Federal Court  Cour fédérale

Date: 20240116

Docket: IMM-5953-22

Citation: 2024 FC 62

Toronto, Ontario, January 16, 2024

PRESENT: Justice Andrew D. Little

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ISMAIL GUCLU

Respondent

JUDGMENT AND REASONS

[1] The applicant Minister seeks to set aside a decision of the Immigration Appeal Division (the *"IAD"*) dated June 13, 2022.

[2] The IAD allowed an appeal against a removal order issued against the respondent, Mr Guclu, under paragraph 67(1)(*c*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

(the *"IRPA"*). It found that sufficient humanitarian and compassionate ("H&C") considerations warranted special relief to him.

[3] For the following reasons, the Minister's application is allowed.

I. Facts and events leading to this application

[4] The respondent is a citizen of Turkey. The following narrative is taken from the IAD's decision and the transcript of part of the hearing before the IAD.

[5] The respondent lived in Malta from 1997 to 2013. During part of this time, he and his wife were divorced. The respondent married a woman in Malta, apparently as a marriage of convenience. In 2005, the respondent and his first wife remarried. Now they live together in Canada.

[6] In 2006, the respondent was charged with criminal offences. He was initially in jail for three months. He was later convicted by the Malta court in 2009, but in 2010, an appeal court declared the conviction null and void and returned the charges to the lower court. That court again convicted him. The respondent appealed again. In 2011, an appeal court declared the second conviction also null and void. The IAD found that the charges were again remitted back to the lower court for additional criminal proceedings. At the time of the IAD hearing, the respondent remained charged with offences.

[7] In 2015, the respondent became a permanent resident of Canada. His wife was his sponsor. While his application for permanent residence was pending in 2014, an officer called

the respondent and his wife to check some facts. I understand that according to the officer's notes made at the time, both advised the officer that they had not been married to anyone other than each other.

[8] In February 2016, an international arrest warrant was issued against the respondent.

[9] In 2017, a report was issued against him under section 44 of the *IRPA*. An officer was of the opinion that he was inadmissible to Canada because he failed to answer truthfully questions in his application for permanent residence. The respondent had not disclosed his prior convictions or charges outside Canada. A delegate of the Minister referred him to an admissibility hearing.

[10] On March 16, 2021, the Immigration Division made an exclusion order under *IRPA* paragraph 40(1)(*a*) and paragraph 229(1)(*h*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[11] The respondent appealed to the IAD and sought relief under *IRPA* paragraph 67(1)(*c*). The IAD held hearings over one day in 2021 and two days in 2022, which included testimony from the respondent and his wife. The hearing concluded after oral submissions from the parties.

II. The IAD's decision

[12] By decision dated June 13, 2022, the IAD allowed the appeal and granted the respondent special relief for H&C reasons under paragraph 67(1)(*c*).

[13] In deciding whether to allow the appeal and grant special relief to the respondent on H&C grounds, the IAD identified *Ribic* factors for assessment: see *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4, approved in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84, at paras 40, 77, 90; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paras 7, 65, 137. The factors identified by the IAD included the seriousness of the misrepresentation, the level of remorse shown by the respondent, the respondent's length of time and establishment in Canada, the respondent's establishment and ties in Turkey, and the hardship that would be experienced by the respondent and his wife if he were removed from Canada.

[14] The IAD concluded that the respondent's misrepresentations in his application for permanent residence were serious and that he did not show remorse for his actions. His length of time in Canada (7 years) was not significant. He would experience minimal hardship personally if he returned to Turkey.

[15] However, the IAD held that several factors weighed in the respondent's favour. They were his significant establishment in Canada; his strong ties to Canada (compared to Turkey); his absence of establishment in Turkey and minimal ties there; and the hardship to his wife if he were removed from Canada due to her financial and emotional dependence on him.

[16] According to the IAD, these latter factors were sufficient to overcome the misrepresentation and warranted granting special relief to the respondent.

[17] The IAD's decision is now challenged by the Minister in this proceeding.

III. Analysis

[18] The parties both submitted, and I agree, that the standard of review is reasonableness as described in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, [2019] 4 SCR 653.

[19] *Vavilov* contemplates that a reviewing court may set aside an administrative decision if the applicant demonstrates that it was unreasonable because it was not transparent, intelligible and justified in relation to the facts and law that constrained the decision maker. Reasonableness review does not permit the Court to come to its own conclusion on the merits, or to reassess or reweigh the evidence. The focus is on the decision making process used by the decision maker. The Court may intervene if the decision maker failed to respect the legal constraints affecting its decision, or if the decision maker fundamentally misapprehended the evidence, failed to account for critical evidence in the record that runs counter to a material conclusion, or ignored material evidence. See *Vavilov,* esp. at paras 12-15, 83-85, 99-106, 125-128, 194. For the Court to intervene, any shortcomings in the decision must be sufficiently central or significant as to render the decision unreasonable as not displaying the necessarily transparency, intelligibility and justification: *Vavilov,* at para 100.

[20] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The concept of responsive reasons is inherently bound up with this principle, because reasons are

the primary mechanism by which decision makers demonstrate that they have actually listened to the parties. A decision maker is not required to respond to every argument or line of possible analysis. However, if a decision maker fails to provide a responsive justification for its decision – that is, there has been a significant failure to account for or meaningfully grapple with a party's key issues or central arguments – a reviewing court may lose confidence in the reasonableness of the decision owing to concerns about justification and transparency: *Vavilov,* at paras 127-128; *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21, at paras 10, 86, 97, 98, 118; *Canada (Attorney General) v. Rushwan,* 2023 FCA 118, at para 35; *Barrs v. Canada (National Revenue),* 2022 FCA 147, at para 38; *Walker v. Canada (Attorney General),* 2020 FCA 44, at paras 9-10.

[21] The applicant's position was that when assessing the *Ribic* factors, the IAD misapprehended the evidence including the seriousness of the charges that were not disclosed in the respondent's application for permanent residence and the facts underlying those charges. The applicant argued that the IAD did not consider or appreciate that the charges against the respondent related to the public safety and security objectives in paragraph 3(1)(*h*) of the *IRPA.* The applicant also submitted that the IAD failed to address credibility issues that were expressly raised before it, which related to the testimony of both the respondent and his wife. According to the applicant, the credibility issues affected the IAD's assessment of key factors including the respondent's remorse and establishment in Canada and the hardship that his wife would experience. The applicant contended that the IAD's analysis of the *Ribic* factors was not intelligible as it did not display logical reasoning because of internal inconsistencies.

[22] The respondent submitted that the IAD's decision was reasonable. He argued that the IAD's reasons did not have to be perfect (citing *Vavilov*, at para 91) and its decision was highly discretionary. The respondent submitted that the factual findings in the IAD's assessment were open to it on the evidence and that the Minister was asking the Court to reweigh the evidence, contrary to *Vavilov* principles. The respondent maintained that the section 44 report was not grounded on inadmissibility for serious criminality, but on misrepresentation, which implied that the applicant's reliance on the *IRPA*'s public safety and security objectives was misplaced.

[23] The parties also exchanged submissions on whether the evidence before the IAD supported its reasoning on each of the factors it assessed under the *Ribic* rubric.

[24] At the hearing in this Court, the applicant focused on the oral submissions made to the IAD. The applicant argued that the IAD's decision was not responsive to the numerous credibility issues raised by the Minister and addressed by both parties during argument and to the decision of this Court in *Canada (Citizenship and Immigration) v. Liu*, 2016 FC 460. The applicant emphasized that the IAD failed to provide a reasonable explanation for its conclusions in response to central arguments made to it. The respondent's oral submissions methodically argued that the IAD's overall reasoning was reasonable on the evidence before it. He also argued that the IAD was not required to explain why it accepted the testimony, only to explain if it did not accept it for reasons of credibility. He sought to distinguish *Liu* owing to the nature of the misrepresentation at issue. In addition, according to the respondent, the evidence supporting the IAD's conclusion of hardship to the respondent's wife was not controversial.

[25] I have concluded that the IAD's decision was unreasonable, principally because the IAD's reasons were not responsive to key issues specifically raised by the Minister during submissions to the IAD. The Minister raised two specific and related issues to the IAD that were not analyzed expressly, or at all, in the IAD's reasons. Those issues related to the credibility of the respondent and his wife (which affected several *Ribic* factors) and the impact of the respondent's serious misrepresentation and his lack of remorse on the weight given to his establishment in Canada.

A. *The Minister's Credibility Arguments to the IAD*

[26] First, I agree with the applicant that the credibility of both the applicant and his wife was an issue that was front and centre during submissions to the IAD.

[27] During the evidence portion of the hearing, the Minister's counsel cross-examined both the respondent and his wife on misrepresentations in the respondent's application forms for permanent residence and inconsistencies in their respective testimony compared with statements made in forms and in oral communications with an officer.

[28] In oral argument, counsel for the respondent properly acknowledged to the IAD that there were "some very incorrectly answered questions" concerning whether the respondent had been arrested or convicted of any crimes or offences in the application for permanent residence, and that there was a mistake in an answer about previous marriages because of the marriage between the respondent and the woman in Malta was not disclosed.

[29] The respondent's counsel, arguing first in the appeal to the IAD, proactively addressed credibility because counsel anticipated, correctly, that the Minister's counsel would raise it. His counsel submitted that the respondent and his wife were both credible overall. Counsel directly addressed several specific credibility issues:

a) Non-disclosure of the prior marriage by the respondent and his wife (sponsor) during calls with the officer in April 2014, raised in cross-examination using the officer's notes stating that both the respondent and his wife had confirmed no other marriages. The respondent's counsel stated that both the respondent and his wife had no memory of any such call;

b) an anticipated argument by the Minister that the misrepresentation about the criminal charges and two marriages was not inadvertent but that the couple had "conspired to lie" on the application. The respondent's counsel argued that this "was not a flagrant misrepresentation" and the respondent had disclosed his record in Malta by providing a police certificate and admitting to two marriages with his sponsor which he could have easily omitted to mention; and

c) that misrepresentations on permanent resident forms signed at an airport were inadvertent and careless, owing to the absence of translation and the respondent's tendency to sign "perfunctory" documents without reviewing them.

[30] The Minister's counsel also raised the credibility of the respondent, repeatedly, during oral submissions to the IAD. Counsel submitted that the respondent's misrepresentation weighed

heavily against the respondent's appeal and struck at the integrity of the Canadian immigration system.

[31] The Minister argued that the respondent's misrepresentation of the past criminal offences was not inadvertent or unintentional, but deliberate: "He chose, and his wife chose, on their own initiative, to provide false information in his application for permanent residence … because he did not want his application to be slowed down or a possibility of being refused in any way".

[32] The Minister also argued that:

a) the respondent's wife's testimony that she had no access to interpreters at a centre where she requested help with forms was "simply not credible";

b) neither the respondent nor his wife was credible, pointing to the many contradictions identified during the hearing between their testimony and the documents and their discussions with the officer about prior marriages;

c) the respondent tried to wipe his hands clean of all responsibility for misrepresentations by blaming others; and

d) the respondent incorrectly stated that he could not work in Malta but stated in his application that he did.

[33] The Minister ended with the submission that the application form for permanent residence was clear about truth and contained warnings about the consequences of false

statements, including exclusion from Canada and inadmissibility for misrepresentation. The Minister's counsel stated, referring to the respondent:

> And he has signed it. So the consequences are there, the warnings are there, he would just have us believe, "I just blindly signed the document and didn't bother reading". And I've already indicated I have not found that to be credible. I think there was a deliberate attempt to hide information and his wife was complicit in helping him to hide that information, not wanting the Canadian Immigration Authorities to know.

[34] As is apparent, the Minister's submissions focussed heavily on the lack of credibility of the respondent and his wife during testimony and the intentional or knowing nature of the several misrepresentations by both individuals.

[35] The point here is not which party was correct on any or all of their submissions to the IAD. It is that credibility was raised many times and as a central issue during oral submissions, with specific references to inconsistencies and prior communications with the respondent and his wife/sponsor. The two sides presented starkly contrasting positions: either the respondent and his wife were truthful and forthright, or each one had deliberately misrepresented the facts on several issues to mislead immigration authorities.

[36] It is not my conclusion that the IAD was required in law to expressly address each and every credibility argument raised by the Minister, or generally that whenever a credibility issue is raised it must be specifically addressed in the IAD's reasons. In addition, I am conscious that the IAD heard the witnesses' testimony. I express no conclusion about the credibility of either witness.

[37] Instead, the issue is that in the face of such pervasive credibility submissions relating to two critical witnesses, the IAD made no express findings and provided no reasoning on whether the testimony of the respondent, or his wife, was credible (i.e., believable or reliable). To elaborate, the IAD's reasons on the *Ribic* factors shed little or no light on how the IAD resolved the credibility issues raised by the Minister:

- The IAD found that the respondent's misrepresentation was material to the decision to grant him permanent resident status. The IAD concluded that the misrepresentation was "serious" and did not "weigh favorably on him" in the assessment. These generic conclusions could imply that the respondent's misrepresentations were not inadvertent, but there is no reasoning responding to any related credibility argument. If the IAD resolved the credibility issues that affected the seriousness of the misrepresentation, it did not share its analysis in its reasons.
- The IAD found that by blaming his misrepresentations on others, the respondent had not shown remorse. This suggests that the IAD found the respondent was responsible for the misrepresentations, but again there was no reasoning on his credibility affected the findings on lack of remorse.
- The IAD noted that the respondent's wife testified about taking her sponsorship forms to a centre for assistance and that she was aware at the time that her husband had been to jail. She also testified that the question about the respondent's criminality abroad were answered incorrectly because she was not the one who filled out the forms. The IAD made no findings and provided no reasoning on her credibility arising from the contents of her sponsorship forms.

- The IAD made no comment at all on the statements made in the application forms, and to the officer in 2014 by both the respondent and his wife, about prior marriages entered by the respondent.
- The IAD made no credibility findings on the respondent's wife's testimony affecting hardship to her if he were removed from Canada.

[38] The IAD's failure to address meaningfully any of the credibility issues raised so prominently by the Minister raises material concerns about its responsiveness to the submissions of the parties, particularly those of the Minister, at the hearing: *Mason*, at para 27. In this case, it also raises secondary, but still conspicuous, concerns about transparency: see *Vancouver Airport Authority v. PSAC*, 2010 FCA 158, [2011] 4 FCR 425, at para 16(d); *Canada (Citizenship and Immigration) v. Kalantari*, 2023 FC 1759, at paras 32-35.

[39] Given the other related concerns below, it is not necessary to determine in this case whether these responsiveness and transparency concerns are sufficient in themselves to require the Court to set aside the IAD's decision.

B. *Impact of the Misrepresentation and Lack of Remorse on Establishment*

[40] The second key issue not addressed in the IAD's decision related to the Minister's argument concerning the respondent's establishment in Canada.

[41] During oral submissions to the IAD, the Minister argued that "how a person gained their permanent resident status" (in this case, through misrepresentation) was relevant to the

respondent's degree of establishment in Canada. The Minister's hearing counsel read the following passage aloud to the IAD, from Justice Zinn's decision in *Liu,* at paragraph 29:

> In my view, it [a misrepresentation] is a relevant factor when considering a person's degree of establishment. To do otherwise is to place the immigration cheat on an equal footing with the person who has complied with the law. Whether the impact of the fraud is to reduce the establishment to zero or to something more is a question for the discretion of the decision-maker based on the particular facts before him or her.

I note that Zinn J. concluded this oft-cited paragraph with the following sentence: "But it must be considered."

[42] After reading this passage, the Minister's counsel then submitted to the IAD:

> And in this particular case, I think if, if the appellant had been honest and forthright from the very beginning, starting at his admissibility hearing, then perhaps you could have given more weight to his establishment. But I think at this particular junction, because he wipes his hand clean, he refuses to accept any responsibility and he's shown absolutely no remorse for his misrepresentation, that his establishment should be given quite – should be zero.
>
> [Emphasis added.]

[43] In *Liu,* Justice Zinn accepted substantially the same argument and concluded that the IAD erred by failing to properly weigh establishment in Canada: *Liu,* at paras 28-29, 32. See also *Li v. Canada (Citizenship and Immigration),* 2022 FC 542, at para 24; *Abeid v. Canada (Citizenship and Immigration),* 2022 FC 413, at para 47; *Dessie v. Canada (Citizenship and Immigration),* 2022 FC 397, at para 47; *Canada (Citizenship and Immigration) v. Ndir,* 2020 FC 673, at para 37.

[44] In this case, in addition to its finding of a serious misrepresentation by the respondent, the IAD found that by blaming his representations on others, he had not shown remorse for his actions. However, I am unable to detect any consideration of the Minister's argument on the impact of the serious misrepresentation, or of the finding of the respondent blaming others and his absence of remorse, on the weight given to the respondent's establishment in Canada.

[45] The IAD's failure even to recognize these arguments and to provide responsive reasoning on them raises material concerns about justification and transparency that undermine the reasonableness of its decision: *Vavilov,* at para 127-128; *Liu,* at paras 28-29, 32.

C. *Did the IAD's errors render its decision unreasonable?*

[46] These two issues were of sufficient importance to the Minister's position on the appeal to the IAD, and sufficiently central or significant to the IAD's decision as a whole, that its failure to assess them rendered the decision unreasonable: *Vavilov,* at para 100; *Mason,* at paras 91-95.

[47] Establishment in Canada and hardship to his wife were two material factors in the IAD's reasons that overcame the seriousness of the misrepresentation.

[48] On establishment, while the IAD found that his seven years in Canada was not significant, the IAD found that the respondent owned a house in which he lived with his wife and one of their daughters (although the Minister challenged whether the daughter actually lived there). In addition, he owned and operated a cleaning company responsible for cleaning three commercial buildings and worked with six individuals in that business. Establishment was material to the overall decision under *IRPA* paragraph 67(1)(*c*) because the IAD found his

establishment in Canada was “significant” and weighed in his favour on the appeal. Its failure to properly consider the impact of the misrepresentation and absence of remorse on the weight given to his establishment directly affected those specific findings and the IAD’s overall decision under paragraph 67(1)(*c*).

[49] Hardship to the respondent’s wife was also a material factor to the IAD’s assessment of the factors that favoured H&C relief. The IAD relied on her testimony when determining that she will experience emotional and financial hardship if the respondent is removed from Canada.

[50] The IAD’s assessment of both factors may have been affected by a determination of whether the two witnesses’ testimony was credible.

[51] Two other factors favoured H&C relief in the IAD’s reasons. One was the respondent’s ties to Canada, due to the presence of his wife and one daughter living with them. The other was the absence of establishment in Turkey and minimal ties to that country (the IAD characterized the respondent’s mother, siblings and other family members who lived there as “extended” family). Although the IAD’s reasoning did not disclose the relative weight given to these factors, it is unnecessary to analyze them.

[52] In these circumstances, there were flaws in the IAD’s reasoning process related to responsive justification and transparency that directly jeopardized two material factors in its *Ribic* assessment under paragraph 67(1)(*c*) of the *IRPA*. The IAD’s decision must be set aside as unreasonable.

IV. Conclusion

[53] The application is allowed and the IAD's decision is set aside. The respondent's appeal will be remitted for redetermination by another panel. Consistent with *Vavilov*, these Reasons make no comment on the merits of the respondent's request for relief under paragraph 67(1)(*c*).

[54] Neither party raised a question to certify for appeal and none arises.

[55] As noted at the end of the hearing, I would like to recognize the thorough and capable advocacy by counsel for both parties in this proceeding.

JUDGMENT IN IMM-5953-22

1. The application is granted. The decision of the Immigration Appeal Division dated June 13, 2022, is set aside. The respondent's appeal is remitted to the Immigration Appeal Division for redetermination by another panel.

2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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