size of the business were alleviated, as there was further recruitment and the business grew from two to seven employees. The issue concerning the applicant's level of education was also moot and had been resolved. With respect to the respondent's suggestion that the applicant had concealed his familial relationship with the employer, the applicant notes that this point was never queried prior to the interview, and that the information was indeed volunteered by the applicant during the interview.

[26] Based on the foregoing, the applicant seeks relief as indicated in the application for leave – to wit, an order quashing the decision of the officer, dated August 24, 2015, as well as an order for a writ of mandamus directing that the respondent consider and process the applicant's application for permanent residence in accordance with the law.

[27] I have decided to allow the present judicial review application.

[28] Firstly, I wish to emphasize that I agree with the respondent that a visa officer has the discretion to refuse an application for permanent residence as a skilled worker, even in cases where HRSDC has issued an AEO. Pursuant to paragraph 203(1)(a) of the *Regulations*, an

officer must determine, on the basis of an assessment provided by the Department of Employment and Social Development, if a job offer is genuine. A visa officer must be satisfied that the criteria specified in section 82 of the *Regulations* are met. Furthermore, HRSDC's opinion is not determinative of whether a visa should be issued. The immigration officer is the ultimate decision maker (*Ghazeleh* at paras 20-21). Yet while the officer was permitted to determine the genuineness of the job offer, taking into account the assessment provided by HRSDC, the respondent misses the crux of the issue by his mischaracterization of the impugned decision. It is true that in this case, the officer's finding that the AEO was not genuine led the officer to award the applicant zero points for that category, presumably resulting in the applicant's failure to reach the necessary 67-point threshold. Nevertheless, it is clear from the impugned decision – both from the letter dated August 24, 2015 and from the GCMS notes – that the officer's primary reason for rejecting the application was the finding that the applicant was inadmissible for misrepresentation under subsection 40(1) of IRPA.

[29] An applicant for a permanent residence visa may be refused if he or she fails to meet the evidentiary burden necessary to satisfy the officer as to his or her eligibility. On the other hand, a finding of inadmissibility is more serious in nature. Under paragraph 40(1)(a) of IRPA, a person is inadmissible to Canada if that person "withhold[s] material facts relating to a relevant matter that induces or could induce an error in the administration of th[e] Act". As my colleague Justice Barnes states in *Xu* at para 16, "[a] finding of misrepresentation under section 40 of the IRPA is a serious matter which should not be made in the absence of clear and convincing evidence […]" [emphasis added]. Similarly, in *Berlin* at para 21, Justice Barnes states, "[a] misrepresentation is not established by mere appearances. As the Respondent's Operational Manual on Enforcement

acknowledges, a misrepresentation must be established on a balance of probabilities." While an applicant for permanent residence has a duty of candour requiring the disclosure of material facts, and while even an innocent failure to provide material information can result in a finding of inadmissibility (*Baro* at para 15), there must still be clear and convincing evidence that an applicant, on the balance of probabilities, has withheld material facts for a finding of misrepresentation to be made.

[30] In the present case, while the GCMS notes indicate that the officer was "satisfied" that the applicant had misrepresented a material fact, I am not convinced that this decision was in fact based on the kind of "clear and convincing" evidence necessary to make a finding of inadmissibility. Indeed, while the reasoning presented in the GCMS notes may be appropriate for a finding that the applicant did not meet his evidentiary burden of convincing the officer that the AEO was genuine, it appears that the officer may have made an "unsupported leap from the reasonable finding of insufficiency of evidence to one of misrepresentation" (*Xu* at para 16). Moreover, the consequences of a finding of inadmissibility on the basis of misrepresentation pursuant to subsection 40(1) of IRPA are more serious than those of a mere refusal. As the applicant points out, in the latter case, an applicant is more or less in the same position he was in before applying, whereas in the former case, an applicant continues to be inadmissible to Canada for a period of five years.

[31] With respect to the allegations in the GCMS notes that the employer changed the educational requirements of the AEO following PFL2, a review of the record does not support such a claim. Rather than altering any of the employment requirements, the employer simply

stated in his first letter (in response to PFL1) that he was aware of the applicant's educational credentials at the time the AEO was made, that he was familiar with the educational institution from which the applicant received his degree, and that he was satisfied that these credentials were sufficient, particularly in conjunction with the applicant's overall training, background and work experience. In his second letter (in response to PFL2), the employer reiterated that the job offer and the need to hire the applicant were genuine, and that the applicant met the requirements for the job. In my view, this does not rise to the level of clear and convincing evidence of a misrepresentation.

[32] Nor do I find anything in the record to suggest that the applicant or the employer misrepresented their familial relationship. While misrepresentation can occur by omission, there does not appear to be any indication that the applicant or the employer believed they were withholding material information with respect to their relationship. Indeed, this information was volunteered by the applicant during his interview, and was not solicited prior to that time. Moreover, an exception to the rule that even an innocent failure to provide material information can result in a finding of inadmissibility arises where applicants can show that they honestly and reasonably believed that they were not withholding material information (*Baro* at para 15). Furthermore, although "[t]he relationship between the applicant and the employer may be a factor that the officer takes into account in assessing the bona fide character of the contract" (*Palogan* at para 15), as the applicant points out in the context of live-in caregivers, "there is nothing in the Act or Regulations to prevent family ties between future employer and employee" (*Ouafae* at para 32). Finally, with respect to the respondent's contention that the "information provided by the Applicant as to the size of his employer's practice contradicted the information

contained in the employer's letters", this conclusion is not stated in the decision letter or in the GMCS notes.

[33] Overall, it appears from the decision that the only evidence the officer used to support the misrepresentation finding was the determination that the employer may not have had an actual business need for the position of office manager. As a result, the reasons do not support the officer's finding of misrepresentation on a basis of clear and convincing evidence. I am therefore not satisfied that the determination of inadmissibility by the visa officer falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

CONCLUSIONS

[34] For these reasons, the application for judicial review is allowed. The decision made on August 24, 2015 is set aside and the matter is remitted back to a different visa officer for redetermination, in accordance with the law and the present reasons. Counsel agree that there is no question of general importance raised in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The decision made on August 24, 2015 is set aside and the matter is remitted back to a different visa officer for redetermination, in accordance with the law and the present reasons. Counsel agree that there is no question of general importance raised in this case.

"Luc Martineau

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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