Federal Court  Cour fédérale

Date: 20230404

Docket: IMM-3055-22

Citation: 2023 FC 476

Toronto, Ontario, April 4, 2023

PRESENT: Madam Justice Go

BETWEEN:

SURYA VIKRAM SINGH RAWAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Surya Vikram Singh Rawat, is a citizen of India.

[2] The Applicant first applied for an open work permit as a dependant spouse in January 2020. On the application form, the Applicant responded "yes" 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?" In response to the prompt asking for more details, the Applicant explained that he was previously refused a visitor visa to Canada in 2018.

[3] In March 2020, the Applicant was sent a procedural fairness letter [First PFL] requesting an explanation for his failure to disclose his previous United States [US] visa refusals. His application was rejected in May 2020 and he was found inadmissible for misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [2020 Decision]. The Applicant sought to judicially review the 2020 Decision. The parties settled and agreed to send the matter back for redetermination.

[4] On November 20, 2020, the Applicant received a second procedural fairness letter [Second PFL] when his file was reactivated. The Second PFL raised the same concerns as in the 2020 Decision, and invited the Applicant to make additional submissions. Counsel for the Applicant provided additional documentation and submissions dated December 17, 2020 [December 2020 Submissions]. Among these submissions, counsel argued that the innocent mistake exception to misrepresentation under paragraph 40(1)(a) of *IRPA* should be applied to the Applicant's case.

[5] On February 26, 2022, an immigration officer [Officer] at the High Commission of Canada in New Delhi, India, refused the Applicant's work permit application [Decision]. The Officer determined that the Applicant is inadmissible to Canada for misrepresentation under

paragraph 40(1)(a) of *IRPA*. The period of inadmissibility will remain for five years as per paragraph 40(2)(a) of *IRPA*.

[6] The Applicant applies to judicially review the Decision. I grant the application as I find the Officer's reasons fail to address whether the innocent mistake exception applied to the Applicant's case, rendering the Decision unreasonable.

II. Issues and Standard of Review

[7] The overarching issues raised by the Applicant are whether the Decision is reasonable and whether the Officer breached their duty of procedural fairness.

[8] In my view, this application does not raise questions of procedural fairness and there is no reason to depart from the presumptive standard of review of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17; *He v Canada (Citizenship and Immigration)*, 2022 FC 112 at para 12.

[9] 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 that constrain the decision maker": *Vavilov* at para 85. The onus is on the Applicant to demonstrate that the Decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "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.

III. Analysis

[10] Before the hearing, I invited the parties to provide more fulsome submissions on the innocent mistake exception to paragraph 40(1)(a) misrepresentation, an argument advanced by Applicant's counsel in the December 2020 Submissions.

[11] In the December 2020 Submissions, counsel explained that the Applicant had previously retained an immigration consultant to complete his first work permit application. Counsel stated that the Applicant had disclosed his previous US visa refusals to his consultant and expressly instructed the consultant to disclose the refusals on his application. However, the consultant did not do so and did not provide a copy of the completed application for the Applicant's review prior to submission.

[12] The Applicant's counsel further explained that upon receiving the First PFL, the Applicant promptly made a request under the US *Freedom of Information Act* [FOIA] to obtain the details of his prior visa rejections to provide full disclosure for his work permit application. The Applicant did not receive a response to this request until October 15, 2020, after the 2020 Decision was rendered. The Applicant's counsel attached a copy of the disclosure containing the Applicant's prior US visa history [US disclosure] in their response to the Second PFL. The US disclosure confirms that the Applicant made the FOIA request on March 19, 2020.

[13] Counsel further submitted that the Applicant was not aware of the non-disclosure by the immigration consultant and did not intend to misrepresent, especially as he was not shown a

copy of the application prior to submission. Counsel argued that the Applicant's unique circumstances warrant an assessment under the exception to the strict application of section 40 of the *IRPA* based on innocent misunderstandings or mistakes. Counsel asserted that any failure to make this assessment by the visa officer would be an error.

[14] The Certified Tribunal Record [CTR] contains an affidavit sworn by the Applicant dated March 23, 2020, which the Applicant believed his consultant submitted in response to the First PFL. A second affidavit sworn by the Applicant dated December 17, 2020, is also found in the CTR and was attached to the December 2020 Submissions.

[15] In the March 23, 2020 affidavit, the Applicant states that he unintentionally withheld information about his prior US visa refusals, noting that he did not have any details such as exact dates or reasons. He attests that two days after receiving the First PFL, he made the FOIA request to obtain the details of his refusals, which he broadly describes in the affidavit.

[16] In his December 17, 2020 affidavit, the Applicant explained:

> 11. I confirm that the immigration consultant further advised me to send a response to IRCC in response to the [First PFL] to confirm that the omission was an inadvertent error on my part. I confirm that I am not conversant with the immigration rules of Canada and I trusted the advice of the immigration consultant truly believing that the advice provided was accurate.
>
> 12. I confirm that I am a victim of bad immigration advice of an Immigration Consultant who has deliberately concealed my US visa rejections without my knowledge when I had specifically instructed him to disclose U.S. Visa Rejections.

[17] The Global Case Management Notes [GCMS] notes attached to the Decision provide the Officer's reasons for the Decision. After going over the history of the Applicant's application process, including the content of the Second PFL sent in November 2020, the Officer found:

> […] The applicant responded to the [PFL] but failed to disabuse me of the concerns, as it is the applicant's responsibility to ensure the completeness and accuracy of the information provided. In my opinion, on the balance of probabilities, the applicant was not truthful on his application form and failed to disclose that they had immigration history in the USA. This could have caused an error in the administration of the Act and Regulations as it could have satisfied an officer that this applicant met the requirements of the Act with respect to having a genuine temporary purpose for travel to Canada and that he would abide by the conditions of entry to Canada based on his previous travel to a country with conditions similar to Canada. I am therefore of the opinion that the applicant is inadmissible to Canada under section 40 of the Act. This application is refused on A40 grounds […]

[18] Relying on *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 [*Berlin*], the Applicant submits that honest and innocent mistakes should be considered by officers where it is evident that an applicant was "subjectively unaware that [they were] holding anything back": at para 16.

[19] The Applicant submits that he was subjectively unaware that he did not disclose the past US visa refusals, since he provided the information to the consultant with the expectation that it would be disclosed. Further, in response to the First PFL, the Applicant notes that he actually applied to obtain a copy of his US immigration file, which was disclosed in full in response to the Second PFL. The Applicant argues that he was able to demonstrate by the evidence in his PFL response that he reasonably believed he was not withholding any information. The

Applicant argues that the Officer did not consider the innocent mistake exception, and in light of the evidence before the Officer, committed a reviewable error in doing so.

[20] Further, based on the law that findings of misrepresentation, due to their severe consequences, should only be made on balance of probabilities with "clear and convincing evidence", the Applicant argues that the Officer's silence on the PFL response is a reviewable error: *Borazjani v Canada (Citizenship and Immigration)*, 2013 FC 225 at para 11, citing *Xu v Canada (Citizenship and Immigration)*, 2011 FC 784 at para 16.

[21] The Respondent, on the other hand, relies heavily on *Vahora v Canada (Citizenship and Immigration)*, 2022 FC 778 [*Vahora*], where the Court set out a comprehensive summary of the principles surrounding refusals of temporary resident permits where the failure to disclose previous immigration history has been found: at paras 26-31.

[22] The Court in *Vahora* cites *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 [*Wang*] at para 17:

> [17] The exception to s 40 is narrow and applies only to truly extraordinary circumstances where an applicant honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control (*Masoud v Canada (Citizenship and Immigration)*, 2012 FC 422 at paras 33-37 ("*Masoud*"); *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at para 40 ("*Goudarzi*")). That is, the applicant was subjectively unaware that he or she was withholding information (*Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345 (FCA) ("*Medel*"); *Canada (Citizenship and Immigration) v Singh Sidhu*, 2018 FC 306 at para 55 ("*Singh Sidhu*")).

[23] The Court in *Vahora* also cited *Malik v Canada (Citizenship and Immigration)*, 2021 FC 1004 [*Malik*] at para 11, which confirmed that the two factors required for a finding of misrepresentation are (1) that there be misrepresentation by the applicant, and (2) the misrepresentation must be material in that it could have induced an error in the administration of *IRPA*.

[24] The Respondent asserts that "a finding of misrepresentation does not require that the applicant intended to deceive or that the applicant was aware of the misrepresentation": *Vahora* at para 31, citing *Malik* at para 22. This proposition includes instances even where misrepresentations are "made by another party, including an immigration consultant, without the knowledge of the applicant": *Malik* at para 10, citing *Wang* at para 16; *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 107 [*Ahmed*] at para 30; see also *Vahora* at para 35.

[25] Applying the jurisprudence to the case at bar, the Respondent submits that the Officer's finding of misrepresentation was reasonable. While the Applicant did answer "yes" to the question about previous visa refusals, he failed to provide a complete answer with regard to the US visa refusals.

[26] The parties' position appear to mirror the two strains of case law on paragraph 40(1)(a) misrepresentation as described by Justice McHaffie in *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 [*Gill*]:

> [18] … 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…
>
> [19] 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."

[27] In *Gill*, Justice McHaffie granted the application because regardless of the two strains of case law, the officer "made no findings about whether the omission was out of Mr. Gill's control as a result of his apparent misunderstanding, such that it is unknown whether the officer considered it a necessary part of the misrepresentation assessment or the innocent mistake exception": at para 21.

[28] I came to a similar conclusion in *Markar v Canada (Citizenship and Immigration)*, 2022 FC 684 [*Markar*] where I found that the reasons provided by the officer failed to explain why the innocent mistake exception did or did not apply in that case: at para 6.

[29] Here, as the Applicant points out, the Decision and its reasons make no mention of counsel's specific request asking the Officer to apply the innocent mistake exception, even though the reasons acknowledged counsel's statement that the Applicant disclosed his prior US visa refusal to his previous immigration consultant and instructed the consultant to disclose the refusal on his application.

[30] The Respondent submits that unlike *Markar*, the Officer here was not required to consider the innocent mistake exception, because the Officer found the Applicant not truthful,

citing *Alalami v Canada (Minister of Citizenship and Immigration)*, 2018 FC 328 [*Alalami*] at para 18.

[31] I am not so convinced. While the Officer noted that the Applicant was "not truthful" in his application form, the Officer did not indicate whether or not they believed the Applicant's explanation for not disclosing the US visa refusals. This is unlike the situation in *Alalami*, where the parties agreed that "the Decision should be read as demonstrating that the Officer did not believe Mr. Alalami's explanation that he had misread the question on the application form about visa refusals as only applying to Canada": at para 12.

[32] Here, the Officer did not state either way if they accepted the Applicant's explanation in his PFL response. Rather, the Decision came down to the Officer's reliance on the Applicant's onus to ensure that the information is "complete, correct and accurate", and to review the application prior to submission. If anything, the reasons suggest that the Officer did not question the veracity of the Applicant's explanation, but nevertheless found the Application inadmissible.

[33] The Respondent also seeks to distinguish this case from *Berlin*, as relied on by the Applicant. The Respondent notes that in the Applicant's affidavit sworn in response to the First PFL, the Applicant stated that he knowingly failed to disclose his previous US refusals because he was unaware of details such as relevant dates. In the response to the Second PFL, the Applicant's affidavit revealed that the immigration consultant instructed him to state that the omission was an inadvertent error on the Applicant's part. The Respondent submits that the Applicant cannot abscond himself from these material omissions as he was ultimately

responsible for the representative he hired and has not made allegations of incompetent counsel: *Bhairon v Canada (Citizenship and Immigration)*, 2022 FC 739 at para 31.

[34] I see no reference in the Decision to the Applicant's affidavit in response to the First PFL as the basis for the Officer's finding of misrepresentation. Even if there were such reference, the reasons still do not explain why the Officer did not consider the innocent mistake exception after receiving the Applicant's December 2020 Submissions.

[35] The Respondent likens the case at bar to *Lin v Canada (Citizenship and Immigration)*, 2021 FC 1124 [*Lin*], where the Court upheld an officer's finding of misrepresentation even after the applicant explained that her omission was unintentional as she did not review the application prepared by her representative: at paras 25-26. The Respondent notes that here, the Officer correctly stated in the GCMS notes that "it is the applicant's responsibility to ensure the completeness and accuracy of the information provided." The Respondent points out that the Applicant himself admits that he did not review the application before it was sent for processing.

[36] Further, by attaching his signature to the Use of Representative Form, the Respondent contends that the Applicant has declared that he "fully and truthfully answered all questions on this form and any Attached Application (if applicable)", with the attached application in this case being his work permit application, as was the case in *Lin*: at para 28.

[37] I disagree. In *Lin*, the applicant provided "little explanation as to how the error came about" and the officer did not accept that Ms. Lin "just forgot to disclose her travel history": at

para 15. Here, the Applicant did provide an explanation for the non-disclosure. Whether or not the explanation was sufficient to meet the innocent mistake exception was for the Officer to decide, which the Officer failed to do.

[38] On the whole, I am of the view that this case is closer in facts to *Markar*, than to *Lin* and *Alalami*. Even in *Markar*, the officer at least acknowledged, *albeit* briefly, that the applicant had made an innocent mistake argument: see para 25. In the case at bar, the Officer did not make any such mention, let alone consider whether the exception was applicable to the Applicant's case.

[39] The Applicant submits, and I agree, that the impact of the Decision on the Applicant is severe, in light of the five-year period of inadmissibility to Canada, where his spouse is currently residing. Given the severity of the impact on the Applicant, the reasons provided by the Officer are required to reflect the stakes: *Vavilov* at para 133. The Officer failed to provide reasons that would explain to the Applicant whether or not they considered the innocent mistake exception. As such, the Decision must be set aside.

IV. Conclusion

[40] The application for judicial review is allowed and the matter is returned for redetermination by a different officer.

[41] There is no question to certify.

JUDGMENT in IMM-3055-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different officer.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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