Federal Court Cour fédérale

Date: 20240822

Docket: IMM-2212-23

Citation: 2024 FC 1303

Ottawa, Ontario, August 22, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

SERGIO ANTONIO REYES GARCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a redetermination decision by an officer [Officer] of the Immigration Section of the Canadian Embassy in Mexico [Embassy] dated February 9, 2023. In the decision the Officer determined that the Applicant was inadmissible to Canada under paragraphs 37(1)(a) and 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] on the grounds of organized criminality and for misrepresenting or withholding material

facts related to a relevant matter that induces or could induce an error in the administration of the *IRPA*.

[2] The Applicant asserts that the Officer's determinations in relation to both paragraphs 37(1)(a) and 40(1)(a) were unreasonable on a number of grounds and that the Applicant was denied procedural fairness. In advance of the hearing, the Respondent conceded that the Officer's paragraph 37(1)(a) determination could not stand and should be quashed. Accordingly, only the reasonableness of the paragraph 40(1)(a) determination and the question of whether the Applicant was denied procedural fairness remain live issues for the Court's determination.

[3] For the reasons that follow, the application for judicial review is granted, the decision of the Officer is set aside and the matter is remitted to a different officer for redetermination.

I. Background

[4] The Applicant is a citizen of Mexico who, along with his family, applied for an electronic travel authorization [ETA] on January 28, 2018. 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 a criminal offence.

[5] On March 3, 2019, the Applicant travelled from Mexico to Canada as a visitor with his family. During the baggage examination at their port of entry [POE], a Canada Border Services Agency [CBSA] officer discovered unreported currency. Consequently, the CBSA officer conducted a secondary, in-depth interview with the Applicant about the undeclared currency.

[6] During the interview, the CBSA officer asked about the Applicant's business interests and the source of the funds he was carrying. The CBSA officer 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 CBSA officer proceeded to question the Applicant on business transactions related to the Applicant's business partner, Manuel Barreiro [Manuel], who was investigated by Mexican agencies for money laundering. The Applicant claimed that the allegations resulted from political issues. The CBSA officer then referred to an article that mentioned the Applicant as having been charged with an offence relating to illicit origins of funds. The Applicant stated he was never charged, although the authorities wanted to charge him.

[7] After a few lines of questioning about Manuel and his businesses, the CBSA 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 stated that he understood what being "charged" meant, answered "yes" to having been charged, and responded to several other questions relating to this "charge."

[8] The CBSA officer concluded that the travel funds in the Applicant's possession at POE were suspected proceeds of crime from a money-laundering scheme in Mexico. The CBSA officer also informed the Applicant that he was inadmissible for misrepresentation because he had failed to indicate "yes" on his ETA application when asked whether he had ever been arrested, charged or convicted of a crime. At no point during this process did the CBSA officer prepare a subsection 44(1) report or send the matter to an admissibility hearing under subsection 44(2) of the *IRPA*.

Rather, the CBSA officer drew his own conclusions and determined that the Applicant was inadmissible for misrepresentation. Having been advised that he was inadmissible, the Applicant voluntarily withdrew his application to enter Canada.

[9] The Applicant commenced an application for leave and for judicial review of the CBSA officer's inadmissibility determination in 2019. By way of a Judgment and Reasons issued January 17, 2020, Justice Ahmed held that the CBSA officer's decision was unreasonable and breached procedural fairness. Specifically, Justice Ahmed held that the CBSA officer erred in making their own admissibility determination, as he lacked the authority to do so — instead, the CBSA officer was required to prepare and transmit a subsection 44(1) report to the Minister's Delegate. Justice Ahmed held that the CBSA officer acted without jurisdiction and consequently stripped the Applicant of the procedural fairness he would have been entitled to under the proper procedure. As a result, this Court granted the Applicant's judicial review and remitted the matter back to a different officer for redetermination [see *Reyes Garcia v Canada (Citizenship and Immigration)*, 2020 FC 66].

[10] On October 7, 2020, Immigration, Refugees and Citizenship Canada [IRCC] received a further ETA application from the Applicant.

[11] On October 26, 2020, a visa officer at the Embassy sent a procedural fairness letter [First PFL] to the Applicant, which advised him that they had concerns he may be inadmissible for criminality as well as for misrepresentation of a material fact under paragraph 40(1)(a) of the *IRPA*. The officer gave the Applicant the opportunity to respond by providing the following

documentation and information: (a) a Mexican police certificate; (b) a completed family information form; (c) a detailed explanation of his involvement/employment with Kross Investments Ltd., including business activities in Canada and abroad; (d) a detailed explanation of involvement/employment with Aspen Partners Invesco including business activities in Canada and abroad; (e) a detailed explanation of involvement/employment with Pinar Partners including business activities in Canada and abroad; (f) an explanation of purpose of visit to Canada including intended duration of stay; and (g) a copy of all pages of the Applicant's passports dating back 10 years.

[12] On February 11, 2021, the Applicant, through his legal counsel, requested further disclosure from the visa officer regarding the basis for the concern that the Applicant had made a misrepresentation.

[13] On March 19, 2021, the Applicant provided a response to the First PFL, in which Applicant's counsel noted that the Embassy had not responded to the Applicant's request for further disclosure regarding the alleged misrepresentation, and reiterated the previous request for particulars. Nevertheless, the Applicant provided detailed explanations, together with supporting documentation regarding the Applicant's involvement/employment with Kross Investments Ltd., Aspen Partners Invesco and Pinar Partners, and an explanation of the purpose of his visit to Canada, together with a Mexican police certificate from Querétaro, a completed family information form and a copy of all pages from his passport.

[14] On November 4, 2021, having received no decision from the Embassy in respect of his ETA application, the Applicant filed an application for leave and for judicial review for an order in the nature of *mandamus* to compel the Embassy to render its decision. This application was subsequently discontinued.

[15] By letter dated September 1, 2022, after the Applicant had commenced his *mandamus* application, a visa officer at the Embassy provided a second procedural fairness letter [Second PFL] in which they stated that they had concerns the Applicant might be inadmissible under paragraphs 37(1)(a) and 40(1)(a) of the *IRPA*. In relation to the misrepresentation concern, the Second PFL stated:

> Regarding paragraph 40(1)(a) of IRPA, I have concerns that you failed to disclose complete and accurate answers to the statutory questions in the eTA application, namely the question regarding previous criminal charges. In your application, you did not indicate that you had been previously charged. However, in your interview at the Port of Entry in 2019, you stated that you were charged with a crime in Mexico around 2018. You subsequently failed to provide the requested Mexican police certificate from the Fiscalía General de la República as evidence as to whether or not you had been subject to criminal charges in Mexico.

[16] The Applicant responded to the Second PFL on September 29, 2022. The response included an affidavit from the Applicant, in which he swore that he had never been arrested, charged or convicted of any offence. The Applicant also addressed what transpired at POE. The affidavit provided, in part, as follows:

> [4] I was interviewed by a border services officer on March 4, 2019. The interview was focused mostly on the funds I had brought to Canada and allegations from the officer that I am involved in money laundering. I deny that I am in any way involved in money laundering. I never told the officer that I had been charged with offences in Mexico although the officer suggested to me that that

> was the case. After I told the officer that I had never been charged the officer then enlisted the services of a Spanish interpreter even though the interview had been conducted in English up to this point. The interpreter in Spanish used the Spanish equivalent for "have there ever been allegations against you." I answered yes to that question because there were allegations made in the media but these never led to charges against me.
>
> [5] These allegations that were mentioned in the media were all of a political nature and were related to my business associate Manuel Barreiro and the opposing party's presidential candidate Ricardo Anaya. The previous government made allegations against them of a political nature and in late 2018 they have been cleared of any wrongdoing and were never convicted of any offences. The prosecutor announced very recently that the allegations against them had been groundless and the investigation closed. These allegations never led to any charges against me.

[17] In his response to the Second PFL, the Applicant also noted that the CBSA officer who took the Global Case Management System [GCMS] notes did not provide a sworn affidavit and, as a result, the Applicant argued that the Embassy was not entitled to rely on those notes as evidence of the facts contained therein.

[18] With respect to the assertion that the Applicant had failed to provide a police certificate, the Applicant noted in his response that he did include a police clearance certificate from the Mexican state in which he resides. The Applicant noted that the Embassy then requested a federal clearance, which he indicated he had applied for and would provide to the Embassy upon receipt.

[19] On October 11, 2022, Applicant's counsel emailed a copy of a certificate from the Secretaría de Seguridad y Protección Ciudadana Prevención y Readaptación Social entitled "Constancia," which confirmed that the Applicant never received a criminal sentence in Mexico.

[20] In October of 2022, a letter was sent to the Applicant refusing his ETA application. In the letter, the Officer incorrectly noted that the Applicant had failed to provide a response to the Second PFL. However, the Applicant subsequently provided evidence that he did, in fact, send a response before the due date, at which point his ETA application was reopened for reconsideration.

II. Decision under Review

[21] In their reconsideration decision dated February 9, 2023, the Officer concluded that the Applicant was inadmissible under paragraphs 37(1)(a) and 40(1)(a) of the *IRPA*. With respect to the Applicant's inadmissibility under paragraph 40(1)(a), the Officer stated:

> On your eTA application V327927417 you misrepresented or withheld the following material facts:
>
> - you failed to disclose complete and accurate answers to the statutory questions in the eTA application, namely the question regarding previous criminal charges.
>
> I reached this determination because in your application you did not indicate that you had been previously charged. However, in your interview at the Port of Entry in 2019, you stated that you were charged with a crime in Mexico around 2018. You subsequently failed to provide the requested Mexican Federal police certificate from the Fiscalía General de la República as evidence as to whether or not you had been subject to criminal charges in Mexico. The misrepresentation or withholding of this/these material fact(s) induced or could have induced errors in the administration of the Act as the applicant's failure to fully disclose his criminal charges could have led to an error in the administration of the Act, because it could have prevented IRCC from investigating the applicant's background.

[22] The GCMS notes dated February 9, 2023 provide further explanation for the Officer's decision. In relation to the Officer's inadmissibility finding under paragraph 40(1)(a) of the *IRPA*, the GCMS notes state:

- In the initial eTA application (V317388049) in January 2018, the applicant did not declare that he had been subject to any criminal charges.

- In the applicant's response to the PFL, he states that that the misrepresentation was overturned by the federal court. This is untrue. According to the Federal Court decision (Reyes Garcia v. Canada (Citizenship and Immigration), 2020 FC 66 (CanLII), [2020] 3 FCR 99), the applicant stated that he had never been charged with or convicted of an offence, then when a Spanish interpreter was brought in and explained what "charged" meant, the applicant changed his answer to "yes" (paragraph 9 and 49 of the decision). The Federal Court decision also states that the judge found that "although it was open to the Officer to form an opinion as to an alleged misrepresentation, […], the Officer did not have the authority to make a final admissibility determination" (para 50). The court further found that the officer breached procedural fairness by making his own determination of inadmissibility when he lacked the authority to do so.

Additionally, in response to the PFL, the applicant's representative also contends that when responding to the question, put to him by the CBSA border officer, regarding previous criminal charges "Mr. Reyes says "yes" but he is not admitting that he was charged but is responding to other aspects of the question and says: "Yes, I know but we rented a condo in West Georgia." As per the Federal Court decision (Reyes Garcia v. Canada (Citizenship and Immigration), 2020 FC 66 (CanLII), [2020] 3 FCR 99), the court accepted that the applicant had in fact admitted to being charged. In particular, the court noted at para 49: "…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."

The applicant was asked to provide a Federal Mexican Police certificate and he was provided with a document, signed by an Embassy representative, and addressed to the FGR (the Fiscalía General de la República – that is, the Mexican Federal Attorney General's Office) requesting that the FGR provide the Embassy with a criminal record certificate for the applicant. In response, the applicant provided a state police certificate from the State of Queretaro rather than the federal certificate that was required from the FGR. Included in the most recent submission, is a Constancia from the Secretaria de Seguridad y protection Ciudana, Prevencion Y Readaption social which is the department that is responsible for

> the penitentiary system in Mexico. The certificate states that there is no record of a criminal sentence, however it does not provide proof that the applicant was never charged with a crime.
>
> Given the inconsistency between the applicant's statements at Canada's Port of Entry (POE) with his statements in his application, and the constancia certificate provided by the applicant, it is not clear whether or not the applicant has or has not previously been charged with a crime in Mexico. His statement that he applied for an "Amparo" would seem to support the notion that he was facing criminal charges. (Note: according to open sources, "amparo" is a judicial action to protect an individual or individuals from the acts or omissions of the authorities that violate the human rights and guarantees protected by the Mexican Constitution). On a balance of probabilities, I am not satisfied that the applicant has been truthful in his application. On a balance of probabilities, I find that the applicant's failure to fully disclose his criminal charges could have led to an error in the administration of the Act, because it could have prevented IRCC from investigating the applicant's background. Therefore, the PA is refused for being inadmissible for misrepresentation as per A40(1)(a) of IRPA

III. Analysis

[23] Having considered the parties' submissions, I find that the determinative issue is the Officer's finding that the Applicant made a misrepresentation on his ETA application when he answered that he had never been charged with a criminal office.

[24] The applicable standard of review for this issue is that of reasonableness. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 8, 59]. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker [see *Canada*

(Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adeniji-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11, citing *Vavilov*, *supra* at para 100].

[25] Section 40 of the *IRPA* deals with inadmissibility due to misrepresentation. Paragraph 40(1)(a) provides:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(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;	**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

[26] Subsection 16(1) of the *IRPA* imposes an obligation on applicants to be truthful:

Obligation — answer truthfully	**Obligation du demandeur**
16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all	**16 (1)** L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les

relevant evidence and documents that the officer reasonably requires.	renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

[27] This Court has held that section 40 of the *IRPA* is to be interpreted broadly and that applicants have a duty of candour, which is required to maintain the integrity of the immigration system [see *Bodine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 848 at paras 41-42; *Kobrosli v Canada (Minister of Citizenship and Immigration)*, 2012 FC 757 at para 46].

[28] To trigger inadmissibility under paragraph 40(1)(a), two criteria must be met: (a) there must be a misrepresentation; and (b) the misrepresentation must be material, in that it induces or could induce an error in the administration of the *IRPA* [see *Singh Dhatt v Canada (Citizenship and Immigration)*, 2013 FC 556 at para 24]. In other words, a misrepresentation need not be decisive or determinative to be material. It will be material if it is important enough to affect the process [see *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25]. This case turns on the reasonableness of the Officer's determination in relation to the first criterion.

[29] As detailed in the GCMS notes set out above, in concluding that the Applicant had made a misrepresentation, the Officer took into account a number of considerations. First, the Officer considered Justice Ahmed's decision on the Applicant's 2018 ETA application. While it was not unreasonable for the Officer to note Justice Ahmed's decision as it forms part of the Applicant's immigration history, I find that the Officer mischaracterized the decision and relied on that mischaracterization to conclude that the Applicant made a misrepresentation, which renders the Officer's decision unreasonable.

[30] Contrary to the Officer's statement, Justice Ahmed did not accept that the Applicant admitted to being charged during his interview at POE. Rather, Justice Ahmed found that, based on the evidence before the CBSA officer, it was reasonable for the CBSA officer to have formed an opinion that the Applicant could be inadmissible on the ground of misrepresentation, but that only the Minister's Delegate or the Immigration Division could make such a finding.

[31] Moreover, it must be recalled that Justice Ahmed's finding as to the reasonableness of the CBSA officer's opinion was based on the evidence that was before the CBSA officer at that time. That evidence did not include the Applicant's affidavit, which addressed the exchange with the Spanish interpreter. In this case, the Officer had a different evidentiary record before them, which had to be considered by the Officer in determining the meaning of the statements made by the Applicant at POE. Yet the reasons do not reflect that the Officer took this important evidentiary distinction into account when considering Justice Ahmed's decision (albeit in a misconstrued manner).

[32] Second, the Officer relied on the fact that the Applicant had not provided a federal Mexican police certificate from the Fiscalía General de la República [FGR] and noted that the state police certificate and Constantia document did not provide proof that the Applicant was never charged with a crime. I acknowledge that the Officer did not have before them a federal Mexican police certificate from the FGR, which would have determinatively answered the question of whether the Applicant had ever been charged with a crime in Mexico. However, the Officer knew that one had been requested by the Applicant but not yet received by the Embassy from the FGR. That said, what the Officer did have before them did not support any determination that the Applicant had in

fact been charged with a crime in Mexico. To the contrary, the certificates evidenced that he had never been charged with a crime at the state level and had never received a criminal sentence.

[33] Third, the Officer relied on the statements made by the Applicant at POE, as reflected in the GCMS notes, as to whether he was ever charged with a crime in Mexico even though the Officer's reasons contain no analysis of those statements. Importantly, the Officer's reasons fail to address the explanation provided by the Applicant in his sworn affidavit, regarding his exchange with the Spanish interpreter about the meaning of the word "charge," wherein he states that the interpreter used the Spanish word for "allegations." It must be recalled that the exchange between the CBSA officer and the Applicant as reflected in the GCMS notes reveals that the Applicant initially stated that he was not charged with a criminal offence in Mexico. It was only after the Spanish interpreter was brought in to explain the meaning of the word "charge" that the Applicant changed his answer. Specifically, the question the officer asked was, "[i]n the context of what the interpreter is saying, were you ever charged with anything?" The Applicant's answer must thus be understood in light of the Spanish interpreter's explanation, for which there is no transcript and no affidavit from the interpreter or the CBSA officer. The only explanation of "what the interpreter is saying" is found in the Applicant's affidavit.

[34] The Officer merely noted that there is an "inconsistency" between the Applicant's statements at POE as reflected in the GCMS notes and the Applicant's statements on this application. The Officer's failure to grapple with the Applicant's affidavit, which expressly addressed the "inconsistency," constitutes a reviewable error, as the Applicant's evidence directly contradicted the ultimate determination made by the Officer [see *Cepeda-Gutierrez v Canada*

(Minister of Citizenship and Immigration), [1999] 1 FC 53 at para 17]. I find that this error, on its own, is sufficient to render the Officer's decision unreasonable.

[35] It must be recalled that the only "positive" evidence supporting a finding that the Applicant had been charged with a crime in Mexico was his own alleged statement at POE, which was clearly disputed by the Applicant's sworn evidence before the Officer. The lack of evidence to support any finding that the Applicant had ever been charged with a crime was recognized by the Officer when, after detailing the three aforementioned considerations, made the statement that, "it is not clear whether or not the Applicant has or has not previously been charged with a crime in Mexico."

[36] However, the Officer then went on to consider the fact that the Applicant had applied for an amparo (the fourth consideration). They concluded that this fact "would seem to support the notion" that the Applicant was facing criminal charges which then seems to have tipped the scales for the Officer and resulted in their determination that the Applicant had made a misrepresentation.

[37] I agree with the Applicant that the article contained in the certified tribunal record that addressed the amparo the Applicant applied for indicated that the amparo was sought to suspend an investigation of the Applicant, not charges. Other evidence in the certified tribunal record confirms that amparos can be sought for many purposes beyond those involving criminal charges. While it is unclear what "open sources" the Officer relied on regarding the meaning and purpose of an amparo, what is clear is that the Officer's reasons do not adequately explain how, on the evidence before them, they determined that applying for an amparo would seem to support the

notion that the Applicant had been charged. This lack of explanation is particularly important given that it is the amparo that appears to have been the determinative consideration for the Officer.

[38] In light of these serious shortcomings in the Officer's reasons for decision, I find the Officer's determination that the Applicant made a misrepresentation on his ETA application was unreasonable. Accordingly, the section 40(1)(a) inadmissibility finding is also set aside and the matter shall be remitted to a different officer for redetermination.

[39] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-2212-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the Officer dated February 9, 2023, is set aside in its entirety and the matter is remitted back to a different officer for redetermination.

3. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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