Federal Court  Cour fédérale

Date: 20200603

Docket: IMM-1771-19

Citation: 2020 FC 664

Ottawa, Ontario, June 3, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

GURVINDER SINGH MATHAROO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of a Senior Visa Officer [SVO] made on November 26, 2018, refusing the Applicant's application for a work permit [Decision]. The Officer also found the Applicant to be inadmissible to Canada for five years because of misrepresentation.

[2] For the reasons that follow, this application is dismissed.

II. **Background Facts**

[3] The Applicant is a citizen of India. Prior to the work permit that underlies this application for judicial review, the Applicant applied to enter Canada several times, without success.

[4] In December 2016, the Applicant met his now wife on Shaadi.com, an online marriage website for people of South Asian descent. The couple began talking on the phone and the two families met in person.

[5] On June 25, 2017, the couple and their families met and agreed to arrange the marriage. The Applicant and his wife married on September 22, 2017.

[6] The Applicant's wife was granted a Canadian study visa in December 2017. She travelled to Canada in January 2018.

[7] On March 7, 2018, the Applicant applied for an open work permit as the spouse of a temporary resident.

[8] The Applicant was interviewed by an officer [IO] at the Canadian visa office in New Delhi on November 19, 2018.

[9] On November 28, 2018 the SVO reviewed the application, supporting documents, and the information gathered at the interview. The SVO concluded that the Applicant did not provide sufficient evidence to show that his marriage was genuine.

[10] The SVO also found the Applicant's misrepresentation about the genuineness of the marriage rendered him inadmissible to Canada under section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for a period of five years. The relevant parts of section 40 are found in the attached Appendix.

III. **Preliminary Issue**

[11] Both the Applicant and his wife filed affidavits in support of the application for judicial review, which contain information that was not before the SVO. The Applicant's supplementary affidavit, dated October 9, 2019, contains WhatsApp chat logs that the Applicant says he would have shown to the IO if he had been asked.

[12] The affidavit from the Applicant's wife, dated April 17, 2019, contains information about what she and the Applicant discussed prior to getting married. The Applicant's wife argues that when she asked if the Applicant would support her education and studies in Canada, she did not mean financial support.

[13] The general rule is that evidence that was not before a decision-maker and that goes to the matter that was before the decision-maker is not admissible on judicial review: *Love v Canada (Privacy Commissioner)*, 2015 FCA 198 at paragraph 17. This rule exists to maintain the

distinction between the roles of a fact-finding administrative tribunal and this Court as a judicial review court: *Association of Universities and Colleges of Canada v Access Copyright*, 2012 FCA 22 at paragraphs 19 and 23.

[14] Having reviewed the affidavits, I find that only one of the recognized exceptions to this rule apply. Both affidavits put forward additional facts that were available at the time of the original work permit application but were not presented to the officers. Those facts go to the very issue before the officers. They contain argument that appears to be presented to address and rebut various findings made by the SVO. Paragraphs 5, 6 and Exhibit "B" of the Applicant's Supplementary Affidavit, other than the photographs that were presented to the IO which are accepted as general evidence of a background nature that are of assistance to the Court, are therefore struck. In addition, paragraph 6 and the last sentence of paragraph 7 of the Affidavit of Jashandeep Kaur are struck.

IV. **Issues**

[15] The Applicant argues that the Decision is unreasonable on four grounds.

[16] First, he says that the finding that the marriage was not genuine was based on speculation and faulty logic. Second, the IO erred in making a negative credibility finding based on the Applicant clearing his throat. Third, the finding that there was insufficient communication between the couple was inconsistent with the finding that the Applicant's responses to questions were "solid and direct." Fourth, the SVO misconstrued what the Applicant meant when he said he would "help" his wife with her studies in Canada.

[17] The Applicant also argues that the Decision is procedurally unfair for two reasons. First, the IO fettered the discretion of the SVO. Second, the IO failed to review the evidence that the Applicant brought to his interview.

V. **Standard of Review**

[18] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions, none of which apply on these facts: *Vavilov* at paragraph 23.

[19] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[20] The presumption does not apply to an issue involving a breach of natural justice or the duty of procedural fairness: *Vavilov* at paragraph 23. In considering issues of procedural fairness, the ultimate question to be answered by a reviewing Court is whether the Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56.

[21] Issues of fettering are not particularly amenable to a standard of review as a decision which is the product of fettered discretion is automatically unreasonable. It is best to resolve a

question of fettering therefore by asking whether the decision arose from a fettered discretion: *Austin v Canada (Citizenship and Immigration)*, 2018 FC 1277 at paragraph 16.

[22] The day after Vavilov was released, counsel for the Applicant submitted a brief letter to the Court stating that "Vavilov redefines reasonableness in the context of Administrative Law and substantially alters the Dunsmuir test." The letter contained no arguments or references to language in *Vavilov* to support that conclusion.

[23] I do not agree that *Vavilov* substantially altered the test in *Dunsmuir*. The Supreme Court specifically said that the revised framework it was introducing would continue to be guided by the principles underlying judicial review articulated in *Dunsmuir*: *Vavilov* at paragraph 2.

[24] I find that further submissions on this issue are not required; the result in this matter would be the same under *Dunsmuir*.

VI. **Analysis of the Decision**

[25] The Global Case Management System [GCMS] notes include the notes of the SVO and the IO. Together with the refusal letter of November 26, 2018 they constitute the reasons for the Decision: *Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at paragraph 15.

[26] The SVO found the Applicant had provided inconsistent information about the progression of the relationship, the wedding, the time spent together after marriage, the couple's current living arrangements, and the wife's day-to-day activities in Canada. The SVO also found

that the Applicant did not provide sufficient evidence to show the couple had ongoing communication after the marriage.

[27] The SVO considered subsection 4(1) of the *Immigration and Refugee Protection Regulations* [*IRPR*], which states that "a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common law-partnership or conjugal partnership was entered into primarily for the purpose of acquiring any status or privilege under the Act; or is not genuine." The attached Appendix contains the full text of subsection 4(1).

A. *The Decision was not based on speculation or faulty logic*

[28] The Applicant argues that at the time he and his wife were married, she had not been approved for her study permit and it was not at all certain that she would receive one. Therefore, the marriage could not have been entered into for the sole purpose of immigration to Canada.

[29] Similarly, the Applicant states that his wife could not have entered into the marriage for the sole purpose of obtaining financing for her education in Canada since she had not been approved for a study permit.

[30] The Applicant says that, given the timing noted above, the SVO's findings do not flow logically from the sequence of events, therefore, they are unreasonable.

[31] Before turning to the Respondent's submissions, I note that while the Applicant has twice referred to the "sole purpose" of various actions, paragraph 4(1)(a) of the *IRPR* refers to the "primary purpose". That is qualitatively different than a "sole" purpose.

[32] The Respondent submits that the SVO's conclusion was based on the Applicant's answers during the interview. It was not based on the sequence of events.

[33] For example, the Applicant confirmed in the interview that before they were married his wife told him that she wanted to study in Canada. She specifically asked whether he could help her with that, and he replied that he could.

[34] Sequentially, the Applicant first applied for a study permit in 2012. It was denied on the basis that the proposed program of study was not reasonable, based on his academic scores and language abilities. The Applicant was denied a temporary resident visa in August 2016 on the basis that he would not leave Canada at the end of his stay given his family ties in Canada and other reasons.

[35] The Applicant met his wife online in December 2016. The GCMS notes show that after his application was received an interview was recommended because there had been four previous refusals. The concerns underlying those refusals were noted to still stand: purpose of travel, genuineness of relationship and enrolment of the spouse as a full-time student.

[36] The IO concluded that the Applicant demonstrated a determination to enter Canada and an understanding that his wife provided him with an opportunity to apply for admission to Canada. This conclusion was based on the Applicant's answer to how the refusal of the visa application would affect his marriage – he would apply again. If he was refused, he would keep applying. In reaching this conclusion, the IO considered the Applicant's previous visa applications and refusals.

[37] Considering the foregoing facts, the Applicant has not persuaded me that the Decision was based either in whole or in part on faulty logic or speculation. The conclusion drawn was reasonably open to the IO and to the SVO on the facts and law.

B. *The IO did not make a negative credibility finding based on the Applicant clearing his throat*

[38] The Applicant says that in determining that he was not credible regarding whether his marriage was genuine, the IO observed that he "started coughing and 'clearing his throat'" when he was asked whether he had considered that his wife may have married him only for assistance with her studies in Canada. The IO wrote that "the applicant's responses were solid and direct" up to that point in the interview. After that, the IO wrote that he had started clearing his throat and said he was "demonstrating nervousness."

[39] The Applicant complains that there could be any number of reasons, several of which he put forward in this application, as to why he started coughing and clearing his throat. On that basis he says that the IO's conclusion that he was nervous lacks justification.

[40] The Respondent submits that observing the demeanour of the Applicant when assessing his credibility is something to which the Court owes deference because the IO had the ability to assess the Applicant's evidence first-hand.

[41] Although the use and relevance of demeanor assessment to determine credibility is not without controversy, it is still accepted in Canadian courts. Recently, Mr. Justice Alan Diner thoroughly reviewed the question of credibility determinations based on demeanour evidence in the refugee context. Justice Diner determined, as do I, that the views of higher courts, including the Supreme Court of Canada in *R v NS*, 2012 SCC 72 at paragraphs 98-102, are binding in that seeing and hearing a witness may confer a fact finding advantage on a first instance decision-maker: *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paragraphs 97-104.

[42] Turning specifically to the jurisprudence of this Court, it has been held that on judicial review particular deference is owed to credibility findings of frontline decision makers who have the advantage of hearing witnesses testify and observe their demeanour: *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 [*Rahal*] at paragraphs 41-45.

[43] However, a decision-maker should not rely on demeanour alone, which may include hesitations and vagueness, to assess credibility. It is preferable if there are additional objective facts to support a negative credibility finding: *Rahal* at paragraph 45.

[44] Where, as here, there may be other plausible explanations for the Applicant's throat clearing and coughing, that does not mean that the IO's assessment was unreasonable: *Amador Ordonez v Canada (Citizenship and Immigration)*, 2019 FC 1216 at paragraph 15.

[45] To persuade a reviewing court that the finding was unreasonable, the Applicant must point to a conclusion that is not supportable on the evidence: *Sinan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 87 at paragraph 11; *Wang v Canada (Citizenship and Immigration)*, 2011 FC 614 at paragraph 16.

[46] The Applicant has not met his onus to show that the findings made by the IO improperly relied on his throat clearing or other demeanour. In effect, the Applicant is asking the Court to re-weigh the evidence based on his interpretation of the GCMS notes. That is not the role of the Court on judicial review: *Vavilov* at paragraph 125.

C. *The finding of insufficient communication or interaction between the Applicant and his wife post-marriage was reasonable*

[47] The Applicant submits that the finding that there was insufficient communication between the couple was inconsistent with the finding that his responses to questions were "solid and direct". He views that as evidence that his answers were being accepted as true.

[48] A careful review of the GCMS notes show that, in context, the Officer's note that the responses were "solid and direct" is stated in contrast to the throat clearing that only began with questions about the possible intention of the Applicant's wife for entering into the marriage. I am

unable to find that the Officer was commenting about the veracity of the Applicant's previous answers.

[49] The Applicant also raises issues with various facts relied on by the IO:

- his wife had not returned to India since arriving in Canada 10 months before but the IO failed to take into account the information in Appendix A to the application about her studies;
- there was an absence of communication over the telephone or internet and the IO failed to request further evidence that could have been provided;
- the photographic evidence provided shows there was direct interaction between the Applicant and his wife from which it was also clear they had a loving relationship;
- the IO failed in their duty to justify credibility findings when they did not make clear reference to the photographs.

[50] The Applicant submits that based on the above, the findings of the IO and the SVO with respect to the absence of communication and interaction between the spouses lacks justification, transparency and intelligibility.

[51] I will briefly consider each of the above noted grounds, in order.

[52] The Applicant argues that the IO failed to consider the Applicant's explanation for why his wife did not visit him after arriving in Canada. The explanation in Appendix A of the Applicant's visa application, which contains his submissions to support his work permit application were that his wife's college schedule was too intensive to allow long breaks so the only option is that he visit her in Canada

[53] In this case the IO noted the wife's absence from India of over approximately 10 months and took into account the lack of evidence of telephone or internet communication. The IO is deemed to have considered all the evidence on the record and is not required to refer to every piece of evidence. Failure to mention a piece of evidence does not mean that it was ignored or that such failure is a reviewable error: *Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 at paragraph 45; *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paragraphs 35 and 36.

[54] As to the lack of records of telephone and internet communication, there was no obligation on the IO to request further evidence to support the Applicant's claim. The Applicant bore the onus to provide sufficient evidence to support his claim that he and his wife were in twice-daily communication. The fact that the Applicant apparently took to the interview, but did not produce, printouts of WhatsApp chats with his wife that might support his claim of twice-daily communication cannot rationally be the fault of the IO.

[55] The Applicant also argued that failure to review the WhatsApp chats was procedurally unfair. My finding above also resolves that issue. It should go without saying that there can be no obligation on a decision-maker to review evidence not presented to them.

[56] With respect to the photographs, the IO asked to see the wedding photos and the after wedding photographs. The Applicant produced a wedding album and sheets of photographs taken post-wedding. The Applicant's claim that the photographs show direct interaction between the Applicant and his wife and that it was clear that they had a loving relationship cannot be

made out simply from looking at photographs. The fact that the photographs are not in the underlying record is because the IO returned them to the Applicant at the conclusion of the interview. However, they have been admitted in this application and I have reviewed them.

[57] Contrary to the Applicant's assertion, the IO did make clear reference to the photographs including, amongst other comments, descriptions such as "elaborate outfits and rituals noted" and "a significant number of people evident throughout pre-wedding and wedding ceremony" and "post wedding photos show outings alone and with family members".

[58] The best that the photos could substantiate is that the Applicant and his wife went through a marriage ceremony. Other evidence is required to substantiate that the marriage is genuine or that it was not entered into for the purpose of acquiring a status or privilege under the *IRPA*.

[59] The IO and the SVO each found there was insufficient such other evidence.

D. *The IO did not fetter the discretion of the SVO*

[60] The Applicant submits that the discretion of the SVO was fettered when they relied on the interview notes taken by the IO.

[61] I disagree.

[62] The SVO did not just “rubber stamp” the IO’s findings. The IO conducts the interview and makes a recommendation to the SVO. Here, the SVO explicitly stated that they reviewed the application, supporting documents, the notes on the application and the information gathered at the interview.

[63] After that process, the SVO found the Applicant had not provided sufficient evidence to show that the marital relationship was genuine or that the relationship was not entered into primarily for the purpose of acquiring a status or privilege under the *IRPA*.

[64] The underlying record supports the findings by the SVO. The 10-month absence from India, along with the absence of evidence of communication over the telephone or internet, raised reasonable concerns about whether the couple had a genuine intent to build a life together. When that is coupled with the Applicant’s history of applying for entry to Canada and his insistence that he would continue to apply if he was turned down for a work permit the outcome is defensible on the facts and law.

[65] The SVO stated that meeting the definition of a family member under the *IRPR* is material to the assessment of eligibility for a work permit under the spouse of a student program. If the Applicant had been considered a spouse in a genuine marriage, it could have induced an error in the administration of the *IRPA*, since a work permit would have been issued to someone who did not meet the eligibility requirements of the program.

[66] The SVO found the Applicant's misrepresentation about the genuineness of the marriage rendered him inadmissible to Canada under section 40 of the *IRPA* for five years.

VII. **Conclusion**

[67] In *Vavilov* the Supreme Court indicated that it was taking the opportunity to consider and clarify the law of judicial review of administrative decisions. Included within that was a desire to provide better guidance on the proper application of the reasonableness standard.

[68] To that end the Supreme Court stated in *Vavilov* at paragraphs 99 – 101 the essential characteristics of what a reviewing court should consider when determining whether a decision is reasonable:

> [99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.
>
> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

> [101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

[69] I find for all the reasons set out in this judgment and reasons that the Applicant has not met the burden to show that the Decision fails to exhibit justification, intelligibility or transparency. There are no discernible fundamental flaws in the reasoning process. The reasons for the Decision enable the Applicant and the Court to understand how and why the IO and the SVO arrived at the conclusions they did. This satisfies the *Dunsmuir* and *Vavilov* criteria.

[70] The application is dismissed.

[71] No serious question of general importance was put forward for consideration and none exists on this very fact-specific application.

[72] No costs are awarded.

JUDGMENT in IMM-1771-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no serious question of general importance for certification.

3. No costs.

"E. Susan Elliott"
Judge

APPENDIX

Immigration and Refugee Protection Act, SC 2001, c27

Misrepresentation

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(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;

[. . .]

Application

(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

[. . .]

Inadmissible

(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).

Fausses déclarations

40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

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;

[. . .]

Application

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

[. . .]

Interdiction de territoire

(3) L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.

Immigration and Refugee Protection Regulations, SOR/2002-227

Bad faith	Mauvaise foi
4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	4 (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	b) n'est pas authentique.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1771-19
STYLE OF CAUSE:	GURVINDER SINGH MATHAROO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 18, 2019
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	JUNE 3, 2020

APPEARANCES:

JASWANT MANGAT	FOR THE APPLICANT
MEVA MOTWANI	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mangat Law Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT