Federal Court  Cour fédérale

Date: 20190614

Docket: IMM-6213-18

Citation: 2019 FC 814

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 14, 2019

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

CHRISTINE ELÉAZAR KANGAH

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Christine Eléazar Kangah, is seeking judicial review of a decision rendered in November 2018 [Decision] by a member of the Immigration Division of the Immigration and Refugee Board [IRB]. In the Decision, the member of the IRB [Member] found that Ms. Kangah had misrepresented a material fact in the context of an application for a work permit [Permit

Application], thereby violating paragraph 40(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In the Decision, the Member found Ms. Kangah inadmissible to Canada as a result of her misrepresentation and issued an exclusion order against her.

[2] Ms. Kangah maintains that the Decision is incorrect because by indicating in her Permit Application that she had been living in France when she had actually been in Canada, she had simply been following the explicit guidelines and instructions of Immigration, Refugees and Citizenship Canada [IRCC] for individuals in her situation. Ms. Kangah also argued that the Member did not consider the evidence on record in finding that she had given reason to believe that she had been outside Canada when she filed her Permit Application. Ms. Kangah is asking the Court to allow her application for judicial review, to set aside the Decision and to refer the matter back to the IRB for reconsideration by a different member.

[3] For the following reasons, Ms. Kangah's application for judicial review will be allowed. Given the instructions provided by IRCC and the file presented to the IRB, I find that the Decision is unreasonable because Ms. Kangah could not have misrepresented a material fact in complying with the instructions of the IRCC. Moreover, the evidence does not support the Member's factual findings concerning the fact that Ms. Kangah allegedly lied about the location of her physical presence at the time that she filed her Permit application. Under the circumstances, this is enough to shift the Decision outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law and to justify the intervention of the Court.

[4] Given this finding, it is not necessary to address Ms. Kangah's second argument against the Decision, i.e., concerning an officially induced error of law.

II. Background

A. *Facts*

[5] Ms. Kangah is a French citizen and holds a medical laboratory technician diploma. She arrived in Canada in 2015, with an open work permit, which was due to expire in September 2017. She settled in Moncton, New Brunswick where she worked in her field of qualification. She completed the processes required to obtain her certification as a medical laboratory technician in Canada. One month before her work permit expired, she applied for an extension thereof. On October 30, 2017, this application was denied because of an incorrect exemption code and because the wrong job was indicated on the application. Since she was no longer a temporary resident, Ms. Kangah now had no status in Canada and IRCC gave her 90 days to restore her status if she wanted to remain in Canada.

[6] On December 26, 2017, Ms. Kangah filed her Permit Application under the Mobilité Francophone program [the Program], which allows Canadian employers outside Quebec to hire foreign workers whose habitual language of use is French, without the need to obtain a Labour Market Impact Assessment. Based on instructions provided by IRCC, Ms. Kangah used the "Application for Work Permit Made Outside of Canada" form and in her application, she indicated France as her current country or territory of residence, despite the fact that she was still living in Canada at the time. She also indicated that she had previously lived in Canada as a

[TRANSLATION] “worker” until October 30, 2017, the date on which her Temporary Residence Permit expired, and that she was filing her Permit Application from her current country or territory of residence, i.e., France. Lastly, she provided an address in France for her mailing address and her residential address.

[7] In so doing, Ms. Kangah believed that she was following the instructions provided in a presentation by IRCC given at the Canadian Embassy in Paris and posted on the IRCC website. These instructions for the Program state that “Even if the candidate is in Canada, he must complete an Application for Work Permit Made Outside of Canada [IMM 1295] and indicate as country of residence his country of usual residence, not Canada, in order to obtain the correct document checklist”. On the Permit Application form, Ms. Kangah also ticked the box to indicate that she had remained in Canada after her status had expired. In order to clarify her situation and avoid any confusion, Ms. Kangah attached an explanatory letter to her Permit Application in which she explained, in part, that Canadian immigration services had allowed her to remain in Canada for a period of 90 days, i.e., until January 30, 2018, in order to restore her status. She also added that she had applied for restoration of temporary resident status as a visitor, pending a decision on her Permit Application. This application for restoration of status was in fact received by Canadian authorities on January 24, 2018.

[8] On March 2, 2018, Ms. Kangah received a letter from Canadian authorities, approving her Permit Application under the Program. The next day, she travelled to a border crossing in order to obtain her work permit. An officer of the Canada Border Services Agency [CBSA] then prepared and made her the subject of an inadmissibility report and referred her for an

admissibility hearing under the provisions of subsections 44(1) and 44(2) of the IRPA. In the report, the CBSA indicated that Ms. Kangah had remained in Canada, without status, since October 2017, and that she had made a false statement by indicating France as her country of usual residence in her Permit Application.

[9] The report was transmitted to the IRB for an admissibility hearing and, further to a hearing held in May and September 2018, the Member rendered the Decision which is the subject of this judicial review.

B. *Decision*

[10] After summarizing the facts and the evidence on record, the Member indicated in the Decision, that he needed to determine whether Ms. Kangah had misrepresented a material fact, thereby making her inadmissible to Canada under paragraph 40(1)(*a*) of the IRPA. He added that Ms. Kangah's presence in Canada at the time that she filed her Permit Application constituted the crux of the matter.

[11] The Member acknowledged that the instructions concerning the Program were not very clear, and that it was in fact possible to complete an application for the Program while in Canada. However, according to the Member, there was a misrepresentation in Ms. Kangah's Permit Application when she indicated that she had been living in Canada until October 30, 2017 and provided a mailing address and a residential address in France. In the Decision, the Member specifically referenced questions 7 and 8 of the Permit Application form, as well as the questions concerning the mailing and residential addresses. In his eyes, Ms. Kangah's answers gave reason

to believe that she had left Canada in October 2017 and had physically been in France at the time that she filed her Application. The Member rejected Ms. Kangah's explanation that she had thought that she was supposed to indicate the date on which her status had expired rather than the date on which she had left Canada because, according to him, question 8 in the "Personal Details" section concerning previous countries or territories of residence was clear. The Member also deemed that the explanatory letter accompanying the Permit Application "does not clearly indicate that Ms. Kangah was in Canada when her application was filed" (Decision at p 4).

[12] The Member concluded that the misrepresentation concerned a material fact, because "it changes the criteria of the application" to the Program (Decision at p 5). He stressed that circumventing the computer system is not a justification, that it is not for the person who files the application to decide where the application will be processed and how and that if the computer system blocks certain applications, it does so for administrative reasons. According to the Member, the argument that Ms. Kangah's Permit Application would have been accepted anyway must be rejected, because it was not for the panel to substitute itself for the IRCC decision makers who evaluate such applications.

[13] The Member therefore determined that Ms. Kangah was inadmissible to Canada for misrepresentation and issued an exclusion order against her.

C. *Issue*

[14] The only issue is to determine whether the Member of the IRB erred in his interpretation and application of paragraph 40(1)(*a*) of the IRPA.

D. *Standard of Review*

[15] A reviewing court need not undertake a full standard of review analysis when the proper standard is well settled by prior jurisprudence: (*Dunsmuir v New-Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 62). However, the Court has repeatedly held that the interpretation and application of paragraph 40(1)(*a*) of the IRPA raises mixed questions of fact and law that are reviewable on a standard of reasonableness (*Mohseni v Canada (Citizenship and Immigration)*, 2018 FC 795 at paras 5, 8; *Sidhu v Canada (Citizenship and Immigration)*, 2014 FC 419 at para 12; *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhun*] at para 19; *Singh Dhatt v Canada (Citizenship and Immigration)*, 2013 FC 556 [*Dhatt*] at para 21).

[16] Based most notably on the decision rendered in *Sittampalam v Canada (Citizenship and Immigration)*, 2006 FCA 326, Ms. Kangah maintained that the standard of correctness should apply to the issue in dispute here, since there is no dispute in terms of the facts, and that this standard must govern questions of law, including matters concerning inadmissibility. Such a position is an error of law. The case law has evolved considerably since the cases cited by Ms. Kangah, and the Supreme Court of Canada has clearly established that the standard of reasonableness is presumed to apply when an administrative tribunal is interpreting its home statute or a law closely related to its mandate and has extensive knowledge thereof (*Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at para 50; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [*CHRC*] at para 27; *Dunsmuir* at para 54). This is clearly the case here. Moreover, the issue to be decided by

the Court is not covered in any of the categories which would authorize the reversal of this presumption in favour of the standard of correctness (*CHRC* at para 18).

[17] When the standard of review is reasonableness, the Court must show deference and be cautious about substituting its own opinion for that of the administrative decision maker, as long as the decision is justified, transparent and intelligible and falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and the law". (*Dunsmuir* at para 47). The reasons for a decision are considered to be reasonable if they "allow the reviewing court to understand why the tribunal made its decision and to permit it to determine whether the conclusion is within the range of acceptable outcomes", (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 16). As long as the process and the outcome respect the principles of justification, transparency and intelligibility and the decision is supported by acceptable evidence that may be justified in respect of the facts and the law, the Court must refrain from substituting the decision rendered with its own view of the preferable outcome (*Newfoundland Nurses* at para 17). Deference is required particularly when the expertise arises from the specialization of functions of administrative tribunals, which have a habitual familiarity with the legislative scheme they administer (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para 33).

III. Analysis

[18] The Minister affirms that Ms. Kangah's situation clearly falls under paragraph 40(1)(*a*) of the IPRA, which provides that a permanent resident or a foreign national is inadmissible for

misrepresentation “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”. The Minister adds that the law does not require misrepresentations to be intentional, deliberate or negligent (*Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 28). The Minister also maintains that in order to be deemed material, a fact need not be decisive or determinative. It will be material if it is important enough to affect the process undertaken (*Goburdhun* at para 37; *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25). The Minister concedes that Ms. Kangah’s response to her current country or territory of residence (question 7 of the “Personal Details” section of the Permit Application form) was not a misrepresentation because it complied with the instructions provided by IRCC. However, the Minister argues that the answers she provided to question 8 (previous countries or territories of residence) and question 9 (country or territory where applying) in the “Personal Details” section and to question 1 (current mailing address) and question 2 (residential address) in the “Contact Information” section constitute misrepresentations concerning a material fact, i.e., the location of Ms. Kangah’s physical presence at the time when she filed her Permit Application. The Minister claims that that is a material fact, because it changes the criteria of application to the Program.

[19] The Minister also contends that in reaching this conclusion, the IRB did not commit a reviewable error, because its findings fall within a range of possible acceptable outcomes that are defensible in respect of the facts and the law.

[20] I disagree; instead, it is my opinion that the Decision was unreasonable in two respects. Two elements must exist in order for a permanent resident or a foreign national to be inadmissible under paragraph 40(1)(*a*) of the IRPA. First, there must be a misrepresentation of a fact and second, the misrepresentation must concern a material fact, i.e., it must induce or have the potential to induce an error in the administration of the law or have an impact on the process undertaken. However, in the specific circumstances of this case, Ms. Kangah's alleged misrepresentations did not concern a material fact that affected the process undertaken by Ms. Kangah. Moreover, the evidence on record does not justify the conclusion that Ms. Kangah erroneously gave reason to believe that she was not physically in Canada when she filed her Permit Application.

A. ***There was no misrepresentation of a material fact***

[21] Given that Ms. Kangah is being faulted by the IRB for misrepresentations made further to compliance with the guidelines and instructions provided by IRCC, the misrepresentations cannot be considered to concern a material fact within the meaning of paragraph 40(1)(*a*) of the IRPA. Indeed, it is a well established fact that a misrepresentation is only material if it affects the process undertaken or the final decision (*Chhetry v Canada (Citizenship and Immigration)*, 2016 FC 513 [*Chhetry*] at para 30; *Murugan v Canada (Citizenship and Immigration)*, 2015 FC 547 at para 14; *Goburdhun* at para 37). In the circumstances of this case, the fact that Ms. Kangah indicated that her current country or territory of residence and relevant contact information were outside Canada, when she was in fact in Canada, could not have affected the process undertaken or the final decision on the Permit Application, because she was complying with the requirements of IRCC. Indeed, IRCC provides the following instructions for completing an

application for work permit under the Program: “Even if the candidate is in Canada, he must complete an Application for Work Permit Made Outside of Canada [IMM 1295] and indicate as country of residence his country of usual residence, not Canada, in order to obtain the correct document checklist”. These instructions were provided in at least two different places, i.e., on the IRCC website and in a presentation prepared by IRCC and given at the Canadian Embassy in Paris.

[22] I note that both the IRB, in its Decision, and the Minister, in its submissions to the Court failed to indicate how Ms. Kangah’s misrepresentations could have affected the application process or changed the criteria of application to the Program.

[23] Furthermore, the Minister acknowledged that Ms. Kangah’s statement in response to question 7 concerning her current country or territory of residence does not constitute a misrepresentation of a material fact, in light of the instructions provided by IRCC. However, if that is the case for question 7, I fail to see how the Minister could claim that this logic would not extend to apply to other questions on the form concerning previous countries or territories of residence (question 8 in the “Personal Details” section), country or territory where applying (question 9 of the “Personal Details” section) or the current mailing address and home address (questions 1 and 2 in the “Contact information” section). Simple logic dictates that, in order to provide consistent responses, an applicant cannot, on the one hand, state that his/her current country or territory of residence is the country of usual residence and then, on the other hand, turn around and adopt a different approach for the other questions. By supporting such an interpretation in its assessment of Ms. Kangah’s Permit Application, the IRB adopted an

interpretation that fell outside the range of possible, acceptable outcomes in respect of the facts and the law.

[24] In oral and written submissions, the Minister argued that IRCC's instructions specifically refer to question 7 concerning the current country or territory of residence and therefore would not apply to any other element of the Permit Application. With all due respect, this claim is incorrect. None of the documents issued by IRCC indicate that these instructions apply only to question 7. Instead, they refer generally and generically to the overall approach that applicants must use to complete the Permit Application form, i.e., that it should be completed as if they were outside Canada. Nowhere is it indicated or suggested that IRCC's instructions apply solely to question 7, to the exclusion of other questions on the Permit Application form.

[25] Furthermore, the explanations provided via email by an IRCC liaison officer reflect this interpretation. In response to a question from counsel for Ms. Kangah, he indicated that applicants who are in Canada should complete the application "as if from outside Canada" (Exhibit N of Ms. Kangah's affidavit), without clarifying that this applied only to question 7. Even though this email exchange took place in June 2018, i.e., after Ms. Kangah had submitted her Permit Application under the Program, it was part of the evidence made available to the Member before he rendered the Decision.

[26] I would add that in its instructions, IRCC asked candidates in Canada applying to the Program to use the form entitled "Application for Work Permit Made Outside of Canada" [emphasis added] and to indicate a country other than Canada as the current country of residence,

two elements which themselves suggest that the applicant is not in Canada. Since IRCC itself proposes that applicants complete the application form in a way which gives reason to believe that they are outside Canada, this could also not be a material element affecting the process undertaken or the final decision. If it was a material element that could have had such an impact, IRCC would not have provided such instructions.

[27] Lastly, the case law recognized that if section 40 of the IRPA is, in fact, broadly worded in order to encompass a wide spectrum of misrepresentations, whether intentional or unintentional, and demands a broad, liberal and generous interpretation, the fact remains that this interpretation could be made more flexible under truly exceptional circumstances. This is most notably the case where the applicant honestly and reasonably believed that he or she was not misrepresenting a material fact (*Goburdhun* au para 28; *Dhatt* at para 27). This is the situation here, in Ms. Kangah's case. In fact, further to a full review of the file and the evidence before the Board, the Member could not reasonably have concluded that Ms. Kangah may have attempted to deceive Canadian authorities. On the contrary, she instead believed that by complying with the instructions provided by IRCC, she was making an honest and truthful statement.

B. ***Ms. Kangah did not give reason to believe that she was not physically in Canada***

[28] The Decision is also unreasonable for a second reason. Indeed, it is my opinion that when the evidence is considered in its entirety, the IRB could not reasonably have concluded that Ms. Kangah gave reason to believe that she was outside Canada when she filed her Permit Application. The Member also erred by claiming that it "is absolutely not clear that Ms. Kangah left—that she was physically in Canada" (Decision at p 5). The evidence does not support such a

claim and there is no information on record to indicate that Ms. Kangah tried to hide information on this point. On the contrary, her Permit Application is extremely candid.

[29] Her response to question 8 in the "Personal Details" section indicated that she had lived in Canada with the status of a worker until October 30, 2017, and this, in fact, was the date on which her status expired. In response to question 2 in the "Background Information" section, she indicated that she had remained in Canada after her status had expired. Lastly, she added, in her explanatory letter, that [TRANSLATION] "immigration had allowed her to remain in canada [*sic*] for 90 days under certain conditions", in order to give her time to restore her status.

[30] Therefore, when the file is analyzed in its entirety, including the explanatory letter, I believe it is unreasonable to conclude that Ms. Kangah misrepresented her physical presence in Canada when she filed her Permit Application (*Hoseinian v Canada (Citizenship and Immigration)*, 2018 FC 514 at para 1; *Chhetry* at para 32). In other words, finding, as the Member did in his Decision, that Ms. Kangah misrepresented her physical presence in Canada does not fall within the range of possible acceptable outcomes in respect of the facts and the law.

[31] I certainly agree that the Member carefully reviewed the Permit Application form and the explanatory letter before concluding that, in his opinion, they gave reason to believe that Ms. Kangah was physically in France when she filed her application, when she was in fact in Canada. He most notably pointed out that the form indicated that Ms. Kangah had been living in Canada with the status of a worker until October 30, 2017. However, in my opinion, it was not reasonable for the Member to infer that the explanatory letter "does not clearly indicate that

Ms. Kangah was in Canada when her application was filed". By confirming that [TRANSLATION] "immigration had allowed her to remain in canada [*sic*] for 90 days under certain conditions", Ms. Kangah instead established the opposite.

[32] I acknowledge and accept that it is not for the Court to reweigh evidence and to substitute its own judgment for that of the IRB. I also do not contest the fact that decisions rendered by the IRB pursuant to the IRPA call for great deference from the Court, given the IRB's specialized expertise. I also agree that the reasons which justify the decision of an administrative tribunal do not need to be perfect or exhaustive and that the decision maker may provide brief or limited reasons. However, even when the deferential standard of reasonableness applies, the fact remains that the reasons for a decision must allow the reviewing court to understand why the decision was made and permit it to determine whether the conclusion is within the range of possible, acceptable outcomes (*Newfoundland Nurses* at para 16). When read as a whole, the reasons must therefore be sufficiently supported and articulated eloquently enough to allow the court to conclude that they offer the justification, transparency and intelligibility required of a reasonable decision (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65 at para 3; *Dunsmuir* at para 47).

[33] Even though a reviewing court must resist the temptation to intervene and usurp the specialized expertise that Parliament chose to delegate to an administrative decision maker such as the IRB, it cannot "show blind reverence" to the interpretations of a decision maker or to the analysis of evidence (*Dunsmuir* at para 48). In the context of a review intended to determine the

reasonableness of a decision, the court should focus on “finding irrationality or arbitrariness” such as “the presence of illogic or irrationality in the fact-finding process” or the analysis, or “factual findings without any acceptable basis whatsoever” (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99, overturned for other reasons 2015 SCC 61). However, in this case, no matter how wide the range of possible and reasonable outcomes may be, or the amount of latitude afforded to the Member, the evidence does not support his finding that Ms. Kangah could have given reason to believe that she was physically present in Canada when she filed her Permit Application under the Program.

[34] I will pause here for a moment in order to quickly address a new argument raised by counsel for the Minister during the hearing before the Court. In this context, counsel indicated that in any event, since Ms. Kangah had lost her temporary resident status as of October 30, 2017, she could not file a Permit Application, under the terms of section 199 of the *Immigration and Refugee Protection Regulations*, SOR 2002-227, because none of the situations referenced in this section applied in her case. Not only was this argument raised extremely late by the Minister (and is inadmissible for this reason alone), but I would also point out that the Decision rendered by the IRB does not make any reference whatsoever to this point in the context of finding Ms. Kangah inadmissible to Canada. Therefore, this element would not in any way serve to validate the reasonableness of the Decision rendered.

IV. Conclusion

[35] For the aforementioned reasons, the IRB’s Decision concerning Ms. Kangah was incorrect and does not constitute a reasonable interpretation in light of the evidence on record.

Based on the standard of reasonableness, the Court must intervene if the decision that is the subject of a judicial review falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. This is the case here. Consequently, I must allow Ms. Kangah's application for judicial review, set aside the IRB's Decision finding her to be inadmissible to Canada for misrepresentation and refer the matter back to the IRB for reconsideration by a differently constituted panel.

[36] The style of cause shall be amended to correctly indicate the "Minister of Public Safety and Emergency Preparedness" as the respondent, rather than the "Minister of Safety and Emergency Preparedness".

[37] No question of general importance was proposed for certification and I agree that none arises.

JUDGMENT in Docket No. IMM-6213-18

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, without costs.

2. The Decision rendered by the IRB Member, dated November 29, 2018, finding Ms. Kangah to be inadmissible to Canada for misrepresentation and issuing an exclusion order against her is hereby set aside.

3. The matter is referred back to the IRB for reconsideration by a differently constituted panel.

4. The style of cause is amended to indicate the "Minister of Public Safety and Emergency Preparedness" as the respondent.

5. No question of general importance is certified.

"Denis Gascon"
Judge

Certified true translation
This 3rd day of July, 2019.

Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6213-18
STYLE OF CAUSE:	CHRISTINE ELÉAZAR KANGAH v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
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DATED:	JUNE 14, 2019

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