Federal Court  Cour fédérale

Date: 20230117

Docket: IMM-899-22

Citation: 2023 FC 66

Ottawa, Ontario, January 17, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ISABELLA MARIA VARGAS VILLANUEVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Vargas applied for a visa to study in Canada. A visa officer found that her proof of funds was fraudulent and denied her application on grounds of misrepresentation. She now seeks judicial review of this decision. I am allowing her application. The record is entirely silent as to the justification of the finding that the proof of funds was fraudulent. Moreover, the officer did not genuinely consider the explanations and evidence Ms. Vargas provided when she was informed of the issue.

I. Background

[2] In November 2020, Ms. Vargas applied for a study permit to study business at York University, starting in September 2021. It appears that she already completed the first year of her program in 2020-2021, presumably by way of distance learning.

[3] In January 2021, Ms. Vargas was asked to provide proof of sufficient funds to support herself during her studies. She sent a letter dated January 11, 2021 in which her mother, Ms. Villanueva, undertook to pay for her expenses and declared that she held a deposit of US$190,000 for that purpose at the Banco Popular Dominicano. Attached to this letter was a letter from the Banco Popular, which is at the forefront of this matter. It is dated September 21, 2018 and is addressed to "Asociación La Nacional." It states that Ms. Villanueva is the holder of a certificate in the amount of 11,385,000 Dominican pesos (roughly 280,000 Canadian dollars).

[4] On April 16, 2021, Ms. Vargas was informed that her application was granted and that she needed to present her passport to finalize it. On May 11, 2021, however, she was informed that her application was re-opened in light of information recently received. The visa officer wrote, "I have concerns that the proof of funds (Banco Popular bank) document in the name of your mother which you have provided in support of your application is fraudulent."

[5] Notes entered in the Global Case Management System [GCMS] provide a slightly clearer picture of these concerns. An entry made on May 7, 2021 reads as follows:

> A copy of the Proof of Funds letter of the PA's mother was sent via e-mail to our Banco Popular contact and she indicated that the

> client exists in their system but she does not have the product listed on the letter, the product does not exist in their system, and the letter was not issued by their institution.

[6] There is no record of the communications between the visa officer and the Banco Popular contact. In contrast, the Certified Tribunal Record [CTR] contains an e-mail from York University in response to a similar request for authentication.

[7] Another entry made on May 7, 2021 reads as follows:

> A copy of the Proof of Funds of the PA's father was sent via e-mail to our Banco Popular contact and she indicated that the client exists in their system and has that product, the balance as of April 29, 2021 is US$184,293.14.

[8] This entry is highly puzzling. First, Ms. Vargas's father died in 2008 in a car accident. Second, neither the CTR nor the application record contain any other proof of funds document issued by the Banco Popular, to which this entry could refer.

[9] The letter Ms. Vargas received on May 11, 2021 is what is commonly known as a procedural fairness letter or PFL. It informed Ms. Vargas of the officer's concerns and gave her 30 days to provide a response. The somewhat more precise description of the concerns found in the GCMS notes was not conveyed to Ms. Vargas until much later in the process.

[10] In the following weeks, Ms. Vargas provided a further letter from her mother. Ms. Villanueva stated that the money needed to pay for Ms. Vargas's studies had been held in a certificate with the Banco Popular, but that this account was later closed and the money was

transferred to an account in the name of Mr. Vargas, who is Ms. Vargas's uncle, and apologizing for any confusion that the situation may have created. Ms. Vargas also submitted a letter issued by the Banco Popular on May 27, 2021, addressed to the "Consulado de Canadá," explaining that the initial certificate, in the amount of 11,385,000 pesos, was cancelled on July 8, 2020 and the funds were transferred to Mr. Vargas's account. This letter does not explicitly refer to the 2018 Banco Popular letter.

[11] On November 25, 2021, a different visa officer reviewed the matter again and reached the conclusion that Ms. Vargas had made a misrepresentation, contrary to section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], for the following reasons:

> Subsequent to the verification, the applicant was advised that the letter was determined to be fraudulent by the purported issuing institution. The applicant's response, to the effect that the account had been closed and that the funds were redeposited in an alternate currency in a different account were supported by a letter to that effect, again purportedly by the Banco Popular. However, the new information provided did not address the information received in the context of the verification with the Banco Popular that Ms. Clara G. Villaneuva did not have the account described in the documents submitted initially in support of her application or that the initial letter was not issued by the Banco Popular.
>
> Having reviewed the information provided, I am satisfied, based on the verification with the Banco Popular, that the initial document provided as evidence of proof of funds was fraudulent. The document provided could have led the officer to believe that the applicant had sufficient funds to support her proposed studies in Canada when this had not, in fact, been demonstrated.

[12] While the officer writes that the second letter is "purportedly" from Banco Popular, they did not write to their contact there to verify its authenticity.

[13] Ms. Vargas applied for reconsideration of the refusal, but her request was denied. She is now seeking judicial review of the visa officer's decision to deny her a study permit.

II. Analysis

[14] Ms. Vargas's application will be allowed because the officer's decision to deny her a visa was unreasonable. The officer did not provide any reasons for the critical finding that the Banco Popular letter was not authentic and a review of the record does not provide any insight as to the justification of this finding. The officer also failed to consider the explanations Ms. Vargas provided in response to the PFL.

[15] Before explaining my reasons for reaching this result, it is useful to say a few words about the scope of judicial review. The role of the reviewing Court is not to step into the shoes of the decision-maker, to reweigh the evidence or to exercise the discretionary power entrusted to the decision-maker. Rather, the Court's role is to ensure that the decision is justified, transparent and intelligible and that it complies with the factual and legal constraints bearing on the decision-maker: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 99, [2019] 4 SCR 653 [*Vavilov*]. It is also to ensure that the decision was made pursuant to a fair process.

[16] In the specific context of misrepresentation findings under section 40 of the Act, three interrelated principles have emerged in this Court's jurisprudence and are relevant to this case.

[17] First, a finding of misrepresentation must be based on “clear and convincing evidence”: *Jain v Canada (Citizenship and Immigration)*, 2022 FC 562 at paragraph 14; *Vahora v Canada (Citizenship and Immigration)*, 2022 FC 778 at paragraph 29; *Munoz Gallardo v Canada (Citizenship and Immigration)*, 2022 FC 1304 at paragraph 17 [*Munoz Gallardo*]; *Brar v Canada (Citizenship and Immigration)*, 2022 FC 1522 at paragraph 10. A mere suspicion, or even reasonable grounds to believe, are not sufficient.

[18] Second, while visa officers are typically required to give only minimal reasons, they must give more extensive reasons when they make findings of misrepresentation: *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at paragraph 27; *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 at paragraphs 6–7; *Munoz Gallardo*, at paragraph 16. This is because the consequences of such findings are more serious than a mere visa refusal: *Vavilov*, at paragraph 133.

[19] Third, before making a finding of misrepresentation, visa officers must give notice and provide the person concerned with the opportunity to make submissions: *Bayramov v Canada (Citizenship and Immigration)*, 2019 FC 256 at paragraph 15. The notice “must contain enough detail to enable the applicant to know the case to meet”: *ibid*.

[20] In this case, the officer’s reasons do not refer to any “clear and compelling evidence” that the first Banco Popular letter was fraudulent and the record does not disclose any. The only relevant information is the mention, in the May 7, 2021 GCMS entry, that “the letter was not issued by their institution.” There is, however, no indication of the basis for this conclusory

statement. The letter itself does not exhibit any obvious sign of fabrication. We do not know what verifications the bank employee performed. It could well be that the employee merely inferred this conclusion from the fact that the account number was invalid; in other words, if the information on the letter is incorrect, the letter must have been forged. There are, however, other potential explanations. The bank may have made a mistake in issuing the letter. The employee who checked the authenticity of the letter may have misinterpreted the information it contained, for example by overlooking the fact that it was written two years earlier and might no longer be up to date. As the email communications between the visa officer and the bank employee have not been kept in the record, we simply do not know.

[21] This case is similar to *Albrifcani v Canada (Citizenship and Immigration)*, 2020 FC 355 [*Albrifcani*], in which a mere mention of a quality assurance or "QA process" in the GCMS notes was found wholly insufficient to buttress a finding of misrepresentation. In that case, there was "no explanation in the record or any affidavit evidence from the Respondent as to what a QA is, how it was conducted in this case, why there is no record of the verification process contained in the record, or why the results supported the conclusion that the submitted IELTS was fraudulent": *ibid*, at paragraph 26. While in this case, the visa officer communicated with an employee of the Banco Popular, we know nothing about the steps the employee took to reach the conclusion that the letter was not issued by the institution.

[22] In both *Albrifcani* and this case, the third parties who were asked to authenticate a document are best understood as witnesses. They are not decision-makers themselves, but rather provide information to the decision-maker. The officer, entrusted with making the decision, must

still assess that information in order to understand the basis for conclusions drawn by the third party. Without a trace of the officer's assessment or the third party's reasoning in the record, the decision is anything but transparent, and it can hardly be intelligible or justifiable.

[23] At the hearing, the Minister heavily insisted on the fact that Ms. Vargas never specifically refuted the concern that the 2018 letter had not been issued by the Banco Popular. However, as I explain later, the PFL did not alert Ms. Vargas to this specific issue. In other words, given what she knew, Ms. Vargas could reasonably understand that the officer's concerns pertained to the accuracy of the information contained in the letter or the fact that it was not up to date. There was nothing to suggest that the concern about the letter being fraudulent was divided into two concerns that needed to be addressed separately, one about accuracy and the other about authenticity. It would have been normal for Ms. Vargas to assume that the officer's concerns were caused by the fact that the 2018 letter was not up to date with respect to the account in which the funds were held. Therefore, the manner in which Ms. Vargas answered the PFL cannot be construed as an admission that the 2018 letter was not authentic.

[24] In my view, the presence of the phrase "not issued by their institution" in the December 15, 2021 decision letter is too little, too late to make Ms. Vargas realize that she had to answer two separate concerns. Thus, I cannot infer anything from the lack of discussion of this issue in her request for reconsideration. In any event, the kind of inferential admission that the Minister now seeks to draw falls far short of the "clear and convincing evidence" needed to buttress a finding of misrepresentation.

[25] The decision is therefore unreasonable, as a critical finding is unexplained and unsupported by the evidence on the record. As the Supreme Court stated in *Vavilov*, at paragraph 98:

> Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

[26] I also have concerns about the fairness of the process followed by the visa officer. While Ms. Vargas did not explicitly assert a breach of procedural fairness, there is not always a watertight separation between substance and process. Here, the lack of precision of the PFL and the apparent lack of consideration of Ms. Vargas's answer most likely led the officer to make a decision without regard to the relevant evidence.

[27] One of the main purposes of the notice requirement is to ensure the quality and accuracy of decision-making by enabling the applicant to contradict the officer's preliminary findings: *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311 at 328. In other words, procedural fairness paves the way to a reasonable decision. To achieve this, the notice must give the applicant a precise description of the preliminary findings or, as is often said, the "case to meet": *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 22; *May v Ferndale Institution*, 2005 SCC 82 at paragraphs 117–118, [2005] 3 SCR 809; *Cordero v Canada (Citizenship and Immigration)*, 2018 FC 24 at paragraph 20.

[28] The notice given to Ms. Vargas on May 11, 2021 merely said that the officer had concerns that "the proof of funds . . . was fraudulent." As noted in *Albrifcani*, at paragraph 34, such a statement does not adequately inform the applicant of the nature of the officer's concerns. The officer should have clearly explained that they had two separate concerns: the accuracy of the information contained in the letter and the letter's authenticity. Had the officer done this, Ms. Vargas could, for example, have asked the bank to confirm that it had in fact issued the 2018 letter, in addition to confirming the accuracy of its contents.

[29] Most importantly, if the notice requirement is to have any usefulness, the decision maker must have a mind willing to understand the applicant's response and be prepared to reconsider the initial results of their investigation. Indeed, the whole point of the notice requirement is that an officer's initial assessment may be wrong and that obtaining more information may enable the correction of a mistake. Thus, when receiving submissions in response to a PFL, an officer must be prepared to question their own initial finding. They must ask themselves, "Is it possible that I was wrong?"

[30] I acknowledge that this may be a challenging exercise when a misrepresentation finding is at stake. Officers may legitimately feel moral outrage when they discover what they think is a misrepresentation. They may think, as the Minister argued at the hearing, that a misrepresentation can never be cured or "covered" by later providing accurate and genuine information. An applicant's presumed dishonesty may well give rise to confirmation bias on the officer's part. The officers, however, must keep their minds open and ask themselves whether the new information received casts doubt on the initial finding of misrepresentation, as opposed to a

mere attempt to "cover" a misrepresentation. They must contemplate the possibility that the applicant did not in fact misrepresent anything.

[31] Here, the GMCS notes do not show that the officer considered or engaged with Ms. Vargas's response to the PFL. First, the officer stated that the response "did not address the information . . . that [Ms. Vargas's mother] did not have the account described in the documents submitted initially." This, however, is incorrect: the whole thrust of Ms. Vargas's response is that her mother did in fact have the account described in the first letter when the bank issued it in 2018.

[32] Second, the officer also stated that Ms. Vargas's response did not address the concern that the letter had not been issued by the Banco Popular. This, however, overlooks Ms. Vargas's demonstration that the information contained in that letter was accurate when it was written in 2018. If the inaccuracy of the information is the sole reason for finding the letter fraudulent, then Ms. Vargas's response is a complete answer. As I explained above, if there were other reasons justifying the initial finding of inauthenticity, they are not apparent from the record and they were never communicated to Ms. Vargas, who cannot be expected to respond to them.

[33] A third concern flows from the absence in the record of any indication that anyone dealing with this matter realized that the first Banco Popular letter was written in 2018 and could possibly have become outdated. Yet this was the basic premise of Ms. Vargas's demonstration that she did not misrepresent anything. It is difficult to give fair consideration to her response if

one fails to appreciate this fact. Even at the hearing of this application, counsel for the Minister appeared to have been unaware of the date of the letter.

[34] This raises a serious question as to whether Ms. Vargas's response was genuinely considered with an open mind. Confirmation bias may well have prevailed. Similar situations led my colleagues to quash decisions of visa officers in *Albrifcani,* at paragraph 36, and in *Kong v Canada (Citizenship and Immigration),* 2017 FC 1183 at paragraphs 39–40 [*Kong*].

[35] At the hearing, the Minister drew my attention to a potential contradiction between the bank's 2021 letter and Ms. Villanueva's affidavit with respect to the precise date at which the funds were transferred from the certificate to the US dollar account. I fail to see the relevance of this issue. It was not mentioned in the officer's reasons, and it is not the Court's role to substitute a different rationale for a decision-maker's flawed reasoning: *Vavilov,* at paragraph 96. Assuming, as the Minister seems to argue, that this constitutes a distinct misrepresentation, its materiality has not been established. It is difficult to understand how the outcome of Ms. Vargas's study permit application could turn on the date at which the funds were transferred from one account to another.

[36] As I have found that the officer's finding that there was a misrepresentation is unreasonable, it is not necessary for me to address Ms. Vargas's alternative argument that any misrepresentation would not have induced an error in the application of the Act. It is enough to say that unless the documents in the record are forgeries, it appears that the money needed to support Ms. Vargas during her studies was always available.

III. Disposition

[37] As the visa officer's decision is unreasonable, the application for judicial review will be granted, the decision will be quashed and the matter will be remitted to a different officer for redetermination.

[38] If the officer entrusted with the redetermination wishes to make negative findings regarding the authenticity of any of the letters issued by the Banco Popular in this matter, it would be highly advisable to obtain additional evidence from the bank in this regard: *Kong*, at paragraph 39. Moreover, it might be useful to clarify the issue of the proof of funds provided by Ms. Vargas's "father" (more plausibly by his uncle), and whether these are the same funds as described in the Banco Popular's letters. If so, this may well bear upon the effects that any misrepresentation may have had.

JUDGMENT in IMM-899-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision to refuse a study permit to the applicant and the finding that the applicant contravened section 40 of the *Immigration and Refugee Protection Act* are quashed.
3. The matter is remitted to a different officer for reconsideration.
4. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-899-22
STYLE OF CAUSE:	ISABELLA MARIA VARGAS VILLANUEVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 11, 2023
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	JANUARY 17, 2023

APPEARANCES:

Amanat Sandhu	FOR THE APPLICANT
Asha Gafar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matkowsky Immigration Law Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT