Federal Court Cour fédérale

Date: 20231205

Dockets: IMM-5972-22
IMM-5973-22

Citation: 2023 FC 1626

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 5, 2023

PRESENT: Mr. Justice McHaffie

Docket: IMM-5972-22

BETWEEN:

PIERRE MSIMBWA RISASI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5973-22

AND BETWEEN:

EMILIE SHAKO KITOKO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Pierre Risasi and Emilie Kitoko, applied for "super visas" to visit their son, a permanent resident of Canada. Their son and an immigration consultant helped them fill out the application forms. In the two forms submitted, filled out in English, they answered no to the question of whether they had ever been refused a visa. This was an error, as the applicants had been refused an American visa in 2017. In their applications for judicial review, heard together, the applicants tried to have the outcome of this error reversed, that outcome being the immigration officer's finding that they had made misrepresentations and were therefore inadmissible for a period of five years.

[2] The Court's role on judicial review is limited. It consists solely of determining whether the officer's decision is lawful, meaning that it is reasonable and has been made in accordance with the principles of procedural fairness. For the reasons that follow, the Court finds that the decision is reasonable and that the principles of procedural fairness were respected. The applications for judicial review must therefore be dismissed.

[3] For greater clarity, the Court notes that this finding does not call into question the applicants' good faith. Nor does it suggest that they deliberately concealed their immigration history. Inadmissibility under section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] is not limited to deliberate misrepresentation. It was open to the officer to conclude that the claims included misrepresentation of material facts relating to a relevant

matter, and that the explanations submitted as to the context of these errors did not alter this conclusion.

II. Issues and standard of review

[4] The applicants' arguments raise the following two issues:

A. Did the officer err in determining that the applicants were inadmissible for misrepresentation?

B. Did the officer breach the principles of procedural fairness?

[5] The first issue goes to the merits of the decision. Accordingly, it must be reviewed on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 at para 5. A reasonable decision is based on coherent reasoning and is justified in relation to the constellation of law and facts that are relevant to the decision: *Vavilov* at paras 101–105. In conducting reasonableness review, the Court considers the reasons given by the decision maker in light of the record and the issues raised, and asks whether the decision bears the hallmarks of justification, transparency, and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints that bear on it: *Vavilov* at paras 83–86, 91–95, 99. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov* at para 100.

[6] The second issue is a matter of procedural fairness. In reviewing such issues, the Court considers whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

[7] I note that the applicants also claim that the officer committed an "abuse of authority" in determining that they were inadmissible and in failing to consider the possibility of an exception on humanitarian and compassionate grounds. In practice, however, their arguments in this respect concern the merits of the decision, the process, or both. I will therefore consider the arguments in the context of the two issues formulated above.

III. Analysis

A. *The officer's decision is reasonable*

(1) The visa applications

[8] Mr. Risasi and Ms. Kitoko, both lawyers, are citizens of the Congo. On November 11, 2021, through an authorized representative, they applied for one-year temporary resident visas for parents (also known as "super visas") to visit one of their sons, a permanent resident of Canada. The representative, with their son's help, filled out their applications online, in English.

[9] The visa application form published by Immigration, Refugees and Citizenship Canada [IRCC] requests, among other things, information about the applicant's travel history. The English version of the form contains the following question: "Have you ever been refused a visa

or permit, denied entry to, or ordered to leave any country or territory?" Each of the applicants responded "No" to that question.

[10] The visa officer responsible for the file discovered that Mr. Risasi and Ms. Kitoko had been refused a visa for the United Stated. According to the officer's notes in the Global Case Management System [GCMS], the information shared by the United States showed that "the applicant has derogatory history (SMUGGLERS) in the US info sharing".

[11] The officer therefore sent each of the applicants a procedural fairness letter on February 24, 2022. These letters, identical in content, pointed out the discrepancy between their declarations and their history in the United States, without directly referring to the smuggling allegations, and informed them of the risks of inadmissibility if it was determined that they had made misrepresentations.

[12] Mr. Risasi and Ms. Kitoko responded by letters dated March 21, 2022. In these letters, which were also identical, they explained that they had hired a consultant who had asked them to fill out forms in English, a language in which they are not fluent. They acknowledged that they had asked their son to complete the documents for them and that he had proceeded without consulting them, unaware that the United States had refused them visas. They expressed their belief that this was an innocent mistake. To show their good faith, they also admitted in these letters that Ms. Kitoko had previously been refused a visa by Canada. Finally, they asked if they could withdraw their applications and submit new ones in French.

(2) The officer's decision

[13] On April 6, 2022, the officer reviewed the file and the applicants' responses. According to the officer, the failure to report the refusal of the American visas constituted a misrepresentation of material facts relating to a relevant matter that could have induced an error in the administration of the IRPA. In his corrected notes in the GCMS, the officer wrote that the error was material because it was directly related to the purpose of the trip, and it could have induced an error in the administration of the IRPA. He also wrote that he was not reassured by Mr. Risasi's and Ms. Kitoko's explanations regarding the language, the representative and their son, as the applicants are under an obligation to be truthful throughout their application process. The officer therefore recommended an inadmissibility order under section 40 of the IRPA.

[14] On April 26, 2022, the same officer, acting as unit manager, again reviewed the file and concluded that the applicants had made a material misrepresentation. In so doing, the officer clearly adopted the reasons that supported the earlier recommendation. The officer therefore refused the visa applications of Mr. Risasi and Ms. Kitoko and determined that they were inadmissible for five years.

(3) The decision is justified, intelligible and transparent.

[15] As argued by the applicants, inadmissibility under paragraph 40(1)(a) of the IRPA is applicable only if the applicant's misrepresentation concerns material facts relating to a relevant matter and that it induces or could induce an error in the administration of the IRPA: *Kazzi v Canada (Citizenship and Immigration),* 2017 FC 153 at paras 32, 39; *Gill* at para 14;

Karunaratna v Canada (Citizenship and Immigration), 2014 FC 421 at para 19. A misrepresentation is "material" if it is important enough to affect the immigration process: *Kazzi* at para 38. That said, it need not be decisive or determinative to be material: *Kazzi* at para 38; *Gill* at para 29.

[16] The applicants claim that the officer did not sufficiently explain why the failure to report the refusal of the American visa concerned material facts relating to a relevant matter. Citing *Gill* and *Karunaratna*, they argue that the lack of such an explanation renders the decision unreasonable: *Gill* at para 29; *Karunaratna* at paras 19–20.

[17] I am not persuaded. The officer explained that he was of the view that the misrepresentation was directly connected with the purpose of the trip and that, accordingly, it could have induced an error in the administration of the IRPA. In the context of the failure to report the visa refusal and in light of the "No" response to a question that should have had a "Yes" response, the officer's explanation is sufficient to understand his reasoning. In this respect, I note that the situation in this case differs from that in *Gill*, in which the applicant had failed to disclose the refusal of an American visa but had reported several refusals of Canadian visas: see *Ram v Canada (Citizenship and Immigration)*, 2022 FC 795 at paras 26–27.

[18] The applicants raised the "innocent mistake exception", arguing that they had acted in good faith, had not intended to deceive and had not intentionally misled the officer. However, inadmissibility under paragraph 40(1)(a) is not limited to deliberate misrepresentations and does not require an intent to deceive or to induce an error in the administration of the IRPA. *Malik v*

Canada (Citizenship and Immigration), 2021 FC 1004 at para 27; *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28. The Federal Court's case law also confirms that (i) even misrepresentations made by a third party are covered by section 40; (ii) the onus is on the applicant to verify the completeness and accuracy of the application and to provide complete, honest and truthful information in every manner; and (iii) an applicant's belief that they were not misrepresenting a material fact is not reasonable where they fail to review their application and ensure the completeness and veracity of the document before signing it: *Goburdhun* at para 28.

[19] The officer took into account the applicants' explanations regarding the involvement of their son and the representative, but he did not find them adequate. In light of the case law cited by this Court, the officer's conclusion satisfies the requirements of justification, intelligibility and transparency.

[20] The applicants also argued that IRCC was already aware of the American visa refusal, since they had informed the IRCC of this in another file. This argument has been rejected by this Court several times: see *Eze v Canada (Citizenship and Immigration)*, 2023 FC 714 at paras 12–13, citing *Ram* (see para 24), *Goburdhun* at para 43 and *Muniz v Canada (Citizenship and Immigration)*, 2020 FC 872 at para 17. The fact that the information was communicated to IRCC on another occasion and might be found elsewhere in their files did not make it unreasonable for the officer to conclude that the omission was a misrepresentation of a material fact.

[21] The applicants have therefore not persuaded me that the officer's decision was unreasonable.

B. *The officer did not breach the principles of procedural fairness*

[22] Despite the applicants' arguments, I also find that the officer did not breach the principles of procedural fairness. As stated above, the officer sent each of the applicants a procedural fairness letter raising the issue of the misrepresentation and the possibility of inadmissibility. The officer also gave the applicants the opportunity to make submissions in response.

[23] The applicants correctly maintain that procedural fairness is not limited to providing an opportunity to respond, but requires that an officer effectively and actually consider an applicant's response in the final decision. That, however, is exactly what the officer did in this case. The officer's notes in the GCMS show that he took into account the applicants' explanations but concluded that they were not sufficient to oust the application of paragraph 40(1)(a) of the IRPA. I can therefore not accept the applicants' argument to the effect that the officer failed to take into account the explanations that they had submitted in their responses to the procedural fairness letters. I note that the applicants' allegation that the officer ignored their responses appears to have been made before they received the GCMS notes addressing their responses. It is also on this basis that they claim that the officer abused his authority. This allegation is unfounded.

[24] The applicants stated that the officer had abused his authority in not exercising his discretion to analyze, [TRANSLATION] "on his own initiative", the humanitarian and compassionate considerations specific to their case. They based this statement on subsections 25.1(1) and 24(1) of the IRPA. However, section 25.1 concerns permanent residence applications and is not applicable to the applicants' situation. As for section 24, the applicants

had not applied for a temporary resident permit and had not reported to the officer any compelling or other sufficient reasons to apply this provision: *AR v Canada (Citizenship and Immigration)*, 2023 FC 1028 at para 26; *Shabdeen v Canada (Citizenship and Immigration)*, 2020 FC 492 at para 14. I can therefore not accept that the officer committed an abuse of authority by failing to consider these provisions.

[25] Finally, the applicants criticized the fact that the person who made the final decision declaring them inadmissible had also issued the initial inadmissibility recommendation. They argued that this gave the impression that the case had been prejudged and that the process was therefore unfair. I acknowledge that this process may seem a bit bizarre. However, as the Minister argued, procedural fairness does not require that an application be considered by two different people. The pre-decision recommendation process appears to be linked to the required level of authority at each stage in the processing of a visa application raising misrepresentation concerns. The fact that the final decision was made by the officer who had conducted the review and had made the initial recommendation is perhaps not ideal, but this in itself does not appear to me to be a breach of the principles of procedural fairness. Nor did the applicants raise any arguments calling this into question.

IV. Conclusion

[26] I therefore conclude that the officer's decision to refuse to issue the visas to the applicants and to declare them inadmissible for misrepresentation under section 40 of the IRPA is reasonable and was reached in accordance with the principles of procedural fairness. The applications for judicial review must therefore be dismissed.

[27] Neither party proposed a question for certification. The Court agrees that the case does not raise any.

JUDGMENT in IMM-5972-22 and IMM-5973-22

THIS COURT'S JUDGMENT is as follows:

1. The applications for judicial review are dismissed.

"Nicholas McHaffie"
Judge

Certified true translation
Francie Gow

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5972-22
STYLE OF CAUSE:	PIERRE MSIMBWA RISASI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	IMM-5973-22
STYLE OF CAUSE:	EMILIE SHAKO KITOKO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 30, 2023
JUDGMENT AND REASONS:	MCHAFFIE J
DATED:	DECEMBER 5, 2023

APPEARANCES:

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Nathan Joyal	FOR THE RESPONDENT

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