Federal Court Cour fédérale

Date: 20231020

Docket: IMM-2460-20

Citation: 2023 FC 1394

Ottawa, Ontario, October 20, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

JINKALBEN JIGNESHKUMAR PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Jinkalben Jigneshkumar Patel, seeks judicial review of a decision made by an Officer on April 16, 2020, rejecting the Applicant's application for an open work permit as the spouse of a student permit holder in Canada pursuant to the International Mobility Program. The Applicant was found inadmissible for misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c27 [*IRPA*].

[2] For the reasons set out below, I am allowing this application.

II. **Background**

[3] The Applicant is a citizen of India residing in Gujarat. The Applicant's husband, also a citizen of India, holds a study permit for a two-year program at Georgian College.

[4] The couple met through an arranged marriage.

[5] The couple's marriage was arranged and a large engagement party took place on February 28, 2019. The Applicant states that the planning for the engagement began in January 2019 before her husband submitted his application for a study permit on February 15, 2019.

[6] At the time of submission, the couple believed the application would take months to process. To their surprise, the Application for the Applicant's husband was approved in ten days on February 25, 2019, for his studies beginning in May 2019

[7] A small marriage ceremony was held on March 28, 2019.

[8] The Applicant made an application for an Open Work Permit as a spouse of a Study Permit holder in Canada on September 24, 2019.

[9] The Applicant received the letter of invitation on November 15, 2019, for an interview in New Delhi on December 3, 2019.

[10] By way of letter dated April 16, 2020, the Applicant's application for a work permit was denied and she now faces a five-year bar for re-application.

III. **Decision under Review**

[11] The Global Case Management System (GCMS) notes, dated December 3, 2019, cite the following concerns:

1. The wedding was not well attended.
2. The Applicant does not look like a newly married woman in post marriage pictures.
3. The Applicant was not knowledgeable about the host.
4. No satisfactory evidence of whether the host is still studying at Georgian College.

[12] Having considered the circumstances of the Applicant and having examined all of the submitted documentation, the Officer was not satisfied the Applicant truthfully answered all questions. Therefore, the Applicant was found inadmissible to Canada in accordance with paragraph 40(1)(a) of the *IRPA* for misrepresentation and, she faces a five-year bar for re-application.

IV. **Issues and Standard of Review**

[13] The Applicant submits the Officer did not provide a procedurally fair opportunity for her to respond.

[14] The Applicant also submits that the finding of misrepresentation under subsection 40(1) of the *IRPA* was unreasonable.

[15] The first issue raised by the Applicant is one of procedural fairness. The standard of review for this is whether the decision is fair in all the circumstances, which has been described as akin to correctness review: See *Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Association of Refugee Lawyers v Canada (Immigration, Citizenship and Refugees)*, 2020 FCA 196 at para 35. See also: *Ganeswaran v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1797, at para 20-28

[16] On the second issue, the standard of review is reasonableness. The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. While this presumption is rebuttable, no exception to the presumption is present here.

[17] A reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at para 15. Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

V. **Analysis**

[18] The parties' disagreement on the applicable degree of procedural fairness reflects the divided jurisprudence on this matter. This Court in *Bains* and the cases cited therein propose that procedural fairness requirements are relatively minimal concerning applications for work permits*: Bains v Canada (Citizenship and Immigration)*, 2020 FC 57 at para 56 citing *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815 at para 5; *Guo v Canada (Citizenship and Immigration)*, 2015 FC 161 at para 27; *Bautista v Canada (Citizenship and Immigration)*, 2018 FC 669 at para 17.

[19] However, this Court has also stressed that the severe consequences of misrepresentation, namely ineligibility to apply to come to Canada for a five (5) year period, attracts a higher degree of procedural fairness and the severe consequences of misrepresentation cannot be ignored: *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at paras 26-27.

[20] I agree.

[21] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Vavilov* at para 133. In this case, a finding of misrepresentation precludes the Applicant from re-applying for a 5-year period and potentially reflects on the Applicant's character. The Applicant has stated her desire to unite with her husband in Canada to provide emotional support while he completes his studies and notes that his academic obligations and their financial circumstances make it

difficult for him to visit India during this time. Therefore, in the matter at hand, the personal impact on the Applicant is not merely the denial of a temporary stay in Canada, but the separation of a newlywed couple during the two-year period of her husband's studies in Canada.

[22] In *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at paragraph 27 [*Bui*] it was found that procedural fairness dictates that a visa officer must ensure that an applicant has the opportunity to meaningfully participate in the application process, citing: *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326 at para 25. This includes being informed of, and provided with, an opportunity to respond to perceived material inconsistencies, credibility concerns, accuracy or authenticity concerns, or the reliance of a visa officer on extrinsic evidence: *Chawla v Canada (Citizenship and Immigration)*, 2014 FC 434 at para 14 [*Chawla*]; *Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716 at paras 6-7.

[23] However, in *Bui* at paragraph 28 it was noted that when a visa officer's concern arises directly from the requirements of *IRPA* or the regulations, the officer is not normally under an obligation to inform or provide the applicant with an opportunity to address the concerns: *Al Aridi v Canada (Citizenship and Immigration)*, 2019 FC 381 at para 20; *Saatchi v Canada (Citizenship and Immigration)*, 2018 FC 1037 at para 40; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 24.

[24] In *Bui* at paragraph 29, it was further noted that an officer may put concerns to an applicant by way of a procedural fairness letter. That letter must contain enough detail to enable the applicant to know the case to meet, meaning that the applicant is provided with a reasonable

understanding of why the officer is inclined to deny the application: *Bayramov v Canada (Citizenship and Immigration)*, 2019 FC 256 at para 15; *Ezemenari v Canada (Citizenship and Immigration)*, 2012 FC 619 at para 11. In other words, an applicant should not be "kept in the dark" about the information upon which an officer may render a decision: *Chawla* at para 19.

[25] In *Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25 at paragraph 21 it was noted that the duty of fairness, even if it is at the low end of the spectrum in the context of visa applications require visa officers to inform applicants of their concerns so that an applicant may have an opportunity to disabuse an officer of such concerns: *Chiau v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (FCA), [2001] 2 FC 297 at para 41; *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422 at para 39,

[26] Regarding concerns arising directly from the requirements of the legislation or related regulations, Justice Mosley of this Court stated the following in *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501 at paragraph 24:

> [24] Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 257 (CanLII), 26 Imm. L.R. (3d) 221 (F.C.T.D.) [*John*] and *Cornea v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 972 (CanLII), 30 Imm. L.R. (3D) 38 (F.C.)] as cited by the Court in *Rukmangathan*, above.

[27] I agree with the Applicant that as notice was not provided, the Applicant was left with no opportunity to respond after the initial interview. The Applicant should have been provided with an adequate opportunity to respond, either by being given advance notice that the general purpose of the interview was to assess the genuineness of the marriage or by providing an opportunity to file additional submissions after the interview responding to the specific questions raised in the interview. An officer is required to provide more than general concerns in the fairness letter when a refusal will result in a finding of misrepresentation and a five (5) year ban: *Toki v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 606 at paras 17, 24-25.

[28] As stated in *Seraj v Canada (Citizenship and Immigration)*, 2016 FC 38 at paragraph 1, "Findings of misrepresentation must not be taken lightly. They must be supported by compelling evidence of misrepresentation occurred by an applicant; thereby an applicant faces important and long lasting consequences in addition to having his/her application rejected."

[29] I agree with the Respondent that the onus is on the Applicant to provide sufficient evidence to the Officer to address the concerns of inadmissibility, such as the genuineness of their marriage. As stated in *Kumarasekaram v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1311 at paragraph 9:

> [9] Under s. 11 of the *IRPA* a visa officer must be satisfied that the applicant is "not inadmissible" and meets the requirements of the Act. The burden is always on the applicant to provide sufficient evidence to warrant the favourable exercise of discretion: *Kazimirovic v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 1193 (Fed. T.D.). In this case, the applicant requests that this Court substitute its view on both the frankness and candour of the applicant during the interview and whether the onus on the applicant to establish that he is not inadmissible has been discharged. Here, the discrepancies noted by the Officer were

> concrete and objective and would, in the mind of any reasonable person, give reason for concern.

[30] In *Xu v Canada (Citizenship and Immigration)*, 2011 FC 784 at paragraph 16 [*Xu*] it was found that, "a finding of misrepresentation under section 40 of the IRPA is a serious matter which should not be made in the absence of *clear and convincing* evidence…" [emphasis added]. However, in the present case, I am not convinced that this decision was in fact based on the kind of "clear and convincing" evidence which is necessary to make a finding of inadmissibility.

[31] I agree with the Applicant that at most the Officer may have determined the Applicant and her spouse had provided insufficient corroboratory evidence that their marriage is genuine, resulting in a refusal of the spousal work permit. However, it was unreasonable and incorrect of the Officer to make an "unsupported leap from the reasonable finding of insufficiency of evidence to one of misrepresentation": *Xu* at para 16. A misrepresentation is not proved where the evidence is found only insufficient to establish the necessary criteria for admissibility. As a result, I find that the misrepresentation finding was made without regard to the evidence and must be set aside.

VI. **Conclusion**

[32] For the reasons set out above, this application for judicial review is allowed.

JUDGMENT in IMM-2460-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, and the matter is set aside to be remitted to a different officer for redetermination.
2. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2460-20
STYLE OF CAUSE:	JINKALBEN JIGNESHKUMAR PATEL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	MAY 5, 2022
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	OCTOBER 20, 2023

APPEARANCES:

Neerja Saini	FOR THE APPLICANT
Idorenyin Udoh-Orok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT