Federal Court Cour fédérale

Date: 20240112

Docket: IMM-5929-22

Citation: 2024 FC 49

Ottawa, Ontario, January 12, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

AZIS SHARSHEEV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of Kyrgyzstan, seeks judicial review of the decision made by an Immigration, Refugees and Citizenship Canada [IRCC] officer [Officer] on June 20, 2022 refusing the Applicant's application for a temporary resident visa [TRV] and finding that he was inadmissible to Canada in accordance with paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for misrepresenting or withholding material facts relating to a relevant matter that induced or could induce an error in the administration of the *IRPA*.

Specifically, the Applicant failed to disclose in his application for the TRV that US authorities had previously refused to issue him a visa.

[2] For the reasons that follow, the application for judicial review shall be granted.

I. Background

[3] In February of 2020, the Applicant applied for a TRV to visit Canada, the purpose of his trip being to visit the Winkler & District Chamber of Commerce and attend their Annual General Meeting in Winkler, Manitoba. In his TRV application, the Applicant answered "no" to the following question: "[h]ave you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?".

[4] On March 4, 2020, the Applicant received a procedural fairness letter [PFL] from IRCC advising that he might be inadmissible to Canada for misrepresentation. Specifically, the PFL stated the Applicant may be inadmissible due to failure "to disclose adverse immigration information such as prior visa refusals". The letter warned that if the Applicant is found to have engaged in misrepresentation, he may be found inadmissible under section 40(1)(a) of the *IRPA* and that such a finding may render him inadmissible to Canada for five years.

[5] The Applicant responded by a letter dated March 5, 2020, wherein he explained, among other things, that he is an Official Representative of the Chamber of Commerce of Kyrgyzstan to the US. He had previously travelled on multiple occasions to the United States (including a trip in March 2017 and when he was a student in the US from 2007-2009) and holds a valid visa to the

US which expires on June 30, 2021. In March of 2017, he temporarily lost his passport that contained his US visa. As he planned to travel with his family to the US during the first week of May 2017, he applied for a new passport on March 23, 2017 and applied for a US visa to replace the one in his lost passport. However, his request for a replacement US visa was denied. He later found his passport that contained the valid US visa.

[6] The Applicant further stated that when he completed his application for a TRV to Canada in February of 2020, he did not think he needed to answer "yes" to the question at issue because he did not know if the decision of the US authorities in 2017 not to issue a replacement visa (as he understood it) would be considered a refusal, since he still held a valid US visa.

[7] On December 22, 2020, an officer from IRCC refused the Applicant's application. The Applicant was found inadmissible under paragraph 40(1)(a) of *IRPA* 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 the IRPA". The Applicant sought judicial review of this decision on the basis that the officer did not explain how the non-disclosure was material to the application and that the officer failed to consider the Applicant's explanation. Leave was granted, but the refusal was set aside on the consent of the parties and the application for judicial review was discontinued.

[8] In a second PFL dated December 17, 2021, IRCC informed the Applicant that his application for a TRV had been re-opened for redetermination and gave him 60 days to provide updated information. This letter again warned the Applicant that the IRCC had concerns that he

had not fulfilled the requirement to answer all questions truthfully in accordance with subsection 16(1) of *IRPA*:

> Specifically, I have concerns that you have failed to fully disclose adverse immigration information from other countries such as visa application refusals or other enforcement action. You have failed to disclose a previous USNIV refusal when asked if you had ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory.
>
> This is material to the assessment of your application.

[9] In a letter dated January 28, 2022 from the Applicant's counsel to the Officer, the Applicant provided further information to address the IRCC's concerns [Response Letter]. The Response Letter notes that the Applicant did not intend to withhold any information and made an innocent mistake. Applicant's counsel provided the following explanation for the Applicant's error:

> The facts surrounding this omission are as follows. My client had received a US visa and had spent considerable time in the United States. He returned from the US to his home country of Kyrgyzstan in March 2017. He misplaced his passport in March, 2017. He applied for a new passport at the end of March, 2017. He wished to take his entire family to the United States for a visit so he could introduce them to the families that had hosted him while he studied there. He applied for visas for the entire family in April, 2017 and they were all refused.
>
> After he applied for the visas he found the previous passport which had been misplaced which continued to have the valid US visa in it. Several years later, in 2020, he applied for a new Canadian visa for himself so he could visit Winkler. His trip is motivated by an invitation and his role as an emissary for the Kyrgyzstan Chamber of Commerce to promote trade between Canada and Kyrgyzstan. He neglected to mention the US visa refusal because he had the old passport with the valid US visa in it. The error was an innocent mistake as he had no intention to withhold the information and no reason to do so as he had received a visa in the past and indeed at the time of the application he had a valid US vistor's visa valid until June, 2021.

[10] Furthermore, the Applicant's counsel provided additional supporting documentation (including the US visa valid until June 2021) and made the following legal argument in the Response Letter:

> In terms of the issue of misrepresentation, Mr. Sharsheev accepts that he made a mistake when he answered the question […] but submits that it was an innocent mistake and given his extensive travel history, the fact that he had a valid US visa that was issued before and had travelled to the US, it was not material to the application.
>
> In the alternative, if you conclude that that [*sic*] my client was required to disclose this information, I would submit that it should be considered an innocent mistake given the circumstances of the case. The courts have carved out a narrow exception to the rule that subjective knowledge of the misrepresentation is not required for a finding of admissibility pursuant to s. 40. This exception occurs when the individual honestly and reasonably believes that they were not misrepresenting a material fact. [Emphasis added]

[11] By letter dated June 20, 2022, the Officer refused the Applicant's TRV, stating:

> ● You have been found inadmissible to Canada in accordance with paragraph 40(1)(a) of the Immigration and Refugee Protection Act (IRPA) 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 the IRPA. In accordance with paragraph A40(2)(a), you will remain inadmissible to Canada for a period of five years from the date of this letter or from the date a previous removal order was enforced.
>
> ● I am not satisfied that you have truthfully answered all questions asked of you.
>
> ● The purpose of your visit to Canada is not consistent with a temporary stay given the details you have provided in your application.
>
> ● I am not satisfied that you will leave Canada at the end of your stay as required by paragraph 179(b) of the IRPR […]. I am refusing

> your application because you have not established that you will leave Canada, based on the following factors: [sic]

[12] In addition to the letter, the Officer's notes from the Global Case Management System [GCMS] also form part of the reasons. In an entry dated February 17, 2022, the Officer stated:

> Applicant seeks to visit Winkler Manitoba from Feb 20th to March 15th and, if coming in Feb, to attend the general meeting on February 24th. Submissions indicate that that applicant seeks to represent and build strong commercial and business relationship ties between Chamber of Commerce and Industry of the Kyrgyz Republic and the Winkler District Chamber of Commerce in addition to organizing a platform where the Winkler and Winnipeg hockey teams could share their knowledge with kyrgyz [*sic*] hockey teams. I note that winkler [*sic*] is a small city of just over 13 000 people. The applicant has failed to satisfy me as to how this community has such significance that it warrants a visit from the national delegation of Kygyzstan [*sic*]. The submission [*sic*] do not demonstrate a sufficient understanding of the area that they seek to visit for the purpose of travel to appear reasonable. No indication hockey teams in the area are aware of intended visit. Based on the applicant's limited employment prospects in their country of residence/citizenship, I have accorded less weight to their ties to their country of residence/citizenship. Weighing the factors in this application. [*sic*] I am not satisfied that the applicant will depart Canada at the end of the period authorized for their stay. Eligibility failed.
>
> Reviewed submissions from rep in response to A40 PFL Applicant applied for a US visa and failed to disclose a refusal. Rep states: "He applied for visas for the entire family in April 2017 and they were all refused." This indicates applicant was aware of the refusal however he did not disclose them on his application. Rep's further explanation that applicant found a previously lost ppt with an old US visa in it that was still valid was why he neglected to mention his previous refusal. I am not satisfied with this response as the previous approval does not mean applicant was unaware of the subsequent refusal. Rep submits mistake was innocent and applicant did not intend to withhold information. As previously noted: there is no requirement within section 40(1)(a) that the misrepresentation be intentional, deliberate or negligent (Bellido at paras 27-28; Bains v Canada (Citizenship and Immigration), 2020 FC 57 at para 63). It is the applicant's responsibility to divulge information relevant and

> material to the case – such as previous immigration history – and failing to do so, even if it is an honest mistake constitutes misrep. Furthermore the prior response to the earlier PFL from the applicant stated: "Because truthfully, I was not sure it had counted as refusal simply because I had existing US B1/B2 Visa on my old passport which had an expiration date on June 30th, 2021." I find this inconsistent with Rep's response indicating that applicant is aware that applications for the family were refused. Furthermore standard operating procedures would ensure that the applicant was informed of the refusal and the reasons for the refusal. Therefore I am not satisfied with applicants [*sic*] explanation that he was not aware or did not understand his refusal. Full disclosure of prior immigration history is relevant to an officer's assessment of an application this includes cases where applicant has prior travel and approvals to a country and then a subsequent refusal. App forwarded to mgr for review.

[13] The Officer sent the reasons recorded in the GCMS notes above to a manager for review. On June 20, 2022, the manager reviewed the case along with the Officer's notes and made the following GCMS entry [collectively, the Decision]:

> Case reviewed along with officer notes, documents on file, new documents submitted by PA and representative, including response to officer's A40 PFL. I note that PA did not disclose his previous US visa refusal, which appears to be his his [*sic*] most recent US visa application. He was presented with the officer's concerns, including related to A40 and I am not satisfied that the response to this letter overcomes these concerns. PA has a responsibility to provide truthful responses to all questions in an application. It is evident that PA was aware that he had been refused entry to the US, after several previous approvals and entries, and failed to disclose this information. As such, I am satisfied that this omission of information is material and relates to a relevant matter that could have induced an error in the administration of the Act. I am satisfied that PA is inadmissible to Canada for 5 years for Misrepresentation pursuant to A40(1)(a).

II. Issues and Standard of Review

[14] The sole issue that arises on this application is whether the Officer's decision was reasonable.

[15] The parties agree and I concur that the applicable standard of review is reasonableness. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8]. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker [see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenjij-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

III. Analysis

[16] Section 40 of the *IRPA* deals with inadmissibility due to misrepresentation. Paragraph 40(1)(a) provides:

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding	a) directement ou indirectement, faire une présentation erronée sur un fait

material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	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;

[17] Subsection 16(1) of the *IRPA* imposes an obligation on applicants to be truthful:

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires	16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

[18] This Court has held that section 40 of the *IRPA* is to be interpreted broadly and that applicants have a duty of candour, which is required to maintain the integrity of the immigration system [see *Bodine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 848 at paras 41-42; *Kobrosli v Canada (Minister of Citizenship and Immigration)*, 2012 FC 757 at para 46].

[19] To trigger inadmissibility under paragraph 40(1)(a), two criteria must be met: (a) there must be a misrepresentation; and (b) the misrepresentation must be material, in that it induces or could induce an error in the administration of the *IRPA* [see S*ingh Dhatt v Canada (Citizenship and Immigration)*, 2013 FC 556 at para 24]. A misrepresentation need not be decisive or determinative to be material. It will be material if it is important enough to affect the process [see *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25].

[20] While the Applicant has raised a number of grounds upon which he asserts that the Officer's decision is unreasonable, I am satisfied that the Officer's consideration of the second criterion is determinative, as the Officer failed to provide adequate reasons to justify their conclusion that the misrepresentation was material.

[21] Neither the Officer nor the reviewing manager provides any justification for why the Applicant's failure to disclose the refusal of his replacement US visa is material to the TRV application. Rather, both simply state that the disclosure is relevant. Although it was open for the Officer and manager to find that the Applicant's omission could have deprived the Officer of the opportunity to inquire into and consider the refusal, the Officer failed to provide reasons to this effect, or to explain how, under the circumstances of this case, the Applicant's failure to disclose the refusal of his *replacement* visa was material and could have induced an error in the administration of the *IRPA*. Contrary to the assertion of the Respondent, I am not satisfied that the materiality of the Applicant's misrepresentation in the particular circumstances of this case is self-evident. While the Officer was not obligated to provide exhaustive reasons, the reasons provided must be intelligible and sufficient to explain the result reached, which was simply not the case here.

[22] Accordingly, I find that the decision is unreasonable and the application shall be granted.

[23] The parties propose no question for certification and I agree that none arises.

JUDGMENT in IMM-5929-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Officer's decision dated June 20, 2022 is hereby set aside and the matter is remitted to a different officer for redetermination.

3. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5929-22
STYLE OF CAUSE:	AZIS SHARSHEEV V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VIDEO-CONFERENCE
DATE OF HEARING:	JANUARY 11, 2024
JUDGMENT AND REASONS:	AYLEN J.
DATED:	JANUARY 12, 2024

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