Federal Court  Cour fédérale

Date: 20230119

Docket: IMM-790-22

Citation: 2023 FC 87

Ottawa, Ontario, January 19, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

KARAMJEET KAUR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the January 19, 2022 decision [Decision] of the Immigration Division [ID] of the Immigration and Refugee Board of Canada, finding the Applicant inadmissible for misrepresentation under subsection 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow, this judicial review is dismissed. The ID identified and applied the correct legal test and the resulting decision is reasonable. I decline to certify the question posed by the Applicant.

I. Background and Procedural History

[3] The Applicant is a 24-year-old citizen of India who applied to study in Canada. Her family hired someone in India, who they believed was an immigration consultant, to obtain a student visa for the Applicant. The Applicant says she never met this consultant and says that she did not sign any documents for her student visa application.

[4] In January 2018, the consultant advised the Applicant she had a letter of acceptance from Seneca College. In April 2018 the Applicant travelled to Canada and based upon the Seneca College acceptance letter, she was granted a study visa.

[5] Shorty after her arrival in Canada, the Applicant was told by the consultant there was an issue with her attending Seneca College because of a dispute between the consultant and the college. The Applicant sought other study options in Canada and enrolled at Norquest College in Edmonton, where she went on to complete a two-year Business Administration diploma.

[6] In July 2020, the Applicant obtained a Post-Graduation Work Permit [PGWP] and submitted an application for permanent residence.

[7] In May 2021, the Applicant had an interview with Canada Border Services Agency [CBSA] and was advised that an *IRPA* section 44 Report had been issued against her as a result of a misrepresentation on her student visa application.

[8] The Seneca College acceptance letter provided by the consultant turned out to be fraudulent. Once the CBSA informed the Applicant of this fact, the family registered a criminal complaint against the consultant in India.

A. *Decision Under Review*

[9] The Decision consists of a transcript of an admissibility hearing held on January 19, 2022, before a member of the ID. The Applicant, a foreign national, was found inadmissible to Canada under subsection 40(1)(a) of the *IRPA*, for misrepresentation of a material fact that could induce an error in the administration of the *Act*.

[10] The ID found the letter of acceptance was not issued by Seneca College and was not consistent with Seneca College records. The ID concluded, on the balance of probabilities, the admission letter was not genuine and that an indirect misrepresentation had occurred.

[11] The ID questioned whether the Applicant made an indirect misrepresentation, as she had not signed the visa application form. The Applicant admitted at the hearing she was aware her cousin had forged her signature on one of the documents in her application, the Use of Representative form. The ID found the evidence demonstrated “she was aware that an application was being made for a Study Permit and that she authorized her cousin and the

immigration consultant to submit the application for the Study Permit." The ID noted that the onus was on the Applicant to ensure her application was complete, accurate, and complied with the legislation. The ID concluded that the Applicant was aware the consultant and her cousin were submitting an application on her behalf, so a misrepresentation had occurred.

[12] The ID determined the misrepresentation concerned a material fact, as an acceptance letter is a required document for a study permit application. The ID found the use of the fraudulent admission letter induced an error in the administration of the IRPA.

[13] The ID also considered the defence of innocent mistake and concluded the defence did not apply in this case. On the first part of the test, subjective belief, the ID accepted the Applicant genuinely believed she had been admitted to Seneca College.

[14] Regarding the second part of the test, whether the belief was objectively reasonable, the ID found the defence failed. The ID found the admission letter was sophisticated and meant to deceive. However, the ID went on to consider:

> … whether someone in Ms. KAUR's circumstances with her background, cultural expectations, family dynamic, the physical disability that she has whether someone in her situation would reasonably believe that they were admitted to Seneca College and I need to determine whether the knowledge of the genuineness of the letter of admission was beyond her control.

[15] According to the ID, there was nothing in the evidence that suggested the Applicant was unable to use a phone or email to contact Seneca College to confirm her enrollment, either when

she received the letter or when she arrived in Canada. The ID found the ability to confirm her place at Seneca College was a matter within the Applicant's control.

II. Issues

[16] The Applicant raises a number of issues with the Decision, which I will address as follows:

A. Was the student visa application valid?

B. Did the ID reasonably consider the innocent misrepresentation test?

C. Did the ID reasonably consider if the innocent misrepresentation exception applied in the circumstances?

D. Does a certified question arise?

III. Standard of Review

[17] The parties submit, and I agree, the standard of review for the issues is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In assessing the reasonableness of the decision, the Court "asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). Where "reasons are provided but they fail to provide a transparent and intelligible justification […] the decision will be unreasonable" (*Vavilov* at para 136).

IV. Preliminary Issue

[18] As a preliminary matter, the Applicant has named both the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness as Respondents. The proper Respondent is the Minister of Public Safety and Emergency Preparedness, as the Minister named in the Decision under review.

[19] Accordingly, the style of cause will be amended, with immediate effect, to name only the Minister of Public Safety and Emergency Preparedness as the Respondent.

V. Analysis

A. *Was the Student Visa Application Valid?*

[20] The Applicant relies upon sections 10 and 12 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] to argue that she never completed a valid application, and therefore the incomplete student visa application cannot be relied upon by the ID to make a finding of misrepresentation.

[21] Subsection 10(1) of the *Regulations* states, in part:

10 (1) Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall	10 (1) Sous réserve des alinéas 28b) à d) et 139(1)b), toute demande au titre du présent règlement :
(a) be made in writing using the form, if any, provided by the Department or, in the case of an application for a	a) est faite par écrit sur le formulaire fourni, le cas échéant, par le ministère ou, dans le cas d'une demande de

declaration of relief under subsection 42.1(1) of the Act, by the Canada Border Services Agency;	déclaration de dispense visée au paragraphe 42.1(1) de la Loi, par l'Agence des services frontaliers du Canada;
(b) be signed by the applicant;	b) est signée par le demandeur;

[22] The Applicant argues she never signed the application as required by the above *Regulations,* therefore the application is a nullity. She relies on *Su v Canada (Citizenship and Immigration)*, 2016 FC 51 [*Su*] at paragraph 40 and *Gennai v Canada (Citizenship and Immigration)*, 2017 FCA 29 [*Gennai*] at paragraph 6 to argue that an incomplete application cannot be said to exist until it complies with section 10 of the *Regulations*.

[23] Additionally, she argues that based upon section 12 of the *Regulations*, an incomplete application must be returned to the applicant. Section 12 of the *Regulations* state:

12 Subject to section 140.4, if the requirements of sections 10 and 11 are not met, the application and all documents submitted in support of it, except the information referred to in subparagraphs 12.3(b)(i) and (ii), shall be returned to the applicant.	12 Sous réserve de l'article 140.4, si les exigences prévues aux articles 10 et 11 ne sont pas remplies, la demande et tous les documents fournis à l'appui de celle-ci, sauf les renseignements visés aux sous-alinéas 12.3b)(i) et (ii), sont retournés au demandeur.

[24] The Applicant argues that her unsigned visa application was incomplete, and based upon section 12, it should have been retuned to her and not retained by CBSA (save for biometric information). She argues that as the result of sections 10 and 12, there is "no" application in the system–thus–there can be no finding of misrepresentation as an application does not exist.

[25] This position is difficult to reconcile with the fact that the Applicant did in fact obtain a study permit based upon the application submitted. Further, the Applicant used the study permit as the basis for her subsequent PGWP and permanent residence applications. It is therefore not logical or credible for the Applicant to now argue that her application never existed, given that she has enjoyed the benefits that came with the study permit issued based upon this application.

[26] Additionally, the cases relied upon by the Applicant do not support her argument. Both *Su* and *Gennai* consider incomplete applications that were returned to the applicants. That did not happen in this case. In any event, the factual scenarios of those cases are entirely different, and therefore distinguishable.

[27] The Applicant's submissions on this point are wholly without merit. They also confuse provisions of the relevant legislation. I agree with the Respondent that subsection 40(1)(a) of the *IRPA* is a stand-alone provision that is not conditional on the existence of a complete application. Subsection 40(1)(a) states an individual is inadmissible for misrepresentation "relating to a relevant matter."

[28] Further, it is a well-established principle of statutory interpretation that regulations are subordinate legislation and, in the event of a conflict, the governing statute will prevail. As Justice Rennie held in *Afzal v Canada (Citizenship and Immigration)*, 2014 FC 1028 at paragraph 22:

> … the *Regulations* are subordinate legislation, and as such cannot derogate from or be inconsistent with the statute. As Professor Ruth Sullivan explains in *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at page 312, "the paramountcy of

> statutes over delegated legislation operates as a presumption" and in cases of conflict, "the statute is presumed to prevail". The Regulations cannot take away that which the statute has granted.

[29] I am satisfied that a misrepresentation on a granted study permit is a misrepresentation in respect of a relevant matter to which subsection 40(1)(a) applies–regardless of any irregularity in the application itself.

B. *Did the ID Reasonably Consider the Innocent Misrepresentation Test?*

[30] The Applicant argues the ID misapplied the test when it asks whether she believed she was admitted to Seneca College. She submits the real question is whether it was reasonable for her to assume the letter of acceptance from Seneca College was valid.

[31] The test for innocent misrepresentation is outlined in *Canada (Citizenship and Immigration) v Robinson*, 2018 FC 159 at paragraphs 5-6:

> … In determining whether the misrepresentation was an innocent mistake, one asks whether the person honestly and reasonably believed that no misrepresentation was being made.
>
> [6] There are thus two aspects to the test. The first is a subjective aspect; the decision-maker must ask whether the person honestly believed that he was not making a misrepresentation. The second is an objective aspect; the decision-maker must ask whether it was reasonable on the facts that the person believed that he was not making a misrepresentation. [Emphasis in original]

[32] The ID considered this as follows:

> Now, what I struggled with was whether a representation had even occurred. In order for there to be a misrepresentation there must be a representation and without the signature of the applicant, I

> [sic] was not clear to me whether there was an actual representation. But why I determined there was a representation was that I looked at the circumstances that surrounded the application; I heard evidence that that [sic] Ms. KAUR's cousin and an immigration consultant went to submit an application, on her behalf and that she was aware that that [sic] was occurring, this is not a situation where somebody filed for an application without the knowledge of the alleged applicant. So I will leave it at that point and I will l [sic] move onto the rest of my analysis on misrepresentation.

[33] The jurisprudence of this Court has repeatedly held that subsection 40(1)(a) of the *IRPA* applies even where the misrepresentation is made by another party (*Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059).

[34] The objective of subsection 40(1)(a) is to deter misrepresentation and maintain the integrity of the immigration process (*Inocentes v Canada (Citizenship and Immigration)*, 2015 FC 1187 at paras 17–18, citing *Sayedi v Canada (Citizenship and Immigration)*, 2012 FC 420 at para 24; see also *Canada (Citizenship and Immigration) v Sidhu*, 2018 FC 306 at para 33).

[35] As stated in *Haghighat v Canada (Citizenship and Immigration)*, 2021 FC 598 at paragraph 25 [*Haghighat*]:

> This Court does not distinguish between innocent misrepresentation and deliberate misrepresentation, including those misrepresentations made on "faulty legal advice" (*Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 678 at para 10). While seemingly rigid, the integrity of the immigration system relies on the provision of complete, honest and truthful information. The obligation of a duty of candor cannot be compromised by an applicant's failure to take responsibility for ensuring an application is truthful and complete, as required.

[36] This case is similar to *Haghighat* where the applicant, who could not read English and was unfamiliar with Canadian immigration processes, was provided a fraudulent document by an immigration consultant. The applicant was found to be inadmissible based on misrepresentation. Justice Manson held "[t]he circumstances of this case are unfortunate. The Applicant placed her trust in an immigration consultant and was deceived. However, these circumstances do not absolve the Applicant from the consequences of her misrepresentation" (at para 21).

[37] Further, this Court has held an "applicant is always responsible for the content of their application, and the belief that he or she was not misrepresenting a material fact is not reasonable where they fail to review their application and ensure its completeness and veracity" (*Lin v Canada (Citizenship and Immigration)*, 2021 FC 1124 at para 26, citing *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28; and *Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at para 16).

[38] Based on the above, the Applicant's position that the misrepresentation should not impact her is simply not supported by the case law from this Court.

C. *Did the ID Reasonably Consider if the Innocent Misrepresentation Exception Applied in the Circumstances?*

[39] The Applicant submits the ID failed to consider her unique circumstances in considering the exception for innocent misrepresentation. Specifically, she argues the ID failed to consider that she is a disabled and persecuted young woman from rural India, with uneducated parents. She says the ID unreasonably considered actions the Applicant took after arriving in Canada, but

it should have considered what a disabled, persecuted woman in India would have done while in India.

[40] Contrary to her submissions, a review of the Decision demonstrates the ID considered the Applicant's specific circumstances and experiences and used that to inform the assessment of the reasonableness of her actions. The ID states:

> The analysis doesn't just stop after looking at the face of a document. I need to look at whether someone in Ms. KAUR's circumstances with her background, cultural expectations, family dynamic, the physical disability that she has whether someone in her situation would reasonably believe that they were admitted to Seneca College and I need to determine whether the knowledge of the genuineness of the letter of admission was beyond her control.
>
> So Ms. KAUR travelled from India to Toronto alone, she also travelled from Toronto to Edmonton alone that shows a degree of mobility. I did hear that she gets tired quickly and her disability affects her ability to walk as well. But there's nothing in the evidence that suggests Ms. KAUR is unable to use a phone nor that she's unable to use email, she could have reached out to Seneca College upon receiving a letter of admission or even when she arrived in Canada. The ability to confirm her place at the Seneca College was within her control, this wasn't evidence or information that could, would have been withheld from her from Seneca College.
>
> …
>
> … In fact, in my view, it would be reasonable for a student to reach out to their school upon admission instead of relying completely on an immigration consultant. So unfortunately in my view, the defence does not succeed because there were no identifiable steps that Ms. KAUR took to determine the veracity of that that [sic] letter of admission.

[41] The above demonstrates the ID fully considered and grappled with the circumstances raised by the Applicant. Nevertheless, the ID concluded that although the Applicant did not sign

the Use of Representative form, she was aware an application was being submitted on her behalf and was aware her signature was forged to facilitate the submission of the application in some manner, even if she did not know the precise document or its purpose.

[42] The ID accepted the Applicant honestly believed she had been accepted to Seneca College, but concluded that her belief was objectively unreasonable. The ID did not narrow its consideration to steps it felt should have been taken, but rather looked for any actions taken by the Applicant to confirm her attendance at Seneca College. This analysis is a reasonable consideration of the objective aspect of the innocent mistake exception.

[43] Further, while the Applicant portrays herself as vulnerable and lacking access to resources, her post-secondary education experience in India calls this submission into question. This is particularly so considering that her previous diploma was in computer science.

[44] Overall, the ID considered the totality of evidence and the facts of the case including the Applicant's background, disability, family dynamics, and culture. The ID also found the Applicant was aware a study permit application was being submitted on her behalf.

[45] I find that the ID reasonably applied the two-part test for innocent misrepresentation. If the ID were required to accept the defence of innocent misrepresentation as soon as the subjective element was established, the second objective element of the test would not be necessary.

D. *Does a Certified Question Arise?*

[46] The Applicant proposes the following certified question:

> Can the Respondent rely on an application deemed incomplete pursuant to sections 10 and 12 of the *Immigration and Refugee Protection Regulations* to make a subsequent determination on the immigration status of an individual?

[47] To be certified for appeal under *IRPA* subsection 74(d), a proposed question must be a "serious question" that (i) is dispositive of the appeal, (ii) transcends the interests of the parties, and (iii) raises an issue of broad significance or general importance: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraph 36 [*Lewis*].

[48] In addition, a certified question "must be a question which has been raised and dealt with in the decision below": *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 12; *Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10 at para 72; *Lewis* at para 36.

[49] In *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, Justice Laskin explained at paragraph 46 that the test set out in *Lewis:*

> … means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness*), 2015 FCA 21, 29 Imm. L.R. (4th) 211, at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186, at paras. 15, 35).

[50] Finally, certified questions should be posed in a manner that recognizes the proper standard of review and links the certified question to the decision under review: *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Galindo Camayo]* at paras 44-45. The drafting approach contemplated by *Galindo Camayo* ensures the question is framed to address a point that arises in the decision itself and poses a general question of importance (such as a question of law), rather than an abstract question or one that focuses on the unique facts of the case: *Galindo Camayo* at paras 40 and 45.

[51] In my view, the proposed question does not arise from the Decision under review as the arguments discussed above regarding sections 10 and 12 of the *Regulations* were not made to the ID. In any event, the question fails to recognize the well-established principle of statutory interpretation that regulations are subordinate legislation and, in the event of a conflict, the governing statute will prevail.

[52] Accordingly, I decline to certify the question proposed by the Applicant.

VI. Conclusion

[53] This judicial review is dismissed as the Decision of the ID is reasonable. I also decline to certify any questions.

JUDGMENT in IMM-790-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. The style of cause is amended, with immediate effect, to name only the Minister of Public Safety and Emergency Preparedness as the Respondent; and

3. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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