Federal Court  Cour fédérale

Date: 20211221

Docket: IMM-1341-20

Citation: 2021 FC 1455

Vancouver, British Columbia, December 21, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

AREZOU ZOLFAGHARIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The Applicant seeks judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA* or the *Act*], of a decision by an Immigration, Refugees and Citizenship Canada (IRCC) visa officer, refusing her application for a temporary resident visa on the grounds that she misrepresented herself and submitted fraudulent documents

in support of her application. For the reasons outlined below, I find the decision to have been reasonable and would dismiss the application for judicial review.

II. BACKGROUND

[2] Arezou Zolfagharian (the Applicant) is a 35-year-old citizen of the Republic of Iran. Her brother and his family live in Richmond Hill, Ontario. She has an extensive travel history, including visits to Canada and, other than the events described below, there is no indication that she has ever failed to abide by the laws or conditions applicable to her.

[3] On or around October 22, 2019, the Applicant applied for a Temporary Resident Visa (TRV) with the assistance of a travel agent. The application included bank statements, which, upon inspection by an Immigration Officer (the Officer), were determined to be fraudulent, which was confirmed by the bank in writing on October 28, 2019.

[4] On October 30, 2019, the Officer sent the Applicant a procedural fairness letter (PFL) detailing their concerns, namely that the Applicant's bank statements were fraudulent and that this could lead to a finding of inadmissibility against her, pursuant to s 40 of the *IRPA*. The PFL provided the text of s 40 and warned the Applicant that a finding of misrepresentation would result in a five-year period of inadmissibility to Canada. The letter offered the Applicant the opportunity to respond to these concerns within 30 days.

[5] On November 20, 2019, the Applicant responded to the PFL, explaining that she was not aware of the problems with the documents, which her lawyer had filed. In her letter of

explanation (the Letter), she stated: “The bank statement from “Mellat Bank” which you received from me, was my subsidiary account’s statement and I have uploaded my main account’s statement with this letter for you”. She also stated: “I truly did not know about this problem until I saw your procedural letter and went for the lawyer to ask what is the problem. I would never risk something like this just to put a fake account or a subsidiary account. I had no clue about this and I am truly sorry that happened”.

[6] In a December 18, 2019 entry to the Global Case Management System, a reviewing officer considered the Applicant’s response, acknowledged her submission that she was unaware the documents were fraudulent, but nonetheless recommended the application be refused, noting it to be the Applicant’s responsibility to ensure their documents are genuine.

III. DECISION UNDER REVIEW

[7] On December 20, 2019, the Officer concurred with the reviewing officer and found that the Applicant had misrepresented materials facts that could have induced an error in the administration of the *IRPA*. The Applicant was determined to be inadmissible for a period of five years and her visa application was refused, as communicated in a refusal letter dated December 23, 2019 (the Decision). The Decision noted the Applicant had been afforded the opportunity, but was “unable to properly address these concerns”.

IV. ANALYSIS

[8] The only issue in this application is whether it was reasonable for the Officer to determine that the Applicant had misrepresented material facts, pursuant to s 40 of the *IRPA*.

[9] The parties agree that reasonableness is the standard of review that applies to a visa officer's decision. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], which set out a revised framework to determine the standard of review, provides no reason to depart from the reasonableness standard followed in previous case law (*Tran v. Canada (Citizenship and Immigration)*, 2021 FC 1054 at para 16). A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Vavilov* at para 99).

[10] While administrative decision makers are not required to engage in formalistic statutory interpretation exercises, their task when interpreting a contested provision is to do so in a manner consistent with its text, context and purpose. Where relevant case law exists for the provision in question, this acts as a constraint on what the decision maker can reasonably decide, and divergence from binding precedent needs to be explained (*Vavilov*, at paras 112, 119-121).

[11] This Application also involves the application of ss 16 and 40 of the *IRPA*. Ss 16(1) requiring applicants to answer truthfully, and 40(1) regarding misrepresentation, are contained in Annex A to these Reasons. The Applicant submits that she did not misrepresent material facts and that the Officer's conclusion that she did, when considered in light of the totality of the evidence, was unreasonable.

[12] Before addressing her arguments, it is useful to note that the Applicant produced an Affidavit in support of this judicial review, in which she deposes to having been in shock when she received the PFL, and having no idea what the Officer was talking about. She swears to having had no intention to misrepresent, but rather to having reviewed and approved only legitimate documents, and thus feeling cheated by her travel agent, who she claims is responsible for replacing her documents without her knowledge or consent. She also admits that she should have sought assistance in preparing her Letter in response to the PFL. Specifically, she deposes at paragraph 19 of her Affidavit that she "may not have been able to explain what happened fully" in that Letter.

[13] There are two points worth noting. First, I note that there are differences between the explanation she provided in her Letter and what she deposed in her Affidavit (further described below in paragraphs 28 and 29). The Applicant's counsel conceded that there were inconsistencies in those two explanatory documents authored by the Applicant, but maintained that ultimately, she was forthright and never attempted to "double down" on the misrepresentation, or mislead the visa office and that indeed, she had no reason to do so as her travel record would suggest.

[14] I have some difficulty with this position, since the Applicant initially claimed in her Letter that the impugned document was a "subsidiary" bank account statement that her lawyer errantly included and failed to explain. Then, some months later, in her Affidavit, she ascribes all responsibility for the fraudulent bank document to her travel agent/visa consultant. As we will

see, the determination of whether information is directly or indirectly withheld or misrepresented is not a question of intent or motivation.

[15] Second, I note that the Affidavit explanation was not before the Officer who made the misrepresentation finding. On judicial review, my task is to consider whether, in light of the facts that were before the Officer at the time, their decision was reasonable. As a result, it is not for me to speculate on the decision that would have been rendered if her Affidavit had been provided instead of, or in addition to the Letter that was before the Visa Officer.

[16] Instead, I limit my review to whether, on the basis of the facts that were before the Officer, the application of the law and Decision were reasonable. In other words, my task is to determine whether it was reasonable for the Officer to conclude that the Applicant misrepresented material facts that could induce an error in the administration of the *Act*.

[17] According to the Applicant, absent *mens rea*, or mental culpability, she cannot have misrepresented anything, either actively or passively. In support of this argument, she relies on two cases, namely: *Osisanwo v. Canada (Citizenship and Immigration)*, 2011 FC 1126 [*Osisanwo*] paras 8-15 and *Lamsen v. Canada (Citizenship and Immigration)*, 2016 FC 815 [*Lamsen*].

[18] The Applicant further submits that, considering her (i) extensive travel history around the world and past receipt of visas to a multitude of countries, including to Canada, (ii) respect of conditions of entry to Canada, (iii) familial ties to Canada, and (iv) solid financial and

employment footing, she simply had no logical reason or motive to mislead. Indeed, she submits that had the Officer reviewed all the evidence provided documenting these four attributes of her application, they would have reached a different conclusion.

[19] While I realize it is difficult for the Applicant to accept a refusal in light of her apparently clean immigration record along with her strong professional and financial profile, and her family members she was coming to visit in Canada, I disagree that there was only one reasonable conclusion, given the fraudulent documents submitted with her application. This is because as proof of her financial circumstances, her bank statements are material and relevant to a consideration of a temporary resident visa, and as such, could lead to an error in an officer's decision – or as *IRPA* states – the administration of the *Act*.

[20] After all, the jurisprudence of this Court has consistently recognized the starting position that s 40 of the *Act* is to be given a broad interpretation consistent with its wording (see, for instance, *Goudarzi v. Canada (Citizenship and Immigration)*, 2012 FC 425 [*Goudarzi*] at para 33; *Jiang v. Canada (Citizenship and Immigration)*, 2011 FC 942 [*Jiang*] at paras 35-36; *Ragada v. Canada (Citizenship and Immigration)*, 2021 FC 639 [*Ragada*] at para 17). The wording of the *Act* provides that inadmissibility can result from "directly or indirectly misrepresenting or withholding material facts" (my emphasis).

[21] Furthermore, the Court has held in numerous cases that s 40 may apply even when the misrepresentation was made by another party to the application, and the applicant had – or claims to have had - no knowledge of it (*Goudarzi* at para 33; *Jiang* at para 35; *Ragada* at para

19; *Paashazadeh v Canada (Citizenship and Immigration)*, 2015 FC 327 [*Paashazadeh*] at para 18). As has been oft-repeated by the Court, the purpose of s 40 is "to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry into Canada" (*Jiang* at para 36). A related purpose of the provision is to deter misrepresentation (*Ragada* at para 29; *Paashazadeh* at para 25).

[22] Justice O'Reilly explained in *Baro v. Canada (Citizenship and Immigration)*, 2007 FC 1299 that "[e]ven an innocent failure to provide material information can result in a finding of inadmissibility" (para 15). The Court went on to identify a narrow exception which can arise "where applicants can show that they honestly and reasonably believed that they were not withholding material information" (para 15, my emphasis). This exception finds its source in a Federal Court of Appeal case, *Medel v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 345, [1990] F.C.J. No. 318 (F.C.A.) (QL) [*Medel*]. It has received limited application by this Court and the reasonable belief that material information is not being withheld does not extend to cases where an applicant fails to review their application to ensure its accuracy (*Goudarzi* at para 36-37).

[23] The Applicant relies heavily on two cases, namely (i) *Osisanwo*, and (ii) *Lamsen.* In the first, where a DNA test revealed that an applicant was not the biological father of his reported child, officials determined that the birth certificate accompanying the *Osisanwo* application (stating Mr. Osisanwo was the father) was fraudulent, without requesting any explanation from the applicants. An Affidavit submitted in support of the judicial review revealed that during a brief separation in the course of their 42 year marriage, the man's wife had been intimate with

another man. Nonetheless, it was not known to the couple that the husband was not the biological father, and the record suggested he had accepted and raised the child as his own.

[24] The Federal Court found there was no reasonable basis for concluding there was any intent to mislead and allowed the application in *Osisanwo*. Reviewing the jurisprudence, including *Medel*, the Court found that there was a subjective element to findings of misrepresentation in some cases, and that *mens rea* could be an essential ingredient, concluding: "[h]ere, the husband and wife believed the child to be theirs; a birth certificate attests to that fact. There was no reasonable basis for concluding that there was any *mens rea* to mislead". (*Osisanwo*, para 15). The facts of *Osisanwo* are very particular, and while they fit within the narrow exception to a finding of s 40 misrepresentation outlined above, they are nothing like the present case.

[25] *Lamsen* is also distinguishable on its facts. There, while there was an error in one area of the application, the facts were correctly stated in other parts of the same application, which the Court determined could not reasonably be considered misrepresentation in the circumstances (see also *Alalami v. Canada (Citizenship and Immigration)*, 2018 FC 328, para 19).

[26] As the Applicant reminds us in this case, visa applications must be considered in their totality, not compartmentalized, particularly in light of the grave consequences of findings of misrepresentation. That very fact was noted in *Lamsen* at paragraphs 23-25. While the Court noted that the Applicant relied on *Osisanwo*, the question of *mens rea* had no bearing on the

outcome of *Lamsen* given that the Applicant disclosed the relevant information. Thus, as with *Osisanwo*, *Lamsen* is also of no assistance to the Applicant.

[27] I find the facts of the present case to be much closer to those of *Goudarzi*. There, unbeknownst to the applicants, the consultant they hired included fraudulent language test results in their immigration application. The applicant in *Goudarzi* alleged she was never given a copy of the forms that were submitted and was unaware of the forgeries, and indicated as much in her response to a procedural fairness letter. Justice Danièle Tremblay-Lamer considered the applicants' position that they had no knowledge of the misrepresentation, and that the fraudulence of the consultant should serve as a defence. The Court ultimately rejected this argument on the basis of the applicants' duty of candour (*Goudarzi* at para 42):

> The applicants in this case chose to rely on their consultant. The principal applicant claims that she was not given the opportunity to review her application. It would be contrary to the applicant's duty of candour to permit the applicant to rely now on her failure to review her own application. It was her responsibility to ensure her application was truthful and complete—she was negligent in performing this duty.

[28] In the present case, despite her insistence on her own ignorance of the situation, the Applicant, after she was informed of the fraudulent document and offered the opportunity to respond, failed to clarify the situation in her Letter. As noted above, she presented a different explanation in her Letter than the one she now provides the Court in her Affidavit. In her Letter, the Applicant claimed she was unaware of the issue, that the document in question was a subsidiary account statement that she provided, and that it was her lawyer who completed all the forms and had erred. She made no reference to the travel agent she refers to in her Affidavit, and

did not even clearly acknowledge the forgeries in her Letter, let alone provide any explanation of how they made their way into her application.

[29] By her own admission in her Affidavit, the Applicant's explanation in her Letter was inadequate. Even if it stemmed from ignorance and not deceit, the Letter appears to suggest the forged statements were actually legitimate, but from a "subsidiary account" at her bank. This explanation could itself have induced an error by the Officer in the administration of the *Act* if it were not for the written confirmation from the bank that the statements were forged. In this way, her belief that she was not withholding information may have been honest, but it was not reasonable.

[30] It was therefore entirely reasonable for the Officer to conclude the Applicant had failed to address their concerns. Consistent with her duty of candour, it was the Applicant's responsibility to determine exactly what happened and provide a clear explanation to the Officer by addressing their concerns. It was also her responsibility to examine the complete application herself in the first place to ensure its accuracy. Regrettably, she failed on both counts.

[31] Fundamentally, there are two basic problems with me accepting the position of the Applicant in this judicial review. First, to conclude that the officer was delinquent in their investigation or follow-up – despite the PFL sent to the Applicant - would be to reverse the burden set out in ss 11 and 16 of the *Act*, and to place an undue responsibility on examining officers when faced with unquestionably fraudulent documents. This would require visa officers to carry out an inquisitorial function and seek out evidence of a dubious motive, or the source of

an applicant's misunderstanding, before denying an application. This is a burden neither the law nor the jurisprudence places on them.

[32] Second, I cannot see how s 40 of the *Act* would fulfill its purpose of deterring misrepresentation and ensuring that applicants provide complete, honest and truthful information as the case law consistently requires, if that provision were interpreted in such a way that applicants could immunize themselves of its effect by blindly entrusting their applications to consultants. Instead, applicants must themselves fulfill their duty of carefully reviewing an application, which includes its attachments, failing which they have to bear the consequences.

V. Conclusion

[33] Contrary to the Applicant's submissions, it was not incumbent on the Officer to assess what her motive for misrepresentation might or might not have been, in light of her otherwise sterling travel and professional record. Instead, the Officer had to make their concerns known to the Applicant and provide her with an opportunity to address them. The Officer did just that. Difficult as the conclusion certainly is for the Applicant given her travel and professional history outlined above, I find that the Officer's interpretation of the *Act* as well as the Decision itself, were transparent, intelligible and justified, in light of both the facts and the law, including with reference to the previous jurisprudence of this Court. I will accordingly dismiss the application.

JUDGMENT in IMM-1341-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The parties raised no questions for certification and I agree that none arise.
3. No costs will be issued.

"Alan S. Diner"

Judge

ANNEX "A" to the Judgment and Reasons in IMM-1341-20

Obligation — answer truthfully	**Obligation du demandeur**
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.
Misrepresentation	**Fausses déclarations**
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

DOCKET:	IMM-1341-20
STYLE OF CAUSE:	AREZOU ZOLFAGHARIAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 15, 2021
JUDGMENT AND REASONS:	DINER J.
DATED:	DECEMBER 21, 2021

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