Federal Court  Cour fédérale

Date: 20240912

Docket: IMM-9501-23

Citation: 2024 FC 1437

Toronto, Ontario, September 12, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

THAMILINI GANESHALINGAM
AJANTHAN SUNTHARALINGAM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application concerns the impact of an applicant's voluntary correction of misinformation on inadmissibility for misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicants are a Canadian-Sri Lankan married couple who appealed a refused sponsorship application to the Immigration Appeal Division (IAD). This appeal was refused on the basis that the Principal Applicant, Ajanthan Suntharalingam, was inadmissible due to his

untruthfulness and misrepresentation, despite the fact that he voluntarily corrected misinformation in the application while it was being processed.

[3] For the reasons that follow, I find that the IAD's decision was unreasonable for its unintelligibility and its unreasonable application of paragraphs 40(1)(a) and 67(1)(c) of the *IRPA*. The application for judicial review is granted.

II. Background

[4] Thamilini Ganeshalingam (Associate Applicant) is the Canadian sponsor in a permanent resident application filed in 2018 by the Principal Applicant, who is a Sri Lankan citizen.

[5] In his permanent residence application, the Principal Applicant indicated that he had never been detained in Sri Lanka. The visa office obtained records from his British refugee claim indicating that he had been detained in Sri Lanka in December 2008. The Principal Applicant stated that this was false and provided proof that he had never been detained at that time.

[6] The visa office arranged an interview for the Principal Applicant in March 2022. Shortly before that interview, the Principal Applicant notified the visa office that he had in fact been detained in Sri Lanka, in June 2008. He provided documentary evidence from the police indicating that he was released approximately one month later without charge and was no longer under investigation. His Sri Lankan police clearance did not record the detention.

[7] The visa officer found the marriage to be genuine but refused the application based on section 16 of the *IRPA* due to the Principal Applicant's failure to be truthful. This decision was appealed to the IAD, which added misrepresentation under section 40 as a ground for refusal.

[8] The IAD dismissed the appeal, finding no reason to disturb the Principal Applicant's inadmissibility and finding insufficient humanitarian and compassionate (H&C) factors to overcome the inadmissibility. The IAD stated that it was "just days before his interview" that he disclosed that he had actually been detained in Sri Lanka.

[9] The IAD acknowledged that the initial misrepresentation made by the Principal Applicant was corrected but found that "the fact that a misrepresentation is caught before the assessment of the application does not assist an applicant in the materiality analysis" (citing *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 [*Oloumi*] at para 26 and *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhun*] at para 43). The IAD concluded that "[t]he fact that the Applicant lied, was caught, and then repented does not mean that a misrepresentation did not take place."

[10] The IAD further found that the Applicants' circumstances did not warrant relief on H&C grounds pursuant to paragraph 67(1)(c) of the *IRPA*. It found that the Principal Applicant's untruthfulness weighed heavily against granting relief. It also found that there would be nothing exceptional or unusual about the Applicants' circumstances and that their separation "need not be permanent," stating that the inadmissibility for misrepresentation "only renders [the Principal Applicant] inadmissible for five years."

III. Issue and Standard of review

[11] The Applicants submit that the issues concerning the Principal Applicant's inadmissibility attract reasonableness as the standard of review, while a review of the IAD's "scope of discretion" attracts a standard of correctness.

[12] However, I agree with the Respondent that the reasonableness standard applies to all the issues in the IAD's decision. The Supreme Court of Canada has held that the only exceptions to the reasonableness standard involve:

- Legislated standards of review,
- Statutory appeal mechanisms,
- Constitutional questions,
- General questions of law of central importance to the legal system,
- Jurisdictional boundaries between administrative bodies, and
- Concurrent first instance jurisdiction over a statutory issue between administrative decision makers and courts.

(*Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paras 26–28)

[13] These issues do not arise here, therefore no aspect of the IAD's decision displaces the presumption of reasonableness as the standard of review (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at paras 39, 42–43). Thus, the sole issue in this application is whether the IAD's decision is reasonable.

[14] The Supreme Court of Canada has recently reaffirmed the importance of decisions' justifications with a "reasons first" approach to reasonableness review, whereby the administrative decision maker's reasons meaningfully account for the parties' submissions and the impact a decision will have upon an individual, in addition to the decision's justification in relation to its legal and factual constraints (*Mason* at paras 58–63, 66, 74, 76).

IV. Analysis

[15] The IAD's determination of the Principal Applicant's inadmissibility for misrepresentation is unreasonable because of its unintelligibility and misapplication of paragraph 40(1)(a) of the *IRPA*.

[16] The IAD's decision on the Applicants' request for H&C relief is also unreasonable because it applied the incorrect threshold for relief under paragraph 67(1)(c) of the *IRPA* and grossly miscalculated the consequences of its decision on the Applicants.

A. *The unintelligibility of the IAD's decision*

[17] The IAD's decision was contradictory regarding whether it perceived that the Principal Applicant's misrepresentation was "caught" by the visa officer before he disclosed it.

[18] The evidence was clear that the Principal Applicant voluntarily corrected the misinformation about his previous detention and was not "caught" by the decision maker. Through his counsel, he wrote to the visa office prior to his interview and described the fact that he was detained in Sri Lanka in June 2008. His police clearance did not indicate the detention, making it unlikely that the detention would have come to the attention of the visa officer. Yet the IAD inexplicably stated: "It is erroneous to suggest that he admitted to his omission before being 'caught out' by the visa officer" (IAD decision at para 15).

[19] The IAD then contradicted its own finding by stating: "I accept that the misrepresentations in his initial application and in his sworn statements from January 2020 and April 2021 were later 'corrected' at the visa post" (IAD decision at para 18).

[20] A further contradiction is made by the IAD in the following paragraph when it states: “The fact that the Applicant lied, was caught, and then repented does not mean that a misrepresentation did not take place” (IAD decision at para 19).

[21] From these passages, it is impossible to know whether the IAD believed that the Principal Applicant voluntarily corrected the misinformation he provided prior to its detection, which is true to the evidence, or that he was first “caught” by the visa officer, which is not true to the evidence. For this reason, the IAD’s decision is unintelligible and, correspondingly, unreasonable.

B. *Misapplication of paragraph 40(1)(a)*

[22] The IAD’s decision is also unreasonable for its misapplication of inadmissibility under paragraph 40(1)(a) of the *IRPA*. On an accurate approach to the evidence and the legislative provision, the IAD should have assessed the Principal Applicant’s correction of misinformation in relation to its potential to induce an error in the administration of the *IRPA*. In my view, the assessment of this risk is a clear statutory requirement.

[23] The Principal Applicant’s intention in voluntarily correcting the misinformation in his application was to provide truthful information and an opportunity for the visa officer to question him about the information at his interview. Paragraph 40(1)(a) of the *IRPA* requires a calculation of the risk that an error in the administration of the Act could occur in these circumstances, however, the IAD failed to conduct that assessment of risk, contrary to the explicit wording of the statutory provision.

[24] Paragraph 40(1)(a) provides that “a permanent resident or foreign national is inadmissible for misrepresentation ‘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.'"

[25] It is true that the IAD refers in passing to the fact that the voluntary correction was made "just days before" the Principal Applicant's interview. The Principal Applicant's explicit explanation for the timing of the disclosure was to allow the visa officer an opportunity to question him about the new information at the interview.

[26] If the IAD's passing reference to the timing of the disclosure was an attempt to assess the risk that an error would result, this assessment was insufficiently explained in light of the serious consequences attached to this ground of inadmissibility. As stated by the Supreme Court of Canada in *Mason* at paragraph 76, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 133:

> The principle of "responsive justification" means that if a decision has "particularly harsh consequences for the affected individual", then "the decision maker must explain why its decision best reflects the legislature's intention".

[27] The cases relied on by the IAD—*Oloumi* and *Goburdhun*—deal with the materiality test for a misrepresentation and do not directly address the risk assessment involved in considering whether a corrected misrepresentation "could induce" an error in the administration of the Act. Also, in both cases, the visa officers independently discovered the misrepresentations and sent the applicants procedural fairness letters (*Oloumi* at para 7; *Goburdhun* at paras 8–9); there was no advance, voluntary correction by the applicants. In the present case, by contrast, the Principal Applicant voluntarily disclosed the June 2008 detention prior to the visa officer becoming aware of it.

[28] This Court has recognized that corrections to misinformation submitted in applications should be assessed in terms of their potential to induce an error in the administration of the Act.

[29] For example, in *Muhenda v Canada (Citizenship and Immigration)*, 2015 FC 854, the Court found that the applicant's disclosure of misinformation regarding his residence could not provide the basis for misrepresentation under paragraph 40(1)(a) because it was corrected well before the assessment was completed and "did not and could not lead to an error in the administration of the *IRPA*" (at para 36).

[30] In *Kaur v Canada (Citizenship and Immigration)*, 2007 FC 268, the Court determined that the retraction of the applicant's false statements regarding her marital status could not have induced any error in the review of the application (at para 29).

[31] In the present case, the Principal Applicant corrected his misrepresentation prior to its detection by the visa officer, prior to his immigration interview, and prior to the initiation of background checks. In these circumstances, the IAD could not reasonably determine the Principal Applicant to be inadmissible under paragraph 40(1)(a) without addressing the explicit statutory requirement pertaining to the level of risk of an error in the administration of the Act. The failure to do so ignores the legal constraint imposed by the clear meaning of the words "could induce an error in the administration of the Act." This oversight renders the decision unreasonable.

[32] An administrative decision maker's decision "must be consistent with the 'modern principle' of statutory interpretation, which focuses on the text, context, and purpose of the statutory provision. The decision maker must demonstrate in its reasons that it was alive to those essential elements" (*Mason* at para 69).

[33] Applying the "text, context, and purpose" approach to paragraph 40(1)(a) supports an interpretation that requires an assessment of risk that the Act will be misapplied. Such an approach is also attentive to the harsh consequences to the individual affected (*Vavilov* at paras 133–135; *Mason* at para 69).

[34] The text of paragraph 40(1)(a) is broad in its application to direct and indirect misrepresentations, as well as classifying the withholding of information as a misrepresentation. However, the text of the provision qualifies the type of misrepresentations captured to those that are material, which also relate to a relevant matter, and which are capable of inducing an error in the administration of the Act.

[35] These qualifying words narrow the scope of misinformation captured by paragraph 40(1)(a). Parliament could have simply referred to "misrepresentations" in the section without adding qualifiers. Instead, Parliament chose language that refers to a subset of misrepresentations, including those capable of inducing an error in the administration of the Act. In my view, this signals a calculation of risk.

[36] The context of paragraph 40(1)(a) includes its contrast with section 16 of the *IRPA*, and the consequences attached to inadmissibility under paragraph 40(1)(a).

[37] Section 16 of the *IRPA* contains a broadly framed requirement of truthfulness for all applicants, and non-compliance with section 16 can result in inadmissibility under the *IRPA*. Subsection 16(1) does not bear paragraph 40(1)(a)'s qualifying language and does not attract the same severe consequences. This suggests that the acts captured by paragraph 40(1)(a) are of a more circumscribed nature than the general untruthfulness captured by section 16.

[38] The purpose of paragraph 40(1)(a) is the prevention of errors in the administration of the Act due to misrepresentation. This purpose is promoted by interpreting the section to encourage the correction of misinformation during the application process prior to the commission or serious risk of the commission of an error. If applicants understand that any error, however caused, will attract the severe consequences of the provision, there will be less incentive to correct inaccurate information and less opportunity to avoid an error in the administration of the Act. Such an interpretation would thwart Parliament's purpose.

[39] Finally, an established principle of statutory interpretation is the assumption that the legislature does not intend absurd consequences (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 27). "Absurd consequences" include those that lead to ridiculous or frivolous consequences, are extremely unreasonable or inequitable, are illogical or incoherent, or are incompatible with other provisions or a legislative enactment's object.

[40] An interpretation of paragraph 40(1)(a) that does not allow applicants to correct misinformation in their application before an error is or could be induced produces absurd consequences. It would interfere with the provision's purpose, as noted above. Furthermore, an applicant who submits an application but makes a correction within minutes or hours would be captured by paragraph 40(1)(a), with all of its severe consequences, despite the miniscule prospect of a misapplication of the *IRPA*. This unreasonable, inequitable result cannot be Parliament's intention.

[41] For the reasons above, I respectfully disagree that "[t]here is nothing in the wording of the paragraph indicating that it should not apply to a situation where a misrepresentation is adopted,

but clarified prior to a decision being rendered" (*Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at para 25).

[42] I also disagree that the timing of assessment of risk that the Act will be misapplied is at the time of the misrepresentation, as found in *Inocentes v Canada (Citizenship and Immigration)*, 2015 FC 1187 at paragraph 16. Such an interpretation forces an officer to ignore the factual constraint posed by the correction of incorrect information. It also strips the words "could induce an error in the administration of the Act" of their temporal significance and applies them solely in relation to a misrepresentation's materiality and relevance.

[43] However, the words "could induce an error in the administration of the Act" cannot be intended only as qualifiers to materiality and relevance. This interpretation would render the words redundant because once materiality and relevance is established, a risk of misadministration of the Act would necessarily follow (see *Oloumi* at para 24). Surely, Parliament did not speak in vain in passing this provision. The words "could induce" must have meaning (*Ebadi v Canada*, 2024 FCA 39 at para 35).

[44] The logical timing of the risk assessment must be the time that a determination of paragraph 40(1)(a) inadmissibility is made. At that time, officers are required to assess all the information before them in deciding whether the misrepresentation could induce a misadministration of the *IRPA*, including the timing of an applicant's disclosure of correct information, the stage of processing of the application, the degree of candidness of the applicant's disclosure, and the stage of investigations in the application process.

[45] Thus, I find that the clear language chosen by Parliament narrows misrepresentations under paragraph 40(1)(a) to those capable of inducing an error in the application of the *IRPA*. As such, a

calculation of the risk of error is required in circumstances involving a voluntary correction to misinformation.

[46] To interpret the section otherwise, in my view, is to collapse separate components of paragraph 40(1)(a) of the *IRPA* in a manner that conflicts this provision's text, context, and purpose. It also risks an interpretation of paragraph 40(1)(a) that replicates the breadth of subsection 16(1), despite the differences in language and consequences between the two provisions, and raises a risk of absurd consequences.

[47] To interpret the section otherwise is also to amplify the impact and severe consequences of paragraph 40(1)(a). This approach is inappropriate in light of the culture of justification and principles of accountability described in *Vavilov* and affirmed in *Mason*. Those principles require justification in the face of severe consequences that is commensurate with the stakes involved, not the amplification of severe consequences.

C. *Misapplication of paragraph 67(1)(c)*

[48] The IAD further misapplied the threshold for relief under paragraph 67(1)(c) of the *IRPA* and misapprehended the consequences of its decision for the Applicants.

(1) Misapplied threshold

[49] The IAD found that there was nothing "exceptional or unusual" about the Applicants' circumstances, as they faced separation that any couple would experience due to an inadmissibility finding. This finding is unreasonable due to the application of an improperly elevated test.

[50] Under the scheme that preceded paragraph 67(1)(c), the Supreme Court of Canada appeared to approve of a test for H&C relief which required "exceptional reasons" (*Chieu v*

Canada (Minister of Citizenship and Immigration), 2002 SCC 3 at para 90). However, the Supreme Court subsequently reframed this approach by noting that paragraph 67(1)(c) is a form of "exceptional relief" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at paras 57, 62, affirmed in *Canada (Citizenship and Immigration) v Solmaz*, 2020 FCA 126 at para 112).

[51] Madam Justice Susan Elliott found that in the context of paragraph 67(1)(c), the precepts of H&C relief apply (*Canada (Public Safety and Emergency Preparedness) v Wu*, 2019 FC 1491 at para 13, citing *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 19). The text of paragraph 67(1)(c) of the *IRPA* requires the consideration of "humanitarian and compassionate considerations," which is the same text as found in subsection 25(1).

[52] The principle of consistent expression supports interpreting the relief in paragraph 67(1)(c) consistently with the interpretation of the relief in subsection 25(1), as the context does not clearly indicate the contrary (*Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 at 400). While the two schemes are different, this principle strengthens the understanding provided by the jurisprudence.

[53] Mister Justice Shirzad Ahmed recently explained that requiring an applicant to prove that their circumstances are "exceptional" for H&C claims is unreasonable. His conclusion was based on the nature of H&C relief described in *Kanthasamy* as well as the contradiction between applying "humanitarian and compassionate" relief, while at the same time requiring that an applicant prove their circumstances to be "exceptional" (*Henry-Okoisama v Canada (Citizenship and Immigration)*, 2024 FC 1160 [*Henry-Okoisama*] at paras 29–47; see para 43 in particular).

[54] Aside from its disconnection from section 25's H&C criteria, the threshold of "exceptional or unusual" is highly vague and subjective to the point of unintelligibility (see *e.g.*, *Henry-Okoisama* at para 45).

(2) Misapprehension of consequences

[55] The IAD's finding is also unreasonable based on the gross miscalculation of the consequences of the IAD's decision for the Applicants.

[56] The IAD found that while the Applicants are in a genuine relationship, and that the purpose of the *IRPA* is to reunite families in Canada, the Principal Applicant would "only" be inadmissible for five years, after which he could file another sponsorship application.

[57] The IAD clearly miscalculated the period of separation faced by the Applicants. The evidence before the IAD was that the Applicants had already experienced a delay of over three years while their application was in process, and that the processing time of a new sponsorship application after the period of inadmissibility could take several more years. Therefore, the total period of separation faced by the Applicants after the paragraph 40(1)(a) inadmissibility finding would be over ten years, not "only" five years.

[58] In both *Vavilov* and *Mason*, the Supreme Court of Canada emphasized an appreciation of the impact of a decision on an affected individual as an independent aspect of reasonableness review. It stated at paragraphs 133–134 of *Vavilov* that:

> … Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected

> individual, the decision maker must explain why its decision best reflects the legislature's intention… [a] failure to grapple with such consequences may well be unreasonable.

[59] The IAD's miscalculation of the period of separation faced by the Applicants is independently fatal to its decision. The Principal Applicant corrected misinformation that may never have come to the attention of the visa officer prior to his immigration interview and prior to background checks. The consequence of this action was the potential separation from his spouse for more than a decade. Responsive justification required a detailed explanation of how these consequences best reflected the legislature's intention. No such explanation was provided. The decision is therefore unreasonable.

V. Conclusion

[60] The IAD's decision is unintelligible and unreasonable in its approach to the application of paragraphs 40(1)(a) and 67(1)(c) of the *IRPA*. The IAD failed to assess the risk of misadministration of the Act as required by the words of paragraph 40(1)(a), applied an improper threshold for relief under paragraph 67(1)(c), and grossly underappreciated the consequences of its decision for the Applicants. The application for judicial review is granted.

JUDGMENT in IMM-9501-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter will be sent back for redetermination by a differently constituted panel of the Immigration Appeal Division.

3. There is no question for certification.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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