

Federal Court



Cour fédérale

Date: 20220419

Docket: IMM-2342-20

Citation: 2022 FC 550

Ottawa, Ontario, April 19, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

PUNEET GAUTAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by a visa officer located at the High Commission of Canada in New Delhi, India (the “Officer”), dated April 16, 2020. The Officer refused the Applicant’s application for a work permit under the Temporary Foreign Worker Program and found the Applicant inadmissible in accordance with paragraph 40(1)(a) of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “Act”), (collectively, the “Decision”).

II. Background

[2] The Applicant, Puneet Gautam, is a 27-year-old male citizen of India. On December 5, 2019, he applied for an open work permit based on his wife’s temporary residence in Canada as a foreign student.

[3] On his Application, in response to whether he had previously been refused a visa or permit, denied entry, or ordered to leave Canada or any other country, the Applicant answered in the affirmative. However, he only referenced a previously refused Canadian application and did not disclose that he was refused an entry visa to the United States.

[4] On December 16, 2019, a procedural fairness letter was sent to the Applicant asking him to respond to the specific misrepresentation by omission in his application. The Applicant replied that the omission was done by accident and that he had not intended to mislead Immigration, Refugees, and Citizenship Canada (IRCC). He also indicated that he had previously disclosed the US refusal to the IRCC in an earlier work permit application.

[5] No interview was conducted.

[6] The Officer refused the application by the Decision dated April 16, 2020, on the ground that they were not satisfied that the Applicant had truthfully answered all questions asked of him according to section 40 of the *Act*.

[7] The Applicant is seeking an Order referring the Applicant's application for a work permit to a different officer for re-determination or, alternatively, for an Order referring the matter back to an officer for determination of the Applicant's application in accordance with such directions as this Honourable Court considers appropriate.

III. Decision Under Review

[8] In their Global Case Management System (GCMS) notes, the Officer highlighted several concerns with the Applicant's application:

- i. The Applicant's failure to disclose the previous US visa refusal and his response that it was an accidental mistake, notwithstanding that the Applicant indicated and provided support that he did disclose the US visa refusal on his previous work permit application.

The Officer's GCMS notes state: "Based on all information on file I do not find his response credible."

- ii. Credibility concerns as regards to the Applicant and the genuineness of his marriage.

The Officer noted several errors and omissions in the wife's study permit application, including which college she had attended, her change in relationship status, limited evidence of a traditional wedding, insufficient evidence that the couple cohabited in a conjugal relationship, and insufficient evidence of ongoing visits or communication since the marriage.

The Applicant's application also included the errors regarding which college the wife attended.

- iii. The couple provided bank records, which revealed a bank balance of less than \$100, then multiple deposits over \$2000 from unknown sources.

[9] After reviewing all the evidence, the Officer found, on a balance of probabilities, that the Applicant was not truthful on his application form and failed to disclose derogatory immigration history in the US. The Officer refused the Applicant's application on the ground of section 40 misrepresentation and found the Applicant inadmissible to Canada under paragraph 40(1)(a) of the *Act*.

IV. Issues

[10] The issues to be decided on this judicial review are:

- (1) Was the Decision reasonable?
- (2) Was the Decision procedurally fair?

V. Standard of Review

[11] Where a Court reviews the merits of an administrative decision the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 23).

[12] Issues that relate to a breach of procedural fairness are reviewed on the standard of correctness or a standard with the same import (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paragraphs 34-35 and 54-55, citing *Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79).

VI. Analysis

[13] A foreign national may be issued a visa if, following an examination, the visa officer is satisfied that the foreign national is not inadmissible and meets the requirements of the *Act* (subsection 11(1) of the *Act*).

[14] 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 (subsection 16(1) of the *Act*).

[15] A 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 the *Act* (paragraph 40(1)(a) of the *Act*).

[16] Paragraph 40(1)(a) of the *Act* is to be given a broad interpretation in order to promote its underlying purpose. The objective of this provision is to deter misrepresentation and maintain the integrity of the immigration process. To accomplish this objective, the onus is placed on the applicant to ensure the completeness and accuracy of their application (*Masoud v. Canada (Citizenship and Immigration)*, 2012 FC 422 at paragraph 24).

[17] Nevertheless, findings of misrepresentation should not be taken lightly, as these findings have serious consequences and long-lasting consequences (*Seraj v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 38 at paragraph 1).

[18] A foreign national seeking to enter Canada has a “duty of candour” which requires disclosure of material facts. The Court has recognized the importance of full disclosure by applicants to the proper and fair administration of the immigration scheme (*He v. Canada (Citizenship and Immigration)*, 2012 FC 33 at paragraph 17).

[19] To trigger an inadmissibility under paragraph 40(1)(a), two criteria must be met: (1) there must be a misrepresentation; and (2) the misrepresentation must be material, in that it induces or could induce an error in the administration of the *Act* (*Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 [*Gill*] at paragraph 14).

A. *Was the Decision reasonable?*

[20] The Applicant argues that the Decision is unreasonable because the Applicant made an innocent mistake.

[21] An *innocent mistake* exception to section 40 of the *Act* has jurisprudential support (see for example *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at paragraph 18).

[22] There appear to be two avenues of case law from this Court regarding innocent misrepresentations as an exception to inadmissibility under paragraph 40(1)(a). In one, the Court has concluded there are effectively two requirements for an innocent misrepresentation: (i) that subjectively the person honestly believes they are not making a misrepresentation; and (ii) that objectively it was reasonable on the facts that the person believed they were not making a misrepresentation. In the other, an additional requirement has been adopted which considerably narrows the availability of the exception, namely that “knowledge of the misrepresentation was beyond the applicant’s control” (*Gill* at paragraphs 18 to 19).

[23] I find that the Decision was reasonable. In his response to the procedural fairness letter, the Applicant conceded that he had misrepresented an important fact and that it was a serious error. There is no question of the Applicant’s awareness of his US visa refusal and that he was in control of this information at all times.

[24] The acknowledgement by the Applicant that he answered falsely in his application distinguishes this matter from cases relied upon to support innocent misrepresentation. In addition, the Officer provided more than just his conclusions in the Decision; they also noted that the Applicant had previously disclosed his US visa refusal in a previous application and acknowledges that the Applicant provided evidence in support of his previous application (*Gill* at

paragraph 23, citing *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 32 [*Alalami*] at paragraph 8 and 15 to 16). The Officer did not ignore this evidence.

[25] The Officer did not accept the Applicant's explanation that the omission of the US visa refusal was an unintentional oversight. Therefore, the innocent mistake exception does not apply here (*Alalami* at paragraph 16).

[26] Notwithstanding that the Decision outlines concerns regarding the genuineness of the marriage between the Applicant and his wife, as well as concerns with information provided to support the wife's study permit, it is clear that the Decision was made on the ground that the Applicant is inadmissible for misrepresentation pursuant to section 40 of the *Act*.

B. *Was the Decision procedurally fair?*

[27] Procedural fairness dictates that a visa officer must ensure that an applicant has the opportunity to meaningfully participate in the application process. This includes being informed of and provided an opportunity to respond to perceived material inconsistencies, credibility concerns, accuracy or authenticity concerns, or the reliance of a visa officer on extrinsic evidence (*Bui v. Canada (Minister of Citizenship and Immigration)*, 2019 FC 440 at paragraph 27).

[28] While the decision to issue a temporary visa typically attracts a low or minimal level of procedural fairness, associated findings under paragraph 40(1)(a) of the *Act* attract a higher (*i.e.*, more than the minimum) level or degree of procedural fairness because a finding of misrepresentation precludes an applicant from re-applying for a 5-year period and potentially

reflects the applicant's character (*He v. The Minister of Citizenship and Immigration*), 2022 FC 112 at paragraph 20).

[29] The Applicant argues that the Officer breached the principles of natural justice when they failed to provide the Applicant with a meaningful and fair opportunity to respond to their credibility concerns, including those regarding the genuineness of his marriage.

[30] As stated above, while the Decision was based on the failure of the Applicant to truthfully answer the questions asked of him (specifically regarding his history of visa refusals), the Officer's GCMS notes raise credibility concerns regarding i) the Applicant's response to the procedural fairness letter, and ii) the genuineness of his marriage.

[31] Given the serious and long-lasting consequences of a finding of misrepresentation, the Applicant was owed a more fulsome and fair chance to address the credibility concerns, such as in an interview.

[32] Furthermore, the Applicant was not made aware of the credibility concerns regarding the genuineness of his marriage. While it was not on this basis that the Decision was rendered, it is clear that the genuineness of the marriage did form a foundation for the Officer's credibility concerns and subsequent refusal. The Officer's GCMS notes state:

It is further noted that I reviewed [work permit] application and I have concerns regarding the credibility of the applicant and the bonafides of the marital relationship. It is noted that pervious Officer refused [work permit] application indicating that there were concerns over the genuineness of the relationship; however, refusal letter did not disclose this information, it

was refused for purpose of visit, nor was a [procedural fairness letter] sent in relation to this matter on that application, nor this.

It appears that the Applicant has been refused two work permits (a least partially) based on concerns of the genuineness of his marriage without having ever been made aware of the case to meet or being provided an opportunity to respond. Therefore, I find the Decision is not procedurally fair.

[33] My finding that the Decision is not procedurally fair does not undermine the importance of the purpose of section 40 of the *Act* in deterring misrepresentation and the importance of being truthful as a statutory requirement and a fundamental principle, which has been repeatedly highlighted in the jurisprudence (*Kaur v. The Minister of Citizenship and Immigration*), 2022 FC 270 at paragraph 41).

JUDGMENT in IMM-2342-20

THIS COURT'S JUDGMENT is that

1. The application is allowed and the matter is remitted to a different officer for redetermination.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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