Federal Court  Cour fédérale

Date: 20220427

Docket: IMM-2456-20

Citation: 2022 FC 620

Toronto, Ontario, April 27, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

DIVYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review, pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a visa officer's (the "Officer") decision finding her inadmissible to Canada pursuant to section 40(1)(a) of the *IRPA*, for providing inauthentic family information in support of her spousal work permit application.

[2] The Applicant challenges the Officer's decision (the "Decision") first, for having failed to respect the duty of procedural fairness and second, for making an unreasonable finding of misrepresentation. I agree that the Decision is flawed in both respects and will accordingly grant the application.

II. Background

[3] The Applicant is a 24-year-old citizen of India. In August 2019, she applied for an open spousal work permit to join her husband in Canada. He had been working as a telecommunications technician in Etobicoke, Ontario since April 2019. Along with photographs and other documentation, the Applicant submitted their marriage certificate, which indicated they had been married since September 7, 2018. Numerous pictures were provided of the ceremony including of the Applicant and her husband, family and friends. Additional photographs were also provided at a November 5, 2019 interview, which forms the basis for the Applicant's procedural fairness arguments. The interview is addressed in greater detail below.

[4] The Applicant also provided a sworn affidavit from her father, dated July 25, 2019, who deposed that her marriage was solemnized on September 7, 2018 according to Hindu Rites and ceremonies, and that he and the other parents in addition to friends and relatives were in attendance.

[5] The Global Case Management System ("GCMS") notes, which form part of the Decision record, include an entry dated September 17, 2019, wherein the Officer outlined the contents of

the permit application, raising concerns with *bona fides* of the marriage (see GCMS entry at paragraph 20 below).

[6] In a letter dated October 10, 2019 ("Letter"), the Applicant was invited to an interview on November 5, 2019 in New Delhi, and informed that if she did not attend, her file would be assessed on the basis of the application and likely refused. The Letter instructed the Applicant to bring required documentation with her to the interview including, *inter alia*, marriage photos depicting all ceremonies, post marriage photographs, and proof of on-going communication with her sponsor (AR p.66/115). The Letter, however, made no reference to the Officer's concerns that essential wedding ceremonies had not yet taken place, that her wedding certificate was not authentic, or his suspicion that she was not yet married.

[7] According to the November 5, 2019 GCMS note, the interview took place as scheduled, was conducted in Hindi, and the officer posed a series of questions, to which inconsistent answers were received on whether a particular "phere" ceremony had been performed or not. The Officer then put to the Applicant that the phere ceremony had not been conducted and that as such there had been no marriage in September 2018. Subsequently, it appears from the GCMS note that the Applicant admitted that: there had been no phere ceremony; she and her husband had not lived together after the stated marriage; the marriage would take place on December 9, 2019; and, that she was not yet married. Following this, the note details that the Officer explained s 40 of the *IRPA* to the Applicant and offered her an opportunity to respond, at which point she said "I am sorry".

III. Decision under review

[8] In a letter dated April 8, 2020, the Applicant was informed that her work permit application was refused on the grounds that she had failed to truthfully answer all questions asked of her. The letter also informed her that she had been found inadmissible to Canada in accordance with s 40(1)(a) of the *IRPA* and that she would remain inadmissible to Canada for a period of five years.

[9] A GCMS note bearing the same date indicates that the Officer who initially reviewed the application noted concerns with the marriage certificate provided. It also states that the Applicant failed to disabuse the Officer of the misrepresentation concerns and that on a balance of probabilities, the Applicant "provided inauthentic family information in support of the application".

[10] The Applicant challenges the Decision as both procedurally unfair and unreasonable.

[11] In support of her application for judicial review, the Applicant provides a sworn affidavit. The Respondent contends that certain paragraphs of the affidavit inappropriately contain (i) new information that was not before the Officer and (ii) argumentative content, neither of which should be considered by the Court on judicial review (*Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at paras 17-20 [*Bernard*]).

[12] However, I note that certain portions of the affidavit, namely paragraphs 18-25 and 27, contain background information, which, if true, was before the Officer and was relevant to the merits of the decision. These portions clearly fit within the recognized exceptions to the rule against affidavit evidence on judicial review (*Bernard* at para 23). Those paragraphs are accordingly accepted to the extent they provide useful background information of the record that was before the Officer. I note the Respondent has not objected to those particular paragraphs, having requested only that paragraphs 5-14, 29 and 31 be struck for providing explanations that could have been, but were not, placed before the Officer.

[13] According to the Applicant's affidavit, she attended the interview in November 2019 accompanied by her father-in-law. After settling on the hearing taking place in Hindi, the Officer immediately informed the applicant that he was concerned her marriage was fraudulent which could result in a finding of misrepresentation and a five-year period of inadmissibility to Canada. Having not been informed of these concerns in her interview invitation, the Applicant deposes that "[t]his came as a total and complete shock to me, so I immediately started crying. I had no idea they were doubting the genuineness of our marriage".

[14] Following her recollection of several of the questions that were asked and the answers she provided, including that a "phere" ceremony had not yet taken place, she deposes that the Officer put to her that having not completed that ceremony, her marriage was not legal. She deposes beginning to worry that perhaps he was right and that she and her family had been mistaken about the requirements. She deposes that she was very upset, "processing this shock and crying", and that she apologized at that point of the interview.

IV. Issues and Analysis

[15] The Parties agree that the standard of review of the Officer's misrepresentation finding is reasonableness. They also agree that questions of procedural fairness are not subject to the reasonableness standard and that instead, the Court must consider whether, having regard to all of the circumstances, the process was fair and just.

[16] Having considered the written and oral submissions of the parties, I find that the process was indeed unfair and that the Officer's misrepresentation finding was unreasonable.

[17] I begin by noting that part of the difficulty in assessing the circumstances surrounding the interview, and assessing the fairness of the application process, reside with the two very different versions of what occurred. Again, the Applicant's sworn version of the events surrounding the November 2019 interview contradicts, in several respects, the version appearing in the GCMS notes, on which the Respondent's submissions rely. Notably, the GCMS notes suggest the misrepresentation concerns were not shared until close to the end of the interview, after the Officer had received inconsistent answers to questions about the phere ceremony. The Applicant's affidavit, on the other hand, suggests the concern was raised at the outset, taking her by complete surprise, resulting in her apology and an admission that she was not married.

[18] As an aside, I note that in the absence of a transcript or recording of the interview, it can be difficult for the Court to decipher which version of the facts is correct (see *Zeon v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1338 at paras 13-14). As interviews are

often only conducted between an officer and the applicant, unlike in days past where it was more common to have legal counsel present at interviews, it is unfortunate that the practice is not – particularly in this day and age – to keep any recording, but rather to rely entirely on GCMS notes. This is particularly true in situations where findings of misrepresentation are concerned, given the severe consequences that result. The Court must have regard to sworn testimony of the Applicant when the fairness of the interview process has been contested, particularly where there has been no cross-examination on the Applicant's evidence.

[19] GCMS notes have been the subject of significant commentary. The Court of Appeal has recognized that they are generally admissible as falling within the business records exception to the hearsay rule, although exceptions may apply where the GCMS notes record interviews conducted during an investigation (see *Cabral v. Canada (Citizenship and Immigration)*, 2018 FCA 4 at paras 24 and 28 respectively). In such a case, the notes may not be admissible to prove the truth of their contents (*Cabral* at para 28). Indeed, this Court has held:

> CAIPs notes should be admitted as part of the record, that is, as the reasons for the decision under review. However, the underlying facts on which they rely must be independently proven. In the absence of a visa officer's affidavit attesting to the truth of what he or she recorded as having been said at the interview, the notes have no status as evidence of such.
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> (*Chou v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14890 at para 13, aff'd 2001 FCA 299).

[20] In she-said he-said situations of which the present case is a classic example, the contradictions between the officer's GCMS notes and the Applicant's Affidavit could be far more easily – and accurately –reconciled with the aid of a recording. Recordings – or transcripts – would go a long way to resolving the issue of conflicting versions of visa officer interviews.

One would think that as technology evolves, and the need for video-conferencing increases in many contexts including visa applications, such recordings or transcripts would be more feasible than they might have been in the past. Certainly, they would be useful to resolving any litigation that ensues, in that they would increase transparency and better safeguard guarantees of basic fairness in the process.

[21] Returning to the circumstances at hand, the Applicant further deposes that on March 27, 2020, having not received a decision yet, her husband submitted a case specific inquiry and provided additional explanations, the first half of which do not appear in the GCMS notes or anywhere else in the record. This further clouds the different accounts of the Applicant and Respondent. Specifically, the Applicant deposes that her husband requested the opportunity to be allowed an additional interview to explain the couple's circumstances. The record makes it impossible to know the contents or extent of the cut off portion of this submission, but the incomplete excerpt of the husband's email provided in the GCMS notes does include a remark suggesting that he come to India so that he and his wife can be interviewed together.

[22] The jurisprudence of this court has repeatedly recognized that where a finding of misrepresentation is being contemplated, which carries with it a five-year bar from Canada, there is a duty to inform the applicant of the specific concerns and provide them with a meaningful opportunity to respond, which usually involves a procedural fairness letter containing enough detail to enable the person to know the case to meet (*Qurban v. Canada (Citizenship and Immigration)*, 2021 FC 724 at para 8; *Bayramov v. Canada (Citizenship and Immigration)*, 2019 FC 256 at para 15).

[23] In this case, it is apparent from the GCMS notes that the Officer had concerns as to the credibility or genuineness of the Applicant's marriage prior to inviting her to the November 2019 interview. The September 17, 2019 note from Officer JM18048 states:

> Photos do not show the couple performing essential marriage ceremonies. No pre marriage ceremony photos are submitted. I note that the ceremonies performed in the photos appear to be of the engagement and not wedding. No evidence of communication before/after the marriage. Referring to interview to assess bfs [*bona fides*] of relationship.

[24] Additionally, and as noted above, the April 8, 2020 note from Officer STO3954 states:

> During the course of the review of the application, the officer noted concerns with the marriage certificate that was provided. The client was convoked for an interview and advised of the concerns, as well as, the consequences of a finding under A40 including being inadmissible to Canada for a period of five years.

[25] However, these concerns were not mentioned in the Letter, which simply stated:

> **Bring all required documentation with you to your interview including marriage photos depicting all ceremonies, post marriage photographs, proof of on-going communication, status of inviter in Canada, proof of on-going education of inviter in Canada.** Any documents not in English or French must be accompanied by a certified translation in addition to a photocopy of the original document. Do not submit originals unless specifically asked to do so.
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> [Emphasis in original]

[26] Rather, and regardless of whether I accept the Officer's or the Applicant's rendition of the interview, it is clear that the Applicant was only made aware of the Officer's concerns once the interview was underway and that she was not offered a subsequent opportunity to provide additional submissions.

[27] Considering the severe consequences of a finding of misrepresentation, the degree of procedural fairness to which the Applicant was entitled was higher than it would otherwise be in the context of a visa decision (*Likhi v. Canada (Citizenship and Immigration)*, 2020 FC 171 at para 27 [*Likhi*], citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 133).

[28] Under the circumstances, and despite the Respondent's submission that the Applicant was given an opportunity to respond at the interview itself, I cannot find that this provided her with a full and fair or meaningful opportunity to respond, or to know the case that she was required to meet.

[29] The failure to provide the Applicant with an opportunity to meaningfully address the Officers concerns raised at the interview could have been remedied by extending a subsequent chance to the Applicant to make further submissions. As Justice Fuhrer held at paragraphs 33-35 of *Likhi*:

> [33] When determining whether the Senior Officer's finding of misrepresentation was arrived at in a procedurally fair manner, it is important to clarify whether the Senior Officer's finding was based on the evidence provided being (a) insufficient to demonstrate a bona fides marriage, as the Minister asserts was the case; or (b) not credible, genuine, or accurate, as Ms. Likhi submits. If the former, the Interviewing Officer was entitled to rely on the fact that the IRPA and IRPR give notice of the evidentiary threshold for proving compliance with Canada's immigration laws, and thus had no procedural duty to alert Ms. Likhi to concerns of insufficiency in her application. If the latter, the Interviewing Officer did have a duty to bring these concerns to Ms. Likhi's attention, and to provide her with an adequate opportunity to disabuse the Interviewing Officer of them.
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> [34] In my view, the findings of the Interviewing Officer and Senior Officer (who essentially adopted the Interviewing Officer's

> assessment) that Ms. Likhi misrepresented the bona fides of her marriage were based on the fact that the evidence she provided, including photographs of the civil ceremony and viva voce evidence from both her and Mr. Sethi, were not believed. The GCMS notes reveal both Officers were concerned about the credibility of Ms. Likhi's evidence.
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> [35] As the Officers' decisions on their face were based on a credibility determination, in my view they were required to alert Ms. Likhi of their credibility concerns and provide her with an adequate opportunity to respond. This could have been accomplished either by the Interviewing Officer providing her with advance notice that the general purpose of the interview was to assess the genuineness of the marriage (and thus an adequate opportunity to prepare accordingly), or the Senior Officer subsequently providing her an opportunity to file additional submissions to respond to the specific concerns raised in her interview, given the Interviewing Officer requested specific evidence. Neither opportunity was extended. Had Ms. Likhi known going into the interview the Interviewing Officer's concerns centred around the bona fides of the marriage, as opposed to routine processing of her application as she understood from the telephone call scheduling the interview, she might have prepared differently
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> [Citations omitted, emphasis added]

[30] This case shares many similarities with *Likhi*, both in profile, and in terms of what was found to be an unfair process. For reasons of basic fairness and judicial comity, I see no reason to diverge from the ratio articulated in the extract above.

[31] Like in *Likhi*, the Officer questioned the genuineness of the marriage in the context of marriage *bona fides* arising from a spousal work permit application, where the male applicant was working in Canada, and the couple stated they had been married in India. Furthermore, in both cases, the suspicion was that there had been an engagement party, rather than a marriage. Finally, as Justice Fuhrer noted in *Likhi,* "there was no effort during the interview to clarify or

confirm the date of the marriage certificate in relation to the marriage ceremonies". The same is true in the present case, according to the both the Applicant's Affidavit, and the GCMS notes.

[32] Furthermore, in this case – unlike *Likhi* – the husband in Canada offered to provide further evidence or present himself with his spouse to address the issue of the marriage, as noted in the portion of his email that was included in the GCMS notes. He stated, *inter alia*, that "If I would be requested for images I would definitely upload it… I can come to India for interview so that we give interview together [*sic*]."

[33] While his complete submission is not available, the Officer made no reference to this request in the Decision, nor was an invitation extended to make additional written or oral explanations. Considering the totality of the evidence from both parties about what transpired, the Officer thus committed the same breach of procedural fairness as occurred in *Likhi*, namely failing to provide either advance notice of, or a subsequent opportunity to address, the Officer's specific concerns with the marriage, which prompted the need for an interview. This was especially problematic in light of the specific request made by the Applicant's husband.

[34] Given the procedural unfairness, I will set-aside the decision and return the matter to a new Officer for determination. Having ruled on this first and determinative issue, I will nonetheless comment on the misrepresentation finding itself, which I also find to be unreasonable for the reasons that follow.

[35] Firstly, it was unreasonable for the Officer to conclude that the Applicant had lied about being married entirely on the basis of a particular religious rite not yet having been performed, without having made any reference to whether such a ceremony was actually required for the marriage to be legal in India. As the Applicant pointed out during the hearing, s 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 defines marriage as "in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law".

[36] Here there was a marriage certificate indicating that the marriage had taken place in September 2018, which was corroborated by an affidavit sworn by the Applicant's father. It is not for me to reweigh the evidence, but there is no question that these would need to have been weighed and considered before a finding that the Applicant had misrepresented her marriage could be arrived at on a balance of probabilities. It is not apparent to me that the Officer considered relevant evidence before reaching a determination or how that evidence was weighed.

[37] Furthermore, the Officer also does not appear to have provided any justification, at the interview or in the Decision, for his view that a valid marriage could not have taken place in India until a phere ceremony was conducted. Setting aside that the Applicant could not reasonably have been expected to anticipate or improvise an adequate response to such a specific concern, it was nonetheless incumbent on the Officer to provide some basis for the significance of the concern. The Decision was consequently unjustified in light of the facts and the law.

[38] Secondly, while much was made of the supposed admissions obtained during the interview, I have already noted that the Applicant's affidavit provides a different version of what exactly was and was not admitted to. I have also already noted that the competing versions of the interview need not be resolved here.

[39] Nevertheless, the Applicant's spontaneous admissions during the interview should have been considered in light of the very particular cultural, religious and legal context at play, in addition to the circumstances of the interview itself. There, a young person was confronted by a person in a position of authority, who challenged her on the legal validity of her marriage without setting out their concerns in advance. Specifically, the Applicant, without any legal representation at the interview or at any time during the process, was challenged with the Officer's stated view that if there was no "phere" ceremony, there was no marriage. Her affidavit suggests that under these circumstances, she was deeply upset and worried that a mistake had potentially been made.

[40] Even if I were to have concluded otherwise in my earlier finding that this process, which did not allow for subsequent submissions or clarifications was unfair, I am still not satisfied that an admission and apology to a person in a position of authority under these very particular circumstances meant that the Applicant lied about being married. The Officer provided no justification in support of his view on the law of marriage in India, which formed the basis for the misrepresentation finding. Furthermore, the Officer provided no explanation as to why the marriage certificate was invalid, fraudulent, or otherwise improper.

[41] The Officer does not appear to have considered or weighed the supposed admissions in this nuanced legal or cultural context before reaching a conclusion of misrepresentation.

[42] Instead, it appears that the Officer may have simply equated an admission that a particular ceremony or rite had not yet been performed to an admission that the Applicant had lied about being married, without any explicit regard to the other evidence in the file or the legal requirement to prove a valid marriage in India.

[43] Without pointing to an underlying reason, such as non-compliance with marriage law in India, or an allegation that the marriage certificate was fraudulent, the finding that no marriage had taken place, and the misrepresentation finding that stemmed therefrom, was unreasonable.

V. Conclusion

[44] Due to the reviewable flaws in both the procedure and rationale of the Decision, I will grant this judicial review, and return the matter for reconsideration by another officer.

JUDGMENT in file IMM-2546-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted.
2. The decision of the visa officer is set aside and remitted to a new officer for redetermination after inviting the applicant to file additional submissions.
3. No question for certification was submitted and I agree that none arises.
4. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2456-20
STYLE OF CAUSE:	DIVYA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 14, 2022
JUDGMENT AND REASONS:	DINER J.
DATED:	APRIL 27, 2022

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