Federal Court  Cour fédérale

Date: 20241015

Dockets: IMM-13360-23
IMM-13374-23

Citation: 2024 FC 1629

Ottawa, Ontario, October 15, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

AHMED HAMED MAHMOUD HUSSEIN
AMIRA AHMED ABDELRAHMAN ABDELKADER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a married couple from Egypt. Mr. Hussein applied for a work permit in connection with his efforts to obtain permanent residence though the Ontario Entrepreneur Provincial Nominee Program Stream [PNP], a program in which he had already invested substantial funds. His spouse, Ms. Abdelkader, applied for a visitor visa in order to accompany him to the same ends, i.e., to subsequently obtain permanent residence through the PNP.

[2] This is an application for leave and judicial review of the decision of an overseas Immigration Officer [Officer] in which the Applicants' applications for their work permit and visitor visa were denied and the Applicants were found to be inadmissible for misrepresentation under s 40(1)(a) of the *Immigration and Refugee Protection Act* [IRPA]. As a consequence of that decision, the Applicants remain inadmissible for a period of five years.

[3] Even though each Applicant had initially filed a separate Application for Leave and for Judicial Review, they both relied on the same evidentiary record and raised largely the same legal issues. Therefore, the two cases were later joined and I heard the judicial review of both matters at the same time.

A. *Relevant Facts*

[4] In 2022, the Applicants who resided in Doha, Qatar, applied for their work permit and visitor visa. In their respective applications, the Applicants failed to fully answer to the question "have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" Both Applicants responded to that question with information on Canadian visas but neglected to include information on visa refusals from other countries.

[5] On 8 February 2023, Immigration, Refugees and Citizenship Canada [IRCC] Visa Office sent the Applicants, through their former counsel, a procedural fairness letter [PFL] outlining a concern that the Applicants had committed misrepresentation by failing to "fully disclose adverse immigration information from Canada or other countries such as visa application refusals or other enforcement actions". The letter stated that IRCC was already aware of at least

one refusal of a non-immigrant visa by the United States. The Applicants were given 10 days to respond.

[6] On February 15, 2023, the Applicants, through their former counsel, filed a detailed response to the PFL, which included an affidavit from each Applicant and their counsel's submissions. They submitted that they had made an "innocent mistake" in completing the form by overlooking that the scope of the question was not limited to Canada and included "any other country". They then provided the details of previous refusals by the US for both, and for Ms. Abdelkader, also by Brazil.

[7] In April 2023, an IRCC officer found that the Applicants had committed misrepresentation and denied the applications. The Applicants sought to judicially review the decision in Federal Court, but the case was settled and sent back for redetermination before it was heard (Federal Court files numbers IMM-5871-23 (Ms. Abdelkader) and IMM-5880-23 (Mr. Hussein)).

[8] In August 2023, IRCC sent the Applicants a letter inviting further submissions for purposes of the redetermination, to which the Applicants responded with further submissions on September 6, 2023. They reiterated that their misrepresentation was innocent. Most notably, even though the IRCC letter did not advise of any potential concerns with the credibility of their evidence, the Applicants specifically stated the following:

> There is no basis upon which the credibility of their statements [in the Applicants' respective affidavits filed previously] may be impugned, and if there are credibility concerns, an oral interview should be conducted.

[9] In denying the application, the Officer found as follows:

> A40 misrep/ A16 truthfulness: applicant answered "yes" to the question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?" and declared prior Canada visa refusal(s) but did not declare prior USA visa refusal in 2018. Applications were refused, applicants applied for leave and JR. That action was discontinued on consent and applications were referred for redetermination. Applicants were given opportunity to make new submissions. In new submissions, ImmRep states that applicant submitted sworn stat dec as part of February 2023 submissions attesting to good faith in completion of the application forms and in answering the question in the way it was answered. ImmRep submits this was an honest and reasonable mistake, and that the submission of the omitted information was beyond the applicants' control due to their misapprehension of the questions on the form. ImmRep who represented applicants in making WP/TRVapp stated the non-declaration of the USA visa refusal was an inadvertent error that applicants innocently omitted to disclose. ImmRep stated that applicants were not aware they had made an error on the form until they received the PFL giving them an opportunity to respond to concerns about possible misrepresentation. Immrep states applicants declared prior Cda visa history and believed honestly and in good faith that was the only information required. ImmRep states applicant was focused on providing accurate info on prior Canadian applications and innocently overlooked the 'any other country" part of the question. Applicants now declare, but only after being notified that IRCC has information to show that the answer on their applications forms was not accurate, that they were refused both USA and Brazil visas. ImmRep submits that failure to declare prior USA and Brazil visa refusals was not a misrepresentation of a material fact that could induce an error in the administration of the Act. Applicants submitted affidavits in which they state that the simply missed the "any other country" portion of the question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?" because they understood the question to relate only to Canada, were focussed on providing accurate info for Canada and overlooked the requirement for other countries, that this was an innocent mistake made while answering the question in good faith. I note that the clients acknowledge the fact that the info provided at question 2(b) and/or 2(c) was not truthful and that relevant information was omitted, namely the refused US visa application. The omitted fact is relevant. The client has not disabused me of the concerns of factual misrepresentation, which were specifically addressed to the applicant and which could have

induced an error in the administration of the Act. I note that this is the client's third application; by which time familiarity with the requirements of the process, including responses to statutory questions, should be understood. I also note that the applicants were represented in submitting the WP/TRV applications, so again, there should be a high degree of familiarity with the process and the requirements to answer all questions fully and truthfully. **The client's statements are self-serving and of limited probative value, given that they were provided in response only after the omitted info and untruthful answers were pointed out in the PFL.** Officers are heavily reliant on applicants telling the truth on all parts of their applications. An officer's access to information from other sources, including IRCC's own records, does not reduce the obligation on an applicant to fully declare immigration history, including prior visa refusals by other countries, on the application. **I am not satisfied that this was simply inadvertent or an honest mistake committed in good faith, particularly taking into account that this was the applicants' third application and that they had the benefit of professional representation.** The question clearly states "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?" Applicants failed to declare prior USA refusals and, as they admitted in their response to the PFL, prior Brazil visa refusals). **I am not satisfied that it is reasonable to accept that it was not important or that applicant forgot or was simply careless or made an inadvertent honest mistake in completing the application. There is no room for misreading or misinterpreting the question to apply only to previous Canadian TRV refusals or for interpreting the question to mean that it is acceptable to omit refusals by other countries depending on the reason for the refusal.** The applicant signed the application declaring that all the questions were answered fully and truthfully. **I am satisfied, on a balance of probabilities, that the applicants misrepresented their immigration history in an attempt to improve the chances of obtaining a WP/TRV**. Immigration history is a material fact going directly to the relevant matter of whether an officer will be satisfied that the applicant will comply with the conditions of the visa and leave Canada at the end of an authorized stay. The failure to accurately declare the immigration history foreclosed an avenue of investigation into the applicant's immigration history and ties to home country. I find the applicant inadmissible for misrepresentation pursuant to A40(1). Application refused. (Emphasis added).

II. Decision

[10] I allow the Applicants' judicial review application because I find the decision made by the Officer was reached in a procedurally unfair manner.

III. The Issues and Standard of Review

[11] I summarize the issues articulated by the Applicants as follows:

i. Was the Officer's decision unreasonable?

ii. Did the Officer breach the principles of procedural fairness in reaching their decision?

[12] The standard of review applicable to visa decisions is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1645 at para 13; S*hah v Canada (Citizenship and Immigration)*, 2022 FC 1741 at para 15). 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" (*Vavilov* at para 85). The reviewing court must ensure that the decision is justifiable, intelligible, and transparent (*Vavilov* at para 95). Justifiable and transparent decisions account for central issues and concerns raised in the parties' submissions to the decision maker (*Vavilov* at para 127).

[13] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada*

(Attorney General), 2018 FCA 69 [*Canadian Pacific Railway Company*] at paras 37–56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paras 21–28 (see *Canadian Pacific Railway Company* at para 54).

[14] Regarding questions of procedural fairness, Justice Régimbald recently wrote in *Nguyen v Canada (Citizenship and Immigration)*, 2023 FC 1617 at para 11:

> the reviewing court must be satisfied of the fairness of the procedure with regard to the circumstances (*Singh v Canada (Citizenship and Immigration)*, 2023 FC 215 at para 6; *Do v Canada (Citizenship and Immigration)*, 2022 FC 927 at para 4; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]). In *Canadian Pacific Railway*, the Federal Court of Appeal noted that trying to "shoehorn the question of procedural fairness into a standard of review analysis is… an unprofitable exercise" (at para 55). Instead, the Court must ask itself whether the party was given a right to be heard and the opportunity to know the case against them, and that "[p]rocedural fairness is not sacrificed on the altar of deference" (*Canadian Pacific Railway* at para 56).

IV. Analysis

A. *Legal Framework: the Applicable Provisions of the IRPA*

[15] A foreign national wishing to reside in or visit Canada must, before entering the country, file an application for the appropriate visa. The visa will be issued if, after an examination, the visa officer is convinced that the foreign national complies with the requirements of the IRPA. A visa may only be issued if the officer is satisfied the foreign national is not inadmissible pursuant to section 11 of the IRPA.

[16] The following are the other applicable sections of the IRPA in this case:

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]

Application before entering Canada 11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. […]	**Visa et documents** 11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi. […]
Obligation — answer truthfully 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. […]	**Obligation du demandeur** 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. […]
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; […]	**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; […]

[17] A foreign national seeking to enter Canada has a "duty of candour", which requires disclosure of material facts (*He v Canada (Minister of Citizenship and Immigration)*, 2012 FC 33 at para 17).The courts have recognized the importance of full disclosure by applicants to the proper and fair administration of the immigration scheme.

[18] Under subsection 40(1)(a) of the IPRA, a person is inadmissible to Canada if he or she withholds “material facts relating to a relevant matter that induces or could induce an error in the administration” of the IRPA. A foreign national is inadmissible for either direct or indirect misrepresentation and, the misrepresentation must be material in that it could have induced an error in the administration of the IRPA (IRPA, s 40(1)(a)).

[19] In this case, I find that the Officer breached the principles of procedural fairness. Therefore, I do not need to engage in a detailed analysis of the framework for misrepresentation.

B. *The Fairness and Reasonableness of the Decision*

[20] In assessing the reasonableness of the decision, the Court recognizes that the high volume of visa decisions are such that exhaustive reasons are not required (*Vavilov* at paras 88, 91; *Lingepo v Canada (Citizenship and Immigration)*, 2021 FC 552 at para 13; *Yuzer v Canada (Citizenship and Immigration)*, 2019 FC 781 at paras 9, 16 [*Yuzer*]; *Wang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1298 at paras 19-20). Nonetheless, the reasons given by the Officer must, when read in the context of the record, adequately explain and justify why the application was refused (*Yuzer* at paras 9, 20; *Hashemi v Canada (Citizenship and Immigration)*, 2022 FC 1562 at para 35; *Vavilov* at paras 86, 93–98).

[21] Having said this, it is important to highlight that in *Vavilov*, the SCC affirmed that the level of procedural fairness must be proportionate to the potential consequences for the Applicants, while also influencing the approach to reasonableness review:

> Impact of the Decision on the Affected Individual
>
> [133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the

> potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
>
> [134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

(1) Did the Officer make credibility findings?

[22] In this case, the Applicants admitted to omitting information on previous US and Brazil applications and explained that the omission was innocent, inadvertent and the result of misreading the form. However, the Officer's reasons do not analyse the explanation provided by the Applicants against the legal test for misrepresentation. Rather, the Officer rejected the explanation that it was an inadvertent and honest mistake and concluded that the Applicants deliberately omitted the information to mislead. This understanding is clear based on what the Officer writes:

> - The client's statements are self-serving and of limited probative value, given that they were provided in response

> only after the omitted info and untruthful answers were pointed out in the PFL.
>
> - I am not satisfied that it is reasonable to accept that it was not important or that applicant forgot or was simply careless or made an inadvertent honest mistake in completing the application. There is no room for misreading or misinterpreting the question to apply only to previous Canadian TRV refusals or for interpreting the question to mean that it is acceptable to omit refusals by other countries depending on the reason for the refusal.
>
> - I am satisfied, on a balance of probabilities, that the applicants misrepresented their immigration history in an attempt to improve the chances of obtaining a WP/TRV.

[23] The Respondent denies that the Officer made a credibility finding. The Respondent suggests that the Officer simply found that careless or reckless readings of the form were not sufficient explanation for the mistake and that the affidavits provided limited probative value to overcome the narrow defence of "innocent misrepresentation".

[24] With respect, I find that the Respondent is mischaracterizing the Officer's reasons. The Officer stated that they reject the evidence because it was "self-serving"; implying that bias or personal interest undermined the reliability or trustworthiness of the Applicants' sworn statements. The Officer rejected that the omission could have reasonably been an oversight, given the Applicants' experience with the process. The Officer did not limit the probative value of the affidavits because they were insufficient to overcome the high legal test. Rather, the Officer explicitly stated that they rejected that the Applicants could have been "simply careless or made an inadvertent honest mistake in completing the application." The Officer emphasized this finding when they wrote that the question on the form left no room for misinterpretation. It is clear that the Officer did not believe the Applicants. The reasons reflect that the Officer found that the Applicants had lied "in an attempt to improve their chances of obtaining a WP/TRV

[work permit, and temporary resident visa, respectively]", and that the Applicants were in effect making unreasonable excuses after they were caught. Given the wording of the reasons, it is logically inconsistent to claim that the Officer did not engage in a credibility assessment. The Officer clearly found the Applicants lacked credibility.

(2) Given that the Officer engaged in a credibility finding against the Applicants, did the Officer have a duty to provide the Applicants with notice?

[25] The Officer made explicit findings, without notice, that the Applicants' misrepresentations could not have been innocent because their explanations lacked credibility. To argue that the decision was reasonable and fair, the Respondent relied on a line of pre-*Vavilov* cases (see *Alalami v Canada ((Minister of Citizenship and Immigration)*, 2018 FC 328 at paras 21–24; see *Khan v Canada (Minister of Citizenship and Immigration),* 2008 FC 512 at paras 25; see *Haque v Canada (Minister of Citizenship and Immigration)*, 2011 FC 315 at paras 13–17). In these decisions, there was not yet explicit guidance for the proportionality of procedural fairness to the consequence of the decision. The Respondent also relied on some post-*Vavilov* cases that had followed these cases, without engaging with the *Vavilov* requirement (see *Muniz v Canada (MCI),* 2020 FC 872). Therefore, I exercise caution in following them. Since *Vavilov*, this Court has repeatedly affirmed the principle that if the decision has a particularly harsh consequence, the decision-maker owes the Applicant a higher degree of procedural fairness (see *Gill v Canada (Minister of Citizenship and Immigration),* 2021 FC 1441 at para 7; *Likhi v Canada (Minister of Citizenship and Immigration)*, 2020 FC 171 at paras 27, 35; see also *He v Canada (Citizenship and Immigration)*, 2022 FC 112 at para 20; see also *Patel v Canada (Citizenship and Immigration)*, 2023 FC 614 at para 14).

[26] In this particular case, there is no dispute that the five-year inadmissibility is a significant consequence to the Applicants. The consequence for these Applicants is even harsher because the finding also jeopardizes their underlying permanent residence application. Further, in their submissions, the Applicants made the explicit request to have the opportunity to respond to any potential credibility concerns. Not only did the Officer base their decision on credibility concerns not properly raised with the Applicants, the reasons were unresponsive to the Applicants' explicit request to respond to credibility concerns.

[27] I find that at a minimum, by not putting the Applicants on notice that there were credibility concerns and then basing the decision on those credibility concerns, the Officer reached a procedurally unfair decision. By not engaging with their explicit request for an interview in case of credibility concerns, the Officer was also non-responsive to their submission, which also made the decision unreasonable.

[28] The Supreme Court of Canada explained that a decision must not only be justifiable but also justified by the reasons given (*Vavilov* at paras 99–100). I do not find the decision justified by the reasons given. The Officer engages in a credibility assessment of the Applicants without providing reasons for denying the Applicants an opportunity to have their credibility assessed.

[29] This is a determinative reviewable error. It is not necessary for me to engage with the nature of innocent misrepresentation and other issues the Applicants have raised in this case.

V. Conclusion

[30] The Application for Judicial Review is granted. This matter is returned to the Visa Post for redetermination by a different officer and in accordance with this judgment.

[31] There is no question to be certified.

JUDGMENT IN IMM-13360-23 and IMM-13374-23

THIS COURT'S JUDGMENT is that

1. The application for Judicial Review is granted. This matter is returned to the Visa Post for redetermination by a different officer;
2. If the matter will be redetermined, the Applicants will be given an opportunity to file further evidence and submissions;
3. There is no question for certification.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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