Federal Court  Cour fédérale

Date: 20210826

Docket: IMM-960-20

Citation: 2021 FC 881

Ottawa, Ontario, August 26, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MOHAMMAD SHARIF HASHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated December 13, 2019 [the Decision], made by a visa officer at the Canadian Embassy in Moscow [the Decision-Maker], refusing the Applicant's application for a work permit under the Temporary Foreign Worker Program. The Decision-Maker refused the application, not being satisfied that the Applicant, Mohammad Sharif Hasham, answered truthfully all questions asked on the application. The

Decision-Maker also found the Applicant inadmissible to Canada in accordance with s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for misrepresenting material facts.

[2] In his Order dated May 17, 2021, granting leave in this matter, Justice Ahmed also granted leave in another application for judicial review brought by the Applicant's father, Mohammad Hanif Hasham, in Court File No. IMM-958-20, and set these two matters down to be heard together on August 11, 2021. While the facts and arguments in the two applications are nearly identical, I am addressing them in separate decisions.

[3] As explained in more detail below, this application is dismissed, because the record before the Court discloses a reasonable analysis underlying the Decision.

II. Background

A. *Work Permit Application*

[4] The Applicant is a citizen of Afghanistan, presently residing with his family in Tajikistan as refugees. On November 11, 2019, the Applicant applied for a work permit to come to Canada to work as a concrete finisher for a Canadian company that had obtained a Labour Market Impact Assessment [LMIA].

[5] In the employment history section of his application, the Applicant stated that he had worked as a concrete finisher for a company in Balkh, Afghanistan from April 2009 to July

2014, as a concrete finisher for a different company in Balkh, Afghanistan from August 2014 to January 2018, and as a concrete finisher in Vahdat, Tajikistan from February 2018 to November 2019.

[6] In the background information section of his application form, the Applicant responded "no" to question 2(b), "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?"

B. *Procedural Fairness Letter*

[7] On November 19, 2019, an immigration officer [the Officer] sent the Applicant a letter [Procedural Fairness Letter] informing him that his application had been reviewed, and there were concerns that the Applicant had not fulfilled the requirement under s 16(1) of *IRPA*, which provides:

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

[8] The Procedural Fairness Letter explained that the Applicant had stated on his application for a work permit that he had never been refused a visa or permit, but the Officer was concerned that this was a misrepresentation, as the Applicant had previously been refused a permanent residence visa to Canada. Furthermore, the Officer noted that the work history the Applicant

provided on his work permit application was inconsistent with the Applicant's previous application for permanent residence in November 21, 2018, in which he stated he was unemployed in Tajikistan from February to September of 2018 and employed as an auto mechanic in Afghanistan from January 2011 to January 2018, with no mention of any other employment. The Officer was therefore concerned that the Applicant had misrepresented both his employment and immigration history.

[9] The Procedural Fairness Letter explained the Officer's concern that the Applicant had deliberately tried to mislead immigration officials in a relevant matter which could induce an error in the administration of *IRPA* and was considering recommending to a supervisor that the Applicant should be found inadmissible to Canada for misrepresentation pursuant to s 40(1)(a) of *IRPA*. The Procedural Fairness Letter provided the Applicant an opportunity to respond within 10 days of the date of the letter.

C. *Response Letter*

[10] The Applicant responded to the Procedural Fairness Letter in a letter dated November 28, 2019 [the Response Letter]. The Applicant acknowledged that he applied for permanent residence in Canada on November 21, 2018, under a private sponsorship refugee program through an organization called Integration Canada Association [ICA], which helps support refugees with sponsorship and settlement initiatives. The Applicant explained that immigration officials raised concerns about the resettlement plan submitted by ICA and determined ICA could not meet the resettlement requirements. As a result, in January 2019, immigration officials disqualified ICA and all applications under their care.

[11] The Applicant explained that his understanding was that it was the organization, not his application, that had been refused. He stated that he came to that understanding because all applicants who were under the care of the ICA received an identical letter.

[12] The Applicant also referenced *Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345, [1990] FCJ No 318 (FCA) [*Medel*], in which the Court relied on an exception to s 40(1)(a) of *IRPA*, which applies when applicants can demonstrate an honest and reasonable belief that they were not withholding material information. The Applicant submitted that he honestly did not know his previous permanent residence application had been rejected.

[13] With respect to the inconsistency between the employment history provided on his work permit application and permanent residence application, the Applicant explained that he used to work for his father as a concrete finisher, but also worked as a part-time mechanic, especially during the winter. He stated that he was instructed by ICA to list only one official employment on his permanent residence application, and he chose to include his profession as a mechanic, which is where his passion lies. The Applicant also explained that, on his work permit application, he was instructed to include all activities, and he chose to include only the concrete finisher work, because he was applying for employment in the trades.

III. Decision Under Review

[14] The Decision-Maker refused the Applicant's application for a work permit under the Temporary Foreign Worker Program on December 13, 2019. That Decision is the subject of this

application for judicial review. The Decision-Maker communicated the Decision to the Applicant in a letter which provided the following as the grounds for refusing the application:

> I am not satisfied that you have truthfully answered all questions asked of you.
>
> You have been found inadmissible to Canada in accordance with paragraph 40(1)(a) of the Immigration and Refugee Protection Act (IRPA) 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 the IRPA. In accordance with paragraph A40(2)(a), you will remain inadmissible to Canada for a period of five years from the date of this letter or from the date a previous removal order was enforced.

[15] The Global Case Management System [GCMS] notes relevant to his matter include entries by both the Officer, who sent the Procedural Fairness Letter, and Decision-Maker, who sent the letter communicating the Decision. As explained later in these Reasons, the extent to which the GCMS notes prepared by the Officer constitute part of the reasons for the Decision is in dispute between the parties.

[16] GCMS notes prepared by the Officer on November 19, 2019, identify the discrepancy between the employment history that the Applicant provided on his work permit application and the history previously provided on his permanent residence application from November 21, 2018. These notes state that, in view of this discrepancy, the Officer was concerned that the Applicant misrepresented his employment history. The Officer further states that the Applicant's employment history is relevant to the work permit application, given that the Applicant had an offer for employment in the occupation of a concrete finisher. The Officer was therefore concerned that the Applicant deliberately tried to mislead authorities in a relevant matter that could induce an error in the administration of *IRPA*. The notes reflect that the Officer was

considering recommending to a supervisor that the Applicant is inadmissible to Canada for misrepresentation under s 40(1)(a) of *IRPA* and that the Officer sent the Procedural Fairness Letter to the Applicant.

[17] The GCMS notes prepared by the Officer on November 19, 2019, also reflect that the Applicant was refused a permanent resident visa to Canada and failed to disclose this on his work permit application form. The Officer states that previous visa refusals are a material fact related to the application, as they have a bearing on the review of the Applicant's ties to home country, previous immigration history and credibility. Therefore, the Officer was concerned that the Applicant misrepresented material facts related to his application, such as his previous immigration history with Canada, which could have resulted in a visa being issued if the misrepresentation was not revealed. The GCMS notes state that the misrepresentation was relevant and could have induced an error in the administration of *IRPA*. The Officer therefore considered this an additional ground to consider the Applicant to be a person described in s 40 of *IRPA*.

[18] The Officer's GCMS notes from November 19, 2019 also comment that, while the LMIA required the Applicant to have abilities in English, there was insufficient evidence of such abilities in the Applicant's file. The Officer therefore was not satisfied that the Applicant meets the requirements of the LMIA. In addition, because of the Applicant's application for permanent residence as a refugee and the fact that he fled Afghanistan for reasons of fear of persecution, the Officer was not satisfied the Applicant would be a genuine visitor who would leave Canada upon expiry of any visa status granted.

[19] The Officer's GCMS notes also include a December 6, 2019 entry, prepared after immigration officials received the Applicant's Response Letter. The Officer rejected the Applicant's explanation that he did not know his permanent residence refugee application was refused, because the Officer had reviewed the permanent residence application and noted that a refusal letter was sent to the Applicant. The Officer, therefore, concluded that the application had been refused and that the Applicant would have been aware of the decision made.

[20] The Officer also rejected the Applicant's explanation that he was told to provide information about only official employment for the permanent residence application and his entire employment history for the work permit application. The Officer reviewed the question posed for both applications and noted that the Applicant was asked to provide his employment history, regardless of whether it was official or unofficial. The Officer commented that the questions were posed in a clear manner and therefore was not satisfied that the Applicant made an error or that there had been a misunderstanding. The Officer concluded that the Applicant misrepresented material facts, which could have resulted in a visa being issued if the misrepresentation was not revealed, and that this misrepresentation could have induced an error in the administration of *IRPA*. The Officer therefore expressed the opinion, for further review, that the Applicant is a person described in s 40 of *IRPA*.

[21] The GCMS notes conclude with an entry dated December 13, 2019, prepared by the Decision-Maker, which states as follows:

> Applicant has failed to disclose one or more previous Canadian visa or USNIV refusals and/or other enforcement action and thus has not been wholly truthful on application. This calls into question applicant's actual intentions and overall credibility and

> thus is material to any assessment. Misrepresentation finding entered.

IV. Issues and Standard of Review

[22] The Applicant describes the issues in this application as follows:

> Whether the Officer rendered an unreasonable decision in failing to engage in a meaningful and transparent manner with the evidence and arguments made, in engaging in circular reasoning, in ignoring evidence, failing to decide whether the misrepresentation was material, and in failing to consider and apply evidence submitted justifying the *Medal* [sic] exception to a finding of material misrepresentation.

[23] The Respondent raises, as an additional issue, whether the Applicant's failure to provide a personal affidavit in support of this application for judicial review is fatal to his arguments surrounding the innocent misrepresentation exception described in *Medel.*

[24] The parties agree, and I concur, that the standard of review applicable to the Court's consideration of the Decision is reasonableness.

V. Analysis

[25] As the Applicant's counsel explained in oral submissions, his principle arguments are that the Decision is unreasonable because the Decision-Maker: (a) failed to engage with the Applicant's arguments that his misrepresentation was innocent; and (b) failed to conduct an intelligible analysis as to the materiality of the misrepresentation.

[26] There is no dispute between the parties as to the principles surrounding the innocent misrepresentation exception described in *Medel*. Nor do the parties dispute that a finding of inadmissibility due to misrepresentation requires an analysis and conclusion that the misrepresentation is material, meaning relevant to a matter that was actively considered by the officer upon reviewing the file and could have affected the outcome of the officer's review (see *Patel v Canada (Minister of Citizenship and Immigration)*, 2017 FC 401 at para 23).

[27] The Applicant also acknowledges that the GCMS notes demonstrate that the Officer (as distinct from the Decision-Maker) engaged with the Applicant's innocent misrepresentation arguments and conducted the requisite materiality analysis. In the absence of that acknowledgement, I would have reached the same conclusion. However, the Applicant notes that the Decision under review is that of the Decision-Maker and argues that the single paragraph in the GCMS notes authored by the Decision-Maker does not reasonably address either of these issues.

[28] Responding to this argument, the Respondent submits that the Officer's analysis should be taken into account in understanding the Decision-Maker's reasoning and that the Decision is therefore reasonable. The Applicant disagrees, submitting that, in the absence of a basis to conclude that the Decision-Maker adopted the reasoning of the Officer, the interpretation advocated by the Respondent would be inconsistent with the teaching of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] as to the importance of judicial review focusing upon an administrative decision-maker's rationale for arriving at its decision (at paras 96-97). As such, the question for the Court to decide, in assessing the Applicant's principal

arguments, is the extent to which the reasoning disclosed in the Officer's GCMS notes informs an understanding of the rationale for the Decision made by the Decision-Maker.

[29] To the extent the Applicant is arguing that the Officer's reasoning cannot be taken into account in the absence of an express adoption of that reasoning by the Decision-Maker, I reject that proposition. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, SCJ No 39 [*Baker*], upon which the Applicant relies, the Supreme Court concluded that the notes of a subordinate officer should be taken, by inference, to be the reasons for making the decision under judicial review in that matter, emphasizing the flexibility that is necessary to recognize the day-to-day realities of administrative agencies (at para 44).

[30] I find no conflict between this reasoning and the teaching in *Vavilov*. Indeed, in its distillation of some of the principles derived from *Vavilov*, the recent decision by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, notes the availability of recourse to context and inference in discerning an administrative decision-maker's reasons (at paras 30 to 32):

> 30. The majority of the Supreme Court in *Vavilov* also describes this component of reasonableness in much detail. However, it breaks up the detail into a number of pieces sprinkled throughout the reasons. Collecting the pieces and consolidating them advances clarity.
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> 31. *Vavilov* tells us that a reviewing court conducting reasonableness review of an administrative decision must investigate whether a reasoned explanation can be discerned. That explanation can be expressly or impliedly in the administrator's reasons but, as we shall see, it can also be outside the reasons.
>
> 32. Reasons of administrators are to be "read holistically and contextually" in "light of the record and with due sensitivity to the administrative regime in which they were given": *Vavilov* at paras.

> 97 and 103. But the basis for a decision may also be implied from the circumstances, including the record, previous decisions of the administrator and related administrators, the nature of the issue before the administrator and the submissions made: *Vavilov* at paras. 94 and 123; and see, e.g., *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140. For this reason, the failure of the reasons to mention something explicitly is not necessarily a failure of "justification, intelligibility or transparency": *Vavilov* at paras. 94 and 122. In reviewing administrators' reasons, a reviewing court is allowed to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267 at para. 11; *Vavilov* at para. 97.

[31] In the case at hand, while the Decision-Maker did not expressly adopt the analysis of the Officer, the context clearly demonstrates that this analysis informed the Decision. The Officer's GCMS notes refer to the Officer's analysis as a recommendation submitted to the Officer's supervisor for review. I agree with the Respondent's submission that such an administrative structure is not unusual and that there is no requirement for an administrative decision-maker to repeat a subordinate officer's analysis upon which it is relying in arriving at its decision. Such a proposition would be inconsistent with the flexibility described in *Baker* as necessitated by the day-to-day realities of administrative decision-making.

[32] I also consider this conclusion to be consistent with the Court's reasoning in *Rahman v Canada (Minister of Citizenship and Immigration)*, 2016 FC 793, where the applicant similarly took issue with the fact that the GCMS notes for his visa application were made by two different officers and submitted that there was no indication that the officer responsible for determining his visa application considered the notes of the other officer. In that case, Justice Strickland held that, in the absence of evidence to the contrary, it was reasonable to infer that the deciding

officer considered all the notes in the GCMS system when deciding on the Applicant's application (at para 19).

[33] In focusing on the particular wording of the GCMS notes in the present mater, I have considered the Applicant's argument that the paragraph in the notes authored by the Decision-Maker is boilerplate in nature, in particular because it references a failure to disclose "… one or more previous Canadian visa or USNIV refusals and/or other enforcement action." I accept that there is a boilerplate element to this paragraph. However, as the Applicant acknowledges, this is not in itself problematic. The paragraph also states that the Applicant has not been wholly truthful on his application and that this calls into question his actual intentions and overall credibility. These conclusions are consistent with the concerns raised in the Officer's GCMS notes, including that previous visa refusals have a bearing on the Applicant's ties to his home country, previous immigration history and credibility.

[34] The Applicant argues that the Decision-Maker's reference to the Applicant's "intentions" is unintelligible. However, reviewing courts are permitted to place decisions in context and, "connecting the dots" as permitted by *Vavilov*, I interpret the reference to "intentions" in the Decision to relate to whether the Applicant intends to leave Canada when required, to which the Officer's concerns about the Applicant's ties to his home country, previous immigration history and credibility also relate. This supports the conclusion that the analysis by the Officer, underlying the recommendation to the Decision-Maker, informs an understanding of the Decision-Maker's reasoning.

[35] I have also considered the Applicant's argument that the reference in the Officer's GCMS notes to the Applicant's English language ability is inconsistent with interpreting those notes as forming part of the reasons for the Decision. The Applicant submits that, as the analysis of his language ability is unrelated to the misrepresentation finding, its inclusion in the Officer's notes undermines any such interpretation. I find little merit to this argument. The fact that the Officer's analysis extended to matters extraneous to the misrepresentation analysis does not logically undermine a conclusion that the Decision-Maker relied on those components of the Officer's analysis that were relevant to the misrepresentation finding.

[36] In conclusion on this point, I agree with the Respondent's position that the Officer's consideration of the innocent misrepresentation exception, and analysis as to the materiality of the misrepresentation, informed the Decision and are reasonable.

[37] I have also considered the Applicant's argument that, because the information as to the refusal of the Applicant's prior application for permanent residence was in the files of, and therefore available to Immigration, Refugees and Citizenship Canada [IRCC], the Applicant's failure to disclose that fact could not constitute a material misrepresentation. The Applicant relies on *Koo v Canada (Citizenship and Immigration)*, 2008 FC 931 [*Koo*], which the Applicant submits stands for the proposition that, when an immigration officer is otherwise aware of information that is withheld by an Applicant, it cannot be concluded that the withholding may have induced an error in the administration of IRPA.

[38] I disagree with this interpretation of *Koo*. In that case, the misrepresentation related to the applicant's former name and the fact that he had previously submitted an unsuccessful application for permanent residence. Justice de Montigny found that: (a) the officer had unreasonably concluded that the applicant's failure to disclose this information was not simply an error; and (b) that the error was not, or was not analyzed to be, material. However, those findings turned on the fact that, although the applicant had made errors on his application form, he had disclosed the relevant information elsewhere in the application process (at paras 21-34). Those circumstances are distinguishable from the case at hand, where the Applicant did not disclose the information that led to the misrepresentation finding as part of his work permit application.

[39] I agree with the Respondent's submission that the Applicant's argument amounts to the proposition that a material misrepresentation cannot result from a circumstances where the misrepresentation is discovered by the decision-maker before a decision is made. This proposition is illogical and does not accord with established jurisprudence to the effect that an applicant cannot take advantage of the fact that a misrepresentation is caught by immigration authorities before the final assessment of the application (see, e.g., *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 38).

[40] The above analysis is dispositive of this application for judicial review. The Decision is reasonable, the application for judicial review must be dismissed, and it is unnecessary for the Court to address other arguments, including the parties' arguments surrounding the fact the Applicant did not file an affidavit.

[41] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-960-20

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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