Federal Court Cour fédérale

Date: 20200122

Docket: IMM-1992-19

Citation: 2020 FC 107

Ottawa, Ontario, January 22, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

TAHIR AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of a Visa Officer [Officer], dated March 1, 2019 [Decision], denying the Applicant a temporary resident visa [TRV].

II. BACKGROUND

[2] The Applicant is a citizen of Pakistan. He says that he resides in Pakistan along with his wife and three children and has been a permanent employee of Sui Northern Gas Pipelines Limited for nearly 25 years.

[3] On January 8, 2019, the Applicant applied for a TRV in order to visit his cousin in Canada and to attend a wedding. The Applicant noted that he had been denied a Canadian visitor’s visa in May 2017 based on his travel history, family ties to Canada, and the purpose of his visit, and that he had been subsequently denied a Canadian visa in February 2018 based on his assets, finances, and the purpose of his visit. However, the Applicant omitted to include on his 2019 application form the fact that he was refused a United States of America [USA] visa in October 2018. He also omitted this information on a past Canadian application form.

[4] On February 14, 2019, the Officer sent the Applicant a procedural fairness letter concerning this omission and warned the Applicant that he could be found inadmissible to Canada for misrepresentation pursuant to s 40(1) of the *IRPA*. The letter invited the Applicant to submit a response within ten days.

[5] On February 23, 2019, the Applicant’s immigration consultant replied to the Officer’s letter stating that the omission was the result of an honest mistake by her colleague who simply copied the information from a past application without including the latest information. The letter states that the Applicant never intended to mislead the Officer as demonstrated by the fact

that he explicitly mentioned his other previous visa rejections. A statutory declaration from the immigration consultant's colleague, which attested to the error, was included with the letter.

III. DECISION UNDER REVIEW

[6] On March 1, 2019, the Officer denied the Applicant's TRV application. The refusal states that the Officer was not satisfied that the Applicant "truthfully answered all questions asked to [him]." Consequently, the Officer also found him to be inadmissible to Canada in accordance with s 40(1)(a) of the *IRPA* for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induced, or could have induced, an error in the administration of the *IRPA*.

[7] The Officer's notes state that he was of the belief that the Applicant's previous refusal of a USA visa was a material fact that was not withheld by mistake as the question was posed to the Applicant in a clear manner. Given the materiality of his previous immigration history, the Officer noted that this could have induced an error in the administration of the *IRPA* had the misrepresentation not been discovered. The Officer also noted that the letter from the Applicant's consultant did not disabuse him of this concern.

[8] The Officer also indicated that he was not satisfied that the Applicant would be a genuine visitor to Canada and leave at the end of the authorized stay. The Officer based this finding on the information submitted by the Applicant as well as the current political, economic, and security situation in Pakistan. The Officer noted that this finding was also supported by the credibility concerns regarding the Applicant's misrepresentation.

IV. ISSUES

[9] The issue to be determined in the present application is whether the Officer erred in concluding that the Applicant directly or indirectly misrepresented or withheld material facts in this case.

V. STANDARD OF REVIEW

[10] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standard of review in this case nor my conclusions.

[11] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review

(*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[12] Both the Applicant and the Respondent submitted that the standard of review applicable in this case was that of reasonableness. I agree.

[13] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to this issue is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Sbayti v Canada (Citizenship and Immigration)*, 2019 FC 1296 at para 21 and *Patel v Canada (Citizenship and Immigration)*, 2017 FC 401 at para 14.

[14] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov,* at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it

cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[15] The following provisions of the *IRPA* are relevant to this application for judicial review:

Misrepresentation	**Fausses déclarations**
40(1) A permanent resident or a foreign national is inadmissible for misrepresentation	40(1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) 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;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
Application	**Application**
40(2) The following provisions govern subsection (1):	40(2) Les dispositions suivantes s'appliquent au paragraphe (1) :
(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination	a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de

of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and	renvoi;
(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.	b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.
Inadmissible	**Interdiction de territoire**
40(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).	40(3) L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.

VII. ARGUMENTS

A. *Applicant*

[16] The Applicant argues that the Decision was unreasonable as a holistic analysis of the evidence at hand demonstrates that the Applicant did not deliberately omit the fact that he was refused a USA visa in 2018. Instead, the Applicant argues that this omission falls into the recognized exception for innocent mistakes.

[17] The Applicant submits that this Court has recognized on numerous occasions a distinction between those who seek to deliberately misrepresent and those who make an innocent mistake on their application forms. The Applicant cites this Court's decision in *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126 at paras 9-10:

> [9] A review of some of the earlier case law is helpful. In *Hilario v Canada (Minister of Manpower and Immigration)* (1977), 18 NR 529 (FCA), the Federal Court of Appeal considered a situation where information had been withheld. Justice Heald for the Court said at the end of the first paragraph at page 530:
>
> > *To withhold truthful, relevant and pertinent information may very well have the effect of "misleading" just as much as to provide, positively, incorrect information.*
>
> [10] This statement carries with it the implication of "withholding" and "providing," which is to say, *mens rea* is involved.

[18] The Applicant argues that the Decision is unreasonable as the innocent mistake exception is clearly applicable in this case. Had the Officer assessed the potential misrepresentation in light of the totality of the evidence at hand, he would have come to the only reasonable conclusion possible: that the failure to include the 2018 USA visa refusal was an innocent mistake resulting from a clerical error made by his immigration consultants. The Applicant argues that this is evident when one considers the fact that the Applicant included his other previous visa rejections in his application, thus signalling that he had no intention to deliberately deceive the Officer.

[19] The Officer erred by narrowly assessing whether there was a deliberate misrepresentation in this case. In fact, the Applicant notes that the Officer must assess, on the balance of probabilities, whether the Applicant deliberately sought to mislead. There are no reasons in the Decision as to how or why the Officer came to the conclusion that the Applicant deliberately misrepresented a material fact. In other words, there was no regard for *mens rea* in the Decision. Instead, the Officer came to his conclusion based on a mere appearance of misrepresentation as opposed to a careful consideration of all the evidence at hand.

[20] The Officer's assessment is inconsistent with this Court's decisions in *Lamsen v Canada (Citizenship and Immigration)*, 2016 FC 815 at para 24 and notably *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at paras 20-21, where this Court notes:

> [20] The decision under review in this case mentions but does not in any way assess the potential significance of the fact that the information Mr. Berlin omitted from his formal application document was available to the Respondent in its files and included in some of the material Mr. Berlin had submitted with the application then under consideration. Indeed, it may well have been the existence of this other information in the Respondent's possession that led to the discovery of the omission. The Officer's negative view is based solely on the observation that it was "reasonable to expect" that Mr. Berlin ought to have known better and that he "must bear responsibility," that the information provided, "be accurate and up to date." Furthermore the Officer merely concluded that "it appears that he was not forthright."
>
> [21] The importance of the decision under review to this family demanded that careful consideration be paid to all of the evidence and that the application not be denied on the basis of catch phrases about personal responsibilities and inconclusive observations about an apparent lack of forthrightness. A misrepresentation is not established by mere appearances. As the Respondent's Operational Manual on Enforcement acknowledges, a misrepresentation must be established on a balance of probabilities: see Citizenship and Immigration Canada, Operational Manual: Enforcement, ENF 2, para 9.3.

[21] The Applicant concludes that this application for judicial review should be allowed, that the Decision be set aside, and that the matter be remitted back for redetermination by a different decision-maker.

B. *Respondent*

[22] The Respondent submits that the Decision was reasonable as the Applicant failed to sufficiently demonstrate to the Officer that the innocent error exception applied in this case. Consequently, this judicial review should be dismissed.

[23] The Respondent notes that the Applicant had a duty of candour to disclose all material facts during the application process (*Alkhaldi v Canada (Citizenship and Immigration)*, 2019 FC 584 at para 18 [*Alkhaldi*]). This duty even applies with regard to submissions by third parties on his behalf (*Khedri v Canada (Citizenship and Immigration)*, 2012 FC 1397 at para 24). The Applicant failed to meet this duty.

[24] The Respondent acknowledges that there is an exception to the duty of candour in cases where an applicant can show that they honestly and reasonably believed they were not withholding any material information. The Respondent highlights, however, that the onus is on the Applicant to demonstrate that the exception applies rather than on the Officer to demonstrate that the Applicant had intent to misrepresent.

[25] The Respondent further notes that this Court has held that only where an error has been deemed unintentional must the decision-maker consider whether or not the error was not only honest but reasonable in order to determine if the innocent error exception applies (*Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 at para 16).

[26] In this case, the Officer found that, after considering the Applicant's explanation for the omission, it was not reasonable on the facts that the Applicant's error was unintentional. As such, the Officer did not need to consider whether the error was both honest and reasonable in order to determine if the innocent error exception applied. This finding was within the Officer's discretion.

[27] In fact, the Respondent argues that this case is analogous to this Court's decision in *Alkhaldi*, where the Court found that the visa officer's conclusion that the applicant committed a misrepresentation by failing to include a USA visa refusal was reasonable, despite the applicant's argument that the innocent error exception applied. This is because the applicant was a sophisticated businessperson with experience in immigration procedures. Similarly, the Respondent submits that the Applicant in the case at bar is a businessperson with notable experience in immigration procedures and applications in Canada as well as abroad.

VIII. ANALYSIS

[28] The Applicant's case is a simple one. He concedes that a misrepresentation did occur in this case, but argues that he falls within the innocent misrepresentation exception.

[29] The Applicant says that:

> 20. At the case at bar, the Applicant had explained through his legal representatives that as his TRV applications were made in quick succession, his TRV form was copied and pasted and due to his legal representative's oversight, the latest rejections were not mentioned.

[30] As the jurisprudence of the Court makes clear, the innocent misrepresentation exception is not established through mere inadvertence, or because the mistake was made by a third-party representative: see *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at para 40 [*Goudarzi*] and *Sayedi v Canada (Citizenship and Immigration)*, 2012 FC 420 at para 43 [*Sayedi*].

[31] The general principles applicable to misrepresentation have been reiterated and summarized by the Court on many occasions. In *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 38 [*Kazzi*], Justice Gascon provided the following general guidance:

> [38] Turning now to the case law, the general principles arising out of this Court's jurisprudence on paragraph 40(1)(a) of the IRPA have been well summarized by Madame Justice Tremblay-Lamer in *Sayedi* at paras 23-27, by Madame Justice Strickland in *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhun*] at para 28 and by Mr. Justice Gleeson in *Brar* at paras 11-12. The key elements flowing from those decisions and that are of particular relevance in the context of this application can be synthetized as follows: (1) the provision should receive a broad interpretation in order to promote its underlying purpose; (2) its objective is to deter misrepresentation and maintain the integrity of the Canadian immigration process; (3) any exception to this general rule is narrow and applies only to truly extraordinary circumstances; (4) an applicant has the onus and a continuing duty of candour to provide complete, accurate, honest and truthful information when applying for entry into Canada; (5) regard must be had for the wording of the provision and its underlying purpose in determining whether a misrepresentation is material; (6) a misrepresentation is material if it is important enough to affect the immigration process; (7) a misrepresentation need not be decisive or determinative to be material; (8) an applicant may not take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application; (9) the materiality analysis is not limited to a particular point in time in the processing of the application; and (10) the assessment of whether a misrepresentation could induce an error in the administration of the IRPA is to be made at the time the false statement was made.

[32] The Applicant characterizes the misrepresentation as an honest mistake made by a third-party (in this case, the Applicant's immigration consultant). The Court in *Goudarzi*, at para 40, advised as follows:

> [40] In keeping with this duty of candour, there is, in my opinion, a duty for an applicant to make sure that when making an application, the documents are complete and accurate. It is too easy to later claim innocence and blame a third party when, as in the present case, the application form clearly stated that language results were to be attached, and the form was signed by the applicants. It is only in exceptional cases where an applicant can demonstrate that they honestly and *reasonably* believed that they were not withholding material information, where "the knowledge of which was beyond their control", that an applicant may be able to take advantage of an exception to the application of section 40(1)(a). This is not such a case.
>
> [Emphasis in original.]

[33] This guidance has been followed and endorsed in other cases. For example, in *Sayedi*, at paras 43-44, the Court held as follows:

> [43] Justice Mosley's comments at paragraph 16 of *Haque*, above, are instructive:
>
>> [16] The applicant was in Bangladesh at the time the updated application was submitted. He admitted during the phone conversation on May 26th that he "could have signed the blank form for the consultant". The new form had further discrepancies. The applicant apparently chose to rely on the consultant to submit the required information without personally verifying that it was accurate.
>
> The applicants in this case chose to rely on their consultant. The principal applicant acknowledges having signed his application. It would be contrary to the applicant's duty of candour to permit the applicant to rely now on his failure to review his own application. It was his responsibility to ensure his application was truthful and complete—he was negligent in performing this duty.

> [44] Furthermore, in order for the applicants to rely on a 'defence' to the finding of misrepresentation, that defence must be grounded either in statute or common law. In my view, there is no such defence under the Act: the wording of section 40(1)(a) is broad enough to encompass misrepresentations made by another party, of which the applicant was unaware: *Wang*, above at paragraphs 55-56. Furthermore, in *Haque v Canada (Minister of Citizenship and Immigration)*, 2011 FC 315, the Court held that the fact that an immigration consultant was to blame for the misrepresentation was no defence. As already discussed, the applicants cannot avail themselves of the exception for an innocent mistake.

[34] The jurisprudence is clear that applicants have to provide complete and accurate information and are bound by the submissions made by those who represent them in the process. There is a duty on an applicant to ensure that their submissions are complete and correct.

[35] The Applicant does not argue that all of his previous refusals were immaterial or were irrelevant. He simply says that he was innocent in this instance and it was his immigration consultant's fault. However, this argument overlooks the real rationale for the Decision as found in the letter of refusal and Officer's Global Case Management System [GCMS] notes.

[36] As the Decision makes clear, the Applicant's January 8, 2019, TRV application was refused because the Officer was not satisfied that the Applicant had truthfully answered all questions asked.

[37] The GCMS notes explain that the Applicant was refused a USA visa on October 18, 2018, and "failed to disclose this on the application form <u>at the time of current and previous application</u>" (emphasis added).

[38] In the procedural fairness letter to the Applicant, the Officer made it clear that "[i]n [the Applicant's] application for a temporary resident visa [he] failed to mention all the occasions during which [he was] refused a visa or permit to any country."

[39] The Applicant did not respond personally to the procedural fairness letter. His agents in Canada provided an explanation on February 23, 2019. That response included the statutory declaration of Mr. Zaki Ahmad that read as follows:

> I, Zaki Ahmad, of Calgary, in the Province of Alberta, on February 23, 2019, do declare that:
>
> 1. I volunteered to work on a Temporary Resident Visa application for Mr. Tahir Ahmed.
>
> 2. While copying over preview forms, I failed to mention his previous rejections and failed to communicate with Mr. Tahir Ahmed if he had any further rejections on any Temporary Resident Visas he may have .applied in his own accord.
>
> 3. I contacted him through WhatsApp on February 14, 2019, asking him to provide a list of all rejections he has had. He explained that he had been refused a USA visa in October 2018.
>
> 4. It was an innocent mistake on my part in ensuring accurate details were on the form and I did not communicate with Mr. Ahmed to ensure we had all accurate details on Question 2c of the form.
>
> AND I MAKE this declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

[40] No information was provided by the Applicant personally to the Officer (either by affidavit or otherwise) to explain (1) why he had not alerted his agents to the October 18, 2018 USA refusal, and (2) whether he provided the agents with the relevant information regarding his

2018 USA visa refusal. In fact, no copy of the WhatsApp exchange was provided so that the Officer could understand the Applicant's personal position on this and/or why he had failed to alert his agents to the prior USA refusal. The Applicant is a sophisticated businessman who has made at least four TRV applications in recent years and there is nothing to suggest that he did not understand that it was important that he disclose all prior refusals. He may have explained to Mr. Ahmad that he had been refused a USA visa when Mr. Ahmad contacted him on February 14, 2019, but he provided no information to the Officer as to why he had not disclosed this fact before the TRV was submitted and/or before the deficiency was noted in the February 14, 2019 procedural fairness letter.

[41] Mr. Ahmad said it was all an "innocent mistake" on his part, but the Officer is entitled to assess that for himself after reviewing all of the evidence available. Indeed, Mr. Ahmad does not explain why the Applicant withheld this information from him until the arrival of the procedural fairness letter. As such, the Officer would have no way of knowing this material fact and whether the Applicant was himself innocent, or indeed whether Mr. Ahmad was simply taking the fall for his client, knowing that he would face no repercussions himself for doing so.

[42] The Officer was entitled to the full picture and sufficient reliable evidence on all points of concern so that he could assess the issue of misrepresentation for himself. What Mr. Ahmad tells him is only a part of the picture. Mr. Ahmad does not explain why the Applicant had not informed him of the USA refusal before the Applicant became aware, through the procedural fairness letter, that the Officer had discovered this serious omission, or indeed why this was the

second time he had failed to disclose that information in a TRV application in Canada, which is what his duty of candour required him to do.

[43] Mr. Ahmad's statutory declaration was clearly intended to place the full blame on himself, but without further evidence from the Applicant or the WhatsApp exchange, the Officer could not complete his due diligence on this matter.

[44] This is why, after reviewing the response from the Applicant's immigration consultant, the Officer could still not be satisfied that the Applicant had made an innocent mistake:

> Submissions from rep reviewed; rep stated that [the Applicant] did not mention his US immigration history by mistake. [Applicant]'s explanation did not disabuse me of my concerns regarding his application. The question was posed in a clear manner and I am not satisfied that [the Applicant] indeed made an error.

[45] The onus was on the Applicant to satisfy the Officer that the mistake was innocent. See *Kazzi*, at para 38 and *Alkhaldi*, at para 18. He did not discharge that onus for the reasons I have set out above.

[46] In this application, the Applicant has tried to convince me that he made an innocent mistake. However, that is not what this Court is tasked with deciding. The issue is whether, given the information that the Applicant and his immigration consultant placed before the Officer in response to the procedural fairness letter, were the Officer's conclusions and findings on misrepresentation reasonable? I cannot say they were not. The Officer did not have sufficient evidence to decide the issue in the Applicant's favour and that cannot be remedied by evidence

the Applicant now places before me as to why he failed to disclose the USA refusal to his agents or to the Officer in response to the procedural fairness letter.

[47] The jurisprudence on innocent misrepresentation does not assist the Applicant in this regard because he did not place sufficient evidence before the Officer to establish that fact and to allow the Officer to make a decision on that issue. It is not my role, on the basis of personal evidence from the Applicant, to make that decision now.

[48] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-1992-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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