Federal Court  Cour fédérale

Date: 20180129

Docket: IMM-2585-17

Citation: 2018 FC 87

Ottawa, Ontario, January 29, 2018

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

KUN LI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Kun Li seeks judicial review of a visa officer's decision to refuse his application for a temporary resident visa. The visa officer found that Mr. Li was inadmissible for misrepresentation pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], because he failed to disclose that he had been charged with impaired driving in Canada.

[2] In my view, the visa officer reasonably found that Mr. Li's application for a temporary resident visa included a material misrepresentation. In the circumstances of this case, the visa officer was not obliged to consider whether Mr. Li might benefit from an exception, or give reasons for not granting one. The application for judicial review is therefore dismissed.

II. Background

[3] Mr. Li is a citizen of China. He came to Canada in December 2008 on a study permit, which remained valid until August 30, 2017.

[4] In November 2016, Mr. Li was charged with impaired operation of a motor vehicle, contrary to ss 253(1)(a) and 253(1)(b) of the *Criminal Code*, RSC 1985, c C-46. His trial is currently scheduled for May 2018.

[5] In April 2017, Mr. Li applied for a temporary resident visa. The application form included the question "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?" Mr. Li responded "No".

[6] On May 12, 2017, a procedural fairness letter was sent to Mr. Li to inform him of the possibility that that he might be inadmissible for misrepresentation, because he had failed to declare that he had been charged with a criminal offence. Mr. Li responded with a brief, type-written letter in which he stated that he had misunderstood the question, and he thought it referred only to convictions. He reiterated that he did not have a criminal record, but admitted that he had been arrested and charged with impaired driving and driving "over 80" in Ontario.

III. Decision

[7] On May 30, 2017, the visa officer rejected Mr. Li's application for a temporary resident visa for misrepresentation under s 40(1)(a) of the IRPA, stating:

> Your response to our procedural fairness letter has been reviewed. The application form clearly asks for arrests, charges, or convictions. Information regarding whether you have been charged with an offence anywhere is directly material to an assessment of your admissibility to Canada. Failure to declare previous charges prevents a further examination as to how these charges affect your admissibility.
>
> I have therefore determined that you are inadmissible to Canada for misrepresentation.

IV. Issues

[8] This application for judicial review raises the following issues:

A. Was the visa officer's rejection of Mr. Li's application for a temporary resident visa unreasonable because the misrepresentation was not material?

B. Did the visa officer unreasonably fail to consider whether Mr. Li should benefit from an exception?

V. Analysis

[9] A visa officer's finding of misrepresentation under s 40(1)(a) of the IRPA is subject to review against the standard of reasonableness (*Seraj v Canada (Citizenship and Immigration),*

2016 FC 38 at para 11). The Court will intervene only if the decision falls outside the 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).

A. *Was the visa officer's rejection of Mr. Li's application for a temporary resident visa unreasonable because the misrepresentation was not material?*

[10] A finding of inadmissibility under s 40(1)(a) of the IRPA requires that a visa officer be satisfied that: (1) a direct or indirect misrepresentation has occurred; and (2) the misrepresentation could induce an error in the administration of the IRPA (*Bellido v Canada (Citizenship and Immigration)*, 2005 FC 452 at para 27).

[11] Mr. Li says that a charge of impaired driving in Canada is immaterial to an application for a temporary visitor permit, because Canadian criminal charges alone have no immigration consequences. He relies on the following provisions of the IRPA:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for:	36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
[…]	[…]

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
36 (2) A foreign national is inadmissible on grounds of criminality for:	36 (2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence[.]	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits[.]

[12] Mr. Li argues that a person who is charged with an offence in Canada, but not convicted, is not inadmissible. Paragraphs 36(1)(a) and 36(2)(a) both require convictions, and s 36(1)(c) applies only where an act was committed outside of Canada. He therefore maintains that his charge of impaired driving was immaterial to his application. Furthermore, he says that background checks are completed for all applicants, and the charges would inevitably have been discovered despite his inadvertent misrepresentation.

[13] The Respondent replies that full disclosure by applicants is necessary to ensure the proper and fair administration of the immigration scheme (*Cao v Canada (Citizenship and Immigration)*, 2010 FC 450 at para 28). A misrepresentation need not be decisive or

determinative in order to be material. It will be material if it is sufficiently important to affect the process (*Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25 [*Oloumi*]). What matters is whether untruthful or misleading answers have the effect of foreclosing or averting further inquiries, even if those inquiries may not reveal an independent ground of deportation (*Canada (Manpower and Immigration) v Brooks*, 36 DLR (3d) 522 at 537).

[14] In *Patel v Canada (Citizenship and Immigration)*, 2017 FC 401 [*Patel*], a visa application was denied for misrepresentation because the applicant failed to disclose that he had been charged with impaired driving in Canada, even though the charges had been withdrawn. Justice James Russell upheld the decision, noting that "the Visa Officer may well have wanted to investigate the charges and the arrest herself" (*Patel* at para 70).

[15] Mr. Li acknowledges that *Patel* is on all fours with this case. However, he urges the Court not to follow *Patel*, because all of the cases cited by Justice Russell at paragraphs 71 to 73 of his decision involved applicants who had been charged outside of Canada.

[16] A judge should ordinarily follow a previous decision of the Court unless the facts differ, a different question is asked, the decision is clearly wrong or the application of the decision would create an injustice (*Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at para 45). In this case, I see no reason to depart from the Court's analysis in *Patel*. Justice Russell elaborated on the rationale for his decision at paragraphs 77 to 81:

> [77] As the jurisprudence cited above make[s] clear, the materiality analysis is not limited to a specific point in the application process. A visa officer can look at the information at the time of the misrepresentation – in fact, the jurisprudence shows that if a

> misrepresentation is made before a procedural fairness letter and later clarified or corrected after the issuance of a procedural fairness letter, it still constitutes misrepresentation and the visa officer is entitled to refuse the application.
>
> […]
>
> [81] In my view, then, the jurisprudence indicates that a visa officer can still assess admissibility based upon the charges even if there is no eventual conviction – whether this occurs through withdrawal, amnesty, or acquittal.

[17] The temporal dimension of the misrepresentation is more significant in this case than it was in *Patel*. At the time Mr. Li submitted his application, the criminal charges were still outstanding (as they are today). I cannot accept Mr. Li's argument that his misrepresentation was immaterial because it would inevitably have been discovered. The duty of candour is not minimized in situations where the misrepresentation is caught by immigration officials prior to the final decision being made. This would be contrary to the intent, objectives and provisions of the IRPA (*Patel* at para 47, citing *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 9714 at paras 19-20, 43).

[18] I therefore conclude that the visa officer reasonably found that Mr. Li's application for a temporary resident visa included a material misrepresentation contrary to s 40(1)(a) of the IRPA.

B. *Did the visa officer unreasonably fail to consider whether Mr. Li should benefit from an exception?*

[19] Mr. Li says that *Medel v Canada (Employment and Immigration)*, [1990] 2 FC 345 (FCA) [*Medel*] permits an exception to be made where applicants are able to demonstrate that

they honestly and reasonably believed that they were not withholding material information. Mr. Li argues that the visa officer had a legal duty to consider whether the *Medel* exception applied, and to give reasons for not granting it.

[20] An application for a temporary resident visa attracts a minimal standard of procedural fairness (*Oloumi* at para 44). The applicants in *Oloumi*, as in this case, were facing not only the possibility that their applications might be rejected, but also a finding of inadmissibility pursuant to s 40(1)(a) of the IRPA. Like Mr. Li, they were sent a procedural fairness letter and given an opportunity to respond.

[21] Mr. Li responded to the procedural fairness letter with nothing more than a bald assertion that he had misunderstood the question. However, as the visa officer noted, "the application form clearly asks for arrests, charges, or convictions". Given the clear language of the application form, and Mr. Li's failure to provide a reasonable explanation for his mistake, I am not persuaded that the visa officer was obliged to consider the *Medel* exception or explain why it did not apply in this case.

[22] The exception in *Medel* is relatively narrow (*Oloumi* at para 36). A determinative factor in *Medel* was that the applicant *reasonably believed* that she was not withholding information from Canadian authorities. Indeed, knowledge of the information withheld in *Medel* was beyond the applicant's control. By contrast, Mr. Li simply failed to ensure the accuracy of his application form.

[23] I therefore conclude that the visa officer was not obliged to consider whether Mr. Li might benefit from the *Medel* exception, or give reasons for not granting it.

VI. Conclusion

[24] Despite the able submissions of counsel for the Applicant, I am not persuaded that the visa officer's decision was unreasonable. The application for judicial review is dismissed. Neither party identified a question to be certified for appeal, and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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