Federal Court Cour fédérale

Date: 20220201

Docket: IMM-930-20

Citation: 2022 FC 112

Ottawa, Ontario, February 1, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

JIAYAN HE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Jiayan He ("Ms. He"), is challenging the decision made by a Deputy Migration Program Manager at the Immigration, Refugee and Citizenship Canada [IRCC] office in Guangzhou, China ("Officer") that found that she was inadmissible to Canada for having misrepresented on a work permit application.

[2] Ms. He argued that the Officer failed to sufficiently respond to the submissions and evidence filed to address the misrepresentation allegation. I agree with Ms. He. Overall, I find the Officer's decision lacked transparency and justification, particularly in light of the severe consequences of a misrepresentation finding on Ms. He and her family. Key evidence and submissions were not addressed, and unsupported negative inferences were drawn.

[3] For the reasons set out below, I am granting this judicial review.

II. Background Facts

[4] Ms. He is a citizen of China. She and her spouse have a child who is approximately 11 years old. On January 30, 2019, Ms. He filed an application for an open work permit as a spouse of a skilled worker in Canada ("Work Permit Application"). Ms. He wanted to join her spouse, who was working in Canada as a skilled worker at that time.

[5] Approximately two months later, Ms. He received a procedural fairness letter from the IRCC visa office considering her Work Permit Application. The letter noted that the Officer had concerns that Ms. He had not truthfully answered question 2(b) of the Background Information section of the Work Permit Application: "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?"

[6] Ms. He had answered that question by checking the box "Yes" and below in the space provided, indicating: "I applied for a visitor visa to enter Canada in July 2018. My visa application was refused due to an incomplete application."

[7] The procedural fairness letter did not indicate the reason that the Officer had concerns about Ms. He's answers to this question. Prior to issuing the procedural fairness letter, in the Global Case Management System ("GCMS") notes, the Officer noted that based on information-sharing between Canadian and United States border authorities, there was a concern that Ms. He had previously been removed upon arrival from the United States on October 21, 2016, March 22, 2017 and March 23, 2017.

[8] Ms. He responded to the procedural fairness letter. She explained that she had previously been refused entry into the United States in April 2016 and refused an L2 visa in August 2016. Ms. He asked the Officer to apply the innocent mistake exception and not find her inadmissible for misrepresentation. She provided an updated work permit application with the correct information and a letter from Mr. Maydaniuk, General Counsel and VP Legal of the company where her husband worked, who confirmed that he had been enlisted to review and translate the form to Ms. He and he had omitted to ask the part of the question that said "any other country or territory."

[9] On December 10, 2019, the Officer refused the Work Permit Application, finding that Ms. He was inadmissible under paragraph 40(1)(a) of *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for misrepresentation. The basis for the misrepresentation finding was Ms. He's omission of her prior visa refusals from the United States in 2016.

[10] The Officer determined that this omission was not a "simple error" on the following grounds: Ms. He signed the form indicating that she understood that she had to answer all the

questions truthfully; she recalled the previous refusals from the United States but did not include them; Ms. He did not include her 2016 removal from the United States in another form in the Work Permit Application that was written in both Chinese and English; and she had filed other applications for Canadian temporary visas and therefore was familiar with the process, including the statutory questions on the form.

III. Issue and Standard of Review

[11] The sole issue in this judicial review is in relation to the Officer's decision to find Ms. He inadmissible based on misrepresenting her prior visa refusals from the United States in her Work Permit Application.

[12] Both parties agree that the standard of review applicable is reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

A. *Framework for misrepresentation determinations*

[13] In order to find a person inadmissible for misrepresentation under paragraph 40(1)(a) of *IRPA*, an officer must determine first, that there has been a misrepresentation; and second, that

the misrepresentation was material in that it could induce an error in the administration of the *IRPA*.

[14] Ms. He has not raised any arguments with respect to the Officer's determination that the misrepresentation at issue was material. Accordingly, the analysis on this judicial review will be limited to the first issue as to whether there has been a misrepresentation.

[15] This Court has consistently held that the misrepresentation provision is to be broadly interpreted given its purpose in promoting the integrity of Canada's immigration scheme (*Oloumi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 428 at para 23; *Tuiran v Canada (Minister of Citizenship and Immigration)*, 2018 FC 324 at paras 20, 25). An intention to deceive is not necessary to ground a misrepresentation determination (*Khedri v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1397 at para 21; *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at para 15 [*Baro*]).

[16] This Court has recognized, however, that there is a narrow exception to a s 40(1)(a) misrepresentation finding where an applicant can demonstrate that they honestly and reasonably believed that they were not misstating or withholding material information ("innocent mistake exception") (*Baro* at para 15). Ms. He raised the innocent mistake exception in her submissions to the Officer in response to the procedural fairness letter.

[17] Justice McHaffie recently considered the innocent mistake exception and noted that there appear to be two strains of case law from this Court, with one line of cases requiring that the

"knowledge of the misrepresentation was beyond the applicant's control" (see discussion at paras 16-21 of *Gill v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1441 [*Gill*]). Like Justice McHaffie in *Gill,* I need not attempt to address this issue because the matter before me—the Officer's treatment of Ms. He's evidence and submissions—is not dependent on a particular approach to evaluating the innocent mistake exception. As argued by Ms. He, the Applicant is not asking the Court to re-weigh the evidence and determine for itself whether Ms. He fits within the exception; this indeed is not my role on judicial review. Rather, at issue is whether the Officer's decision was transparent and justified by being sufficiently responsive to Ms. He's submissions and evidence.

[18] An inadmissibility finding due to misrepresentation has serious consequences for an applicant. It leads to a five-year period of inadmissibility during which they cannot apply for permanent residence and they must obtain Ministerial permission to be able to enter Canada (*IRPA*, ss 40(2), 40(3)).

[19] In this case, the consequence of a misrepresentation finding, if Ms. He's husband continued to work in Canada, would result in Ms. He and her son being separated from their husband/father for prolonged periods during the five-year period Ms. He is inadmissible to Canada. It would also not permit the family to apply for permanent residence for approximately five years.

[20] This Court has found that given these severe consequences, findings of misrepresentation must be made on the basis of clear and convincing evidence (*Xu v Canada (Minister of*

Citizenship and Immigration), 2011 FC 784 at para 16; *Chughtai v Canada (Minister of Citizenship and Immigration)*, 2016 FC 416 at para 29), that there is a heightened duty of procedural fairness owed (*Likhi v Canada (Minister of Citizenship and Immigration)*, 2020 FC 171 at para 27), and the reasons provided must reflect the profound consequence to the affected individual (*Gill* at para 7; *Vavilov* at para 133).

B. *Insufficient engagement with submissions and evidence*

[21] The Officer's reasons were not sufficiently responsive to the submissions and evidence filed by Ms. He in response to the procedural fairness letter. In particular, the Officer: i) failed to address evidence that explained the circumstances of the omission; and ii) drew unsupported negative inferences.

(1) Failed to address key evidence

[22] In Ms. He's response to the procedural fairness letter, her counsel included a letter from the General Counsel and VP Legal of the company where Ms. He's husband worked ("General Counsel"). The General Counsel explained that in asking Ms. He about her background information, he had mistakenly omitted the remainder of the question in 2(b) that stated "or any other country or territory." He acknowledged that his translation of the question was limited to prior visa refusals and removals by Canada and he did not ask for information about "any other country or territory."

[23] There is no mention of the General Counsel's letter in the Officer's decision. It was the only supporting letter Ms. He provided with her submissions in response to the procedural fairness letter. The Officer incorrectly noted in their reasons that Ms. He had "used the services of an agency"; it is unclear whether the Officer properly understood the steps Ms. He had taken to provide accurate information on the form. The Respondent's position is that this is of no consequence as it is presumed that officers have considered the evidence, and that in any case the Officer understood Ms. He's explanation that the full question had not been interpreted to her.

[24] It is not my role to speculate as to how the letter would have impacted the Officer's assessment of Ms. He's submissions and evidence. Nor is it my role to attempt to apply the innocent mistake exception test to these circumstances and determine whether Ms. He's situation would fit within it. The Officer did not accept Ms. He's explanation for omitting information about her United States refusals, finding that they were not satisfied it was a "simple error." I am satisfied that consideration of the letter, which provided a third party account of the circumstances surrounding the misrepresentation, could have had an impact on the Officer's overall decision.

(2) Unreasonable negative inferences

[25] The Officer cast aspersions on Ms. He's account by noting that the omitted information had also not been included in another required form in the Work Permit Application. The Officer referred to a form called "Education/Employment" where the questions are written in both English and Chinese, and where Ms. He provided her responses in both Chinese and English. This form includes a question that asks applicants for their travel history for the past five years.

In response, Ms. He noted the following: “Canada from 2015-10 to 2015-10, USA from 2015-05 to 2015-06, Belgium from 2014-09 to 2014-10, Germany from 2014-09 to 2014-10, France from 2014-09 to 2014-10, and Italy from 2013-09 to 2013-10.”

[26] The Officer drew a negative inference from the non-inclusion of Ms. He’s removal from the United States on April 20, 2016. The Officer noted that this form was provided in both English and Chinese; a point that seems to be made in order to contrast it from the other form where, according to Ms. He, the April 2016 removal from the United States was not included because the question had been improperly translated to her.

[27] It was unreasonable for the Officer to draw a negative inference on this basis. As explained by Ms. He in her submissions and supported by her passport stamp, Ms. He did not enter the United States on April 20, 2016 but rather was refused formal entry into the country upon arrival. The Officer’s analysis was devoid of consideration of the circumstances of the removal. Nevertheless, the fact that the non-entry was not listed as part of her travel history is used by the Officer to ground an inference about her conduct. This is significant because it goes to whether the Officer even believed Ms. He’s account of the circumstances surrounding the misrepresentation — whether they accepted on a subjective basis that she had made an innocent mistake. As noted above, the Officer found that they were not satisfied this was a “simple error,” implicitly suggesting that Ms. He intentionally withheld the information about her visa refusals from the United States.

[28] The Officer also noted that Ms. He had made previous Canadian temporary resident visa applications, including in 2015, where her application was approved. The Officer drew from this that Ms. He "therefore is familiar with the process, the statutory questions, as well as the need to answer all questions truthfully." While it may be true that Ms. He would have been familiar with the process and is expected to understand that she has an obligation to answer all questions truthfully, the assertion that she would have been familiar with the "statutory questions" on the Work Permit Application is unreasonable. The question at issue is lengthy with multiple parts. It is unreasonable to expect that applicants would remember the details of the questions years later.

C. *Conclusion*

[29] Given the serious consequences of a misrepresentation finding, I find the Officer's decision was not transparent or justified. Key evidence was not considered and unreasonable negative inferences were drawn.

[30] The application for judicial review is granted. Neither party raised a question for certification and I agree that none arises.

JUDGMENT IN IMM-930-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. The matter is referred back to a new officer for redetermination;

3. There is no question for certification.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-930-20
STYLE OF CAUSE:	JIAYAN HE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 21, 2021
JUDGMENT AND REASONS:	SADREHASHEMI J.
DATED:	FEBRUARY 1, 2022

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