

Federal Court



Cour fédérale

Date: 20200310

Amended: 20200311

Docket: IMM-4503-19

Citation: 2020 FC 355

Ottawa, Ontario, March 10, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**ARAZ MOHAMMED MAMDOH
ALBRIFCANI**

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

AMENDED JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a visa officer (“Officer”) with the Visa Section of the Embassy of Canada in Ankara, Turkey, refusing the Applicant’s work permit application on the basis that the Applicant was inadmissible to Canada for misrepresentation pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] For the reasons that follow, this application for judicial review is granted as the decision is not justified or intelligible.

Background

[3] The Applicant, Araz Mohammed Mamdoh Albrifcani, is a citizen of Iraq. In 2018, he submitted a work permit application based on a positive Labour Market Impact Assessment. With his application, and although not required, he submitted his International English Language Testing System (“IELTS”) results, dated January 24, 2018.

[4] The Applicant was sent a procedural fairness letter dated February 12, 2019, informing him that the Officer was concerned the IELTS that the Applicant submitted was fraudulent. The Applicant responded by letter dated February 13, 2019. He explained how he came to know of the 8-week English course offered by Modern Up in Duhok City, which he paid for and attended, that he took the exam on January 12, 2018, and subsequently received his IELTS results from Modern Up on January 25, 2018. The Applicant stated he did not imagine that the results were not genuine. He advised that after receiving the procedural fairness letter he attempted to contact Modern Up seeking clarification, but the phone was out of service, and when his wife went to ask in person, she discovered that the facility had closed. He offered to re-write an English exam in a secured facility while in Canada.

Decision under review

[5] The May 28, 2019 letter stated that the Officer had determined that the Applicant's work permit application did not meet the requirements of the IRPA and *Immigration and Refugee Protection Regulations*, SOR/2002-227 and was refused because the Applicant was inadmissible to Canada on the basis of misrepresentation, pursuant to s 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 IRPA. As a result, pursuant to s 40(2)(a) of IRPA, the Applicant was inadmissible to Canada for five years from the date of the letter.

[6] Further reasons are found in the Global Case Management System notes ("GCMS Notes"). In a February 12, 2019, entry the Officer noted that following a "QA" it was discovered that the IELTS results were fraudulent and that a procedural fairness letter was therefore sent to the Applicant. An entry made on May 13, 2019 states that in his response to the procedural fairness letter the Applicant "stated that he took an exam at a centre called the Modern up, in Iraq. Stated that when we sent the PFL, he and his wife tried to contact the centre but it no longer exist. client does not appear to deny that the IELTS was fraudulent. Recommending Misrep." An entry dated May 28, 2019, made by another officer, states that although the Applicant replied to the procedural fairness letter, he "does not address our concerns as to why he submitted fraudulent IETLS results, in support of application" and determined the Applicant to be inadmissible for misrepresentation.

[7] By letter of May 28, 2019, the Officer communicated a negative decision to the Applicant, informing him that he was inadmissible to Canada on the basis of misrepresentation. That negative decision is the subject of this judicial review.

Issues and standard of review

[8] In his written submissions the Applicant identified two issues arising in this application for judicial review:

1. Did the Minister's delegate breach the duty of fairness by failing to provide any indication of why or how it was determined that the IELTS was fraudulent, thus not allowing the applicant a meaningful opportunity to respond to the concerns?
2. Did the Officer base his or her decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material?

[9] When appearing before me the Applicant raised a new matter, not addressed in his Notice of Application for Leave and Judicial Review or written submissions, being that that the Officer did not have the authority to make the decision. The basis for this submission being that s 44 of the IRPA states that an officer who is of the opinion that a foreign national who is in Canada is inadmissible may prepare a report, which shall be submitted to the Minister. If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing (IRPA, s 44(2)). Here, the Applicant held a valid work permit and was legally employed in Canada when the decision was made, but the s 44 process was not followed. The Applicant sought leave to make subsequent written submissions on this point.

[10] The Respondent submits that the only issue is whether the Officer made a reviewable error. The Respondent was not in a position to respond to the Applicant's new issue given that prior notice of it had not been given.

[11] As to the request to permit subsequent written submissions addressing a new ground of review, the application for leave and judicial review must identify and address the grounds intended to be relied upon, including any reference to a statutory provision (*Federal Courts Citizenship, Immigration and Refugee Protection Regulations*, SOR /93-22, Rule 5(1)(f)). Further, the Court has held that it will only deal with grounds of review raised in the notice of application record (see, for example, *Benitez v Canada (Citizenship and Immigration)*, 2006 FC 461 at para 227). Accordingly, I am denying the Applicant's last-minute request. And, in any event, the application has been granted for the reasons set out below, rendering the request moot.

[12] I would reframe the issues presented by the Applicant as follows:

- i. Did the Officer breach the duty of procedural fairness owed to the Applicant?
- ii. Was the Officer's decision reasonable?

[13] The parties submit and I agree that the standard of review for issues of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("Vavilov") the Supreme Court of Canada, in establishing reasonableness as the presumptive standard of review for most questions on judicial review, was concerned with circumstances where "the merits of an administrative decision are challenged" and indicated that that a challenge on the merits is not one that relates to natural justice or procedural fairness (*Vavilov* at paras 16, 23). Accordingly, prior jurisprudence establishing correctness as the standard of review for questions related to procedural fairness remains authoritative.

[14] I also agree with the parties that whether the Officer reasonably found that the Applicant had committed a material misrepresentation and whether the Officer reasonably refused the Applicant's work permit application are issues to be reviewed on the reasonableness standard. As indicated above, *Vavilov* established a presumption of reasonableness for judicial review. That presumption can be rebutted in two types of situations. The first being where the legislature explicitly prescribes the applicable standard of review or where it has provided a statutory appeal mechanism from an administrative decision to a court. The second being when the rule of law requires that the standard of correctness be applied. This will be the case in certain categories of questions, namely, constitutional questions, general questions of law of central importance to the legal system as a whole, questions regarding jurisdictional boundaries between administrative bodies, or any other category that may subsequently be recognized as exceptional and also requiring review on the correctness standard (*Vavilov* at paras 17, 69). However, in this matter, none of the circumstances exist which might rebut that presumption.

[15] The Supreme Court in *Vavilov* also held that “[i]n order to fulfill *Dunsmuir*'s promise to protect ‘the legality, the reasonableness and the fairness of the administrative process and its outcomes’, reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28” (*Vavilov* at para 12). The reviewing court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified (*Vavilov* at para 15). That is, a reasonableness review means that this Court must review the underlying decision for justification, intelligibility and transparency, and with “whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

Analysis

[16] I acknowledge that the Applicant has made a number of submissions attempting to characterize the Officer's decision as breaching the duty of procedural fairness owed to him. However, in my view, this matter can be resolved determinatively based the Applicant's submissions concerning the reasonableness of the Officer's decision.

Applicant's position

[17] The Applicant submits that the GCMS Notes indicate that the Officer based the misrepresentation finding on two factors. First, that the Applicant's reply to the procedural fairness letter did not address the concerns as to why he submitted fraudulent IELTS results and, second, he did not appear to deny that the IELTS results were fraudulent.

[18] The Applicant submits, on the first point, that the Officer failed to provide any specifics of the concern to which the Applicant could meaningfully respond. As to the second basis of the refusal, the Officer's reasons demonstrate that the decision was made without regard to the evidence. Although the Officer stated that the Applicant did not appear to deny that the results were fraudulent, the Applicant clearly stated that he believed the results were genuine and that he was under the impression the results were legitimate. As the Officer's stated conclusion was the only basis provided for the decision, this goes to the heart of the decision and does not represent a defensible outcome.

[19] The Applicant also submits that there is nothing in the record to demonstrate how the Officer determined that the Applicant's IELTS results were fraudulent, beyond the Officer's GCMS Notes entry referencing a "QA". In the absence of any evidence to support the Officer's conclusion, it is not justified and is unreasonable (*Kong v Canada (Citizenship and Immigration)*, 2017 FC 1183 at paras 37, 40 ("*Kong*"). Further, by focusing only on the QA, the Officer failed to consider the Applicant's explanation provided in response to the procedural fairness letter (*Kong* at paras 37, 40).

Respondent's position

[20] The Respondent appears to characterize this issue as one of procedural fairness issue on the basis of the Respondent's view that the Applicant is essentially arguing that the Officer failed to provide any reasons.

[21] The Respondent submits that the Officer was not required to provide extensive reasons, that this Court can fill in logical inferences which are implicit to the result of a decision but not explicitly stated, and that deference is owed to the decision-maker (*Singh v Canada (Citizenship and Immigration)*, 2015 FC 115 at para 24 ("*Singh*"); *Gechuashvili v Canada (Citizenship and Immigration)*, 2016 FC 365 at para 22; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54).

[22] Further, that when the GCMS Notes are read against the record as a whole, there is sufficient detail for a reviewing court to determine that the Officer's decision was reasonable. The GCMS Notes indicate that the Officer determined through a QA that the IELTS results may

be fraudulent. The Officer used language in the procedural fairness letter which jurisprudence has considered as notifying an applicant that an officer considers that authenticity of the entire document to be at issue (*Akpoduado v Canada (Citizenship and Immigration)*, 2017 FC 103 at para 26; *Kong* at para 26). Further, the Applicant failed to provide any evidence to support his belief in the legitimacy of the IELTS test results. Accordingly, the Officer reasonably concluded that the Applicant had not satisfied his onus of proving that the test results were accurate and authentic. This reasoning and conclusion can be implied from the Officer's GCMS Notes entry indicating that the Applicant had not addressed the concerns as to why he submitted fraudulent IELTS results. Additionally, the GCMS entries dated May 13, 2019 and May 28, 2019 show that the Officer considered the Applicant's response to the procedural fairness letter. The May 13, 2019 entry reviews the response and the May 28, 2019 alludes to it. The Respondent submits that there is no evidence in the record proving that the Officer did not review the entire response to the procedural fairness letter.

Analysis

[23] As a preliminary observation I note that on December 13, 2019, counsel for the Applicant sent a letter to the Court indicating that the Officer's GCMS notes reference a "QA" which showed that the Applicant committed a misrepresentation. Counsel stated that there were no QA documents in the record and that it was essential to disclose those documents as part of the CTR. Counsel for the Respondent responded by letter of January 3, 2020, stating that the Respondent could advise that there were no missing documents in the CTR. The Respondent advised that the QA or "Quality Assurance" conducted by the Officer was done using an online portal that verified the Applicant's IELTS results based on a test report number. The portal did not yield

any results and no documentation was produced as the result of the verification process. On January 3, 2020, Prothonotary Ring directed that the Applicant's request for further disclosure would not be granted. This was because the request was made by way of an Informal Request for Interlocutory Relief and one of the requirements for granting such relief is that the parties consent to, or do not oppose, the request. Here, the Respondent opposed the requested relief.

[24] Ultimately, there is nothing in the record to explain the February 12, 2019, GCMS Notes entry that "Following a QA, it was discovered that the client submitted a fraudulent IELTS." There is no evidence before me as to what a "QA" is, who conducted it, how it was conducted or why the Officer appears to rely on the referenced "QA" to substantiate that the Applicant submitted fraudulent IELTS results. While counsel for the Respondent offered an explanation for this in its letter to the Court, this is not evidence. The Officer did not submit an affidavit to explain why there are no details of the conduct of the verification contained in the record. Moreover, while counsel's letter to the Court stated that the Respondent could advise that there were no missing documents in the CTR, in fact, the CTR does not contain a copy of the procedural fairness letter, which was clearly sent and received. These points raise concerns as to the completeness of the CTR.

[25] As to the merits of the matter, I do not agree with the Respondent's view that the Applicant is arguing that the Officer failed to provide any reasons and, therefore, that this is a procedural fairness issue. Rather, the Applicant's submission is clear that, in his view, the Officer's reasons do not reflect the evidence before the Officer, being his response to the procedural fairness letter in which he stated that he believed the test results to be genuine. While

the Applicant did submit that the Officer failed to provide “substantive reasons”, read in context, I understand this to point out that that the Officer did not provide any detail or specifics of the nature of the concern in the procedural fairness letter, not that the Officer failed to provide *any* reasons in support of the decision. The Applicant submits that the Officer’s decision was not intelligible or justified which is concerned with the reasonableness of the Officer’s decision (see *Vavilov* at para 99). Indeed, the Respondent also submits that the Officer’s decision is to be afforded deference. Deference applies only to assessments of the reasonableness of a decision, not to breaches of procedural fairness that attract the correctness standard of review.

[26] I also agree with the Applicant that there is no evidence in the record to support a finding that the IELTS results were fraudulent. The only explanation in the record is the entry into the GCMS Notes, which states that “[f]ollowing a QA, it was discovered that the client submitted a fraudulent IELTS.” As discussed above, there is no explanation in the record or any affidavit evidence from the Respondent as to what a QA is, how it was conducted in this case, why there is no record of the verification process contained in the record, or why the results supported the conclusion that the submitted IELTS was fraudulent.

[27] While there is small print at the bottom of the IELTS form that instructs how to validate the results using a website, the GCMS Notes entry does not indicate whether the Officer used that online portal or another online portal or what, if any, results were obtained.

[28] Of note in this regard is Justice Kane’s decision in *Kong*, in which she held that:

[39] With respect to the Officer’s concerns about the BOC bank statements, the Officer relied on a self-service verification from an

on-line system rather than on information from a bank officer that could have alleviated the confusion about the bank stamp or code. The additional documents and explanations provided by the Applicant in her response to the procedural fairness letter, although rather convoluted, required more careful consideration by the Officer. The explanations were not sufficiently analyzed, or at least no such analysis can be discerned from the very cryptic GCMS notes. Nor did the Officer attempt to contact the bank to confirm the information submitted or, alternatively, to validate his concerns which were based on the on-line information. I also observe that the original bank statements were submitted, and although in Chinese, could have shed some light on the confusion regarding the validation codes.

[40] Although the reasons for a decision on a visa application are not expected to be detailed and are generally only the GCMS notes, these reasons do not permit the Court to conclude that the decision is “defensible in respect of the facts and the law”. Given the totality of the information provided by the Applicant, both at the time she submitted her application and in her response to the procedural fairness letter, the Officer erred by focusing on only one set of Bank Statements, and nothing else. I can only conclude that the Officer failed to consider the other supporting documents and the explanations provided in response to the procedural fairness letter. The decision cannot be found to be justified or intelligible.

[29] Here, the Officer may well have been entitled to verify the IELTS results using an online portal, given the instructions found on the IELTS results form. However, there is nothing in the record to confirm that the Officer did so or to explain how that led to the belief that the Applicant had submitted fraudulent results. For example, had the Officer provided the results of the confirmation and noted that they differed from the results submitted by the Applicant or, indicated that the verification link was not operative and that follow up confirmed that the operation was not legitimate, this would have provided justification for the finding that the Applicant’s IELTS results were fraudulent. However, it cannot even be discerned from the GCMS Notes what a “QA” entails. While I agree with the Respondent that visa officers are not

required to provide detailed reasons (*Singh* at para 24), the lack of detail in the Officer's reasons in the circumstances of this matter renders the decision unjustified.

[30] This is further demonstrated by *Kong*. In that case, there was a brief entry in the GCMS notes that explained the officer's concern as to the genuineness of a bank statement:

[6] The Global Case Management System [GCMS] notes maintained by the Officer and his or her supervisors are also part of the reasons for the decision. The GCMS notes are brief. The entries dated October 1, 2 and 4, 2016 indicate that Applicant planned to visit her son and daughter-in-law at a particular address in Canada. The entry dated October 13, 2016, with respect to the verification of the bank documents submitted by the Applicant, indicates that the Officer called the Applicant's bank and that "[a]ccording to the on line verification self-service check that the 16 digits listed on the official stamp actually can't be found in the system" [sic]. The Officer concluded "PA's Bank Statement is a fake." A procedural fairness letter was sent to the Applicant on October 13, 2016.

[31] Despite the brevity of those reasons, they provide an explanation of how the verification process was conducted and the basis for the finding that the subject document was not authentic. Conversely, in this matter, there is no explanation in the record as to what results the QA yielded that undermined the genuineness of the Applicant's IELTS results. In the absence of even a bare explanation justifying for the Officer's finding, the decision is unreasonable.

[32] I also agree with the Applicant that the Officer's treatment of the Applicant's response to the procedural fairness letter was unreasonable. The Officer made two findings: that the Applicant did not appear to deny that the IELTS was fraudulent, and that he did not explain why he submitted fraudulent IELTS results.

[33] However, in his procedural fairness response the Applicant explained how he came to learn about the 8-week English course offered by Modern Up, that he paid \$2260 to take the course and write the exam, that he received his certificate, and that he was “very happy for [his] results and under no circumstances imagined it could not be genuine”. Further, he stated that “I am under the impression of this IELTS being legitimate as other students who took the same course and exams have used it for studying for a master’s degree abroad.” The Applicant then went on to discuss his inability to verify the results with the facility because it closed and he expressed a desire to get more information to stop the institution from “doing this to other people.”

[34] I do not read the Applicant’s comments as conceding that his results were fraudulent. Rather, they must be viewed in the context of what was put to him in the procedural fairness letter. Specifically, that the Officer had “concerns that the IELTS which you have provided in support of your application is fraudulent.” The Applicant could not garner from this if the concern was that the results did not reflect his actual results – that is, that Modern Up provided an inaccurate score – or whether the suggestion was that he had submitted a document which he acquired knowing it to be fraudulent, or otherwise. The Applicant’s comments suggest that he was attempting to ascertain the basis for the Officer’s concern and, based on his resultant unanswered inquiries to Modern Up, he assumed that the concern was that facility may not have been legitimate. Viewed in context, it is difficult to understand the Officer’s comment that the Applicant did not “appear to deny” that the IELTS were fraudulent. The Applicant clearly stated that he believed the IELTS were legitimate and why he held that belief. Any doubt in his mind

arose from his subsequent efforts to have Modern Up verify his results in response to the procedural fairness letter.

[35] And, while the Respondent submits that the Officer's finding actually relates to the Applicant's failure to meet his onus of providing supporting evidence to establish that his results were genuine, the Officer did not make that finding. The Officer does not state that the Applicant failed to provide proof that his results were genuine. The Officer states only that the Applicant did not appear to deny that his results were fraudulent. Nor do I agree that the GCMS notes imply that the Officer was making a finding based on the Applicant's failure to provide sufficient evidence to establish the genuineness of his IELTS submission.

[36] As to the Officer's second finding, that the Applicant "[did] not address our concerns as to why he submitted fraudulent IELTS results," this is unintelligible. The Applicant explained that he took the test because he always wanted to learn English and when he decided to apply for his work permit, he was happy to be able to share his English test results even though they were not required. The Applicant did not acknowledge in his explanation that the IELTS were fraudulent, but as noted above, explained how he obtained the results and stated his belief that the results were genuine when he submitted them. It was unreasonable, in the face of this explanation, for the Officer to conclude that the Applicant did not address the concern "as to why he submitted fraudulent IELTS results". The Applicant addressed the concern fully in view of the limited explanation of the basis for the Officer's concern and stated why he believed the results to be genuine. The Officer's reasons do not demonstrate that the Officer properly

considered the Applicant's response, and the decision is unintelligible as a result (*Kong* at para 40).

[37] The Respondent submits that the Officer was really stating that the Applicant had not submitted sufficient evidence to confirm that the IELTS results were genuine. Again, however, I disagree. That is not what the Officer said. The Officer said the Applicant did not address the Officer's concerns as to why he submitted fraudulent IELTS results. That is an unintelligible comment for the above reasons.

[38] In sum, the Officer's reasons were not justified by the information contained in the record and were unintelligible in the face of the Applicant's response to the procedural fairness letter. Having considered the Officer's reasons in conjunction with the record, I am not satisfied that the Officer's reasoning process was sound nor that the decision was justified in relation to the facts before the Officer. The decision lacks the hallmarks of reasonableness: justifiability, transparency, and intelligibility (*Vavilov* at para 99).

[39] Although I have determined this matter on the basis of the reasonableness of the decision, and while not addressed in the Applicant's written submissions, I also agree with the Applicant that the Officer may have prejudged the outcome of this matter. That is because the procedural fairness letter not only advised the Applicant that the Officer had concerns that the IELTS was fraudulent, but also stated, "*Consequently, the visa and work permit that were issued to you have been cancelled and you are not allowed to enter or remain in Canada using those documents*"

(Italics original). The cancellations were effected prior to the Officer receiving and considering the Applicant's response to the procedural fairness letter.

JUDGMENT IN IMM-4503-19

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted.
2. No question for certification was proposed and none arises.
3. There shall be no order as to costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4503-19

STYLE OF CAUSE: ARAZ MOHAMMED MAMDOH ALBRIFCANI v
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PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: FEBRUARY 24, 2020

JUDGMENT AND REASONS: STRICKLAND J.

DATED: MARCH 10, 2020

AMENDED **MARCH 11, 2020**

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