Federal Court

Cour fédérale

Date: 20180831

Docket: IMM-4869-17

Citation: 2018 FC 880

Ottawa, Ontario, August 31, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DA ZHOU

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of China. He has applied for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*] of a decision by an officer [Officer] of the Immigration Division to issue an exclusion order against him for misrepresentation pursuant to paragraph 40(1)(a) of the *IRPA*. For the reasons that follow the application is dismissed.

II. Background

[2] The Applicant was issued a student visa on May 28, 2009 and arrived in Canada on January 2, 2010. He studied English at the University of Alberta from January 2010 until August 2013. He renewed his study permit twice, on September 5, 2012 and on April 19, 2013. After the Applicant completed his English courses at the University of Alberta, his friend recommended that an immigration consultant [the Consultant] help him renew his study permit and apply to other schools. The Applicant sought help from the Consultant to transfer to a different school to study engineering.

[3] The Applicant agreed with the Consultant's suggestion that he apply exclusively to schools in Ontario because of the high quality of the schools in that province. He paid the Consultant $2,050 in December 2013 to cover his fees and school applications. From November 21, 2013 until February 21, 2014, the Applicant was under the impression that he could renew his study permit *after* he received an offer from a school. Thus, the Applicant had instructed the Consultant to only apply to schools and not for a study permit.

[4] The Applicant, after learning that the Northern Alberta Institute of Technology [NAIT] had a reputable engineering program, told the Consultant in January 2014 that he did not want to attend a school in Ontario, that he no longer required his services, and that he wanted a refund. However, the Consultant informed Applicant that he had already received an offer to attend a school in Ontario and, contrary to the Applicant's instructions, he had used the offer to renew the

Applicant's study permit. The Applicant did not ask the Consultant which school he had been accepted to because he had no interest in studying in Ontario.

[5] The Consultant told the Applicant to pay an additional $805 for the study permit. When the Applicant refused, the Consultant told him that he could use the study permit to attend NAIT. The study permit was granted on February 21, 2014, after which the Consultant sent the study permit to the Applicant on February 27, 2014. The Applicant paid the Consultant the additional $805.

[6] The Applicant applied to NAIT in June 2014, but the program was full. The Applicant re-applied to NAIT in October 2014, was accepted to the program, and began studying at NAIT in September 2015. However, Citizenship and Immigration Canada sent the Applicant a letter on May 29, 2015 stating that he failed to attend an admissibility hearing in Toronto on August 20, 2014. The Applicant says he was not notified about an admissibility hearing and was unaware of any issues with his study permit until he received the letter. The admissibility hearing related to the Consultant having included a fraudulent acceptance letter from Centennial College in the study permit application.

[7] The Applicant's admissibility hearing was held on September 6, 2017 wherein the Minister alleged that the Applicant was inadmissible for misrepresentation pursuant to paragraph 40(1)(a) of the *IRPA*.

[8] The Officer found that the Applicant was aware in either late January or early February 2014, at least two weeks before the application was approved, that the Consultant had submitted the unauthorized study permit application.

[9] The Officer held that the Applicant had a duty to inform immigration officials that the Consultant had submitted the study permit application without his knowledge and consent and thus the Applicant failed to act diligently over the application. The Officer relied on *Goudarzi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 425 [*Goudarzi*] for the proposition that an applicant has a continuous duty of candour, even when represented by counsel, including ensuring that an application is complete and accurate.

[10] The Officer found that the Applicant was responsible for the material misrepresentation that occurred when the Consultant submitted a fraudulent acceptance letter as part of the Applicant's study permit application. As a result, the Officer held that the Applicant was a foreign national who was inadmissible for misrepresentation pursuant to paragraph 40(1)(a) of the *IRPA* for directly or indirectly misrepresenting or withholding material facts relating to a matter that induces or could induce an error in the administration of the *IRPA*.

III. Statutory Provisions

[11] Paragraph 40(1)(a) of the *IRPA* explains the circumstances in which a permanent resident or foreign national may be found inadmissible for misrepresentation:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or	**40 (1)** Emportent interdiction

a foreign national is inadmissible for misrepresentation	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;

IV. Issues

[12] This matter raises the following issues:

(1) What is the applicable standard of review?

(2) Did the Tribunal err in law by interpreting paragraph 40(1)(a) to include situations where the applicant is not aware of the existence of an application until after it is submitted and the misrepresentation has already occurred?

(3) Did the Tribunal err in finding that paragraph 40(1)(a) applies to the facts of this case by failing to engage in a meaningful analysis of the honest and reasonable belief exception?

V. Analysis

A. *What is the applicable standard of review?*

[13] The Applicant in written submissions argued that the standard of review regarding the second issue is correctness because it concerns an issue of statutory interpretation, namely, whether the Officer correctly interpreted and applied paragraph 40(1)(a) of the *IRPA*. In oral argument counsel for the Applicant acknowledged that the applicable standard of review for the

second issue is reasonableness. The Applicant says that the third issue involves a question of mixed fact and law that is reviewable on a standard of reasonableness.

[14] Regarding the second issue, the Respondent contends that a tribunal's interpretation of its home statute is, in fact, reviewable on a reasonableness standard. The Respondent argued that both this Court and the Supreme Court of Canada have affirmed that deference will normally apply where a tribunal is interpreting its home statute, even on questions of law, except in categories of cases where the standard remains that of correctness.

[15] The Respondent agrees with the Applicant that the standard of review for the third issue is reasonableness.

[16] This Court agrees with counsel that the applicable standard of review is reasonableness for both issues. The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether 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).

B. *Did the Tribunal err in law by interpreting paragraph 40(1)(a) to include situations where the applicant is not aware of the existence of an application until after it is submitted and the misrepresentation has already occurred?*

[17] The Applicant submits the Officer interpreted paragraph 40(1)(a) of the *IRPA* in an overbroad manner when considering the finding of fact that the Consultant submitted the application, including the fraudulent document, without the Applicant's knowledge. The

Applicant adds that even if he had been more proactive, as the Officer suggests he ought to have been, and had contacted immigration authorities to advise them that the Consultant had submitted an application without his knowledge, he still would have committed a misrepresentation since misrepresentation is assessed at the moment an application is submitted.

[18] The Respondent submits that the Applicant's concession that a misrepresentation occurred, on its own, is sufficient to trigger paragraph 40(1)(a) of the *IRPA* because the provision also captures unintentional misrepresentations. Moreover, the Respondent argues that the Applicant is captured by paragraph 40(1)(a) because the misrepresentation was material to the assessment of the study permit application and could have affected the process.

[19] The applicable authority is (*Kazzi v Canada (Minister of Citizenship and Immigration),* 2017 FC 153 at para 38). In that case, Justice Gascon listed factors that must be considered when assessing whether paragraph 40(1)(a) of the IRPA has been met. The applicable factors are listed below:

> (4) an applicant has the onus and a continuing duty of candour to provide complete, accurate, honest and truthful information when applying for entry into Canada;
>
> (10) the assessment of whether a misrepresentation could induce an error in the administration of the IRPA is to be made at the time the false statement was made.

[20] This Court is of the view that the key point is that an applicant has a "continuing duty" of candour. The Applicant argued that even if an applicant was to correct a misrepresentation once they are aware of it, that this would enable an immigration officer to still deem them inadmissible since the application would have already been made. This is speculative. An

immigration officer is expected to review an application on its face and look at any actions of an applicant that could assist an application including a continuing duty of candour.

[21] The record illustrates that the Applicant was aware that an application was submitted on his behalf at least two (2) weeks before the actual acceptance of that application. He did nothing to view the application, let alone correct any issues that he may have noticed from the application.

[22] This Court finds that the Applicant relied on the Consultant to his detriment. Although there was no formal engagement of the Consultant by the Applicant, he nevertheless allowed the Consultant to continue to represent him and he even paid him additional sums of money once the application, that he did not authorize, was processed in his favour.

[23] Since the Officer considered all of the applicable sections of the *IRPA* and the case law, and applied those principles to the facts, this Court finds that there was no reviewable error by the Officer. This aspect of the decision is reasonable.

C. *Did the Tribunal err in finding that paragraph 40(1)(a) of the IRPA applies to the facts of this case by failing to engage in a meaningful analysis of the honest and reasonable belief exception?*

[24] The Applicant says that since he did not know that an application was submitted, the proposition in these cases, that an applicant has a duty of candour to provide complete, honest and truthful information when applying for entry into Canada, does not apply to the case at bar. The Applicant says that the exceptional circumstance of a defence against a finding of

misrepresentation applies in this case since he honestly and reasonably believed that he was not withholding or misrepresenting information as he did not know that the Consultant had submitted an application in the first place.

[25] The Applicant cites *Goudarzi* where Justice Tremblay-Lamer noted that while the general rule is that an applicant is culpable of misrepresentation even when it occurs without his or her knowledge, a finding of misrepresentation will not be made under 40(1)(a) of *IRPA* in "truly exceptional circumstances where the applicant honestly and reasonably believed they were not misrepresenting a materials fact" (*Goudarzi* at para 33).

[26] The Respondent submits that the Officer had the discretion to infer from the facts that the Applicant's misrepresentation was neither honest nor reasonable, and that the narrow exceptions to paragraph 40(1)(a) of the *IRPA* did not apply.

[27] This Court is persuaded by the argument of the Respondent. The Applicant became aware of the application at least two weeks before the application was approved and once he knew about the existence of that application it cannot be said that he honestly or reasonably believed he was not misrepresenting anything. He became aware of the application and did not ask for a copy of it. The Applicant failed to exercise proper diligence to his own detriment. The Applicant did not fall within the narrow exception.

[28] There is also authority that sets out that it is no defence to an inadmissibility hearing that the applicant was duped by a fraudulent immigration consultant. In *Tofangchi v Canada*

(Minister of Citizenship and Immigration), 2012 FC 427, Justice Tremblay-Lamer elaborated on this point:

> [51] The Court acknowledges that the problem of fraudulent immigration consultants is a serious one. However, this problem does not amount to a *defence* against the operation of section 40(1)(a). Furthermore, subject to the narrow exception discussed above, this Court has consistently found that an applicant can be inadmissible under section 40(1)(a) for misrepresentations made by another without the applicant's knowledge. There can thus clearly be no subjective intent or knowledge requirement to section 40: this would be contrary to the broad interpretation that the wording and purpose of the provision requires.

[29] The Applicant had a continuing duty of candour that he did not comply with. He became aware of circumstances that may impact his application but did nothing about it. The integrity of the immigration system as set out in the *IRPA* required him to exercise this duty. He did not do so to his detriment.

[30] This Court finds no reviewable error on the part of the RAD. The decision is within the range of possible, acceptable outcomes in respect of the facts and law. Accordingly, the application for judicial review is dismissed.

[31] Neither party has suggested a question for certification and none arises.

JUDGMENT in IMM-4869-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4869-17
STYLE OF CAUSE:	DA ZHOU v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 30, 2018
JUDGMENT AND REASONS:	FAVEL J.
DATED:	AUGUST 31, 2018

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