Federal Court  Cour fédérale

Date: 20240130

Docket: IMM-13465-22

Citation: 2024 FC 154

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 30, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

GAMAR ALHADJE ISSA
SAFIA MAHAMAT BECHER
ADAM MAHAMAT BECHER
DJIDDI MAHAMAT BECHER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The principal applicant, Gamar Alhadje Issa, and her children, Safia Mahamat Becher, Adam Mahamat Becher and Djiddi Mahamat Becher [collectively, the "applicants"], were found to be inadmissible to Canada for misrepresentation for a period of five years. The family was

sponsored by Oumar Kedelay Mahama [the "sponsor"]—the principal applicant's husband and father of the children—who became a permanent resident of Canada in 2016.

[2] As part of the application, a DNA test revealed that one of the children, Adam, was not the sponsor's biological son. The sponsor indicated that he had been unaware that he was not Adam's biological father, but the officer found that the principal applicant misrepresented a material fact that could have induced an error in the administration of the *Immigration and Refugee Protection Act* [IRPA]. The officer therefore concluded that the applicants were inadmissible to Canada for a period of five years under section 40 of the IRPA, including the minor applicants, pursuant to paragraphs 40(1)(a) and 40(2)(a) and subsection 42(1) of the IRPA.

[3] As a preliminary matter, the applicants do not dispute the officer's findings with respect to paragraphs 117(9)(d) and 117(1)(c) of the *Immigration and Refugee Protection Regulations* [IRPR].

[4] There is no doubt that the paternity of a dependent child is a material fact in a sponsorship application. The applicants argue that what constituted a misrepresentation was rather an innocent mistake and that they simply did not know that the husband was not Adam's father. They argue that the officer did not adequately consider the evidence presented to him and therefore assumed that the principal applicant misrepresented Adam's paternity. For the reasons I will develop below, I agree that the officer's decision did not take into account the evidence in its context, leading him to conclude that the principal applicant knew or ought to have known that the sponsor was not Adam's biological father. This speculation, without further inquiry, broke a logical chain of reasoning and rendered the decision as a whole unreasonable.

[5] The officer's conclusion as to the children's inadmissibility is dependent on the principal applicant's inadmissibility. Because of my determination that the officer's conclusion was unreasonable, the children's inadmissibility is also unreasonable.

[6] The application for judicial review will therefore be allowed and the Applicant's application will be remitted to a different officer for re-determination.

A. *Relevant legislation*

***Immigration and Refugee Protection Regulations,* SOR/2002-227 [IRPR]**

Member	**Regroupement familial**
117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(a) the sponsor's spouse, common-law partner or conjugal partner;	a) son époux, conjoint de fait ou partenaire conjugal;
(b) a dependent child of the sponsor;	b) ses enfants à charge;
(c) the sponsor's mother or father;	c) ses parents;
…	[…]
Excluded relationships	**Restrictions**
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
…	[…]
(c.1) the foreign national is the sponsor's spouse and if at the time the marriage ceremony was conducted either one or both of the spouses were not physically present unless the foreign national was marrying a person who was not physically present at the ceremony as a result of their service as a member of the Canadian Forces and the	(c.1) l'époux du répondant si le mariage a été célébré alors qu'au moins l'un des époux n'était pas physiquement présent, à moins qu'il ne s'agisse du mariage d'un membre des Forces canadiennes, que ce dernier ne soit pas physiquement présent à la cérémonie en raison de son service militaire dans les Forces canadiennes et que le mariage ne soit valide à

marriage is valid both under the laws of the jurisdiction where it took place and under Canadian law; (d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	la fois selon les lois du lieu où il a été contracté et le droit canadien; d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

***Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]**

Misrepresentation 40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act; … **Application** (2) The following provisions govern subsection (1): (a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and (b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.	**Fausses déclarations** 40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants : a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi; […] **Application** (2) Les dispositions suivantes s'appliquent au paragraphe (1) : a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi; b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.
Inadmissible family member	**Inadmissibilité familiale** 42 (1) Emportent, sauf pour le résident permanent ou une personne protégée,

42 (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if (a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or (b) they are an accompanying family member of an inadmissible person.	interdiction de territoire pour inadmissibilité familiale les faits suivants : a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas; b) accompagner, pour un membre de sa famille, un interdit de territoire.

II. Issues and standard of review

[7] The applicants raise the following issues:

- Whether the officer erred in law and in fact in reaching the conclusion that the principal applicant had misrepresented the minor applicant Adam.
- Whether the officer erred in law in concluding that the minor applicants were also inadmissible for a period of five years.
- Whether the officer erred in law in his analysis of the best interests of the child.

[8] The respondent identifies the following issue:

- Did the applicants raise any serious grounds that would warrant this Court's intervention in this case and its setting aside the decision?

[9] These issues boil down to whether the officer's decision was reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at paras 12–13, 15).

III. Analysis

[10] In the case at bar, a DNA test revealed that the principal applicant's husband and sponsor, with whom she has two other children, is not Adam's biological father. Both parties agree that these were the unequivocal facts before the officer:

- The sponsor and the applicants represented themselves before the officer. According to the history of this case, the officer sent a total of three procedural fairness letters to the principal applicant. In each case, it was the sponsor who replied. In other words, the officer was processing the sponsorship application of a family from Chad, where the husband was the only party to speak and the principal applicant was always completely silent, with her husband responding on behalf of the principal.
- The sponsor and the principal applicant were the parents of other children, including children born before and after Adam. The paternity of the other children is not in question, since DNA tests show that the sponsor is their father.
- Adam's birth certificate, issued prior to the sponsorship application, indicates that the sponsor is his father.
- Letters of support from people who know the family also reveal that they know the sponsor as Adam's father.
- The sponsor wrote to the officer that he did not know that he was not the father and that when he confronted his wife with the results of the DNA test, she

> categorically denied that she had had a relationship with another man since their marriage.

[11] On the basis of the above facts, the officer concluded that the principal applicant had misrepresented that her husband, the sponsor, was Adam's father.

[12] This Court has found on a number of occasions that a misrepresentation determination pursuant to section 40 of the IRPA requires an element of *mens rea* (*Sbayti v Canada (Citizenship and Immigration)*, 2019 FC 1296 at para 30; *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 18). In this case, there was no basis for the officer to think that the mother knew that her husband was not the father. I also think that having sexual relations with more than one man is not in itself an objective basis on which to conclude that the husband was not the father. At the time of Adam's conception and birth, the husband was living in Chad, the sponsor and the principal applicant had already been married for a number of years and had other children, fathered by the sponsor, together, born before and after Adam.

[13] There is no chain of reasoning to explain how the Agent arrived at this conclusion. I find it unreasonable for the officer to have assumed that if a woman had sexual relations with another man, she knew or ought to have known that her husband was probably not the father of one of her children.

[14] At the hearing, counsel for the respondent argued that it was incumbent on the principal applicant to provide an explanation, and not incumbent on the officer to make assumptions to refute the misrepresentation. I agree that the burden of proof was on the applicants, and that the honest mistake exception is used in exceptional circumstances. However, officers are expected to

be aware of and attentive to the context of the applicants before them. This does not alter the applicants' burden of proof or duty of candour, but simply gives the parties the opportunity to be heard (*He v Canada (Citizenship and Immigration)*, 2012 FC 33 at para 17).

[15] In this case, the officer's context was that of a self-represented Chadian family whose husband presented himself not only as the sponsor, but also as the sole interlocutor throughout the proceedings. The couple have been married for a long time and have several children. Adam was known as the husband's child, both within the community and based on what the parents believed when they applied for and obtained his birth certificate—an event that took place before starting the family reunification application. The misrepresentation does not concern a legally material but socially insignificant fact, such as the failure to disclose the refusal of a previous visa application (*Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441). The facts that led to Adam's conception are not only legally material, but in most cases, whether a sexual relationship was consensual or not, they would carry a negative stigma for the woman. The wife's denial of her loyalty to her husband, as expressed by him (for as far as the officer was concerned, she remained silent throughout the proceedings), cannot reasonably be considered to be her declaration to the Canadian authorities. On the contrary, it should have served as a warning signal for the officer to inquire about the context by addressing the principal applicant directly.

[16] Officers have a wide range of investigative options, including the option of interviewing the parties. The stakes are particularly high in cases of inadmissibility for misrepresentation, where officers' factual findings are based on credibility. The officer should have shown a higher degree of procedural fairness towards the principal applicant rather than to jump to the

conclusion that she had to have known that her husband was not the father of one of her children (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817; *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at paras 26–27).

[17] This Court has held on numerous occasions that immigration officers have expertise in the handling of their cases and that, as such, their findings of fact deserve to be approached with a high degree of deference (*Tsigehana v Canada (Citizenship and Immigration)*, 2020 FC 426 at paras 33–35). A claim to expertise cannot be made in a contextual vacuum. Officers cannot, on the one hand, claim expertise on the questions they decide and, on the other hand, demonstrate that they were unaware of the context of the cases they adjudicate.

[18] I also agree with the applicants that the evidence presented to the officer, even without further inquiry with the wife, could not reasonably support the conclusion that she had made a misrepresentation. The applicants provided statements from the husband and people around them that everyone believed the husband was the father, supporting their claim that it was an innocent misrepresentation. These statements were corroborated by Adam's birth certificate, issued prior to the DNA test, which indicates that the sponsor is the father.

[19] This allowed the family and those around them, including the wife, to reasonably believe that her husband was Adam's father. The officer's notes do not explain why all this evidence was rejected, nor on what potentially contradictory evidence of the principal applicant's state of mind he relied in reaching this conclusion. There was no evaluation of the potentially contradictory evidence. The officer simply jumped to the conclusion that she must have known that the sponsor was not the father. This leap into speculation prevented the decision from being transparent, intelligible and justifiable (*Vavilov*), thereby rendering it unreasonable.

[20] I also agree with the applicants that this case is similar to *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126 [*Osisanwo*]. In *Osisanwo*, Justice Hughes reviewed decisions in which findings of misrepresentation had been upheld, noting that they all contained an element of *mens rea* or subjective intent. The respondent submitted that the officer in this case had no such evidence before him and that the case is therefore distinguishable.

[21] I disagree. Although there was evidence that the sponsor was not Adam's father, there was nothing before the officer to suggest that the principal applicant was aware or that it would have been objectively reasonable for her to have been aware that he was not.

[22] Given that the finding of misrepresentation against the children is indirect and flows from the unreasonable finding against their mother, it cannot stand.

[23] Since I find the officer's decision unreasonable for the above reasons, I need not address the applicants' arguments that the officer failed to analyze the children's best interests.

IV. Conclusion

[24] The application for judicial review is allowed and the matter is remitted for consideration by a new officer.

[25] There is no question for certification.

JUDGMENT in IMM-13465-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed and the matter is remitted for consideration by a new officer.

2. There is no question for certification.

"Negar Azmudeh"
Judge

Certified true translation
Daniela Guglietta

FEDERAL COURT

SOLICITORS OF RECORD

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