Federal Court  Cour fédérale

Date: 20240628

Docket: IMM-6657-23

Citation: 2024 FC 1027

Ottawa, Ontario, June 28, 2024

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

DINH HO TRINH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated April 14, 2023, of a visa officer (Officer) with Immigration, Refugees and Citizenship Canada (IRCC) denying the Applicant's application for permanent residence in the self-employed class under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] on the basis that he made a misrepresentation (Decision).

[2] The Applicant asks this Court to set the Decision aside and send the matter back for redetermination by a different officer.

[3] For the reasons that follow, this application is dismissed.

II. Background

[4] The Applicant, Mr. Dinh Ho Trinh, is a 50-year-old citizen of Vietnam. He is married and has three children.

[5] The Applicant submitted an application for permanent residence in the Start-Up Business class pursuant to subsection 98.01(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] to IRCC in or around October 2020. The application included himself, his spouse, and his children.

[6] In support of his application, the Applicant took the International English Language Testing System (IELTS) test on August 1, 2019, through the Vietnam British Council. His results (IELTS Results) were available later that month.

[7] The Officer was concerned that the IELTS Results may have been fraudulent, as the IELTS Results provided by the Applicant did not correspond with the records of the British Council.

[8] The Applicant received a procedural fairness letter (PFL) on May 20, 2022, wherein the Officer's concerns were set out. The Applicant requested an extension of time on May 26, 2022, until July 20, 2022, to respond to the PFL. The request was granted. By April 14, 2023, the Officer had still not received a response to the PFL or any other response from the Applicant.

[9] The Applicant's application was refused on April 14, 2023, because the Officer determined they were inadmissible pursuant to paragraph 40(1)(a) of the *IRPA* for directly or indirectly misrepresenting or withholding material facts relating to a relevant mater that induces or could induce an error in the administration of the *IRPA*.

[10] The Applicant commenced his application for leave of the Decision on May 29, 2023. This Court granted leave on March 21, 2024.

III. Issues and Standard of Review

[11] This application raises three issues:

A. Is the Applicant's new evidence admissible in this judicial review?

B. Did the Officer breach the duty of procedural fairness in denying the Applicant's permanent residence application?

C. Was the Officer's Decision to refuse the Applicant's permanent residence application on the basis of misrepresentation reasonable?

[12] The standard of review applicable to the Officer's Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 23).

[13] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (*Vavilov* at paras 12–15, 95). The starting point for a reasonableness review is the reasons for the decision. Pursuant to the *Vavilov* framework, a reasonable decision 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" (*Vavilov* at para 85).

[14] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant to render the decision unreasonable (*Vavilov* at para 100).

[15] Officers are not required to respond to every argument or piece of evidence advanced in an application or make an explicit finding on each element; however, the reasons must demonstrate that the officer "meaningfully grapple[d]" with key issues or central arguments raised (*Vavilov* at para 128).

[16] The standard of review for procedural fairness issues is correctness, or akin to correctness (*Vavilov* at para 53; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56). The reviewing court must consider what level of procedural fairness is necessary in the circumstances and whether the "procedure followed by the administrative decision maker respect[s] the standards of fairness and natural justice" (*Chera v Canada (Citizenship and Immigration)*, 2023 FC 733 at para 13. In other words, a court must determine if the process followed by the decision maker achieved the level of fairness required in the circumstances (*Kyere v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 120 at para 23, citing with approval *Mission Institution v Khela*, 2014 SCC 24 at para 79).

IV. Analysis

A. *Is the new evidence admissible in this judicial review?*

[17] The Applicant submitted multiple exhibits in his application record that contain several new pieces of evidence that were not before the Officer. The new evidence was:

- Exhibit F – an access to information response dated June 17, 2022;

- Exhibit G – an email from the Applicant's immigration consultant dated April 25, 2023, to the Access to Information officer (AIO). A reply email from the AIO dated May 4, 2023, indicating that the request was completed on February 13, 2023. A letter dated May 10, 2023, containing the results of the access to information request.
- Exhibit I – an article dated November 18, 2022, indicating that IELTS exams in Vietnam were suspended until further notice.

[18] The Applicant argues that new evidence in a judicial review application is permissible where an issue of alleged procedural fairness is raised.

[19] The Respondent argues that the new evidence is not admissible and that reviewing courts are restricted to the evidence that was before the Officer.

[20] A court may admit new evidence on judicial review in three circumstances. One, where the new evidence provides general background information that assists the Court in its understanding of the issues relevant to the judicial review, without adding evidence that goes to the merits of the matter before the Court. Two, where the new evidence brings the Court's attention to procedural defects not found in the record before the decision maker. Three, where the new evidence highlights a complete absence of evidence before the decision maker on a finding (*Bains v Canada (Citizenship and Immigration)*, 2020 FC 57 at paras 23–24 citing with approval *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

[21] This Court has consistently found that review of a tribunal decision should proceed on the basis of the evidence that was before the decision maker (*Dayebga v Canada (Citizenship and*

Immigration), 2013 FC 842 at para 25, citing *Fabiano v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1260 at paras 22–25).

[22] I have reviewed the new evidence submitted by the Applicant and I agree that it was not before the Officer. The Applicant suggests that this information is necessary as it links to procedural fairness arguments in this application. I disagree. It is not clear how this evidence is relevant to the case at bar. The Applicant took his IELTS examination in 2019 and it is not clear how information concerning the closure of IELTS examination facilities in 2022 is relevant. The article and the access to information request do not contain any information that links the issues that prompted the closure of the IELTS facilities in Vietnam to issues that date back to 2019, when the Applicant took his test.

[23] In my opinion, the Applicant's new evidence does not meet any of the recognized exceptions noted above. Accordingly, paragraphs 16–34 of the Respondents Further Memorandum of Argument and Exhibits F, G, and I are struck and not considered in this matter.

B. *Did the Officer breach their duty of procedural fairness?*

[24] The Applicant submits that there was a breach of procedural fairness in this matter because the Officer ought to have been aware of the closing of the IELTS examination centres in Vietnam in November 2022. The Applicant argues that the closure of the centres in 2022 illustrates that there were "issues" at the examination centres, and that those issues resulted in administrative irregularities that affected the Applicant's information. Further, the Applicant submits that this information was or ought to have been known to IRCC officers and employees in the British Council.

[25] The Respondent submits that there was no breach of procedural fairness. A PFL was issued on May 20, 2022, that clearly outlined the Officer's concern. The Applicant requested and was granted an extension of time, to July 20, 2022, to respond to the PFL. The Applicant did not respond and, I note, did not request an additional extension of time to do so.

[26] Further, the Respondent submits that the Applicant's assertion that the closing of examination centres in Vietnam in November 2022 would have been known to the Officer is not supported by the evidence. There is also no evidence as to how the closure of IELTS centres in November 2022 would have had any effect on the Applicant's IELTS Results from August 2019.

[27] I agree with the Respondent. There is no breach of procedural fairness in this case. The Applicant was provided an opportunity to respond to the Officer's concerns and did not. The Applicant argues that the evidence that they required in response to the Officer's concerns (Exhibits G and H) was not available in advance of the Officer's Decision. Nevertheless, the Officer provided the Applicant with a reasonable opportunity to respond to the concerns and the Applicant did not avail himself of the opportunity. In addition, the Applicant did not request a further extension of time to acquire the new evidence needed to support his argument. Finally, as noted above, the new evidence is not relevant to the issues in this matter.

C. *Was the Officer's Decision reasonable?*

[28] The Applicant argues that the Officer's concerns with the IELTS Results and verification evidence is questionable, given the closure of the exam centres in Vietnam, thus the Officer's analysis is not reasonable.

[29] The Respondent argues that the Applicant has the onus and a continuing duty to candour to provide complete, accurate, honest, and truthful information when applying for entry into Canada (*Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 [*Kazzi*] at para 38).

[30] The Decision letter dated April 14, 2023, from the Officer denying the Applicant's application states:

> You were previously sent a letter dated May 20, 2022, outlining concerns that you appeared to have misrepresented your language testing result. It was pointed out that the test report form you submitted was verified and found to not correspond to official records. Our letter stipulated that we would wait seven days for you to provide a response and any information or material you wanted taken into consideration that might alleviate the concern outlined. We have received and reviewed your counsel's request for additional time to make submissions, and allowed it. To date, however, you have failed to make any further submissions or any submissions at all that would refute or assuage the concern outlined. After full consideration, it is found that the concern is valid and, more likely than not, you did in fact misrepresent a material fact on your application, contrary to subsection 40(1)(a) of the IRPA, as outlined above.
>
> [Emphasis added.]

In addition, the PFL from the Officer dated May 20, 2022, states:

> … I have concerns that you have not fulfilled the requirement put upon you by section 16(1) of the Immigration and Refugee Protection Act, which states:
>
> 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.
>
> Specifically, I am concerned with the language test # 19VN009475TRID028G done on 2019/08/01. This test result does not correspond with the records at the British Council, therefore I have reason to believe that the result you submitted is fraudulent.
>
> …

> Please note that if it is found that you have engaged in misrepresentation in submitting your application, you may be found to be inadmissible under section 40(1)(a) of the Immigration and Refugee Protection Act. A finding of such inadmissibility would render you inadmissible to Canada for a period of five years…
>
> [Emphasis added.]

[31] A finding of misrepresentation "must be made on the basis of clear and convincing evidence" (*Baniya v Canada (Citizenship and Immigration)*, 2022 FC 18 at para 19). Where an officer makes a finding of misrepresentation, "more extensive reasons" are required (*Vargas Villanueva v Canada (Citizenship and Immigration)*, 2023 FC 66 at para 18). However, this does not detract from the onus on the Applicant to provide complete, accurate, honest, and truthful information on their application (*Kazzi* at para 38. See also *Vahora v Canada (Citizenship and Immigration)*, 2022 FC 778 at paras 26–31).

[32] With respect, the Officer's reasons are clear as to what their concerns were, how the Officer verified the information, and what the consequences could be for the Applicant. In my opinion, the Officer's finding that there was a misrepresentation is reasonable.

V. Conclusion

[33] In light of the foregoing, this application for judicial review is dismissed.

[34] The parties did not pose any questions for certification and I agree that there are none.

JUDGMENT in IMM-6657-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Julie Blackhawk"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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