Federal Court  Cour fédérale

Date: 20180209

Docket: IMM-3676-17

Citation: 2018 FC 159

Ottawa, Ontario, February 9, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MICHAEL ROBINSION

Respondent

JUDGMENT AND REASONS

[1] The Immigration Appeal Division [IAD] dismissed an appeal by the Minister of Public Safety and Emergency Preparedness from a decision of the Immigration Division [ID] with respect to Mr. Robinson. The ID found that Mr. Robinson was not inadmissible to Canada for misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. That provision provides: "A permanent resident or a foreign national is inadmissible for misrepresentation 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."

[2] Mr. Robinson is a citizen of the United Kingdom, and a foreign national in the eyes of Canada. He has been in Canada on work permits from 2004 to the present, with a few gaps.

[3] The Minister alleges that Mr. Robinson misrepresented the facts when, in his 2008 work permit application, he answered "No" to the question: "Have you or any of your family members in Canada ever been convicted of or charged with any crime or offence in any country?" His applications prior to 2008 were unavailable as they had been destroyed by the Minister.

[4] In 2002, Mr. Robinson was convicted under the *Road Traffic Act* and *Road Traffic Offenders Act* in the United Kingdom for driving a motor vehicle with alcohol in his bloodstream in excess of the maximum permitted. He was sentenced to 40 hours of community service and had his driving privileges suspended for 30 months.

[5] The determinative issue before the ID was whether, notwithstanding the misrepresentation, the innocent mistake exception applied. That exception arises from the decision of the Federal Court of Appeal in *Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345. In determining whether the misrepresentation was an innocent mistake, one asks whether the person honestly and reasonably believed that no misrepresentation was being made.

[6] There are thus two aspects to the test. The first is a subjective aspect; the decision-maker must ask whether the person honestly believed that he was not making a misrepresentation. The second is an objective aspect; the decision-maker must ask whether it was reasonable on the facts that the person believed that he was not making a misrepresentation.

[7] The relevant portion of the decision of the ID relating to the exception is as follows:

> Mr. Robinson's position is credible and sincere. His failure to disclose the conviction was an innocent mistake in the sense that he sincerely and reasonably believed that he was not misrepresenting information in his application.

[8] Where a person is found to be credible and he or she testifies that the belief was honestly held, the first aspect of the test – the subjective aspect – has been satisfied. However, credibility does not address the reasonableness of the belief – it does not address the objective aspect of the test which is to be determined based on all the facts before the decision-maker. I agree with the Minister that the ID gave no reasons as to why it found on the evidence before it that the belief was reasonable.

[9] The error of law identified by the Minister in his submissions to the IAD was the ID's application of the "honest and reasonable" exception to misrepresentation to the facts before it. In the Minister's view, it was not reasonable for Mr. Robinson to believe that he was not withholding information, since the question asked him about a conviction for "any crime or offence" not just a criminal conviction, the information was within his control, he knew he had been charged, he had attended court, he was found guilty, he was sentenced and fulfilled that

sentence, "and by his own admission he knew he had been convicted under the Road Traffic Act of the United Kingdom" of an offence.

[10] The IAD dismissed the Minister's appeal. It said that on an "appeal based solely on the law" (which, in the view of the IAD, was what the parties had agreed upon at a pre-hearing meeting) it could not go behind the ID's finding of fact, which it described as follows:

> The ID heard Mr. Robinson's oral testimony in addition to considering the documentary evidence before it, and considered submissions on law and fact from counsel to the respective parties. It is not my role in an appeal based solely on the law to go behind the ID's finding of fact. In sum, the ID found Mr. Robinson's testimony to be credible and, when it weighed the documentary and *viva voce* evidence before it on the balance of probabilities, concluded that the preponderance of the evidence supported the respondent's submission that the facts established that the legal test for an "innocent exception" had been met.

[11] Like the ID, the IAD expressed no reason at all, other than it could not go behind the ID's finding of facts, as to why it found that Mr. Robinson reasonably held the belief that he had not misrepresented his record.

[12] In my view, the IAD made a similar error to that made by the ID.

[13] The Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at paragraphs 20 and 22, reminded us that it held in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR817 that "in certain circumstances", the duty of procedural fairness

will require “some form of reasons” and that “the breach of the duty of procedural fairness is an error of law.” In sum, the failure to give any reasons where they are required is an error of law.

[14] In *Newfoundland Nurses* the Supreme Court of Canada informed us that if the reasons allow the reviewing court to understand why the decision-maker reached the decision it did, and permit the reviewing court to determine whether that conclusion was within the range of acceptable outcomes, then the criteria in *Dunsmuir v New Brunswick*, 2008 SCC 9, are met.

[15] In this case, neither the ID nor the IAD offer any reason for holding that the belief of Mr. Robinson was a reasonably held belief.

[16] Both the ID and the IAD state that they reviewed the materials before them. But because there are no reasons given, neither provides any insight as to what weight was given to the evidence that it considered as relevant to the reasonableness finding. Furthermore, neither outlines what evidence is relevant to the reasonableness finding.

[17] The IAD accepts that another decision-maker may have reached a different result. That proves that the evidence in the record does not lead inexorably to the conclusion the ID reached. Because a contrary decision could have been reached, in the absence of any reasons for the finding regarding the reasonableness of the belief, it is quite impossible to ascertain the basis on which that decision was made. This applies equally to the ID as it does to the IAD decision. Absent reasons for the reasonableness determination, no review is possible. That explains why

in this case reasons for that finding are required, and why the failure to provide them is an error of law.

[18] The decision under review must be set aside. It was an error of law for the ID to fail to provide any reasoning as to how it arrived at the conclusion that the belief held by Mr. Robinson was a reasonably held belief. Even if, in this case, the IAD was restricted to examining errors of law alone in the underlying decision – this it did not do. It failed to address this error of law in the ID decision. Had it done so, and because it is a *de novo* appeal, it should have reached a decision, with reasons, as to why the belief was, or was not, reasonable given the evidence in the record. Instead, it committed the same error as the ID. It failed to provide any reasons for accepting the determination of the ID that the reasonableness of the belief had been established on the evidence presented.

[19] The Minister's appeal is remitted back to the IAD for a decision in keeping with these reasons.

[20] This case turns on its facts and there is no question that meets the criteria for certification.

JUDGMENT in IMM-3676-17

THIS COURT'S JUDGMENT IS that the application is allowed, the appeal is remitted back to the Immigration Appeal Division for determination, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3676-17
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