Federal Court

Cour fédérale

Date: 20230720

Docket: IMM-2780-22

Citation: 2023 FC 994

Ottawa, Ontario, July 20, 2023

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

NADIA ANDREIA NOBREGA PEREIRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Nadia Andreia Nobrega Pereira ("Applicant" or "Ms. Pereira"), seeks judicial review of a visa officer's decision to refuse her application for a temporary resident visa. The visa officer found that Ms. Pereira was inadmissible to enter Canada for a period of five years for misrepresentation pursuant to subsection 40(1)(a) of the *Immigration and Refugee Protection*

Act, SC 2001, c 27 [*IRPA*], because the Applicant failed to disclose the material facts of 1) her arrest by the Hamilton Police, 2) the refusal of her application for permanent residence based on humanitarian and compassionate ("H&C") grounds and 3) the reason for her exclusion order.

[2] In the Court's view, the visa officer reasonably found that Ms. Pereira's application for temporary resident visa included at least one of the three above-mentioned material misrepresentations. In the circumstances of this case, the "innocent error exception" is inapplicable to the misrepresentations made by the Applicant. It was not unreasonable for the visa officer to come to such a conclusion based on the evidentiary record. For the reasons set out below, the application for judicial review is dismissed.

II. Background

[3] Ms. Pereira is a citizen of Portugal. She came to Canada with her mother and siblings in 2012.

[4] On February 28, 2018, the Applicant was taken into the custody of the Hamilton Police during a raid in a cannabis shop and held by the Hamilton Police for a suspected charge of possession, for the purpose of trafficking. On the same day, the Applicant was transferred into the custody of the Canada Border Services Agency ("CBSA") because she was in Canada without status and she was unlikely to appear for examination under section 55 of the *IRPA*. While in CBSA's custody, the Applicant was questioned, fingerprinted and photos were taken. She was then released on the same day with reporting conditions.

[5] In December 2018, the Applicant made an application for permanent residence based on H&C grounds.

[6] On June 13, 2019, the Applicant was served with an Exclusion Order for having overstayed her authorized stay and for being in Canada without status. On the same day, the Applicant was served with a Direction to report for removal. Her removal was scheduled for June 22, 2019 to Portugal.

[7] On June 22, 2019, the Applicant was removed from Canada.

[8] On February 26, 2020, the Applicant's H&C application was denied.

[9] On May 8, 2021, the Applicant applied for an electronic travel authorization ("ETA Application") to come to Canada to visit her wife. The application form included the following questions to which the Applicant answered as follows:

Question	**Answer**
Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?	"NO"
Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?	"YES". "Extension order back in June 13 2019. Due to family issues. Order Brother got diagnosed with MS in Hamilton, Ontario mid 2019 and hospital couldn't offer medication he needed without payments so we returned so he could get better so I came has a care giver for him."

[10] In November 2021, a procedural fairness letter was sent to the Applicant to inform her of the possibility that she might be inadmissible for misrepresentation, because she had failed to

indicate that 1) she was arrested in March 2018, 2) she was refused an H&C application, and 3) she was removed on an exclusion order in 2019 for failing to comply with the requirements of the *IRPA*.

[11] On January 3, 2022, the Applicant responded to the procedural fairness letter in which she stated:

In regards to question where I answered no which was "Have you ever been arrested"	I answered no – not with the intention of lying but simply because I did get physically arrested but I was not incarcerated, there were no charges and no court dates. I simply had to appear every 2nd Tuesday every month at the Canada border services agency in Hamilton, Ontario, Canada. Officers also told me it would not be on record since I was just at the wrong place at the wrong time. […] Attached I send all documents in my possession in regards to my arrest in 2018. [Emphasis added.]
Question which I answered yes to was "have you ever been denied a visa"	My answer is yes because back in 2018 when I first applied for a humanitarian compassionate permanent residency within Canada, due to my departure in 2019 on the order of Exclusion order when Canadian officers at Hamilton Canada border services agency advised us that going back to Portugal would be the only way to get my brother treatment, and make my paperwork move faster, what they did not tell me was that if I left, my humanitarian compassion applicant would not be valid anymore. Since I left the country to be a caregiver for my brother 8 months after being in Portugal I received an email stating that my application had been denied due to my departure. […] Attached I send all documents in my possession in regards to […] my humanitarian compassionate application also together with my affidavit and lawyers documentation, my

	Exclusion order in 2019, a police record from the Hamilton police station and my marriage certificate. [Emphasis added.]

III. Decision

[12] On January 31, 2022, the visa officer found that the Applicant's response to the procedural fairness letter did not disabuse him of his concerns that the Applicant misrepresented facts on her application stating:

> The applicant was sent the following A40 PFL:
> You 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?
> In particular, you answered: Extension order back in June 13 2019. Due to family issues. Order Brother got diagnosed with MS in Hamilton, Ontario mid 2019 and hospital couldn't offer medication he needed without payments so we returned so he could get better so I came has a care giver for him.
> You answered NO to the question: Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?
> <u>However, you were refused an application for permanent resident status in 2018, and were removed on an exclusion order in 2019, and you were arrested in March 2018 according to your immigration records, which you did not disclose on your current application. This omission of information is misrepresentation as it could have induced an error in the administration of the Act.</u> The applicant responded to this PFL by stating that he did not disclose her exclusion order precisely because he was giving the context for why he left. He states that he did not disclose that he had been arrested, because he thought it did not count if he was never incarcerated afterwards. States that there were no criminal charges, he just had to follow up with CBSA on Tuesdays following the arrest. The applicant provides a marriage certificate from USA, his original notice of removal from CBSA, his transport slip from when he was removed, his exclusion order, documents from Hamilton Police Service, emails from CBSA regarding his removal. <u>The applicant's response does not disabuse me of my concerns because it is the applicant's responsibility to maintain truthfulness</u> throughout the application process. The applicant's misrepresentation could have induced an error in the application of the Act. Recommend misrep. To Unit manager for A40 decision.
>
> [Emphasis added.]

On this basis, the visa officer recommended that the Unit Manager make a finding of misrepresentation.

[13] On March 4, 2022, the Unit Manager reviewed all the facts of the case including the procedural fairness letter sent out and the materiality of the misrepresentations. The Unit Manager similarly found that the Applicant's response to the procedural fairness letter did not disabuse him of his concerns because it is the Applicant's responsibility to maintain truthfulness throughout the application process and found that the Applicant's misrepresentation could have induced an error in the application of the *IRPA*. On the same day, a refusal letter was sent out indicating that the Applicant had been found inadmissible to Canada.

IV. Issues

[14] The application for judicial review raises the following issues:

A. Was the visa officer's finding that Ms. Pereira was inadmissible for misrepresentation reasonable in light of the evidence?

B. Did the visa officer unreasonably fail to consider whether Ms. Pereira should benefit from the "innocent error exception"?

V. Analysis

[15] Before the Court can turn its attention to the Decision under judicial review, there is a preliminary issue as to whether this Court can consider new evidence submitted by the Applicant that was not before the decision maker. The new evidence consisted of a letter from the Hamilton Police Service dated August 29, 2022 (at page 114 of the Applicant's Record) stating, *inter alia,* that "*(...) I can confirm that on February 28, 2018 a warrant was executed on a business*

property and all occupants including, Nadia Andreia Nobrega-Pereira, were taken into custody at the time. Nadia Andreia Nobrega-Pereira was not charged and was released unconditionally into the custody of Canadian Border Services."

[16] The parties did not submit any case law on this preliminary issue. As such, the Court issued an oral direction inviting the parties to consider the following cases that may be applicable and asked counsel to come to the hearing prepared to discuss them and any other cases that might be relevant to this issue: *Aryan v. Canada (Attorney General)*, 2022 FC 139, para 42 citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras 97 and 98.

[17] The Applicant submits that the Court should consider the new evidence because of two exceptions: a) procedural fairness defects that cannot be found in the evidentiary record of the administrative decision maker and/or b) to highlight the complete absence of evidence before the decision maker when it made a particular finding (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para 98).

[18] The Respondent submits that the exceptions in *Tsleil-Waututh Nation* do not apply, and that the Court should apply the general rule stating that only the evidentiary record before the decision maker is admissible before the reviewing court (*Aryan v Canada (Attorney General)*, 2022 FC 139 at para 42).

[19] The Court agrees with the Respondent. Indeed, the new evidence does not show either a procedural fairness defect or the complete absence of evidence before the decision maker when making its decision that there was a material misrepresentation related to the Applicant's withholding a material fact related to her arrest in 2018. The evidentiary record before the visa officer shows that there was evidence that Ms. Pereira was arrested – she admitted to being "physically arrested". And since there was already evidence that Ms. Pereira was arrested, there is no need to consider the new documentary evidence, which only states that she was not charged, and was silent on the arrest. The inadmissibility for misrepresentation was based on the withholding of the arrest, not the withholding of the criminal charge.

[20] Invariably, even if the Court had accepted the new evidence, it would not change the Court's decision.

[21] Turning to the applicable standard of review, a visa officer's finding of misrepresentation under subsection 40(1)(a) of the *IRPA* is a discretionary decision subject to review under the standard of reasonableness (*Singh v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 187 at para 7; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

A. *Was the visa officer's finding that Ms. Pereira was inadmissible for misrepresentation reasonable in light of the evidence?*

[22] A finding of inadmissibility under subsection 40(1)(a) of the *IRPA* requires that a visa officer be satisfied that the foreign national has directly or indirectly misrepresented or withheld

material facts that could induce an error in the administration of the *IRPA* (*Gill v Canada*, 2021 FC 1441 at para 13).

[23] Ms. Pereira argues that she was not arrested and that the other misrepresentations fall within the innocent error exception that the officer unreasonably failed to consider.

[24] The Respondent argues that there was a misrepresentation, that the innocent error exception does not apply in this case, and that the officer's decision was not unreasonable.

[25] Section 40 of the *IRPA* is to be given a broad interpretation in order to promote its underlying purpose and objective of deterring misrepresentation and maintaining the integrity of the immigration process (*Faisal Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at paras 25 and 29). Subsection 16(1) of the *IRPA* explicitly imposes on applicants an obligation to be truthful (*Jiang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 942 at paras 33 and 36).

[26] Given the above-mentioned objective of section 40 to deter misrepresentation and maintain the integrity of the immigration process, the onus is on the Applicant to ensure the accuracy of her application (*Wang v. Canada (Citizenship and Immigration)*, 2018 FC 368 at para 15 [*Wang*]).

[27] In *Tuiran v Canada (Citizenship and Immigration)*, 2018 FC 324 at para 20 [*Tuiran*], the Honourable Mr. Justice LeBlanc stated "the purpose of misrepresentations provisions in the

[IRPA] is "to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry in Canada" *(Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 at para 36) […]".

[28] In other words, section 40 of the *IRPA* requires no intent to mislead (*Tuiran* at para 26). The Applicant submits that there was no *mens rea* on the part of the Applicant to mislead immigration authorities. The Respondent is not required to show that an applicant's misrepresentations were intentional, deliberate, or negligent for a section 40(1)(a) finding to be made (*Tuiran* at paras 29 and 30).

[29] In this case, the Applicant did not fulfill her duty of candour and provide complete, honest and truthful information (Wang at para 16). Even if the Applicant did not believe she was arrested or was not sure whether she was arrested, she should have disclosed that she had been taken into custody and the circumstances related thereto. The circumstances of her being taken into custody included her being put into a police vehicle, brought to and held at the police station, transferred to the custody of the CBSA where she was questioned, fingerprinted and photos were taken, and then released by the CBSA with reporting conditions. The Applicant should have disclosed these circumstances, or at least a part thereof, in some way in her initial answer to the relevant question in the form. Given the complete withholding of information in this regard, it was not unreasonable for the officer to raise this as a material misrepresentation.

[30] While there was debate between the parties as to whether there was an arrest or not and as to whether there was a resulting misrepresentation or not, this was not the only material

misrepresentation raised by the officer. In this case, there was not one, not two but three different identified material misrepresentations. They were: 1) the Applicant's statement that she never was arrested – after the officer found out and raised it, she admitted to being "physically arrested" –, 2) the Applicant not saying that her H&C application was refused, and 3) the Applicant not explaining the reason for exclusion order from Canada.

[31] As an example of what constitutes a material misrepresentation, the withholding of a prior refused US visa was considered as a material fact by this Court when it upheld the officer's misrepresentation finding (*Mohseni v Canada (Citizenship and Immigration)*, 2018 FC 795 at para 39). As the Court held in *Mohseni*, the withholding of a prior visa refusal could induce an error in the Administration of the IRPA. The withholding of facts by an Applicant does not allow the visa officer the opportunity to investigate a material fact. If the Applicant discloses a visa refusal and an officer is made aware of same, the visa officer could then make inquiries to determine why there was such a refusal. The prior visa refusal in this case and, similarly, the two other above identified potential misrepresentations undoubtedly constitute relevant material facts that could, if disclosed, been investigated further by the visa officer. This helps convince the Court that the misrepresentations raised by the visa officer in this matter were material.

[32] Considering the quantity and nature of the misrepresentations, the admission of being "physically arrested" made on the record by the Applicant and the lack of candour in providing any of the circumstances relating thereto, the Court concludes that the officer reasonably found that Ms. Pereira's application for a temporary resident visa included a material misrepresentation contrary to subsection 40(1)(a) of the IRPA.

B. *Did the visa officer unreasonably fail to consider whether Ms. Pereira should benefit from the "innocent error exception"?*

[33] The jurisprudence on section 40 and the exception of the innocent error is clear: it only applies when the knowledge of the misrepresentation is beyond the applicant's control regardless of whether the Applicant misunderstood the question or intended or not to misrepresent her situation; in other words, it only applies to truly extraordinary circumstances (*Tuiran* at para 29 and 30; *Malik v Canada (Immigration and Citizenship)*, 2021 FC 1004 at para 31 [*Malik*])

[34] The officer provided an opportunity to Ms. Pereira to respond to the concerns about the misrepresentations, and those concerns were precise. The officer considered the Applicant's explanations. After the response, the officer did not accept Ms. Pereira's explanations that these were innocent mistakes, and in view of the nature of the omissions, it is not difficult to understand why. Given this, the officer did not fail to consider the innocent error exception.

[35] Indeed, the arrest could not have been beyond Ms. Pereira's control as required by the innocent error exception, since she knew about it, and when asked about it, she admitted to having been "physically arrested". Similarly, the Court has repeatedly held that failure to properly relate the status of one's own visa history is not a matter beyond one's control (*Malik*). Thus, it is inconceivable that these material facts were beyond her control.

[36] While it is possible that the Applicant was not subjectively aware that she got arrested, visa officers have a significant degree of deference in making such factual findings, and for the

aforementioned reasons, I am not prepared to conclude that the officer was unreasonable in holding otherwise (*Appiah v. Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 19).

[37] The Applicant claims she believed she did not have to disclose her arrest because she was neither incarcerated nor charged. However, the question "have you ever (…) been arrested (…)" in her ETA Application form could not have been clearer or subject to any interpretation. To cite the Honourable Madam Justice McDonald in *Smith v Canada (Citizenship and Immigration),* 2018 FC 1020 at para 14:

> Mr. Smith argues that the Officer over-emphasized the clarity of the question and did not accept his explanation for the mistake. I agree that in certain cases an officer may have an obligation to consider in more detail the surrounding circumstances, such as where the question at issue could be subject to various interpretations or where the unique circumstances are not responsive to the question at issue. Here, however, I agree with the Officer that the question in this case — "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?" — is not vague or misleading.

[38] In summary, considering the non-disclosure of the refused H&C application, the true reasons for the Applicant's exclusion order – the non-compliance to IRPA's requirements –, the number and degree of the misrepresentations, the admission of the arrest misrepresentation, and the materiality of the omissions, the officer's decision was reasonable. The misrepresentations do not fall within the innocent error exception, and the Court fails to see how the officer could have reasonably reached another conclusion in the circumstances. The Court issatisfied, therefore, that the officer's decision was reasonable and falls within the range of possible and acceptable outcomes.

VI. Conclusion

[39] Despite the submissions of counsel of the Applicant, the Court is not convinced that the visa officer's decision was unreasonable.

[40] The application for judicial review is dismissed. Neither party identified a question to be certified for appeal, and none arises in this case.

JUDGMENT in IMM-2780-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Ekaterina Tsimberis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2780-22
STYLE OF CAUSE:	NADIA ANDREIA NOBREGA PEREIRA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 17, 2023
JUDGMENT AND REASONS:	TSIMBERIS J.
DATED:	JULY 20, 2023

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