Federal Court  Cour fédérale

Date: 20200117

Dockets: IMM-1773-19
IMM-2874-19

Citation: 2020 FC 66

Ottawa, Ontario, January 17, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SERGIO ANTONIO REYES GARCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of a Canada Border Services Agency ("CBSA") Border Services Officer (the "Officer") to cancel the Applicant's electronic travel authorization ("ETA") on a finding that the Applicant had misrepresented on the ETA and was therefore inadmissible for misrepresentation.

[2] The Applicant is a citizen of Mexico, and was travelling from Mexico to Canada as a visitor with his family. Due to the discovery of undeclared currency during baggage inspection, the Applicant underwent a secondary examination for an in-depth interview with the Officer. At the end of the interview, the Applicant was found inadmissible for misrepresentation pursuant to subsection 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] on the Officer's conclusion that the Applicant misrepresented having been charged with a criminal offence. The Applicant withdrew his application pursuant to subsection 42(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], and subsequently, the Applicant's ETA was cancelled pursuant to subsections 12.06(e) and 12.07 of the *IRPR*.

[3] The Applicant submits that the Officer found the Applicant inadmissible for misrepresentation without the proper procedures and therefore had no jurisdiction to make such a determination, the Officer violated procedural fairness, and the Officer erred in concluding that the Applicant had misrepresented the facts.

[4] For the reasons below, I find the Officer breached procedural fairness and that the Officer's decision is unreasonable. This application for judicial review is granted.

II. Facts

A. *The Applicant*

[5] Sergio Antonio Reyes Garcia (the "Applicant") is a 44-year-old citizen of Mexico. On January 28, 2018, the Applicant applied for an ETA. On the ETA application form, when asked

whether he had been charged with or convicted of an offence, the Applicant stated that he had never been charged with or convicted of an offence.

[6] On March 3, 2019, the Applicant travelled from Mexico City, Mexico to Vancouver International Airport via air. He was accompanied by his wife and their two children. The Applicant stated that he was travelling to Whistler, British Columbia for vacation. The Applicant had completed an E677 currency declaration form. However, during the baggage examination, additional unreported currency was discovered. The CBSA Border Services Officer interviewed the Applicant concerning the undeclared currency. The Officer writes in his affidavit that the Applicant provided multiple inconsistent and contradictory statements when questioned about the origins of the currency. Based on the "legitimate origin concerns of the currency and further possible concerns regarding the [Applicant's] inadmissibility," the Applicant was subject to a further, more in-depth interview to determine admissibility.

B. *The Interview and Decision under Review*

[7] During the interview, the Officer asked about the Applicant's business interests and the source of the funds he was carrying with him. The Officer asked where the Applicant obtained funds to start his first company, how much the Applicant earned in income, and how much money he had in his accounts. The Officer questioned the Applicant on the amount of funds he had taken out for his travels, and the Applicant told the Officer that a woman named Christina exchanged his money. The Applicant stated that he had known Christina for ten years, but appeared to have little knowledge of her beyond the money exchanging services she provided for the Applicant.

[8] The Officer delved into the Applicant's companies that he had mentioned and asked if the Applicant had been involved in any investigations regarding his businesses or business partners. The Applicant responded that he was never investigated. The Officer proceeded to question the Applicant on business transactions related to the Applicant's business partner, Manuel Barreiro, who was investigated by Mexican agencies for money laundering. The Applicant claimed that the allegations resulted from political issues. The Officer then referred to an article that mentioned the Applicant having been charged with an offence relating to illicit origin of funds. The Applicant stated he was never charged, although the authorities had wanted to charge him.

[9] After a few lines of questioning about Manuel and his businesses, the Officer again turned the focus back to the Applicant as to whether he was ever "charged, convicted, or arrested of anything". The Applicant stated he did not understand what being "charged" meant, so a Spanish interpreter was brought in to explain what the term meant in the context of a criminal investigation. Subsequently, the Applicant claimed that he understood what being "charged" meant, and answered "yes" to having been charged, and several other questions of the Officer relating to this "charge".

[10] During the interview, the Officer accessed the Applicant's email on his mobile phone and asked questions about meetings that were set up between the Applicant and his contacts who were allegedly accused of money laundering. The Officer concluded that the travel funds in the Applicant's possession were suspected proceeds of crime from the money-laundering scheme in Mexico. The Officer stated:

> My conclusion is that this money is suspected proceeds of crime. This money was derived from assertions based on information that

> you and your fellow co-defendants were charged with money laundering in Mexico in which you were aware of the business dealings of your fellow co-defendants including Barreiro who was orchestrating the movement of money through various shell companies including companies in Canada. By providing false companies and registering companies outside of Mexico, there was vast movement of money to various places around the world including Switzerland and Canada.

[11] The Officer informed the Applicant that he was "inadmissible to Canada for misrepresentation," because he "failed to indicate "yes" on [his] eTa application that [he was] arrested/charged/convicted of a crime" although he purportedly knew of these charges before submitting the ETA application, according to the Officer's conclusions.

[12] The Officer subsequently advised the Applicant that he could re-apply for his ETA, and noted that the Applicant would be required to answer all questions truthfully and provide documentation to confirm that he would not be inadmissible to Canada. The Officer reiterated this again at a later point.

[13] Subsequently, the Applicant signed a form titled "Allowed to Leave", which allowed the Applicant to voluntarily withdraw his application to enter Canada under subsection 42(1) of the *IRPR*. The Applicant's "Withdrawal of the Application to Enter Canada" form stated that the Applicant's ETA was cancelled for the following reasons: "As per section A40(a), You are inadmissible to Canada for Misrepresentation. You have withdrawn your application to enter Canada under subsection 42(1)."

[14] As noted by the Applicant, at no point during the process in which the Applicant was "found inadmissible" was a s.44(1) report prepared by a CBSA Officer or the case sent to an admissibility hearing under s.44(2) of the *IRPA*. From the record, it appears that the Officer drew his own conclusions and determined that the Applicant was inadmissible for misrepresentation following the secondary interview. The Officer informed the Applicant that he was inadmissible to Canada, and based on the information provided by the Officer, the Applicant agreed to withdraw. Furthermore, the record shows no evidence of the Applicant having been advised of the consequences of a misrepresentation finding nor of the five-year bar on entering Canada.

III. Issues and Standard of Review

[15] There are three issues that arise on this application for judicial review:

1. Did the Officer have the power to find the Applicant inadmissible for misrepresentation without writing a s.44(1) report and referring the matter to a Minister's Delegate, and as a result breach procedural fairness?
2. Did the Officer err in cancelling the Applicant's ETA application?
3. Did the Officer err in finding that the Applicant misrepresented on his ETA application?

[16] As this case was heard prior to the release of the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], parties' submissions did not reflect the revised framework on standard of review. Nonetheless, in my view, the same standard of review would apply on the issues as under the previous framework in *Dunsmuir v New Brunswick*, 2008 SCC 9.

[17] Under the *Vavilov* framework, the analysis begins with the presumption of reasonableness. This presumption can be rebutted in two types of situations: first, where the legislature has indicated that it intends a different standard to apply, i.e. where it has explicitly prescribed the applicable standard of review, or where it has provided a statutory appeal mechanism from the administrative decision maker to a court; and second, where the rule of law requires that the standard of correctness be applied, for example in certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17).

[18] However, in assessing the Officer's decision to the finding of misrepresentation and the cancellation of the ETA, neither exception to the presumption applies. Thus, issues #2 and #3 are reviewable on a reasonableness standard.

[19] Pre-*Vavilov*, issues of procedural fairness were reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 72). In *Vavilov*, this approach remains the same. In *Vavilov* at paragraph 23, the Supreme Court writes:

> Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[20] A reading of paragraphs 76 and 77 in *Vavilov* reveals the Supreme Court's acknowledgement that the "requirements of the duty of procedural fairness in a given case…will impact how a court conducts reasonableness review." In my view, this is instructive for a reviewing court to first determine whether a duty of procedural fairness exists, and in light of the procedural fairness requirements (if applicable), apply the presumption of the reasonableness standard on the overall decision. In *Vavilov*, the duty of procedural fairness concerned whether reasons for the administrative decision was required and provided (*Vavilov* at para 78). Having found that reasons for both required and provided in this case, the Supreme Court moves onto its discussion on whether the decision is substantively reasonable. The following excerpt is also helpful, where the duty of procedural fairness is distinguished from the reasonableness analysis (*Vavilov* at para 81):

> […] The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

[21] In my view, the correctness standard continues to apply to the issue of procedural fairness in the case at bar.

IV. Statutory Framework

[22] Under subsection 40(1)(a) of the *IRPA*, misrepresentation is one of the grounds for inadmissibility when entering Canada. It reads as follows:

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;

[23] Subsection 44(1) of the *IRPA* describes a report that may be written by an officer upon an alleged inadmissibility of a foreign national or permanent resident and transmitted to the Minister's Delegate. Subsection 44(2) of the *IRPA* provides that if the report written pursuant to s.44(1) is well-founded, the Minister may refer this to the Immigration Division ("ID") for an admissibility hearing. The provisions read as follows:

Preparation of report

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Referral or removal order

(2) 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, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Rapport d'interdiction de territoire

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

V. Analysis

A. *Breach of Procedural Fairness*

[24] The Applicant submits that the Officer was without jurisdiction to make a finding of misrepresentation pursuant to subsection 40(1)(a) of the *IRPA* because a finding of misrepresentation in the context of an application for admission to Canada at a port of entry ("POE") can only be made at an admissibility hearing. The Applicant also submits that he was not adequately provided with notice of the consequences of an inadmissibility finding, and not provided with a chance to respond through the proper channels.

[25] The Respondent argues that if a foreign national has not been granted the right to enter Canada upon examination at a POE, they are not "a foreign national in Canada" for purposes of section 44 of the *IRPA*. The Respondent bases its submission on the wording in sections 44(1) and 18 of the *IRPA*, and argues that since the Applicant had not "entered" Canada when the officer interviewed him, he was not a foreign national in Canada as described in subsection 44(1) of the *IRPA*, and thus the Officer had no obligation to prepare a s.44(1) report.

[26] I note that the parties agree there was no formal finding of inadmissibility. The Respondent takes the position that there is no decision to set aside because the Officer did not make a formal determination and thus no misrepresentation finding.

[27] The Applicant asks the Court to provide a clear indication that there is no five-year bar from entry, and that the Officer did not have jurisdiction to make a "finding" of inadmissibility.

[28] The Respondent, in reply, noted that there is nothing in the record regarding the five-year bar. The Respondent submits that the conversation between the Officer and the Applicant would have discussed the bar if it had a relevant application to the Applicant. The Respondent notes that the Applicant's affidavit is the only place where the five-year bar is discussed.

[29] However, I am not persuaded by the Respondent's submissions. Although the Officer did not state a five-year bar, the bar does not derive from the Officer's delegated authority—but rather from the operation of statute. Furthermore, in my view, the Respondent's interpretation of sections 44(1) and 18 of the *IRPA* is incorrect. Subsection 37(1) of the *IRPR* states (with my emphasis added):

37 (1) Subject to subsection (2), the examination of a person who seeks to enter Canada, or who makes an application to transit through Canada, ends only when	**37 (1)** Sous réserve du paragraphe (2), le contrôle de la personne qui cherche à entrer au Canada ou qui fait une demande de transit ne prend fin que lorsqu'un des événements ci-après survient :
(a) a determination is made that the person has a right to enter Canada, or is authorized to enter Canada as a temporary resident or permanent resident, the person is authorized to leave the port of entry at which the examination takes place and the person leaves the port of entry;	**a)** une décision est rendue selon laquelle la personne a le droit d'entrer au Canada ou est autorisée à entrer au Canada à titre de résident temporaire ou de résident permanent, la personne est autorisée à quitter le point d'entrée où le contrôle est effectué et quitte le point d'entrée;
(b) if the person is an in-transit passenger, the person departs from Canada;	**b)** le passager en transit quitte le Canada;
(c) the person is authorized to withdraw their application to enter Canada and an officer verifies their departure from Canada; or	**c)** la personne est autorisée à retirer sa demande d'entrée au Canada et l'agent constate son départ du Canada;
(d) a decision in respect of the person is made under subsection 44(2) of the Act and the person leaves the port of entry.	**d)** une décision est rendue en vertu du paragraphe 44(2) de la Loi à l'égard de cette personne et celle-ci quitte le point d'entrée.

[30] The wording of subsection 37(1) of the *IRPR* shows that one possibility for the end of an examination for a person seeking to enter Canada is a decision under subsection 44(2) of the *IRPA*. The Applicant did not have to be formally "admitted" into Canada before the Officer could prepare a s.44(1) report. Furthermore, the Respondent appears to have misconstrued the inadmissibility determination process. For a finding of inadmissibility, the procedure at a POE requires an officer to prepare a s.44(1) report setting out allegations, which is then referred to a Minister's Delegate for a section 44(2) determination. Pursuant to subsection 44(2) of the *IRPA*, the Minister's Delegate may refer the report to the ID for an admissibility hearing, if they are of the opinion that the report is well-founded. Since a report involving allegations of misrepresentation under subsection 40(1)(a) of the *IRPA* does not fall under one of the circumstances that "shall not be referred to the Immigration Division" pursuant to subsection 228(1) of the *IRPR*, it follows that the matter would need to be referred to an admissibility hearing as a next step.

[31] Whether the Officer acted without proper authority in making his own admissibility determination deserves a close reading and interpretation of the word "may" in subsection 44(1) of the *IRPA* and the scope of discretion afforded by the provision.

[32] In *Correia v Canada (Minister of Citizenship and Immigration)*, 2004 FC 782 (CanLII) [*Correia*], this Court discussed subsection 44(1) of the *IRPA* with regard to a CBSA officer's "formation of the opinion as to inadmissibility" and "the decision to make a report" (*Correia* at para 20):

> The decision to make a report must be considered against the backdrop of this Division of the Act which has as its purpose the

> removal of certain persons from Canada. The discretion not to report must be extremely limited and rare otherwise it would give to officials a level of discretion not even enjoyed by the responsible Minister.

[33] In case law that discusses the interpretation of subsection 44(1) and the discretion given to officers, the analysis is focused on whether and to what extent officers can consider various factors in making a decision to prepare the s.44(1) report. For example, this Court has discussed whether an immigration officer has the discretion to consider humanitarian and compassionate grounds under section 44 of the *IRPA*, and whether immigration officers are obligated to take factors listed on Immigration, Refugees and Citizenship Canada's ("IRCC") Operational Manuals into consideration (*See Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 (CanLII) at paras 17-31). *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 (CanLII) at para 29 offers an example as well (emphasis in original):

> In spite of this clarity regarding inadmissibility under paragraph 36(1)(*a*), subsection 44(1) allows a residual discretion in the immigration officer. Once the immigration officer reaches his opinion of inadmissibility, the officer "<u>may</u> prepare a report setting out the relevant facts". The IRPA does not set out what "relevant facts" would be. Nor does it confine the discretion of the officer in preparing a report. Parliament has not provided any direction to how these officials are to carry out their duties under these provisions.

[34] Neither the jurisprudence nor a reading of the relevant statutory provisions offer support for the proposition that officers have the discretion to make their own admissibility determinations without writing a s.44(1) report. The discretion under subsection 44(1) of the *IRPA* does not empower immigration officers to make an admissibility finding themselves, but

rather allows officers to report their opinion of inadmissibility of an applicant, should they reach one given the evidence before them.

[35] Although the case at bar involves a non-criminal inadmissibility section, I note that some cases involving inadmissibility based on criminality even go as far to completely reduce the discretion that officers may have in writing s.44(1) reports, and treat it merely as "an administrative function", which demonstrates that in certain cases, officers have a severely narrowed discretion and are essentially required to write the s.44(1) report. *Awed v. Canada (Minister of Citizenship and Immigration),* 2006 FC 469 (CanLII) at paras 10 and 18 notes two such cases:

> [10] In *Correia v. Canada (Minister of Citizenship and Immigration) (2004),* 253 F.T.R. 153, 2004 FC 782 (CanLII), Justice Michael Phelan viewed the report made by the officer under s. 44(1) as essentially an administrative function, lacking any scope for the exercise of discretion on the part of the officer. The report under subsection 44(1), he concluded, is restricted to the relevant facts, and in the case of criminality the relevant facts are those pertaining to the fact of conviction. […]
>
> […]
>
> [18] In my view, where an interview is held under s.44 (1), the purpose of the interview is simply to confirm the facts that may support the formation of an opinion by the officer that a permanent resident or foreign national present in Canada is inadmissible. The use of the word "may" in s. 44(1) does not connote discretion but merely that the officer is authorized to perform an administrative function: *Ruby v. Canada (Solicitor General) (C.A.),* 2000 CanLII 17145 (FCA), [2000] 3 F.C. 589 at 623 - 626, 187 D.L.R. (4th) 675 (F.C.A.).

[36] An understanding of the discretionary aspect of subsection 44(1) of the *IRPA* can also be informed by IRCC's Operational Manuals. "ENF 3: Admissibility, Hearings and Detention

Review Proceedings" [ENF 3] notes that a s.44(1) report is "the legal document that gives the [Minister's Delegate] the authority to issue a removal order or to refer the matter for an admissibility hearing, as prescribed by R228 and R229."

[37] "ENF 5: Writing 44(1) Reports" [ENF 5] outlines the procedure for immigration officers when they make a decision to write a s.44(1) report. It provides guidance as follows (ENF 5, page 8) [my own emphasis added]:

> The fact that officers have the discretionary power to decide whether or not to write n inadmissibility report does not mean that they can disregard the fact that someone is, or may be, inadmissible, or that they can grant status to that person under A21 and A22. Rather, this discretion gives officers flexibility in managing cases where no removal order will be sought, or where the circumstances are such that the objectives of the Act may or will be achieved without the need to write a formal inadmissibility report under the provisions of A44(1).

[38] The discretion as described in ENF 5 is one that "gives officers flexibility in managing cases", and not a discretion or authority for the officers themselves to make conclusive inadmissibility determinations. ENF 5 provides further insight into the nature of discretion and the word "may" in subsection 44(1) of the *IRPA* through a list of factors. A non-exhaustive list of factors for officers to consider in assessing a non-criminal inadmissibility includes: whether the person is already the subject of a removal order; whether the person is already subject to a separate inadmissibility report that will likely result in a removal order; whether the person has been fully counselled on the topic of their inadmissibility; and whether there is any evidence of misrepresentation.

[39] On a plain reading, some of these factors allude to situations where an officer could exercise the discretion not to write a s.44(1) report because the preparation of a separate s.44(1) report would result in duplicated efforts for removal if the person concerned is likely to be or already subject to a removal order. None of the listed factors indicate that the discretion for an officer not to write a s.44(1) report flows from some authority of the officer to make an admissibility determination on their own.

[40] In the case at bar, there was no indication that a s.44(1) report was written or that a referral was made to the Minister's Delegate. However, during the interview, the Officer came to his own determination on admissibility by stating, "You are inadmissible to Canada for misrepresentation. You failed to indicate 'yes' on your eTa application that you were arrested/charged/convicted of a crime". In this regard, the Officer acted without proper authority and erred in making an admissibility finding based on misrepresentation. As such, the Applicant was deprived of the procedural fairness that would have been accorded under subsections 44(1) and 44(2) of the *IRPA*.

B. *Cancellation of ETA Application*

[41] As the Applicant notes, "ENF 4: Port of entry examinations" [ENF 4] states that a Border Services Officer who is a Minister's Delegate may cancel an ETA when certain conditions are met. It reads as follows:

> As per the CBSA OB PRG-2016-22, a BSO who is an MD (refer to OPS-2015-12 OB) may cancel an eTA when the following conditions are met:
>
> - Following the preparation of an A44(1) report by an officer; and

- If the foreign national is subject to an enforceable removal order issued by the MD; and
- Following a review of the report by an MD who forms his/her own conclusions regarding inadmissibility based on careful considerations of facts and evidence and only after having met the fairness requirement.
- If the MD does not have the delegated authority to issue a removal order and instead refers the report to the Immigration Division (ID) for an admissibility hearing, a decision on eTA cancellation should be deferred until a removal order is issued as a result of the admissibility hearing.
- The cancellation of the eTA should not merely be based on the fact that a removal order has been issued, unless the delegated officer forms his/her own conclusions concerning inadmissibility. This should be articulated in the officer notes.

[42] One of the conditions to be met is "the preparation of an A44(1) report by an officer" (ENF 4, section 13.14 "eTA validity and cancellation"). However, since a s.44(1) report was not prepared in the case at bar, the Officer erred in listing inadmissibility for misrepresentation as one of the grounds for cancelling the ETA.

[43] The Respondent submits that the Officer properly cancelled the Applicant's ETA because the Applicant had voluntarily withdrawn his application to enter Canada pursuant to section 42(1) of the *IRPA*. The Respondent relies on section 12.06(e) of the *IRPR* for this proposition. Section 12.06(e) of the *IRPR* states that a foreign national who holds an ETA becomes "ineligible" to hold the ETA upon withdrawal of their application to enter Canada. Furthermore, section 12.07 of the *IRPR* states:

12.07 An officer may cancel an electronic travel authorization that was issued to a foreign national if the foreign national is inadmissible or becomes ineligible to hold such an	**12.07** Un agent peut annuler une autorisation de voyage électronique délivrée à un étranger si ce dernier est interdit de territoire ou s'il n'est plus habilité, aux termes de l'article

authorization under section 12.06. 12.06, à en détenir une.

[44] The Respondent submits that based on the interview conversation and the evidence before him, it was reasonable for the Officer to cancel the ETA. The Respondent argues that the Officer relied on the interview and open source articles, which pointed to charges against the Applicant.

[45] However, the Applicant notes that while the open source articles discuss investigations, they do not mention formal charges. The Applicant asserts the decision to make a misrepresentation finding based on this information was unreasonable because the articles never clearly stated that there were charges.

[46] In my view, it was reasonable for the Officer to cancel the Applicant's ETA on the basis that the Applicant had become ineligible to hold it upon withdrawal of his application to enter Canada under subsection 42(1) of the *IRPA*. That being said, however, the Officer erred in finding that misrepresentation was a ground for cancellation of the ETA.

C. *Finding of Misrepresentation*

[47] The Applicant submits that the Officer erred in finding that the Applicant misrepresented, as he was never charged with an offence in Mexico. The Applicant notes in his affidavit that he answered "yes" to a question related to allegations made against him, but claims that he never stated he had been charged with an offence.

[48] The Respondent submits that the Officer's finding of misrepresentation was reasonable as it was based on the Applicant's answers in his ETA application and those given during the interview. The Respondent argues that the Officer presented public source information regarding the alleged money laundering, and the Applicant had an opportunity to respond to the Officer's concerns.

[49] In my view, it was open to the Officer to form his own opinion as to an alleged misrepresentation based on the interview and the Applicant's ETA application based on the evidence before him. The Applicant stated in his application that he had never been charged with or convicted of an offence. Then during the interview, when it appeared that the Applicant did not fully understand what being "charged" meant, an on-site Spanish interpreter was brought in to explain the term's meaning in the context of a criminal investigation. The Officer provided instructions for the interpreter to explain to the Applicant the meaning of "charged" and its distinction from a conviction. The Applicant subsequently stated that he "understand[s] now what charge means". Then upon the Officer's question as to whether he was charged with anything, the Applicant replied, "Yes, I was"—an answer contrary to what he had stated in the ETA application. Based on the evidence, it was reasonable for the Officer to have formed an opinion that the Applicant could be inadmissible on the ground of misrepresentation.

[50] However, although it was open to the Officer to form an opinion as to an alleged misrepresentation, as I noted above, the Officer did not have the authority to make a final admissibility determination. Only the Minister's Delegate or the ID may make such findings.

Therefore, the Officer erred in finding that the Applicant had misrepresented and that he was therefore inadmissible.

VI. Certified Question

[51] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. Conclusion

[52] The Officer's decision is unreasonable and the Officer breached procedural fairness. The Officer erred in making his own determination of an admissibility finding, as he lacked authority to do so. For an admissibility finding, the Officer was required to prepare and transmit a s.44(1) report to the Minister's Delegate. As the Officer acted without jurisdiction, he stripped the Applicant of procedural fairness that the Applicant would have been provided with under the proper procedure. Moreover, the Officer erred in listing inadmissibility based on misrepresentation as a ground for cancelling the ETA. Lastly, the Officer erred in finding the Applicant had misrepresented. He simply could not conclude so, for the reasons stated above.

[53] Therefore, this application for judicial review is allowed.

JUDGMENT in IMM-1773-19 and IMM-2874-19

THIS COURT'S JUDGMENT is that:

1. The decisions under review are set aside and the matters referred back for redetermination by a different officer.
2. No question is certified.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-1773-19 AND IMM-2874-19
STYLE OF CAUSE:	SERGIO ANTONIO REYES GARCIA V THE MINISTER OF CITIZENSHIP AND IMMIGRATION & THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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