Federal Court  Cour fédérale

Date: 20110928

Docket: IMM-7436-10

Citation: 2011 FC 1117

Ottawa, Ontario, September 28, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

OLEG BERLIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Oleg Berlin for judicial review of a decision of an Immigration Officer (Officer) denying his application for a permanent-resident visa under the spouse or common-law partner in Canada class. The Officer refused the visa on the basis that Mr. Berlin failed to declare his relationship as the adoptive father of two children from a previous marriage.

[2] When the Officer raised a possible issue of misrepresentation, Mr. Berlin's legal counsel replied on his behalf. Mr. Berlin's counsel argued that Mr. Berlin omitted the two children from his

visa application because he did not believe them to be dependants. In further support for his position, it was pointed out that Mr. Berlin disclosed the existence of the two children in his earlier application for refugee status, in his Personal Information Form, and in other documents submitted with his spousal application.

[3] The Officer did not accept these representations and rejected Mr. Berlin's application on the basis of a misrepresentation under s 40 of the *Immigration Refugee and Protection Act,* SC 2001, c 27 [*IRPA*]. The Officer noted Mr. Berlin's education and experience with immigration proceedings and concluded that "he would have acquired some knowledge as to what was necessary to complete [the] forms accurately and completely". The Officer concluded the decision in the following way:

> Because the applicant is signing a government form, he must bear responsibility that the information given on all forms must be accurate and up to date. It appears that he was not forthright in his application for permanent residence under the spousal class. Having failed to disclose these 2 [dependants], the applicant is inadmissible to Canada under 40(1)(a) of IRPA. As a result his application for permanent residence is therefore refused.

Issues

[4] Should the Court extend the time to bring this application in accordance with the discretion afforded by s 72(2)(c) of the *IRPA*?

[5] Did the Officer err in rejecting Mr. Berlin's application for a permanent resident visa on the basis of a misrepresentation in breach of s 40 of the *IRPA*?

Analysis

A. Should the Court extend the time to bring this application in accordance with the discretion afforded by s 72(2)(c) of the IRPA*?*

[6] This application was submitted out of time by 49 days. In the Order granting leave, Justice Richard Mosley left Mr. Berlin's motion to extend time to the determination of the judge hearing the application.

[7] I am satisfied that this is an appropriate case to extend time to permit the determination of this matter on the merits. The following principles apply to a motion to extend time:

a. there is a continuing intention to pursue the application;

b. the application has some merit;

c. there is no prejudice to the respondent arising from the delay; and

d. a reasonable explanation for the delay exists.

See *Patel v Canada (MCI)*, 2011 FC 670 at para 12, [2011] FCJ no 860 (QL) (TD).

[8] The Respondent argues that the fourth point is not met by the evidence submitted. I do not agree. Mr. Berlin's affidavit explains that the passage of time arose because of his previous counsel's efforts to obtain an acknowledgement from the decision-maker that all of the information submitted had been considered and by a failed attempt to seek a reconsideration of the decision.

[9] Although prudence would suggest that counsel ought to file first and ask questions later, I am satisfied of the reasonableness and sufficiency of the explanation provided. The other three requirements for an extension of time are readily met on the record before me.

B. Did the Officer err in rejecting Mr. Berlin's application for a permanent resident visa on the basis of a misrepresentation in breach of s 40 of the IRPA*?*

[10] This is an issue of mixed fact and law and it is well established that the applicable standard of review for assessing misrepresentation decisions under s 40 of the *IRPA* is reasonableness: see *Ghasemzadeh v Canada (MCI)*, 2010 FC 716 at para 18, 372 FTR 247, and the authorities cited therein.

[11] Although s 40 of the *IRPA* has been the subject of considerable judicial attention, the precise boundaries of the exceptions to its application remain somewhat elusive. Justice Mosley dealt conclusively with the issue of intent in *Chen v Canada (MCI)*, 2005 FC 678 at paras 10-13, [2005] FCJ no 852, where he held:

> 10 The respondent submits that the Board was entitled to rely on Le because it was a case where a parent had failed to disclose the existence of a child. Furthermore, the position in *Le* was recently affirmed in *De Guzman*, supra. The Act and Regulations do not create a distinction between deliberate misrepresentations and innocent misrepresentations, including those made on faulty legal advice. The jurisprudence is clear that clients are to be held to their choice of advisers: *Lopez v. Canada (Minister of Citizenship and Immigration)* IMM-3999-01 (December 13, 2001); *Cove v. Canada* [2001] F.C.J. No. 482, 2001 FCT 266.
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> 11 The reference in *De Guzman* to "fraudulent concealment" was made in the context of Justice Kelen's analysis in that case of whether the regulation was ultra vires the enabling statute. I do not read the paragraph in which those terms are found as limiting the scope and effect of paragraph 117(9)(d) to fraudulent non-disclosure.

> The regulation is clear. Whatever the motive, a failure to disclose which prevents the immigration officer from examining the dependent precludes future sponsorship of that person as a member of the family class.
>
> 12 The sole question before the Board was whether An Bo Xie was or was not examined at the time that his mother applied for permanent residence. Because he was not declared, he could not have been examined, and is not, therefore, considered a part of the family class for the purposes of sponsorship.
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> 13 Mrs. Chen made the choice to not include her son as a dependent child on her application. Her choice may have been misinformed and, indeed, made for entirely innocent reasons, but it was not any less deliberate. This is not a case like *Jean-Jacques v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 131, 2005 FC 104, where a sponsor had "acted without knowledge" that he had a child [italics added].

[12] Counsel for the Respondent is correct in saying a disqualifying misrepresentation “need not be willful or intentional”. It is sufficient if it is done knowingly or with deliberation.

[13] At the other end of the spectrum are cases like *Jean-Jacques v Canada (MCI)*, 2005 FC 104, [2005] FCJ no 131 (QL) (TD), where, as Justice Mosley noted in *Chen*, above, a sponsor was excused for not declaring a child whose existence was unknown. Clearly, a party cannot be faulted for failing to impart information which was unknown to him.

[14] The question raised by this application is whether there is a further recognized exception to the strict application of s 40 of the *IRPA* based on innocent misunderstandings or mistakes and, if so, whether the Officer erred by failing to consider that possibility.

[15] The Respondent's enforcement manual does acknowledge that "mistakes or misunderstandings" sometimes occur and it provides helpful examples to guide its visa officers. One such example involves a situation where a person spontaneously provides correct information when asked suggesting the possibility of a misunderstanding or an earlier memory lapse.

[16] The authorities similarly acknowledge that honest mistakes or innocent misunderstandings do occur. One of the earlier relevant authorities is *Medel v Canada (MEI)*, [1990] 2 FC 345, [1990] FCJ no 318 (QL) (FCA), which dealt with the case of a woman who entered Canada with a permanent resident visa that the Department had repeatedly, but unsuccessfully, asked her to return for correction. Upon entry, she failed to advise the admitting officer about that earlier administrative history. Although the Court acknowledged that such persons have "a positive duty of candour" it excused the applicant because she was "subjectively unaware that she was holding anything back". The views of the Court were expressed in the following passage from Justice Mark R. MacGuigan's decision at paragraph 12:

> It seems to me that the same factors, looked at objectively, lead to the conclusion that she reasonably believed that at the border she was withholding nothing relevant to her admission. That was, in fact, precisely what she had been told by the Embassy, viz., that a correction was necessary to enable her to use the visa, from which she would have reasonably deduced that there continued to be no problem respecting her admission.

[17] The decision in *Medel*, above, has been subsequently relied upon for the principle that honest and reasonable mistakes or misunderstandings can fall outside the scope of s 40. The decision by Justice James O'Reilly in *Baro v Canada (MCI)*, 2007 FC 1299, [2007] FCJ no 1667 (QL) (TD), recognized the existence of an innocent mistake exception and his decision was

subsequently cited with approval by Justice Michael Kelen in *Merion-Borrego v Canada (MCI)*, 2010 FC 631, 370 FTR 145: also see *Ghasemzadeh*, above.

[18] Justice Yves de Montigny's decision in *Koo v Canada (MCI)*, 2008 FC 931, [2009] 3 FCR 446, dealt with a factual situation similar to this one insofar as it involved a withholding of information that was otherwise available to the visa officer in departmental records and freely disclosed by the applicant when he was asked about it. The following passage from Justice de Montigny's decision is pertinent:

> 22 Despite the fact that both of the applicant's names had not been disclosed on the forms as he had believed, the officer should have found his previous legal name as it appears throughout the supporting documentation. The Tribunal Record demonstrates that an extensive number of supporting documents were submitted in the applicant's previous name of Chi-Sing Koo. Further, during his interview of July 25, 2007, the Computer Assisted Immigration Processing System (CAIPS) notes showed that the applicant provided numerous supporting documents with the name Chi-Sing Koo. This, in my view, is clear evidence that the applicant did not mislead Citizenship and Immigration authorities regarding his identity.
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> 23 It is trite law that the officer has an obligation to consider the totality of the information before her. The Application for Permanent Residence is comprised of the required forms, any verbal information and any supporting documentation submitted for the officer's consideration. The applicant's previous name was available to the officer from the supporting documentation submitted with the initial application. This information was available for the officer's review and consideration throughout the entire application process, and there was therefore no attempt by the applicant to conceal his change of name.
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> 24 Indeed, the CAIPS notes reflect that the officer reviewed the additional documentation provided by the applicant prior to the interview. She noted that some of those documents were issued in his former name, Chi-Sing Koo, and she was therefore aware of the applicant's previous name prior to conducting the interview. She

subsequently conducted a search of the name Chi-Sing Koo within the Field Operations Support System (FOSS).

25 At his interview, the applicant advised the officer that he had not thoroughly read the completed application forms before signing them. In light of this explanation and the fact that the applicant had clearly not attempted to conceal his previous name because he had provided numerous supporting documents in his previous name and had also disclosed his previous name at his interview, it was unreasonable for the officer to conclude that the failure to include his previous name on the application forms was not simply a human error in transcription, as his former representative recognized, and did rise to the level of misrepresentation under section 40(1)(a) of *Act*.

26 Moreover, the officer failed to conduct the proper analysis to determine if the name change was or was not material in the case at bar. At the hearing, counsel for the respondent submitted that the name change could have induced an error as the officer would have only conducted criminal and security checks under the applicant's current name and not with the birth name. But the correct information was on record for approximately two years and thus, available to the officer for her consideration. She could have completed the necessary checks required, as she did indeed within the FOSS system, and therefore the information provided could not have induced an error in the administration of the Act even if the applicant's former name did not appear on the application form.

27 I shall now turn to the alleged misrepresentation with respect to the applicant's previous application for permanent residence. The error occurred when the applicant check off the "yes" box to the question whether he had "previously sought refugee status in Canada or applied for a Canadian immigrant or permanent resident visa or visitor or temporary resident visa", but check off the "no" box to the following question as to whether he had been refused such a status. The applicant has stated that this was an oversight on both the part of himself and his former representative and was in no way intentional. Further, when the applicant was asked at interview about whether he had previously submitted any immigration applications, the CAIPS notes reflect that he advised the officer that he had previously submitted an application for permanent residence in Canada, which was refused in 1995.

28 Not only do the CAIPS notes indicate that the existence of the applicant's previous application for permanent residence was known to Citizenship and Immigration despite the applicant's change of

> name, but they also demonstrate that the applicant had previously disclosed his 1995 application for permanent residence when applying for a Work Permit. The applicant's previous disclosure supports the applicant's claim that he misread the question on the application form and inadvertently ticked off the wrong box.
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> 29 Moreover, no assessment of the materiality of the inadvertent failure to disclose that the applicant had previously applied for permanent residence was conducted. Such an assessment is necessary in order to properly evaluate whether a misrepresentation was material in accordance with section 40(1)(a) of the *Act*. The officer's failure to conduct such an assessment constitutes a reviewable error.

[19] It seems to me that an innocent mistake exception to s 40 of the *IRPA* has considerable jurisprudential support and that the Respondent's enforcement manual recognizes this possibility as the basis for excusing what might otherwise appear to be a deliberate misrepresentation.

[20] The decision under review in this case mentions but does not in any way assess the potential significance of the fact that the information Mr. Berlin omitted from his formal application document was available to the Respondent in its files and included in some of the material Mr. Berlin had submitted with the application then under consideration. Indeed, it may well have been the existence of this other information in the Respondent's possession that led to the discovery of the omission. The Officer's negative view is based solely on the observation that it was "reasonable to expect" that Mr. Berlin ought to have known better and that he "must bear responsibility" that the information provided "be accurate and up to date". Furthermore the Officer merely concluded that "it appears that he was not forthright".

[21] The importance of the decision under review to this family demanded that careful consideration be paid to all of the evidence and that the application not be denied on the basis of catch phrases about personal responsibilities and inconclusive observations about an apparent lack of forthrightness. A misrepresentation is not established by mere appearances. As the Respondent's Operational Manual on Enforcement acknowledges, a misrepresentation must be established on a balance of probabilities: see Citizenship and Immigration Canada, *Operational Manual: Enforcement*, ENF 2, para 9.3.

[22] Like Justice de Montigny in *Koo*, above, I am satisfied that this decision is unreasonable because it cannot be justified by the evidence the visa officer relied upon. This deficiency arises from the Officer's failure to acknowledge the potential significance of the relevant mitigating evidence Mr. Berlin had provided and from the Officer's failure to include that evidence in a meaningful analysis of the recognized innocent mistake exception to s 40 of the *IRPA*.

[23] In the result, this application for judicial review is allowed with the matter to be remitted to a different decision-maker for reconsideration on the merits.

[24] Both parties were invited by the Court to propose certified questions. Counsel for the Respondent advised the Court that because of the factual nature of the issue, "it is unnecessary to certify a question". Having regard to the outcome of this application, the questions proposed by counsel for the Applicant are moot.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed with the matter to be redetermined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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