

Federal Court



Cour fédérale

Date: 20220107

Docket: IMM-6270-20

Citation: 2022 FC 18

Ottawa, Ontario, January 7, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

WAJDI JABER BANIYA BANIYA

Applicant

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this judicial review, the Applicant, Mr. Baniya, challenges a finding that he is inadmissible for misrepresentation. In a decision dated October 2, 2020, a Migration Officer (“Officer”) determined that Mr. Baniya had misrepresented his offer of employment in his application for permanent residence as a member of the provincial nominee class.

[2] Mr. Baniya argues that this decision is unreasonable because the Officer relied on speculation and claims about insufficiency of evidence, instead of basing their misrepresentation decision on the clear and convincing evidence standard that is required.

[3] I do not agree. The Officer's decision is thorough and carefully examines the evidence on file from the Immigration, Refugee and Citizenship Canada [IRCC] investigation, the BC Provincial Nominee Program ("BC PNP") investigation, and the Applicant's response to the procedural fairness letter. The decision follows a rational chain of analysis and is consistent with the legal framework for misrepresentation findings under s 40 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*.

[4] I do not find Mr. Baniya has shown that there is a basis for the Court to interfere with the decision. For the reasons set out below, the Applicant's application for judicial review is dismissed.

II. Factual Content

[5] Mr. Baniya is a citizen of Iraq, who was living and working in Oman at the time the underlying application was made. He has been attempting to settle in Canada as a permanent resident since 2016.

[6] In August 2016, Mr. Baniya was offered employment as a construction supervisor at Vision Glass LTD ("Vision Glass"), a business operating in British Columbia. After a review by Employment and Social Development Canada [ESDC], his prospective employer, Vision Glass,

received a positive Labour Market Impact Assessment (“LMIA”) in November 2016. Mr. Baniya used this offer of employment as a basis for his application under the BC provincial immigration program, the BC PNP, which allows BC to approve and nominate qualified applicants based on criteria set by the province.

[7] Mr. Baniya was nominated by the BC PNP in May 2017 and then soon after, in that same month, he applied to IRCC for permanent residence as a member of the provincial nominee class. Mr. Baniya’s 2017 application for permanent residence was refused due to being incomplete.

[8] Mr. Baniya re-applied for permanent residence in January 2018, continuing to rely on the 2017 BC PNP nomination based on the 2016 offer of employment from Vision Glass. The misrepresentation finding that Mr. Baniya is challenging was made in relation to this 2018 application for permanent residence.

[9] Mr. Baniya’s application was flagged as needing further investigation because of the similarities between his employment offer and other files that were under investigation by IRCC. A risk assessment officer at IRCC requested that the Employment Verification Hub (“EVH”) at IRCC investigate the genuineness of Mr. Baniya’s 2016 employment offer. After conducting an investigation, in January 2019, the EVH concluded that it was highly probable that the employment offer with Vision Glass was not genuine.

[10] In June 2019, a migration officer at IRCC contacted a BC PNP director to share the results of the EVH investigation. On November 5, 2019, after conducting their own investigation into Vision Glass, and reviewing Mr. Baniya's response to their procedural fairness letter, the BC PNP cancelled Mr. Baniya's nomination and advised IRCC of the cancellation.

[11] In a November 7, 2019 letter, the Officer advised Mr. Baniya that he no longer qualified for permanent residence due to the withdrawal of the BC PNP nomination and that they had concerns that Mr. Baniya was inadmissible for misrepresentation in relation to his job offer at Vision Glass. The Officer advised Mr. Baniya that both IRCC and the government of British Columbia had concluded that Vision Glass was not located at the company's address at the time the Applicant applied for permanent residence. The Officer also noted that Mr. Baniya had chosen not to apply for a work permit, as he was permitted to do, to begin work at Vision Glass while he was awaiting a determination on his permanent resident application. Mr. Baniya provided a response to this procedural fairness letter on November 22, 2019.

[12] On October 2, 2020, the Officer refused Mr. Baniya's application for a permanent residence visa as a member of the provincial nominee class because the BC PNP had cancelled his nomination and therefore he no longer qualified. This refusal is not being challenged by Mr. Baniya.

[13] The Officer went further and found the Applicant inadmissible for misrepresentation on the basis that the offer of employment he submitted in his 2018 application was, on a balance of probabilities, not genuine.

III. Issues and Standard of Review

[14] The sole issue in this judicial review is in relation to the Officer's decision to find that the Applicant was inadmissible based on misrepresenting his job offer at the time of his application for permanent residence.

[15] Both parties agree that the standard of review applicable is reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

A. *Framework for misrepresentation determinations*

[16] In order to find a person inadmissible for misrepresentation under paragraph 40(1)(a) of *IRPA*, an officer must determine first, that there has been a misrepresentation; and second, that the misrepresentation was material in that it could induce an error in the administration of the *IRPA*.

[17] As I will explain below, given the nature of the alleged misrepresentation, it is my view that only the first criteria is at issue in this judicial review—namely, whether there was a misrepresentation.

[18] This Court has consistently held that the misrepresentation provision is to be broadly interpreted given its purpose in promoting the integrity of Canada's immigration scheme (*Oloumi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 428 at para 23; *Tuiran v Canada (Minister of Citizenship and Immigration)*, 2018 FC 324 at paras 20, 25). An intention to deceive is not necessary to ground a misrepresentation determination (*Khedri v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1397 at para 21; *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at para 15 [*Baro*]). This Court has recognized, however, that there is a narrow exception where an applicant can demonstrate that they honestly and reasonably believed that they were not misstating or withholding material information (*Baro* at para 15).

[19] An inadmissibility finding due to misrepresentation has serious consequences for an applicant. It leads to a five-year period of inadmissibility during which they cannot apply for permanent residence and they must obtain Ministerial permission to be able to enter Canada (*IRPA*, ss 40(2), 40(3)). This Court has found that given these severe consequences, findings of misrepresentation must be made on the basis of clear and convincing evidence (*Xu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 784 at para 16; *Chughtai v Canada (Minister of Citizenship and Immigration)*, 2016 FC 416 at para 29), that there is a heightened duty of procedural fairness owed (*Likhi v Canada (Minister of Citizenship and Immigration)*, 2020 FC 171 at para 27), and the reasons provided must reflect the profound consequence to the affected individual (*Gil v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1441 at para 7; *Vavilov* at para 133).

B. *Nature of the misrepresentation and relevant issue*

[20] In order to determine the central issues involved, it is important to have a common understanding of the nature of the alleged misrepresentation.

[21] Mr. Baniya argued—in response to the procedural fairness letter and before this Court—that the change of a business location for a construction company is not necessarily indicative that the company is no longer operating. This argument is not about the materiality of misrepresentation, but rather goes to the first question — whether there was clear and convincing evidence to support the Officer’s finding that there was in fact a misrepresentation.

[22] If the misrepresentation allegation had been framed by the Officer as relating solely to the change of location of the prospective employer and the Applicant’s failure to inform IRCC of this move, then the Applicant’s argument about the relevance of the move would need to be examined in relation to the materiality of the misrepresentation (see, for example, *Song v Canada (Minister of Citizenship and Immigration)*, 2019 FC 72, where the misrepresentation related to the name of a workplace). However, in this case, in their procedural fairness letter and in the Officer’s reasons, the alleged misrepresentation was consistently framed as being about whether the 2016 job offer from Vision Glass was valid when the Applicant applied for permanent residence in 2018.

[23] Both parties agree that if the job offer was found to not be valid at the time of the application for permanent residence, this would amount to a material misrepresentation.

Accordingly, the only issue on judicial review is in relation to the first criteria—whether there was a misrepresentation.

[24] Moreover, Mr. Baniya's arguments to the Officer centred only on their lack of awareness of the company changing locations, not on the company no longer being in operation at the time he applied for permanent residence. Mr. Baniya's response to the procedural fairness letter asserted, though he admits to not having contact with the company after 2017, that Vision Glass was and continued to be a legitimate business in operation. Mr. Baniya's response to the Officer was that the misrepresentation allegation had not been made out because the company continued to operate and the job offer was valid; it was not based on an argument that he had no knowledge that the company seized operations at the time he submitted his application.

C. *Misrepresentation finding is reasonable*

[25] The Officer's reasons demonstrate that there were a number of factors considered comprehensively. The evidence cited in support of the misrepresentation determination, included the following:

- The result of the IRCC EVH investigation that found that it was highly probable the job offer was not genuine;
- The result of the BC PNP investigation that found that Vision Glass was not in operation;
- Inactivity of Vision Glass's website since 2016, and no other web presence, including social media posts, since 2016;
- Vision Glass was not operating from its listed address since 2016 or responding to three previously listed phone numbers;

- Mr. Baniya provided no explanation for Vision Glass leaving its office premises and for shutting down its website and not having a social media presence since 2016;
- Mr. Baniya could not provide an updated address or contact information for Vision Glass;
- Mr. Baniya did not provide any documents to demonstrate that Vision Glass conducted actual business at the time of his application in January 2018 or afterwards;
- Though eligible, Mr. Baniya did not apply for a work permit to work at Vision Glass despite their stated need and the delay in processing his permanent residence application;
- Vision Glass did not ask the Applicant to apply for a work permit despite its supposed immediate need for workers; and
- Mr. Baniya had not communicated with Vision Glass for several years.

[26] Upon my review of the Officer's reasons, I do not agree with the Applicant that their findings were based on personal speculation or that they did not consider the previous positive determinations (the LMIA and BC PNP); nor do I accept that the Officer unreasonably found there was insufficient evidence provided.

[27] The Officer considered that Vision Glass had been approved by Service Canada for an LMIA in 2016. However, the Officer found that they did not have evidence of the steps that were taken to confirm the genuineness of the job offer at that time by Service Canada; nor did they agree with Mr. Baniya's representative that it was impossible that documents that were presented from the Canada Revenue Agency, presumably in the LMIA process, could not have been valid. The Officer also noted that they were considering whether the job offer was valid in 2018 at the time of the permanent residence application.

[28] The Officer considered Mr. Baniya's representative's argument that the mere change of business location for a construction company did not mean that they were no longer operating. The Officer accepted that this could be true but also considered that there was no evidence of another office being established, or other evidence that the business was actively operating at the time the application was made in 2018 or after.

[29] The Officer also considered Mr. Baniya's representative's submission that no negative inference should be drawn for not obtaining a work permit to work at Vision Glass while awaiting the processing of the permanent residence application given this was not a requirement and Mr. Baniya was waiting to come to Canada as a permanent resident with his family. The Officer accepted that obtaining a work permit was not necessary, but also found in these circumstances, given the lengthy delay in processing, the long period of no contact between Mr. Baniya and his employer, and the employer's stated immediate need to fill this position, it was unusual to not have sought out a work permit.

[30] The Officer noted that it was possible that Mr. Baniya did not follow up with Vision Glass over these years because he decided not to take the job. However, the Officer decided not to consider this possibility given that Mr. Baniya did not make this assertion in their response. The Officer determined that it was unusual that no contact was maintained given that Mr. Baniya was expecting to relocate with his family for the job.

[31] The Officer also reviewed the documents that were submitted in response to the procedural fairness letter. The Officer found that the documents filed related to historic

registrations and licences before the 2018 application, except for evidence that an annual report had been filed in February 2019 for the period up until June 2018. The Officer did not find that these documents assisted in overcoming their concerns about the validity of the job offer in 2018. The Officer found that there was no evidence of recent business activity.

[32] I find that the Officer's decision is transparent, intelligible and justified. There were multiple investigations into the operations of Vision Glass. The Officer thoroughly reviewed the results of these investigations, put their concerns clearly to Mr. Baniya, and evaluated Mr. Baniya's response.

[33] I find that the Officer not only considered the factors that favoured a finding of misrepresentation, but also considered those factors that went against a misrepresentation finding. In conducting this weighing exercise, I find that the Officer attempted to consider Mr. Baniya's position in its best possible light, but ultimately came to the conclusion that a misrepresentation finding was made out based on a number of considerations as set out above. I do not see any basis to interfere with their decision. Accordingly, the application for judicial review is dismissed.

[34] Neither party raised a question for certification and I agree that none arises.

JUDGMENT IN IMM-6270-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6270-20

STYLE OF CAUSE: WAJDI JABER BANIYA BANIYA v THE MINISTER
OF CITIZENSHIP & IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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APPEARANCES:

Aman Sandhu FOR THE APPLICANT

Daniel Nunez FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sandhu Law Office FOR THE APPLICANT
Vancouver, British Columbia

Attorney General of Canada FOR THE RESPONDENT
Vancouver, British Columbia