Federal Court  Cour fédérale

Date: 20200130

Docket: IMM-1089-19

Citation: 2020 FC 171

Ottawa, Ontario, January 30, 2020

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

SAKSHI LIKHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Sakshi Likhi, applied for an open work permit application based on her spouse working in Canada. On December 18, 2018, this application was refused and she was found inadmissible for misrepresentation under s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This is an application for judicial review of both the work permit refusal and the underlying finding of misrepresentation, pursuant to IRPA s 72(1).

[2] Ms. Likhi and her spouse, Mr. Anand Sethi, are citizens of India. Mr. Sethi previously lived in Toronto, Canada while working for a company known as Cognizant. Cognizant has operations in at least India, the United States of America and Canada, and Mr. Sethi has worked for its Canadian office since October 2014, including when Ms. Likhi submitted her work permit application.

[3] The marriage of Ms. Likhi and Mr. Sethi was arranged by their families; despite speaking on the phone, they had not met in person prior to their engagement party. Ms. Likhi's father first discovered Mr. Sethi's profile on a matrimonial website and connected the two in March 2018 by phone. After one month of speaking, Mr. Sethi proposed to Ms. Likhi in April 2018. Mr. Sethi subsequently travelled to India in July 2018 for the marriage.

[4] Ms. Likhi explains she and Mr. Sethi held their engagement ceremony on July 9, 2018 in Ghaziabad before friends and family. Two days later, they held their civic marriage ceremony and registration. Mr. Sethi then returned to Canada. In November 2018, he returned to India to attend a number of family events, including another marriage and a birthday party. The pair also held their social marriage ceremony on November 28, 2018 in Ambala and their wedding reception on December 3, 2018 in Lucknow.

[5] In September 2018, several months after their civil ceremony but prior to the social marriage and reception, Cognizant assisted Ms. Likhi to apply for an open work permit so that she could join Mr. Sethi in Canada. On November 24, 2018, a Visa Officer with the High Commission of Canada in New Delhi called and requested she attend an interview in New Delhi

on December 4, 2018. Because of the wedding reception scheduled for December 3, 2018 in Lucknow, Ms. Likhi enquired about whether she could reschedule this date, but was informed she could not. She states she was not given any specific information about the purpose of the interview, and that she was told she would not need to bring any additional evidence aside from the documentation she already had submitted for her application. The procedural fairness letter which followed the call advised she should "bring all required documentation … to [her] interview", but provided no additional information as to the interview's purpose aside from it being necessary "to continue processing [her] application."

[6] Both she and Mr. Sethi attended the interview despite only Ms. Likhi having been invited. The Interviewing Officer decided to interview both of them separately. Ms. Likhi was questioned at the outset about the genuineness of her marriage. She states that although the Interviewing Officer requested additional photographs to substantiate the version of events she provided during the interview, the Interviewing Officer did not permit her to retrieve her phone to pull these up, nor give her an opportunity to provide them after the fact. As a result, all she had with her during the interview was a few additional photos from their social ceremony she had recently printed just in case. During Mr. Sethi's interview, the Interviewing Officer asked him general questions about his travel and activities in India.

[7] At the end of both interviews, Ms. Likhi was advised the Interviewing Officer had reasonable grounds to believe her marriage was not genuine and that she entered into the marriage to gain admission to Canada as a spouse. The Interviewing Officer explained the

provisions of IRPA s 40 to her, including a 5-year ban from entering Canada, and indicated that a final decision on her application would be made by a more senior officer [“Senior Officer”].

[8] On December 18, 2018, the Senior Officer agreed with the Interviewing Officer, denied Ms. Likhi’s work permit application, and found her inadmissible for misrepresentation.

[9] For the reasons that follow, I grant this judicial review application and remit the matter for redetermination by a different Senior or reviewing Officer.

II. Impugned Decision

[10] The Global Case Management System [GCMS] notes which form part of this decision indicate initial concern about the *bona fides* of Ms. Likhi's marriage because of the haste of the wedding and the short time Ms. Likhi was married to Mr. Sethi. In addition, the GCMS notes indicate “Marriage certificate provided (2017). Email correspondence provided states ‘be ready for the marriage..’ in 2018. Photos provided doesn’t [sic.] demonstrate bonafides [sic.] of relationship in terms of ceremony.” As such, the Ms. Likhi was invited for an interview to establish “bonafides [sic.] of relationship.” She was not informed of these concerns about her relationship until the live interview on December 4, 2018.

[11] On this date, the Interviewing Officer also conducted an unscheduled, independent interview with Mr. Sethi who had accompanied Ms. Likhi to the interview for support. After Mr. Sethi’s interview, the Interviewing Officer then outlined the following concerns to Ms. Likhi:

- Ms. Likhi and Mr. Sethi did not meet prior to the finalization of their marriage and Mr. Likhi could provide no evidence of stated contact with Mr. Sethi prior to the marriage;
- The limited number of guests appearing in the engagement and marriage photographs showed the marriage was performed in the presence of family members only and not the alleged 120 guests;
- The marriage photographs provided with the application and at the interview, led the Officer to conclude the photographs depicting the marriage ceremony were taken after Ms. Likhi was informed of the interview;
- There was no evidence of time spent together after the marriage [I note, however, this was contradicted to some extent by Mr. Sethi's presence at the interview] and there was limited evidence of contact between them;
- Ms. Likhi's belief that Mr. Sethi was pursuing his MBA was contradicted by his testimony that he started the MBA through distance education in 2010 but stopped after getting his job [with Cognizant];
- Ms. Likhi stated that Mr. Sethi came to India on October 15, 2018 whereas he indicated he came to India on November 17, 2018;
- She stated it was his maternal uncle's daughter who was being wed in December 2018, not his son, as advised by Mr. Sethi;
- Mr. Sethi indicated Ms. Likhi did not attend his niece's birthday party, despite her prior testimony that she had, but rather she was with her parents instead; there also conflicting evidence on the gifts Mr. Sethi gave to his niece.

[12] Given the above, the Interviewing Officer found the marriage was not genuine and referred the application to a Senior Officer. I note at several instances the Senior Officer referred to Mr. Sethi as a "student", despite that he was in Canada under a work permit; and referred to Ms. Likhi as a male when making the finding of inadmissibility. The formal letter refusing Ms. Likhi's work permit application and indicating she will remain inadmissible for five years is dated December 18, 2018.

III. Issues

A. Preliminary Issues:

1. Are the affidavits of Ms. Likhi and Mr. Sethi admissible?

2. Is the issue of the denial of Ms. Likhi's work permit moot?

B. Was the decision procedurally fair?

C. Was the decision reasonable?

IV. Relevant Provisions

[13] The relevant provisions are reproduced in Annex A.

V. Analysis

A. Preliminary Issues:

(1) Are the affidavits of Ms. Likhi and Mr. Sethi admissible?

[14] The Applicant's Application Record in this matter contains the Affidavit of Sakshi Likhi dated April 22, 2019, while the Affidavit of Anand Sethi dated October 31, 2019 was filed on

November 1, 2019, further to the Order of Justice Roy dated September 18, 2019 granting the application for leave and scheduling the steps to be taken in connection with the judicial review deemed to have been commenced ["Leave Order"]. I note the Minister (i) consented to an adjustment of the timelines indicated in the Leave Order such that any further affidavits by the Applicant were due by November 1, 2019 and (ii) did not challenge the admissibility of these affidavits.

[15] Evidence not before the decision maker generally is not admissible on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22 [*Access Copyright*] at para 19; *Bernard v Canada (Revenue Agency),* 2015 FCA 263 at para 17. Where, however, the material assists the court to understand the general background circumstances of the judicial review, is relevant to an issue of procedural fairness or natural justice, or where the material highlights a complete absence of evidence before the decision maker, this Court can make an exception and accept that evidence: *Access Copyright*, above at para 20.

[16] The affidavits of both Ms. Likhi and Mr. Sethi touch on what occurred up to and during the interview, including the conversations each had with the Interviewing Officer and what Ms. Likhi was instructed to bring in advance of the interview. Given Ms. Likhi's assertion her application assessment was not procedurally fair, I admit the affidavits as they aid this Court's understanding of what occurred up to and including the interview, subject to the discounting of the following inadmissible portions. First, each affidavit describes the testimony provided by the other affiant during their interview. Because these descriptions involve hearsay, these segments

will be disregarded [paragraphs 16 of Ms. Likhi's affidavit, and paragraph 5 of Mr. Sethi's affidavit]. Second, Ms. Likhi's affidavit describes at paragraph 19 what additional documentary evidence could have been provided in response to the procedural fairness letter and the Interviewing Officer's concerns, and appends as an Exhibit the described documentary evidence. Because this additional evidence was before neither the Interviewing Officer nor the Senior Officer, and therefore formed no part of their decision, it cannot be relied on to assess the reasonableness of the Officers' decision and also will be disregarded.

(2) Is the issue of the denial of Ms. Likhi's work permit moot?

[17] The Minister submits Ms. Likhi's challenge to the refusal to issue her a work permit is now moot, given that Mr. Sethi was transferred to Cognizant's office in Boston, MA, USA. A dependent spouse is only eligible to apply for an open work permit if the principle foreign worker physically resides, or plans to physically reside, in Canada while working: *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], s 205(c)(ii). While Mr. Sethi states, in his affidavit, that he is "hoping" to be transferred back to Canada when his current status in the USA expires in March 2020, the Minister submits this is not the same as a concrete plan to do so. As such, Ms. Likhi's work permit application is not eligible for reconsideration.

[18] I agree. As Mr. Sethi currently has no status in Canada, he is ineligible to act as the principal for Ms. Likhi's application for a dependent open work permit, as required under the spousal open work permit program. This renders Ms. Likhi's application for judicial review moot in respect of the visa refusal. The only live question under review, therefore, is the finding of misrepresentation resulting in the 5-year ban on reapplication.

B. Was the decision procedurally fair?

[19] In administrative contexts, breaches of procedural fairness have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though strictly speaking no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CP Railway*] at para 54 [citing *Eagles Nest Youth Ranch Inc. v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20]; see also *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 43-44 [citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 at para 19. In reviewing allegations of procedural fairness breaches, a reviewing court ultimately has been, and in my view continues to be, concerned with assessing whether the process was fair. As further noted in *CP Railway*, at paras 54-55:

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all the circumstances, including the *Baker* factors [*Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paras 21-28]. …it asks, with a sharp focus on the nature of the substantive rights involved the consequences for an individual, whether a fair and just process was followed. …
>
> [55] Attempting to shoehorn the question of procedural fairness into a standard of review is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, …certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. …the distinction between substantive and procedural review and the ability of a court to tailor remedies appropriate to each is a useful tool in the judicial toolbox, and, …there are no compelling reasons why is should be jettisoned.

[20] The recent Supreme Court of Canada [SCC] decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] has not displaced the overarching principle of ensuring a fair process, nor the factors to be considered in assessing whether a fair process was followed: *Vavilov* at paras 23, 76-81. Confirming the duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific", *Vavilov* instructs that where a duty of procedural fairness arises, the procedural requirements imposed by the duty are to be determined with reference to all the circumstances, including the *Baker* factors: *Vavilov*, above at para 77.

[21] Though, as a matter of procedural fairness, reasons are not required for all administrative decisions, where reasons are required/provided, the starting point for the judicial review of procedural fairness and reasonableness is the articulated reasons. As such, there is a degree of linkage or overlap as noted in *Vavilov*, above at para 81: "It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable." Moreover, although *Vavilov* seemingly separates natural justice breach and/or procedural fairness duty from review of the merits of an administrative decision in para 23, the decision nonetheless holds as follows at paras 13 and 25:

> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and **fairness of the administrative process**. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

> [25] …In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for **all aspects of that decision** will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute**, the presumption also applies more broadly to other aspects of its decision**.
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> [Bold emphasis added.]

[22] Furthermore, *Vavilov* identifies the circumstances when the presumption of reasonableness can be rebutted and the correctness standard will apply instead, and then discusses those circumstances in some detail: *Vavilov,* above at paras 17, 33-72. Notwithstanding the ambiguity introduced by the bracketed portion of para 23, nowhere is there specific mention of procedural fairness in the SCC's explanation of where the "correctness standard" properly applies. While not foreclosing the possibility of another category requiring a derogation from the presumption of reasonableness, the SCC expressed the view that "at this time, ... these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review": *Vavilov*, above at para 69. This is consistent with the rearticulated approach to judicial review which not only has eliminated the "contextual approach" to determining the applicable standard of review but also has closed the door on "jurisdictional" questions as a category attracting the correctness standard: *Vavilov,* above at paras 31, 65 and 69. As emphasized by the SCC in para 31:

> … because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

[23] In the end, I believe the ultimate question to be answered regarding the administrative process remains, "was it fair?". It is tempting, in light of the above discussion regarding *Vavilov* and the SCC's treatment of the duty of procedural fairness, to conclude the applicable standard of review is more closely aligned to that of robust reasonableness tempered with judicial restraint, absent an explicit legislative intention to the contrary regarding the standard of review [*i.e.* one of the identified circumstances that can rebut the presumption of reasonableness]. To some extent, this is consistent with the way in which the duty of procedural fairness was framed in *Baker*, above at paras 22 and 27:

> … the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected. …
>
> … the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances… While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.

[24] That said, *Vavilov* does not articulate clearly a standard of review applicable to judicial review of procedural fairness. The most that can be said is that "the Supreme Court did not subsume or collapse a discrete doctrine of administrative law, the law of procedural fairness, into the standard of review applicable to substantive review": *CP Railway*, above at para 52 [characterizing *Khela*]. Arguably the lines have been blurred, however, in favour of applying a robust reasonableness lens applied to the review of procedural fairness, with the degree of fairness (*i.e.* high, verging on a correctness-like standard, versus low and points in between)

dependent on context. In my view this is best exemplified by the following description of the linkage or overlap between procedural fairness and reasons in *Vavilov*, above at para 127:

> 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 principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. 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.

[25] With this in mind, I turn to a consideration of the fairness of the applicable administrative process in the instant matter.

[26] Given the severe consequences of a finding of misrepresentation, namely ineligibility to apply to come to Canada for a 5-year period, Ms. Likhi submits a higher degree of procedural fairness is required to ensure such findings are made only where there is clear and convincing evidence of misrepresentation: *Ni v Canada (Citizenship and Immigration)*, 2010 FC 162 [*Ni*] at para 18; *Lin v Canada (Citizenship and Immigration)*, 2019 FC 1284 [*Lin*] at paras 24-25; *Seraj v Canada (Citizenship and Immigration)*, 2016 FC 38 [*Seraj*] at para 1; *Lamsen v Canada (Citizenship and Immigration)*, 2016 FC 815 at para 24; *Bao v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 268 at paras 17-18.

[27] I agree. The decision to issue a temporary visa typically attracts a low or minimal level of procedural fairness, as an applicant does not face detention or removal and can re-apply: *Bains v Canada (Minister of Citizenship and Immigration)*, 2020 FC 57 [*Bains*]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, and *Bautista v Canada (Citizenship and Immigration)*, 2018 FC 669 at para 17. In my view, however, associated findings of misrepresentation under IRPA s 40(1)(a) attract a higher level or degree of procedural fairness because a finding of misrepresentation precludes an applicant from re-applying for a 5-year period, a harsh result, and therefore, also potentially reflects on the applicant's character: *Ni*, above at para 18; *Lin*, above at para 25; *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 273 [*Kaur*] at para 13. As noted in *Vavilov*, above at para 133, the severity of the outcome requires the decision maker's reasons to reflect the stakes for, and from the perspective of, the affected individual:

> 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: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the **perspective of the individual or party over whom authority is being exercised**. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, **dignity** or livelihood. [Bold emphasis added.]

[28] Ms. Likhi asserts she was not put on notice prior to her interview that the Officer did not consider her marriage *bona fides* and, as a result, she was unable to prepare adequately for the interview. She submits the interviewing Officer was required to disclose in advance that the genuineness of her marriage, and not the routine processing of her application, was the purpose and focus of the interview: *Bin Chen v Canada (Citizenship and Immigration)*, 2008 FC 1227

[*Bin Chen*] at paras 32-35; *Kaur*, above at para 14; *Johnson v Canada (Citizenship and Immigration)*, 2017 FC 550 at paras 15-16; *Bushra v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1412 [*Bushra*] at paras 9, 15, 19-20. Nor was Ms. Likhi provided an opportunity to respond with submissions or appropriate documentation following the interview. She submits procedural fairness, in this context, required she at least be given the opportunity to provide post-interview submissions and/or the documents requested prior to the Officer making a finding of misrepresentation: *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326 at para 32; *Shadow Lai v Canada (Citizenship and Immigration)*, 2013 FC 563 at paras 28-29.

[29] Finally, Ms. Likhi submits she was not aware in advance of the additional documentation requirements because (a) the document list she relied on, prepared by Mr. Sethi's employer, did not list all documents that could be relevant; and (b) the document checklist for open work permits, which is the guide applicable for her situation, does not make reference to the types of documents required to provide sufficient evidence of a relationship. As such, she maintains she originally provided sufficient information. As she was given not advance notice of the Interviewing Officer's concerns and purpose of the interview, was explicitly told not to bring additional documentation, and did not have the an opportunity to provide further submissions (such as to retrieve her phone) prior to the decision being rendered, she submits the process was procedurally unfair.

[30] The Minister submits that since Ms. Likhi chose to base her open work permit application on her [purported] spousal relationship, she reasonably was aware the genuineness of her

relationship would form the central pillar of her application. Further, the Minister stresses that an Officer need not notify an applicant of concerns where they "[arise] directly from the requirements of the legislation or related regulations": *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 28. As IRPR s 4 requires Officers assess the genuineness of an applicant's marriage, the Minister submits it should have come as no surprise that Ms. Likhi's interview would cover this topic. The Minister emphasizes the application also included a checklist of relevant documents necessary for the application, including a marriage certificate, wedding photographs, a wedding invitation, and copies of communication between her and Mr. Sethi, and submits this was a clear indication such documents would be relevant, a fact which was reiterated in the fairness letter.

[31] The Minister distinguishes the decisions in *Bushra* and *Bin Chen* on the basis Ms. Likhi was advised during the interview the genuineness of her marriage was at issue and was given an opportunity to respond. In contrast, in the *Bushra* and *Bin Chen* decisions, concerns were voiced only after the interview and were never put to the applicants. The Minister maintains the duty of fairness does not require an opportunity to address concerns following the interview: *Sar v Canada (Citizenship and Immigration)*, 2018 FC 1147 at paras 20-34. Given Ms. Likhi's background in Computer Applications [in which she holds a Master's Degree] and the Interviewing Officer's serious concerns about her credibility, the Minister submits allowing additional time to submit digital imagery from her phone would not have allayed the Officer's concerns, as it is easy to alter an image digitally: *R v Andalib-Goortani*, 2014 ONSC 4690 at paras 23-33, citing the US decision *People v Beckley*, 110 Cal Rptr. (3d) 362 (Ct App 2010). In my view, this latter remark is an inappropriate and unreasonable consideration, absent any

evidence whatsoever, of evidence tampering. Further, this was not a stated factor considered by the Interviewing Officer nor the Senior Officer.

[32] I note credibility, on the one hand, and insufficiency of evidence, on the other, are distinct concepts that should not be conflated, especially when a Visa Officer makes a finding of misrepresentation: *Seraj*, above at para 18. Findings of insufficiency, in themselves, do not amount automatically to misrepresentations. Rather, a finding of misrepresentation is reasonable only where an applicant is shown to have led incorrect information or omitted material information, intentionally or accidentally, which could have affected Canada's ability to administer its immigration laws: IRPA s 40(1); *Muthui*, above at para 27.

[33] When determining whether the Senior Officer's finding of misrepresentation was arrived at in a procedurally fair manner, it is important to clarify whether the Senior Officer's finding was based on the evidence provided being (a) insufficient to demonstrate a *bona fides* marriage, as the Minister asserts was the case; or (b) not credible, genuine, or accurate, as Ms. Likhi submits. If the former, the Interviewing Officer was entitled to rely on the fact that the IRPA and IRPR give notice of the evidentiary threshold for proving compliance with Canada's immigration laws, and thus had no procedural duty to alert Ms. Likhi to concerns of insufficiency in her application: *Zhou*, above at para 28: *Bains*, above at para 58. If the latter, the Interviewing Officer did have a duty to bring these concerns to Ms. Likhi's attention, and to provide her with an adequate opportunity to disabuse the Interviewing Officer of them: *Zhou*, above at para 29.

[34] In my view, the findings of the Interviewing Officer and Senior Officer (who essentially adopted the Interviewing Officer's assessment) that Ms. Likhi misrepresented the *bona fides* of her marriage were based on the fact that the evidence she provided, including photographs of the civil ceremony and *viva voce* evidence from both her and Mr. Sethi, were not believed. The GCMS notes reveal both Officers were concerned about the credibility of Ms. Likhi's evidence.

[35] As the Officers' decisions on their face were based on a credibility determination, in my view they were required to alert Ms. Likhi of their credibility concerns and provide her with an adequate opportunity to respond. This could have been accomplished either by the Interviewing Officer providing her with advance notice that the general purpose of the interview was to assess the genuineness of the marriage (and thus an adequate opportunity to prepare accordingly), or the Senior Officer subsequently providing her an opportunity to file additional submissions to respond to the specific concerns raised in her interview, given the Interviewing Officer requested specific evidence. Neither opportunity was extended. Had Ms. Likhi known going into the interview the Interviewing Officer's concerns centred around the *bona fides* of the marriage, as opposed to routine processing of her application as she understood from the telephone call scheduling the interview, she might have prepared differently: *Bin Chen*, above at paras 34-35; *Bushra*, above at para 20.

[36] I note the GCMS notes disclose the following notation made on November 22, 2018, two days prior to the call to Ms. Likhi to schedule the interview:

> ***DO NOT DISCLOSE: …Recommend interview to establish bonafides [*sic*.] of relationship. Marriage certificate provided (2017). Email correspondence between them states 'be ready for

> the marriage..' in 2018. Photos provided doesn't [*sic*.] demonstrate bonafides [*sic*.] of relationship in terms of ceremony.

There is no indication of why the note "***DO NOT DISCLOSE" was added, and as the GCMS notes are contained in the Applicant's Application Record and hence form part of this Court's public file for this matter, I see no reason to refrain from mentioning it especially as it speaks to the issue of procedural fairness in my view.

[37] I further note the marriage certificate indicates it was registered on July 11, 2018 and the official rule under which it was registered is dated "2017" [*i.e.* "UTTAR PRADESH MARRIAGE REGISTRATION RULE, 2017"] but this does not appear to be the date of the marriage certificate itself. It is unclear from the GCMS notes whether the reference to "Marriage certificate provided (2017)" was a typographical error in respect of the date and if not, whether and to what extent it may have influenced the Officer's assessment of Ms. Likhi's application. Based on the GCMS notes, there was no effort during the interview to clarify or confirm the date of the marriage certificate in relation to the marriage ceremonies [as there was more than one] and reception.

[38] Ms. Likhi not only was *not* apprised prior to the interview of the Interviewing Officer's concerns about the *bona fides* of her marriage, but intentionally so. This effectively precluded her from presenting additional evidence to respond to these concerns during the interview in particular, but after as well in the circumstances. In my view, this renders the Senior Officer's decision manifestly procedurally unfair. This is a determinative error justifying the redetermination of the application.

[39] After the hearing but prior to this decision, the Minister drew the Court's attention to *Bains*, above. I determined it was prudent of the Minister to bring the decision to my attention, while my decision of the instant proceeding was under reserve, as it accorded with counsel's ongoing duty to the Court: *Blake v Blake*, 2019 ONSC 4062 at paras 33-34. I advised the parties, however, that no submissions were necessary on the application of the *Bains* decision to the instant proceeding.

[40] I find a number of factual differences distinguish the matter before the Court in *Bains* from the instant matter. First, I note Mr. Bain's application initially was approved; he was called in for an interview only after his application subsequently was cancelled because of concerns about the genuineness of the marriage: *Bains*, above at para 8. Unlike the circumstances in the instant matter, Mr. Bains knew the reason for the interview and thus had an opportunity to prepare in advance. Second, there is no indication Mr. Bains ever was informed that additional evidence was unnecessary but nonetheless expected in the interview, as occurred here. Third, Mr. Bains had family in Canada, which raised concerns that the arranged marriage was facilitated not for cultural, but for immigration purposes: *Bains*, above at para 61. This was not the case before me.

[41] Most notably, however, the decision hinges on the low level of procedural fairness afforded to work permit applications: *Bains*, above at para 56, citing decisions that do not include elements of misrepresentation. The distinction between a refusal of a work permit and a finding of misrepresentation under IRPA s 40(1)(a) does not appear to factor into the *Bains*

decision. In light of the important distinctions between these two matters, I believe [as discussed above] a higher degree of procedural fairness is appropriate in the instant matter.

[42] Despite concluding that these errors in procedural fairness are determinative, I consider next the reasonableness of the Officers' decision for thoroughness and, to the extent possible, to avoid "an endless merry-go-round of judicial reviews and subsequent considerations": *Vavilov*, above at para 142.

C. Was the decision reasonable?

[43] The December 19, 2019 decision in *Vavilov* adopted "a revised framework for determining the standard of review where a court reviews the merits of an administrative decision" - having as the starting point "a [rebuttable] presumption that reasonableness is the applicable standard in all cases" - and providing "better guidance … on the proper application of the reasonableness standard": *Vavilov*, above at paras 10-11. I find none of the situations in which the presumption of reasonableness is rebutted [summarized in *Vavilov*, above at paras 17 and 69] is present in the instant proceeding. Further, "[i]n conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov*, above at para 15.

[44] A principled approach to reasonableness review puts the reasons first, "…by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion": *Vavilov*, above at para 84. The

focus of reasonableness review, therefore, must be on the decision, including the decision maker's reasoning process and the outcome. The reviewing court must consider only whether the decision, taking into account the rationale and outcome, was unreasonable, and must avoid substituting its own analysis or preferred decision: *Vavilov*, above at para 83. As noted by the SCC, "[t]he burden is on the party challenging the decision to show that it is unreasonable. …the court must satisfied that any shortcomings or flaws … are sufficiently central or significant to render the decision unreasonable": *Vavilov*, above at para 100.

[45] The SCC found two types of fundamental flaws useful to consider: "[t]he first is a failure of rationality internal to the reasoning process"; and "[t]he second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it": *Vavilov*, above at para 101. In other words, to be considered reasonable, the decision must be based on rational and logical reasoning: *Vavilov*, above at para 102. The SCC defined 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" and held that "… a reviewing court [must] defer to such a decision": *Vavilov*, above at para 85. The SCC found "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons…": *Vavilov*, above at para 86 [emphasis in original]. The decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility – and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, above at para 99. "[W]here reasons are provided but they fail to provide a transparent and intelligible justification …, the decision will be unreasonable": *Vavilov*, above at para 136. Written reasons, however, "must not

be assessed against a standard of perfection": *Vavilov*, above at para 91. Rather, "they must be read holistically and contextually, for the purpose of understanding the basis on which a decision was made": *Vavilov*, above at para 97.

[46] In short, "judicial review is concerned with both outcome and process" when considering whether the challenged decision was unreasonable, having regard to the chain of analysis [was it internally coherent, rational and justified?] in relation to the facts and law that constrain the decision maker: *Vavilov*, above at para 87. With this framework and guidance in mind, I turn to the analysis of the impugned decision, including the reasoning and outcome. I add that the instant matter was heard the same week as the SCC released the *Vavilov* decision. Both parties advocated the applicability of the reasonableness standard as articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9 and intervening cases. The reasonableness standard continues to apply to this matter, albeit as rearticulated in *Vavilov*, with no difference to the outcome before this Court.

[47] Ms. Likhi submits both the Interviewing and Senior Officers erroneously failed to acknowledge or otherwise consider important, relevant evidence which ran contrary to their conclusions: *Groohi v Canada (Citizenship and Immigration)*, 2009 FC 837 at para 16; *Thomas v Canada (Citizenship and Immigration)*, 2009 FC 1038 at paras 13-14; *Yaqoob v Canada (Citizenship and Immigration)*, 2015 FC 1370 at para 8. She submits the Interviewing Officer, by focusing on the email one-liner and photographs, subsequently placed "too much reliance .. on minutiae and marginalities without enough attention being paid to the evidence bearing directly on the bona fides of the marital relationship": *Tamber v Canada (Citizenship and Immigration)*,

2008 FC 951 at para 18. This lead to a myopic rather than comprehensive assessment of her application. For example, she asserts the Senior Officer:

- failed to consider her explanation for the one-liner, nor that the Interviewing Officer's initial concern on this point apparently arose from a misapprehension of the date of her marriage certificate (referred to as 2017 in the GCMS notes while it mentions the specific date 11-07-2018); as already noted, this was not addressed in the interview itself;
- made reference to "the student's life in Canada" – a factually incorrect statement; Ms. Likhi submits this brings into question whether the Senior Officer actually reviewed the full record before rendering a determination;
- made no reference to the evidence she provided demonstrating recent communication between her and her spouse and a letter from Cognizant;
- failed to acknowledge she provided correct answers about Mr. Sethi's past and current life, such as knowing Mr. Sethi had been enrolled in an MBA program, and including the only question the Officer asked about Mr. Sethi's life in Canada; as such, she submits the Officer's conclusion that she could not speak to her husband's life in Canada is neither justifiable nor intelligible;
- failed to consider Ms. Likhi only provided select photos from the wedding, but had also offered to show additional photographs and was refused, when determining it "made no sense" a wedding attended by 120 guests would only show pictures of family; and
- failed to appreciate the additional photographs provided at the interview were from the subsequent "social marriage", as described in the interview.

[48] Ms. Likhi submits these errors, which she characterizes as significant, renders the decision not transparent, intelligible, nor justifiable in light of the evidence: *Dunsmuir*, above at para 47. As rearticulated in *Vavilov*, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility – and it must be justified, and not merely justifiable, in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, above at para 99. Written reasons, however, "must not be assessed against a standard of perfection": *Vavilov*, above at para 91. Rather, "they must be read holistically and contextually, for the purpose of understanding the basis on which a decision was made": *Vavilov*, above at para 97.

[49] The Minister asserts it is trite law that adverse credibility findings are rationally supported on the basis of confirmed and important inconsistencies, contradictions, and omissions: *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at para 34. The Minister submits the interviewing Officer's conclusions on the size of the marriage attendance were reasonable, given the photographic evidence submitted did not match the descriptions provided. Ms. Likhi's other inconsistencies and contradictions, some of which referred to very recent events, such as niece's birthday party and the gifts given, only served to bolster the interviewing Officer's credibility concerns. Meanwhile, the Senior Officer's reference to Mr. Sethi being a 'student' arose from Ms. Likhi's own description – one which was factually incorrect, as he hadn't been a student for several years having discontinued his MBA studies which Ms. Likhi thought were ongoing.

[50] In my view, the Senior Officer's decision was unreasonable. As Ms. Likhi notes, the Senior Officer does not reference any of the *viva voce* evidence she provided to counter the

Interviewing Officer's credibility concerns. For example, the Senior Officer makes no mention of whether they accepted Ms. Likhi's submissions that they had held multiple marriage ceremonies, some of which only family attended and others which approximately 120 guests attended. Reasons must be responsive to submissions: *Vavilov*, above at paras 127-128.

[51] The Senior Officer also found Ms. Likhi did not provide clear answers as to why photographs of their wedding did not match the given details. The GCMS notes indicate, however, Ms. Likhi initially provided photographs of their civil wedding; claimed she did not know she was required to submit photographs of her social wedding; and explained the photographs she did have of their social wedding did not depict all wedding guests. The Senior Officer does not engage with these explanations, nor explain whether the Interviewing Officer's refusal to permit Ms. Likhi to show more photos on her phone during the interview was reasonable, which in my view it was not given the expressed concerns.

[52] Finally, the Senior Officer found Ms. Likhi did not know the basics of Mr. Sethi's life in Canada. This appears to reference her mistaken understanding Mr. Sethi was still a correspondence MBA student (whereas he attested he was not), and that she did not know the month he originally arrived in Canada. In my view, it was unreasonable for the Officer to infer Ms. Likhi did not know about Mr. Sethi's life in Canada from two questions – one of which she partially knew and which occurred prior to their relationship with one another.

[53] In my view, the Senior Officer's lack of engagement with Ms. Likhi's evidence, in itself, renders the decision unreasonable, in addition to the Interviewing Officer's refusal to permit

Ms. Likhi to show additional marriage photos on her phone during the interview, given the centrality of the issue of the genuineness of the marriage to the finding of misrepresentation.

[54] Neither party proposed a serious question of general importance for certification.

VI. Conclusion

[55] This judicial review application is granted. The impugned decision is set aside and the matter remitted to a different Senior or reviewing Officer for redetermination on the finding of misrepresentation, after inviting Ms. Likhi to file additional submissions. Ms. Likhi was not provided an adequate opportunity to respond to the Officers' concerns about the *bona fides* of her marriage. Nor did the Senior Officer demonstrate engagement with all of the evidence. There is no question for certification.

JUDGMENT in IMM-6557-18

THIS COURT'S JUDGMENT is that: the judicial review application is granted; the December 18, 2018 impugned decision is set aside; the matter is to be remitted to a different Senior Officer for redetermination, after inviting Ms. Likhi to file additional submissions; and there is no question for certification.

"Janet M. Fuhrer"
Judge

Annex A: Relevant Provisions

[1] Open work permits may be issued to the spouses of workers already in Canada IRPR s 205(c)(ii).

205 A work permit may be issued under section 200 to a foreign national who intends to perform work that	**205** Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes :
…	…
(c) is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely,	**c)** il est désigné par le ministre comme travail pouvant être exercé par des étrangers, sur la base des critères suivants :
…	…
(ii) limited access to the Canadian labour market is necessary for reasons of public policy relating to the competitiveness of Canada's academic institutions or economy; or	**(ii)** un accès limité au marché du travail au Canada est justifiable pour des raisons d'intérêt public en rapport avec la compétitivité des établissements universitaires ou de l'économie du Canada;

[2] A relationship must be genuine in order to qualify for spousal provisions: IRPR s 4(1)(a).

4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	**4 (1)** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
…	…
(b) is not genuine.	**b)** n'est pas authentique.

[3] An individual may be found inadmissible for misrepresenting or withholding material facts: IRPA s 40(1)(a).

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(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;	**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;

FEDERAL COURT

SOLICITORS OF RECORD

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