Federal Court  Cour fédérale

Date: 20240917

Docket: IMM-12502-23

Citation: 2024 FC 1460

Calgary, Alberta, September 17, 2024

PRESENT: Justice Andrew D. Little

BETWEEN:

MICHEL OLUWAFEMI ANOMNEZE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a member of the Immigration Division ("ID") of the Immigration and Refugee Board of Canada. The ID found the applicant inadmissible for misrepresentation under paragraph 40(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[2] The applicant contends that the ID's decision was unreasonable under the principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[3] For the reasons below, I conclude that the application must be dismissed.

[4] By way of introduction to this application, the Court's case law confirms that for inadmissibility under paragraph 40(1)(*a*), two criteria must be shown: (1) there must be a misrepresentation; and (2) the misrepresentation must be material, in that it induces or could induce an error in the administration of the *IRPA*.

[5] The Court has also recognized a narrow "innocent mistake" exception under paragraph 40(1)(*a*), because genuine mistakes occasionally occur when filing immigration applications. An applicant who has made an honest or innocent mistake may not be inadmissible under that provision. There are two requirements for the innocent mistake exception to apply: (1) the applicant must have honestly believed that they were not making a misrepresentation, and (2) that belief must be reasonable. The first is a subjective assessment: the applicant must have a genuine belief that he was not making a misrepresentation, or be truly unaware that he was withholding information. The second involves an objective assessment of the specific circumstances when the applicant made the misrepresentation. See the summary of the case law in *Singh v. Canada (Citizenship and Immigration)*, 2024 FC 1369, at paras 15-20; *Kaur v. Canada (Citizenship and Immigration)*, 2024 FC 416, at paras 11-13; *Singh v. Canada (Citizenship and Immigration)*, 2023 FC 747, at paras 24-30 and the cases cited there.

I. Facts and Events Leading to this Application

[6] The applicant is a 24-year-old citizen of Nigeria. He came to Canada on a study permit in 2017. He has graduated high school and is now a business student at a university in Alberta.

[7] On December 9, 2022, the applicant was arrested in relation to a charge of fraud under $5,000, contrary to paragraph 380(1)(*b*) of the *Criminal Code*. Police came to his apartment late one evening and during this interaction, an officer placed the applicant under arrest. The police were at his home for more than an hour, during which time an officer explained to the applicant that he was under arrest and why. The applicant was released that night on an undertaking with conditions.

[8] A couple of days later, the applicant called his immigration consultant about extending his study permit. He told the consultant about the arrest and that it had to be included in his application for the extension.

[9] The consultant completed the extension application and submitted it to IRCC. The applicant did not review it beforehand. The copy in the Certified Tribunal Record, dated December 14, 2022, is not signed by the applicant. The consultant sent him the confirmation that the extension application had been submitted.

[10] The form for the extension application asked, “Have you ever committed, been arrested for or been charged with or convicted of any criminal offence in any country or territory?” The response provided in the application form answered: “No”.

[11] In mid-December 2022, the applicant was involved in a motor vehicle collision. Police advised him at that time that he had been charged with fraud under $5,000.

[12] In February 2023, a Canada Border Services Agency officer interviewed the applicant in relation to the study permit extension application. When asked about the arrest on December 9, 2022, the applicant initially stated that he was unaware that he was arrested that night. According to the officer, subsequent answers led the officer to believe the applicant knew he had been arrested.

[13] On February 24, 2023, the officer wrote a report under *IRPA* subsection 44(1) based on the non-disclosure of the arrest and referred the applicant to an admissibility hearing under subsection 44(2).

[14] On September 27, 2023, following a hearing at which the applicant testified, the ID issued an Exclusion Order against the applicant for failing to disclose the arrest on his application to extend his study permit. By this time, the applicant had entered into an alternative measures agreement and it appears that the fraud charge under the *Criminal Code* had been withdrawn (the record on this application is incomplete on this point). That the applicant was charged with other offences in early 2023 is not relevant to the present application.

II. The ID Decision under Review

[15] After hearing the testimony of the applicant and submissions from the parties' respective counsel, the ID rendered an oral decision. The ID concluded:

- The applicant did not disclose his arrest when he applied to extend his study permit, which was an indirect misrepresentation made by the applicant through his immigration consultant.
- The misrepresentation was material, as it could have induced an error in the administration of the *IRPA.*
- The applicant was a sophisticated individual studying business at the university level.
- Based on the police officer's notes and the applicant's oral testimony, the applicant knew "very well" that he was arrested on the night of December 9, 2022.
- The ID did not accept the applicant's evidence and argument that he honestly believed the matter was civil, rather than criminal in nature.
- The applicant recognized that the arrest was important enough to tell his immigration consultant.
- The fact of his arrest was information that was within the applicant's control. He had the ability to control whether that information went before an immigration official in his extension application.
- The consultant completed the application for an extension and submitted it, without sending a copy to the applicant.
- The applicant allowed the consultant to submit the application without showing it to him.
- It was the applicant's responsibility to ensure his application was complete and truthful.

[16] With respect to the first part of the innocent mistake exception – subjective belief – the ID accepted that the applicant had an honest belief that the information he provided was accurate. The ID had no reason to disbelieve the applicant that he had a conversation with his immigration consultant, and that he told her about the arrest and wanted it to be included in his extension application.

[17] However, on the second aspect of the innocent mistake exception, the ID concluded that the applicant did not act reasonably and therefore his belief was not objectively reasonable. The ID held that, based on his testimony, "issues of trust" arose during the conversation with the immigration consultant. He wanted confirmation that the information in his application was accurate, and the consultant declined to send him the application. Based on his own testimony about his conversation with the consultant, the applicant had an "instinct that something was untoward here and – and chose not to do anything about it".

[18] According to the ID, the applicant could have taken steps to ensure that the information in his control (the arrest) was disclosed with his extension application, but did not. The ID found:

a) The applicant could have insisted on seeing the application form and reading it before it was submitted.

b) The applicant did not push the consultant to provide the application form to him when she resisted doing so; he "simply let it be".

c) The applicant could have told the consultant that he wanted to withdraw (i.e., no longer retain her services). The applicant was paying for the services, was in charge, and did not do anything when "it became very obvious" to him that the

consultant did not want to share the amendments to the application or confirm that they occurred.

d) The applicant could have submitted the application himself, or he could have hired another person to assist him. He was responsible for it and knew it was important, but did not personally check the application filed on his behalf to ensure it had the arrest information in it.

[19] The ID stated near the end of its reasons:

> […] there's a number of steps that you could have done here to ensure that the information that you had control of got before the immigration official, so that they were able to make an informed decision on your application and were alert to potential inadmissibility that were perhaps, you know, occurring here with by way of this arrest.
>
> So, you were not diligent in --- in pursuing it to the --- to the full extent. There's much more that you could have done to ensure that this misrepresentation didn't take place.
>
> So, I don't think that this was reasonable conduct on --- on the facts here. You --- you simply chose to rely on inaction after telling the consultant, and according to the Federal Court, that's insufficient.
>
> A person can't contract out to a third party, allow that third party to submit applications without the applicant reviewing them, and then turn around and blame the consultant for any misrepresentations that may be in such a document.
>
> So, I'm not satisfied that the honest and reasonable, responsible, been met by way the facts of your case.
>
> [Emphasis added.]

[20] The ID held that the applicant was inadmissible to Canada for misrepresentation under *IRPA* section 40 and issued the Exclusion Order.

III. Analysis

A. *Standard of Review for the Substantive Merits of the ID's Decision*

[21] The standard of review of the ID's substantive decision is reasonableness, as described in *Vavilov*. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov,* at paras 12-13 and 15; *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21, at paras 8, 63. The starting point is the reasons provided by the decision maker, which are to be read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov,* esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v. Canadian Union of Postal Workers,* 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61; *Mason,* at paras 8, 59-61, 66.

[22] The reviewing court focuses on the reasoning process used by the decision maker: *Vavilov,* at paras 83, 84 and 87. The court does not consider whether the decision maker's decision was correct, or what the court would do if it were deciding the matter itself: *Vavilov,* at para 83; *Canada (Justice) v. D.V.,* 2022 FCA 181, at paras 15, 23.

[23] The reviewing court may not reassess or reweigh the evidence: *Vavilov,* at para 125. The Court may intervene if the decision maker has fundamentally misapprehended the evidence before it, ignored critical evidence, or failed to account for evidence before it that ran counter to its conclusion: *Vavilov,* at para 126; *Federal Courts Act,* paragraph 18.1(4)(d); *Maritime Employers Association v. Syndicat des débardeurs (Canadian Union of Public Employees, Local 375),* 2023 FCA 93, at paras 115-117.

[24] Not all errors or concerns about a decision will warrant intervention. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100.

B. ***Application of the Reasonableness Standard and Judicial Review Principles***

(1) Impermissible Arguments before this Court

[25] The applicant's written submissions raised the question of whether the ID "correctly applied" the innocent mistake exception to the circumstances of this case. Applying the reasonableness standard in *Vavilov*, that is not a question a review court is permitted to answer. It was the ID's role to determine merits of whether the applicant made a material misrepresentation, and whether the innocent mistake exception applied in the circumstances. As such, the Court cannot engage with the applicant's position in his written submissions that, on the merits, he subjectively believed he was not making a misrepresentation (as the ID held) and that objectively it was "reasonable on the facts that [he] believed that he was not making a misrepresentation" (contrary to the ID's findings and conclusions). As the applicant's counsel properly submitted at the oral hearing in this Court, the proper question on judicial review is whether the ID's decision was reasonable.

[26] At that oral hearing, the applicant's central submission was that the ID made a reviewable error by ignoring the evidence of the applicant's state of mental health. The applicant relied upon

his testimony at the ID hearing that he woke up in a panic when the police arrived at his home on the evening of December 9, 2022, and the letters from medical practitioners in April and July 2023 concerning his mental health.

[27] The respondent objected to the applicant's line of argument, on the basis that the applicant's mental health (a) was not raised as an issue at the ID, and (b) was not raised in the applicant's written submissions to the Court on this judicial review.

[28] As a general rule, issues should be placed before a decision maker or they may be considered new issues on a judicial review of the decision and will not be considered: *Firsov v. Canada (Attorney General),* 2022 FCA 191, at para 49; *Gordillo v. Canada (Attorney General),* 2022 FCA 23, at para 99. The Federal Court of Appeal has recently reconfirmed this general principle: see e.g., *Sullivan v. Canada (Attorney General),* 2024 FCA 7, at para 8; *Terra Reproductions Inc. v. Canada (Attorney General),* 2023 FCA 214, at para 6.

[29] In this case, neither the applicant's testimony nor his legal counsel's submissions to the ID raised his mental health and its potential impact on the events in December 2022, particularly on the applicant's interactions with the immigration consultant after his arrest and his failure to take steps to ensure that the representations in his extension application were accurate. The ID did not make any findings or reach its conclusion based on the applicant's mental health in December 2022.

[30] At the ID hearing on September 27, 2023, the applicant testified at some length about his communications with the consultant, in direct examination, in cross-examination and in response to questions from the ID member. He provided long narratives in response to his own counsel's questions about what had occurred in December 2022. His testimony did not connect his state of mental health at the time in December 2022 with any explanation about why he did not take steps to ensure the application filed on December 14 accurately disclosed his arrest a few days earlier. He testified about waking up in a panic attack when the police arrived at his home on December 9, and that he was "already going through panic attacks and mental therapy or mental deterioration at the time". However, his testimony did not address whether and how his mental health affected the non-disclosure of the arrest in his application on December 14 or his interactions with the immigration consultant on December 11 and December 15. He did not mention the state of his mental health when testifying about those topics. In addition, there was no medical evidence before the ID relating to his mental health in December 2022. There were only the April and July 2023 documents related to his mental health in the ID record.

[31] I hasten to add that in reaching the conclusion that the issue now argued was not previously raised at the ID hearing, I do not minimize the applicant's mental health struggles as reflected in the medical evidence from 2023. My conclusion is based on the absence of argument and material evidence before the ID as to the applicant's mental health in December 2022 and how it may have impacted the misrepresentation at issue before the ID.

[32] I must conclude that the applicant's submissions on the issue were not proper on this judicial review application, because the argument was not made to the ID. In the circumstances,

the Court cannot consider the new argument made orally at the hearing that was not made to the ID and was not raised by the evidence before the ID.

[33] I observe also that the applicant's argument was also not raised in his written submissions to the Court. I do not agree with the applicant that his memorandum of fact and law raised the issue on leave, when he argued that objectively it was "reasonable on the facts that [he] believed that he was not making a misrepresentation" [underlining added]. The applicant did not file a further memorandum of argument. The argument was unrelated to any substantive submission made by the applicant before the hearing, and appeared to take the respondent by surprise. The respondent's counsel objected, and in this case properly so.

(2) Reasonableness of the ID's Decision

[34] I have conducted an analysis of the ID's decision, applying the principles in *Vavilov*. In my view, the decision was reasonable.

[35] The applicant did not challenge the legal principles applied by the ID. I detect no material legal error in the ID's analysis in this case.

[36] In addition, applying *Vavilov* principles, the ID's application of the law to the facts was reasonable. The ID's decision respected the factual constraints arising from the applicant's testimony. The ID did not ignore or fundamentally misapprehend the evidence before it. The decision was sufficiently responsive to the arguments made by the applicant and to the evidence he provided. There were no "serious shortcomings" in the decision, read in light of the record.

The ID's analysis and overall conclusion was reasonably open to it based on the evidence before it.

[37] I add that, while it may be cold comfort to the applicant, the lack of material evidence and argument at the ID described in paragraph 30, above, implies that even if the argument concerning his mental health had been considered by this Court, it would not have succeeded: *Vavilov*, at paras 125-128.

IV. Conclusion

[38] The application is therefore dismissed.

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

JUDGMENT in IMM-12502-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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