Federal Court  Cour fédérale

Date: 20240926

Docket: IMM-7007-23

Citation: 2024 FC 1521

Ottawa, Ontario, September 26, 2024

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

YANBIN WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Yanbin Wang, a resident and citizen of the People's Republic of China, seeks judicial review of a March 7, 2023 decision [Decision] of a Senior Immigration Officer [Officer] refusing her application for a temporary resident visa [TRV]. The Decision rendered the Applicant inadmissible to Canada for five years pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for misrepresenting information in her application.

[2] The Applicant previously applied for and was refused visitor visas to Canada and the United States [US] but did not disclose these prior refusals in her application, nor respond to a procedural fairness letter [PFL] that had been sent by the Officer.

[3] The Applicant asserts that she was unaware of the omission and was not advised of the PFL by her representative. She asserts that the Officer failed to consider whether the omission was material and if it should be exempted as an innocent mistake. While it is my view that the Applicant has not properly advanced a procedural fairness argument, as set out further below, I find the Decision lacks justification as the Officer failed to conduct an assessment of the materiality of the omission to the application and as such the application should be allowed as the Decision is unreasonable.

I. Background

[4] The Applicant applied for and received a TRV for Canada in 2016. She travelled to Canada on August 8, 2016 and exited on August 23, 2016.

[5] In May 2019, the Applicant submitted a second application for a TRV with the help of a paid individual. The Applicant asserts that she was called by the Canada Visa Application Centre to pick up a package, where she was provided with an envelope with her passport inside. She asserts that she did not receive a refusal letter or notice indicating that her TRV application had been refused.

[6] Near the end of 2019, the Applicant submitted a separate application to the United States Citizenship and Immigration Services for a Non-Immigrant B1/B2 visa. The Applicant alleges that she was unaware if her application had been refused when her passport was returned as there was no refusal stamp on the passport.

[7] In June 2022, the Applicant paid an individual to submit a third TRV application on her behalf. The Applicant alleges that she did not find out the application was refused until May 6, 2023 when her representative sent her the Decision and that she was not aware that a PFL had been issued in February 2023 until she received the Global Case Management System [GCMS] notes on May 16, 2023.

II. Issues and Standard of Review

[8] The Applicant raises the following issues in this application:

A. Did the Officer err by failing to meaningfully address whether the omission was material to the application?

B. Did the Officer err by failing to consider whether the innocent mistake exception applied?

C. Was there a breach of procedural fairness that resulted in a miscarriage of justice?

[9] The parties assert and I agree that the standard of review of the merits of the Decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17 and 25. A reasonable decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision will be reasonable if when read as a whole and

taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[10] For issues of procedural fairness, there is no strict standard of review analysis. The ultimate question is whether the applicant knew the case they had to meet and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56.

III. Analysis

A. *Did the Officer err by failing to meaningfully address whether the omission was material to the application?*

[11] Paragraph 40(1)(a) of the IRPA provides that a foreign national is inadmissible to Canada for misrepresentation where they directly or indirectly withhold material facts that could induce an error in the administration of the IRPA. The facts must be material for there to be a misrepresentation and there must be clear and convincing evidence that an applicant, on a balance of probabilities, has withheld material facts for a finding of misrepresentation to be made.

[12] In this case, there is no dispute that the Applicant omitted relevant information from her TRV application. The Applicant argues that the Officer erred by failing to assess the materiality of the omission. She claims that the Officer's GCMS notes do not provide an intelligible analysis as to how the denial of her earlier Canadian and US visas could cause an error in the administration of IRPA.

[13] The Respondent's processing guidelines for evaluating inadmissibility (Chapter ENF 2 – Evaluating Inadmissibility of the Enforcement Manual (ENF), published by Citizenship and Immigration Canada, paras 9.3 & 9.4) recognizes that not all information that is relevant will be material. Only when relevant information affects the process undertaken or the final decision does it become material: *Koo v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 931 [*Koo*] at para 19. An assessment of materiality is necessary in order to properly evaluate whether paragraph 40(1)(a) of the IRPA is satisfied: *Koo* at paras 29-30.

[14] In the GCMS notes, the Officer states that they have "reviewed all relevant information including but not limited to the procedural fairness (PF) letter sent to the applicant and all of the verification notes outlining document verification efforts and the conclusion that Applicant withheld information in support of this application (undeclared previous US and CAD applications)". The Officer notes that the Applicant answered "No" to the question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" which is not true. The Officer highlights that the Applicant did not respond to the PFL and did not bring any new material facts forward and therefore "failed to allay or address the concerns outlined." They conclude by stating that they are "satisfied based on all information" that the Applicant "did in fact withheld information as part of [the] application thereby misrepresenting a material fact" and that "the act of misrepresentation could have induced an error in the administration of the Act had it gone undetected".

[15] The Respondent argues that it is a "no-brainer" that failing to disclose the past refusals was material to the application and that a substantive materiality analysis was not required in this

instance. The omitted refusals were inherently related to the Applicant not being able to satisfy an officer that they would leave Canada at the end of their stay and were particularly misleading in view of the select disclosure of the positive past visa approval in 2016.

[16] The Respondent asserts that on its face, it would be apparent that the omitted refusals could have affected whether a future TRV might issue, and as concluded by the Officer, could have induced an error in the administration of the IRPA.

[17] However as noted in *Gallardo v Canada (Citizenship and Immigration)*, 2022 FC 1304 at paragraph 34, materiality cannot be presumed. The stakes involved in an inadmissibility finding require a visa officer to conduct an assessment of the false or omitted information and provide some basis for the conclusion that the omitted information is material to the matter actively being considered and that it could affect the outcome of the officer's review.

[18] In this case, the Respondent's logic is found nowhere in the Officer's reasons. The Officer does not conduct any analysis of the omitted information and why it is considered to be material to the pending application. Nor does the Officer offer any significance to the positive visa information that was noted in the application. The reasons of the Officer substantially focus on the fact that there was no response to the PFL. However, the Respondent provides no authority for the proposition that this relieves an officer from considering the issue of materiality.

[19] In the absence of any analysis on the issue of materiality, it is my view that the Decision lacks sufficient justification and cannot be reasonable. As such, I shall remit the application back for redetermination on this basis.

[20] While I need not go on to consider the remaining issues, I will nonetheless provide the following additional comments regarding the Applicant's procedural fairness argument in the event that this may be of assistance should there be a judicial review of the redetermination decision.

B. *Is there a breach of procedural fairness that has resulted in a miscarriage of justice?*

[21] The Applicant argues that the Decision is procedurally unfair as she was unaware of the omission in her TRV application and had no knowledge of the PFL to be able to respond. She asserts that her paid representative did not report the PFL and was negligent in their representation, and that these acts and omissions amount to a miscarriage of justice.

[22] However, the problem with this argument is that the notice provisions for asserting incompetence by a third party have not been followed. As set out at paragraph 11 of *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 [*Guadron*], in order to succeed with an allegation of breach of procedural fairness resulting from incompetent representation, the Applicant must establish that all parts of the following tripartite test are met: (1) the representative's alleged acts or omissions constituted incompetence; (2) there was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and (3) the representative must have been given notice and a reasonable opportunity to respond.

[23] The Federal Court has issued practice guidelines governing the procedure for raising allegations against a former counsel or authorized representative (Consolidated Practice Guidelines for Citizenship, Immigration, Refugee Protection Proceedings, dated June 24, 2022, paragraphs 46 to 53). These practice guidelines provide mandatory steps for providing notice of allegations of incompetence to a former representative and an opportunity for written response before the allegations are raised in an application.

[24] While the Applicant refers to the decisions in *Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 [*Satkunanathan*] and *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 1360 [*Xiao*] as purported examples of cases where only a two-part test is cited for determining whether acts of alleged incompetence amount to a miscarriage of justice (only parts (1) and (2) of *Guadron*), in each of *Satkunanathan* and *Xiao* it is clear that while not explicitly cited as part of the analysis for determining incompetence, notice was provided to the former representative before incompetence was alleged (see *Satkunanathan* at paras 27-29, 37 and 40, and *Xiao* at paras 19 and 36).

[25] I agree with the Respondent, unless notice and an opportunity to respond have been given to the former representative, the Court is not in a position to evaluate the veracity of the allegations made. Allegations of incompetence against a former representative must be given with notice and follow the practice guidelines of this Court to be considered on judicial review. As such, on the record before me, an argument of procedural fairness cannot succeed.

IV. Conclusion

[26] While the Applicant has not been successful on this latter issue, on the basis of my earlier finding on the issue of materiality, the application will be allowed and the matter shall be remitted back for redetermination.

[27] There was no question for certification proposed by the parties and I agree none arises in this case.

JUDGMENT IN IMM-7007-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the March 7, 2023 decision is set aside and the matter is remitted for redetermination by a different officer.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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