Federal Court  Cour fédérale

Date: 20230411

Docket: IMM-2673-22

Citation: 2023 FC 519

Ottawa, Ontario, April 11, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ROMY JOHNSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Romy Johnson, seeks judicial review of a decision of the Immigration Division ("ID") dated February 25, 2022, finding the Applicant inadmissible to Canada on the ground of misrepresentation, pursuant to subsection 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] Before the ID, the Applicant submitted that the misrepresentation in his application to extend his visitor visa could be attributed to his immigration consultant's negligence. He submitted that this error therefore qualifies as an innocent misrepresentation, which is an exception to the finding of misrepresentation. However, the ID found that the Applicant bore the burden of ensuring the completeness and honesty of his application and that he is therefore inadmissible pursuant to subsection 40(1)(a) of the *IRPA*.

[3] The Applicant submits that he was denied procedural fairness as a result of his immigration consultant's negligent representation and in the course of inadmissibility proceedings before the ID. The Applicant further submits that the ID's finding that he engaged in indirect misrepresentation is unreasonable in failing to engage with his submissions.

[4] For the reasons that follow, I find that the ID breached the duty of fairness owed to the Applicant. This application for judicial review is therefore granted.

II. Facts

A. *The Applicant*

[5] The Applicant is a 24-year-old citizen of India. He arrived in Canada on December 26, 2016 as a student to attend the University of Regina.

[6] On February 27, 2019, the Applicant retained an immigration consultant (the "consultant"). The Applicant claims he was initially hesitant about the consultant's competency,

but the Applicant's friend—the consultant's son—assured him that the consultant would adequately represent him. The Applicant claims he had a close relationship with and trusted him as his immigration consultant and as his friend's father. The consultant assisted the Applicant to obtain his study permit, his visitor visa, and complete subsequent renewal applications.

[7] The Applicant claims that on June 9, 2019, he had a disagreement with his girlfriend. The following day, his girlfriend made a police complaint against the Applicant. The police called the Applicant and instructed him not to interfere with his girlfriend. The Applicant claims that the next day, he visited his girlfriend's workplace to apologize. His girlfriend felt threatened by this visit and called the police. The police visited the Applicant's home, arrested him the following day, and enforced a no-contact order between the Applicant and his girlfriend. The Applicant was charged with mischief and criminal harassment under subsections 430(4) and 264(3) of the *Criminal Code*, R.S.C., 1985, c. C-46, respectively. On June 11, 2020, the Applicant received a conditional discharge and the no-contact order was lifted.

[8] The Applicant claims that he informed the consultant of these circumstances soon after the incident occurred. He claims that when he told the consultant of his conditional discharge, the consultant informed him that this would not affect his admissibility to Canada.

[9] On May 19, 2021, the consultant submitted an application to extend the Applicant's visitor visa on the Applicant's behalf. In response to Question 3(a) of the application, which asks whether the individual has ever committed, been arrested for, or been charged with or convicted of any criminal offences, the consultant answered "No". The Applicant claims that the

consultant only sent him the Use of Representative form to sign and did not give him an opportunity to review the entire application before it was submitted. The Applicant claims that he was unaware that the consultant did not disclose his criminal charges in this application.

[10] On September 27, 2021, two Canada Border Services Agency ("CBSA") officers visited the Applicant's residence. The officers asked the Applicant about Question 3(a) of his application and informed him that he had not disclosed his criminal charges. The Applicant claims that this was the first time he learned about the omission.

[11] A report was written against the Applicant pursuant to subsection 44(1) of *IRPA*, dated October 27, 2021, seeking that he be found inadmissible for misrepresentation pursuant to subsection 40(1). This report was referred to the ID for an admissibility hearing.

B. *Decision Under Review*

[12] The ID held a pre-hearing on February 25, 2022, with the possibility of an admissibility hearing. The Applicant informed the ID member that he was self-represented. The ID member explained to the Applicant that the pre-hearing conference could proceed to an admissibility hearing or the Applicant could request to schedule the admissibility hearing for another date, giving him time to retain representation. The Applicant stated that he wished to proceed with the admissibility hearing.

[13] The ID rendered an oral decision following the admissibility hearing, finding the Applicant inadmissible to Canada due to misrepresentation pursuant to subsection 40(1) of *IRPA*.

[14] The ID found that the Applicant committed a material misrepresentation by failing to disclose his criminal charges in his extension application. The ID afforded a broad interpretation to subsection 40(1), in which indirect misrepresentation includes situations in which the misrepresentation was made by a third party without the Applicant's knowledge. The ID cited jurisprudence put forward by the Respondent for this proposition, including *Khan v Canada (Citizenship and Immigration)*, 2008 FC 512, and *Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942.

[15] The ID noted that the Applicant ultimately bears the onus of submitting true and complete information in his application and ensuring that it complies with the legislation. The ID therefore found that the Applicant is not protected by the exception of innocent misrepresentation and he is therefore inadmissible to Canada.

III. Issues and Standard of Review

[16] This application for judicial review raises the following issues:

A. *Whether there was a breach of procedural fairness.*

B. *Whether the ID's decision is reasonable.*

[17] The applicable standard of review of the ID's decision is reasonableness (*Kaur v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 87 at para 17). I find that this conclusion

accords with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17.

[18] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35)).

[19] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[20] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than

superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[21] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. Analysis

[22] The Applicant submits that he was denied procedural fairness on two occasions: firstly, by the negligent and incompetent representation of the consultant and secondly, by the nature of the ID's admissibility proceedings. The Applicant further submits that the ID's assessment of misrepresentation in his case is unreasonable.

[23] I find the ID's unfairness in the nature of proceedings to be sufficient to warrant this Court's intervention. I therefore do not address the remaining issues.

[24] The Applicant submits that the nature of the ID proceedings breached his right to procedural fairness. The Applicant submits that the transcript of the ID hearing reveals that he wished to show the ID member certain evidence and could not do so, and that his statements at the end of the hearing indicate that he was aware of other evidence that he had not disclosed and would assist in establishing elements of his case. The Applicant submits that the ID was not

adequately mindful to the fact that the Applicant was self-represented in the proceedings and was unfamiliar with the process.

[25] The Respondent submits that no such breach of procedural fairness occurred in the course of the ID proceedings. The Respondent notes that the Applicant failed to provide disclosure to the ID in advance of the hearing, despite given clear instructions to do so, and was given an opportunity to schedule the hearing for another date and seek counsel in the meantime.

[26] I agree with the Applicant that the nature of the ID's admissibility proceedings failed to fulfil the duty of fairness owed to the Applicant. While I recognize that the ID member informed the Applicant of his ability to seek counsel to represent him at the outset of the hearing, and provided him with opportunities to present his evidence, the transcript of the hearing reveals that the Applicant did not fully understand the nature of the hearing, that he could have bolstered his case by providing evidence in support of his claims, and that the ID member did not advise the Applicant that he could file material after the close of the hearing, as per the Immigration and Refugee Board ("IRB") Rules.

[27] I further agree with the Applicant's submission that the nature of the ID's admissibility proceedings are highly analogous to those found procedurally unfair by my colleague Justice Pentney in *Clarke v Canada (Citizenship and Immigration)*, 2018 FC 267 ("*Clarke*"). In *Clarke*, Justice Pentney stated the following at paragraphs 13 and 19:

> [13] However, as the hearing unfolded it became evident that the Applicant had not understood the nature of the legal proceeding before the IAD; she did not arrange for any witnesses to testify, nor did she obtain witness statements. She produced very little

> written information, and several key elements of her evidence were not substantiated by any oral or written evidence. During the proceeding, the Applicant stated on several occasions that she could have provided more information, and that she was not prepared […]
>
> […]
>
> [19] Similarly, at the close of the hearing the Applicant stated that she realized that she should have brought forward more evidence. However, the IAD member did not advise her that she could file more material after the close of the hearing, as permitted under the IRB Rules. This compounds the denial of procedural fairness for the Applicant, because she relied on her oral statements and the few documents she submitted, while stating that she could have provided more information. However, the Applicant was never advised that she could, in fact, supplement her evidence with further material, and she was obviously not aware of that. In the particular circumstances of this case, I find that this is a contributing factor to the denial of procedural fairness to the Applicant.

[28] This is highly analogous to the Applicant's case. The transcript of the hearing shows the Applicant's references to additional evidence he could have proffered to better substantiate his claim and signals his lack of preparedness to meaningfully represent himself before the ID. For instance, when the Applicant attempted to show the ID member the Use of Representative form, to indicate that he only signed this form and not the actual application, the ID member remarked that "it is not relevant" and later stated that the Applicant signed both the Use of Representative form and the application. The distinction between what form he signed and what he did not sign is central to the Applicant's submissions regarding innocent misrepresentation due to his consultant's negligence. Despite the Applicant's enthusiasm to show the ID member this form, and his references to other evidence he could provide, the ID member did not advise the Applicant that he could file more material after the hearing, as permitted by the IRB Rules

(*Clarke* at para 19). For these reasons, I find that the nature of the ID's proceedings breached the duty of fairness owed to the Applicant and warrants this Court's intervention.

V. Conclusion

[29] This application for judicial review is granted. The nature of the ID's admissibility proceedings in the Applicant's case breached procedural fairness. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-2673-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter remitted back for redetermination by a differently constituted panel.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2673-22
STYLE OF CAUSE:	ROMY JOHNSON v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 1, 2023
JUDGMENT AND REASONS:	AHMED J.
DATED:	APRIL 11, 2023

APPEARANCES:

Sumeya Mulla	FOR THE APPLICANT
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT