

Federal Court



Cour fédérale

Date: 20231020

Docket: IMM-3262-22

Citation: 2023 FC 1400

Ottawa, Ontario, October 20, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

ALIAKSANDR TARASEVICH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Aliaksandr Tarasevich, applied for permanent residency through an overseas spousal sponsorship application (“Spousal Application”) supported by his spouse, Alena Tarasevich. A Migration Officer at the Embassy of Canada in Warsaw refused the application, finding Mr. Tarasevich inadmissible to Canada on multiple grounds: misrepresentation, criminality, and serious criminality. Due to the serious criminality finding, the

Officer's refusal of the Spousal Application cannot be appealed to the Immigration Appeal Division [IAD] under section 64(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant raises many issues on judicial review. In my view, the determinative issue is the Officer's serious criminality finding. The Officer's brief reasons on this issue do not explain their reasoning process and are not responsive to the submissions filed by the Applicant and his spouse. This is a key issue because it led to the determination that the Officer's decision could not be appealed to the IAD.

[3] Given that I am not satisfied that the serious criminality finding is reasonable, the matter has to be sent back to be redetermined. In these circumstances, where the Applicant may end up being able to appeal the substance of the decision to the IAD under section 63(1) of *IRPA*, I will limit my reasons to addressing the Officer's finding on the serious criminality inadmissibility.

[4] Based on the reasons below, I grant the judicial review.

II. Preliminary Issues

A. *Proper Applicant*

[5] Alena Tarasevich, the spouse of Aliaksandr Tarasevich, initially filed the application for judicial review and named herself as the Applicant. In their written materials, the Respondent raised a concern with Ms. Tarasevich's standing to bring this application for judicial review

because the underlying application for permanent residence was that of Mr. Tarasevich and not his spouse, who is already a citizen of Canada. The parties agreed that the matter could proceed with confirmation from Aliaksandr Tarasevich that he would like to proceed as the Applicant in this matter and adopt the submissions and evidence previously filed by his spouse.

[6] The Court received confirmation from Aliaksandr Tarasevich that he consented to being added as an applicant and relied on the submissions presented by Alena Tarasevich.

Accordingly, under Rule 104 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], the Court orders that with immediate effect that Aliaksandr Tarasevich be added to this matter as an applicant and that Alena Tarasevich cease to be a party. The style of cause is amended with immediate effect to name Aliaksandr Tarasevich as the sole Applicant.

[7] In these circumstances, I also varied the requirement under Rule 119 of the *Rules* that requires individuals can either represent themselves in person or be represented by a solicitor. I accepted written and oral submissions from Alena Tarasevich, the Applicant's spouse.

B. *Excluded Evidence*

[8] The Respondent raised that Ms. Tarasevich's further affidavit, dated February 11, 2023, contains information that is not properly before the Court. I agree that the affidavit and attached exhibits contain new evidence, not before the Officer, relating to the circumstances of one of Ms. Tarasevich's sons. Evidence not before the decision-maker is only admissible in very limited circumstances. None of those apply here (*Association of Universities and Colleges of Canada v*

Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 at paras 17–20; *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 791 at para 28).

[9] I have not considered the information starting from the second paragraph of page 5 of the document filed as Ms. Tarasevich's further affidavit.

III. Background on Spousal Sponsorship Process

[10] The relationship timeline between the Applicant and his spouse is lengthy and does not need to be repeated here. I will only address key, undisputed facts that relate to the determinative issue on judicial review.

[11] Ms. Tarasevich was previously married to the Applicant's brother. The Applicant's brother is the biological father of Ms. Tarasevich's five children. The two youngest children were conceived after Ms. Tarasevich and her former husband, the Applicant's brother, had already separated and while she was married to the Applicant.

[12] The serious criminality finding relates to the birth certificates of the two youngest children, which list the Applicant as their father. These birth certificates were filed with the Sponsorship Application.

[13] In February 2020, the Applicant received the first procedural fairness letter relating to the Sponsorship Application. The Officer set out the following concerns: genuineness of the relationship, possible misrepresentation because of failure to declare a previous permanent

residence refusal, and concerns about whether two children were the Applicant's biological children.

[14] The Applicant and his spouse responded to these concerns in May 2020, admitting that the Applicant was not the biological father of the two youngest children. They explained that at the time the two youngest children were born, Ms. Tarasevich had already divorced the Applicant's brother, the Applicant's brother was in a new relationship, and the Applicant and Ms. Tarasevich were committed to raising the children together. The Applicant and Ms. Tarasevich further explained that in these circumstances, they indicated that the Applicant was the father in the birth registration documents.

[15] The Applicant received another procedural fairness letter in July 2020. This time, the Officer focused on the issue of a potential serious criminal inadmissibility under section 36(1)(c) of *IRPA*, due to the Applicant filing the birth certificates with the Sponsorship Application. The Officer specifically raised section 368 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]: Use, trafficking or possession of forged document.

[16] The Applicant and his spouse responded the same month. In their submissions, they disputed that section 368 of the *Criminal Code* could apply to their circumstances. They specifically disputed that the birth certificate was a "forged document".

IV. Decision under Review

[17] On February 8, 2022, the Officer refused the Sponsorship Application because they found the Applicant inadmissible on multiple grounds. The Officer found that by providing false information to the Ontario Office of the Registrar General that the Applicant was the father of two of his sponsor's children, and then using the birth certificates that listed him as a father in his Sponsorship Application, the Applicant was inadmissible for misrepresentation under section 40(1)(a) of *IRPA*, criminality under section 36(2)(c) of *IRPA* and serious criminality under section 36 (1)(c) of *IRPA*.

[18] The Officer further noted that since the Applicant was inadmissible under section 36(1)(c) of *IRPA* for serious criminality, neither he nor his sponsor could appeal the Officer's decision to the IAD. This is because section 64(1) of *IRPA* does not permit appeals to the IAD where a foreign national or their sponsor has been found inadmissible on the grounds of serious criminality described in 36(1)(c) of *IRPA*.

V. Issue and Standard of Review

[19] As noted above, the only issue I am considering is the Officer's determination that Mr. Tarasevich is inadmissible on the grounds of serious criminality. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

[20] The Supreme Court of Canada described a reasonable decision as “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” (*Vavilov* at para 85). Administrative decision-makers must ensure that their exercise of public power is “justified, intelligible and transparent, not in the abstract, but to the individuals subject to it” (*Vavilov* at para 95).

VI. Serious Criminality Inadmissibility Finding

[21] The Officer’s reasons for finding the Applicant inadmissible under section 36(1)(c) of *IRPA* are very brief. The decision is unreasonable because the Officer fails to address the critical elements required to make out the inadmissibility finding and does not address the Applicant’s submissions.

[22] Section 36(1)(c) of *IRPA* provides that a permanent resident or a foreign national is inadmissible on grounds of serious criminality for “committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.”

[23] Inadmissibility under section 36(1)(c) of *IRPA* is a complex determination that requires a consideration of a number of elements, including: whether the individual committed the act in question, where the alleged act was committed, whether it would have been considered an offence where it was committed, whether it would constitute an offence if the same act had been

committed in Canada, which offence would it be in Canada and would the offence it matches to in Canada carry with it a maximum term of imprisonment of at least 10 years.

[24] The Officer's reasons relevant to the serious criminality finding are limited to the following:

You provided false information to the Ontario Office of the Registrar General listing you as the father of at least two of the sponsor's children [names of children]... I am satisfied that you have intentionally provided misleading information to obtain the birth certificates that these were then submitted to IRCC for the purpose of substantiating a relationship which may not actually exist.

This act constitutes an offence under the laws of the place where it occurred. If committed in Canada, this act would constitute an offence under section 377(1) of the Canadian Criminal Code:
Damaging Documents

377 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who unlawfully

(b) inserts or causes to be inserted in a register or copy referred to in paragraph (a) an entry, that he knows is false, of any matter relating to a birth, baptism, marriage, death or burial, or erases any material part from that register or copy,

and then knowing that these documents contained false information submitted them as genuine would also be contrary to the Criminal Code of Canada as in Sections 366 and 368.

[25] The Officer's reasons raise many questions: who committed the act in question—the Applicant or his Canadian citizen sponsor; where was the act committed and specifically, was it committed outside of Canada; what act specifically is alleged to have happened outside of

Canada; and—if the alleged act happened outside of Canada—what is the applicable offence in the place where it was committed.

[26] There are also many questions raised with respect to the alleged equivalent Canadian offences. The Officer does not explain how the Applicant’s actions would be captured by the cited Criminal Code provisions. I note first that section 377 of the *Criminal Code* carries a maximum term of imprisonment of five years and therefore is irrelevant to the serious criminality finding under section 36(1)(c) of *IRPA*, which requires an equivalent offence carrying a maximum term of imprisonment of at least ten years or more.

[27] Sections 366 and 368 of the *Criminal Code* carry a maximum term of imprisonment of at least ten years and therefore are relevant, but the Officer provides no explanation as to how these provisions would apply to the Applicant’s activities. Both of these provisions relate to “forgery”—the making of false documents including by alteration, addition or erasure, and the possession and use of these documents. The Applicant and his spouse directly responded to the claim in the procedural fairness letter that their actions constituted using a “forged” document and took the position that the birth certificates are not “forged” but are valid documents. The Officer does not address this submission from the Applicant anywhere in their reasons.

[28] The serious criminality inadmissibility finding has significant consequences for the Applicant and his family. In the immediate term, it resulted in denying his sponsor the ability to appeal the refusal of the Sponsorship Application to the IAD. In light of the significant

consequences of the decision, there is a heightened obligation on an officer to provide responsive reasons that justify their decision to an applicant (*Vavilov* at para 133).

[29] I find the Officer's determination on the serious criminality inadmissibility lacks the hallmarks of a reasonable decision. The Officer's reasons are not responsive to the Applicant's submissions and fail to explain in a transparent, intelligible and justified manner why the Applicant was found inadmissible under section 36(1)(c) of *IRPA*.

[30] The application for judicial review is allowed. Neither party raised a question for certification and I agree none arises.

JUDGMENT in IMM-3262-22

THIS COURT'S JUDGMENT is that:

1. Aliaksandr Tarasevich be added to this matter as an applicant and that Alena Tarasevich cease to be a party. The style of cause is amended with immediate effect to name Aliaksandr Tarasevich as the sole Applicant;
2. The application for judicial review is allowed;
3. The decision dated February 8, 2022, is set aside and the matter is sent back to be redetermined by a different officer at IRCC; and
4. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3262-22

STYLE OF CAUSE: ALIAKSANDR TARASEVICH v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 18, 2023

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: OCTOBER 20, 2023

APPEARANCES:

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FOR THE APPLICANT

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