Federal Court  Cour fédérale

Date: 20191206

Docket: IMM-1934-19

Citation: 2019 FC 1462

Ottawa, Ontario, December 6, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ROOPANDEEP KAUR MAHAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application by Roopandeep Kaur Mahal challenging the decision of an Immigration Officer (Officer) dated February 28, 2019, refusing a Temporary Resident Visa (TRV) on the basis of a misrepresentation.

[2] Ms. Mahal came to Canada as a student in August 2011. She obtained a Business Administration Diploma from the Northern Alberta Institute of Technology in January 2014.

Shortly thereafter, she applied for a post-graduation work permit and was nominated under the Alberta Immigrant Nominee Program as a potential candidate for permanent residency. On December 10, 2016, Ms. Mahal applied for permanent residency under the provincial nomination. Less than two weeks later she was charged with theft for stealing merchandise from Sears. Needless to say, this criminal history had the potential to impact Ms. Mahal's immigration status.

[3] Fortunately for Ms. Mahal, on her first appearance in Court, she was offered the chance to avoid a conviction by entering the Alternative Measures Program (AMP). The prosecution was adjourned for four months to allow her to complete the AMP process. Ms. Mahal again appeared before the Court on July 6, 2017 and, having successfully fulfilled the AMP requirements, the Crown withdrew the criminal charge. If matters had ended there, Ms. Mahal would not likely have faced significant immigration problems. However, Ms. Mahal further compromised her immigration status when, on May 15, 2017, she applied for an extension to her work permit. In answer, to the question: "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country or territory?", Ms. Mahal wrongly answered "No". It is important to understand that when Ms. Mahal gave this incorrect answer she was still facing a charge of theft. It was not until 3 weeks later that the theft charge was withdrawn. Ms. Mahal's work permit was subsequently reissued on July 20, 2017.

[4] At the same time, Ms. Mahal's application for permanent residency continued to be processed. Part of that process required the submission of an RCMP criminal record check, which, of course, turned up Ms. Mahal's criminal charge. In late 2017, Ms. Mahal's

immigration consultant provided the RCMP record to Immigration, Refugees and Citizenship Canada (IRCC) along with an explanation that the charge had been withdrawn.

[5] On June 5, 2018, Ms. Mahal again applied to extend her work permit and, once again, she answered "No" when asked if she had ever been criminally charged. The work permit was reissued on July 24, 2018.

[6] Ms. Mahal returned to India in late 2018 to visit her family. Because she had no immigration status to permit a return to Canada, she applied for a TRV. Once again, she answered "No" to the question concerning criminal charges. It was at this point that Ms. Mahal's three denials caught up with her. On February 4, 2019, the Officer wrote a fairness letter to Ms. Mahal disclosing the following concerns:

> We are in receipt of information indicating that you were charged in Canada with a criminal offence on or around 2016/12/23. However, I note that on each of your three subsequent applications to IRCC, you responded "No" to the question, "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country or territory?"
>
> The questions on an immigration application are put forth to you in order to have you disclose, truthfully, facts that are material to the proper assessment of your eligibility for the requested document and of your admissibility to Canada. Furthermore, the question above does not exclude you from being required to disclose charges that have been withdrawn.
>
> I also note, in particular, that on the date of your first application subsequent to that criminal charge, the charge was not yet known to IRCC as having been withdrawn.
>
> As such, I am concerned that your withholding of this information was liable to induce an error in the administration of the Act and that you are inadmissible to Canada for misrepresentation.
>
> Please note that if it is found that you have engaged in misrepresentation in submitting your application, you may be

> found to be inadmissible under section 40(1)(a) of the **Immigration and Refugee Protection Act**. A finding of such inadmissibility would render you inadmissible to Canada for a period of five years according to section 40(2)(a)[.]

[7] Ms. Mahal's immigration consultant responded to the fairness letter with a three-page reply. He sought to excuse Ms. Mahal's erroneous answers on the basis of her asserted misunderstanding that "withdrawn charges do not constitute charges" and because the answers she gave were "immaterial". He also pointed out that Ms. Mahal had disclosed the criminal charge in the context of her pending application for permanent residency and it was, thus, known to the IRCC.

[8] The Officer did not accept Ms. Mahal's explanations and, by letter dated February 28, 2019, he refused her application for a TRV. The basis of that decision is contained in the following note to file:

> The client has responded to our procedural fairness letter. The client has responded with a letter from her representative. The representative indicates that the charges were withdrawn and as such, it as if they never occurred and therefore, the representative contends that they do not need to be declared. The representative also contends that the withdrawn charges in this case are not material. With regard to the latter argument, I am satisfied that criminal charges, whether withdrawn or not are material to the application in that fulsome information regarding prior criminality is clearly material to a criminal admissibility assessment. The information withheld need not necessarily lead to an error in the administration of the Act, but I note is could affect the process undertaken. In this case, the process undertaken could have been affected (i.e. the officer may have needed to confirm that the charges were withdrawn, etc.). With regard to the former argument, I note that the question asked of the client does not indicate that withdrawn charges do not need to be declared. The fact that the charge was subsequently withdrawn does not mean that it never occurred in the first case. Much like an arrest that does not result in a charge, it must nevertheless be declared in

> response to the relevant question so that an officer has all of the facts to make an informed assessment of admissibility. I note that the charge appears on the client's criminal record provided by the R[C]MP and therefore clearly it is not as if it never existed. I note that the client is responsible for the information provided in the application package. As such, I am satisfied that the client misrepresented or withheld a material facts or material facts relating to a relevant matter in the application package by: - omitting information related to a criminal charge in Canada. I am satisfied that this misrepresentation or omission could have induced an error in the administration of the Act. As such, I find that the client is inadmissible to Canada.

[9] Ms. Mahal contends that the Officer's decision is unreasonable and tainted by procedural unfairness. The Respondent argues that the decision was reasonably based on the evidentiary record, and accords with the strict duty of candour under section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] .

I. Is the Officer's Decision Reasonable in all the Circumstances?

[10] Ms. Mahal does not deny that she provided erroneous answers on three separate applications to IRCC when asked if she had ever been criminally charged. She contends, however, that her mistaken answers were based on an innocent misunderstanding of the law, and that the errors were effectively corrected in her later application for a permanent residency visa. These explanations, she says, place her situation squarely within the innocent mistake exception to a misrepresentation finding articulated in IRCC inadmissibility guidelines, and as recognized in some decisions of this Court: see *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117, [2011] FCJ No 1372 (QL) [*Berlin*], and *Koo v Canada (Minister of Citizenship and Immigration)*, [2009] 3 FCR 446, [2008] FCJ No 1152. According to this argument, it was

unreasonable for the Officer not to have applied this exception when considering her application for a TRV.

[11] Firstly, I do not accept Ms. Mahal's argument that her answers, though wrong, were immaterial to her TRV application. She gave the same incorrect answer on three separate occasions, including in her application for a TRV. The Officer was entitled to a correct answer so that further enquiries could be made. Whether or not those enquiries would have made a difference is not the issue. What is important is whether avenues of further enquiry that could have been material to the decision were foreclosed. Indeed, as the Officer noted, at a minimum, a verification of the withdrawal of the charge would have been expected. There is a reason why criminal histories are considered to be important throughout Canada's immigration system. It is difficult to think of any issue that has a higher level of potential materiality than that of an applicant's criminal history: see *Patel v Canada (Citizenship and Immigration)*, 2017 FC 401 at paras 81-85, 279 ACWS (3d) 810.

[12] The suggestion that the submission of the correct information in Ms. Mahal's permanent residency application wholly vitiates the legal significance of her three wrong answers is not persuasive. On the occasion of Ms. Mahal's first misstatement, her criminal charge was still outstanding. The significance of this point was indicated in the Officer's fairness letter. It is simply implausible that Ms. Mahal was labouring under a misunderstanding of the question posed to her. The fact that her work permit was reissued a few days later ought not to have caused her to think that her answer was acceptable.

[13] The fact that Ms. Mahal provided the same incorrect information on two subsequent occasions is not automatically excused by her provision of accurate information in support of her application for permanent residency. If the disclosure of her criminal history in the context of that application was Ms. Mahal's excuse for her later answers, one is left to wonder as to the reasons behind her inconsistencies. It is equally plausible that, having gotten away twice with those answers, she tried once more on the TRV application. I accept that there are cases like *Berlin*, above, where the immigration record contains the correct information and this may be helpful to establish an honest error or a lapse in memory. The Officer was not obliged, however, to accept Ms. Mahal's explanations at face value. It is apparent from his reasons that he did not accept Ms. Mahal's claim to have misunderstood the question on three separate applications. This was a reasonable conclusion on the evidence. Ms. Mahal is well educated and the question about criminal charges was very clear on its face. These circumstances do not readily support a finding of innocent error and it was not unreasonable for the Officer to find that Ms. Mahal had misrepresented her criminal history in contravention of section 40 of the IRPA.

II. Fairness and Reasonable Expectations

[14] I can identify no breach of procedural fairness in the way this matter was processed by the Officer. A fairness letter was sent to Ms. Mahal setting out the Officer's concerns, and she gave a detailed response that the Officer took into account. Ms. Mahal was not entitled to any particular outcome. She did have a right to due process and she received it.

[15] There is also no basis for a finding that Ms. Mahal was misled, or had a reasonable expectation from her earlier applications that her TRV answer would be accepted or acceptable.

It would only encourage untruthfulness if an applicant could misrepresent a material fact on one occasion in the hope it might be overlooked, and then claim to have a reasonable expectation that a later identical misrepresentation would have to be excused.

[16] Neither party proposed a certified question, and no issue of general importance arises on this record.

JUDGMENT in IMM-1934-19

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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