Federal Court  Cour fédérale

Date: 20240903

Docket: IMM-8000-23

Citation: 2024 FC 1369

Toronto, Ontario, September 3, 2024

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

MANINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] An Immigration Officer rejected the Applicant's application for a Temporary Resident Visa [TRV] because the Officer found the Applicant to be inadmissible to Canada for misrepresentation. Beyond the refusal of the TRV, an important consequence of this decision is that the Applicant will remain inadmissible to Canada for a period of five years.

[2] This application for judicial review will be allowed, as I find the underlying decision to be unreasonable. My reasons follow.

II. BACKGROUND

[3] The Applicant, Maninder Singh, is a citizen of India. It appears from the record that he and his spouse were residing in Canada in September 2022 when they sought to extend existing work permits. They each did this by going to a Canada-United States land crossing, exiting Canada, then turning around without being admitted into the United States, and applying for their permits upon re-entry into Canada.

[4] This process, informally referred to as "flagpoling" is not unlawful, and it is a common way to extend one's status in Canada. For further on the process, see *Paranych v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 158 at para 5; *Bisht v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1178 at para 2; *Kumar v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1512 at para 2; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 692 at para 2.

[5] I further understand from the record that the Applicant's spouse was successful in having her post-graduation work permit extended, but that the Applicant was told that his work permit could not be extended through this process.

[6] Some six months later, in March 2023, the Applicant applied for a TRV. In April 2023, an Immigration Officer sent a letter to the Applicant, indicating a concern that he might be

inadmissible to Canada due to misrepresentation, pursuant to s.40 of the *Immigration and Refugee Protection Act* [IRPA]. The letter stated: “In your application, you indicated that you have never been refused a visa or permit, denied entry or ordered to leave Canada or any other country. There is information on file which indicates that you have not answered this question truthfully, namely, that enforcement activities by the United States of America were taken against you on or around 2022/09/30”.

[7] The “enforcement activities” referred to by the Officer related to the flagpoling process, which I understand technically results in an administrative refusal to enter the United States.

[8] In response to the Officer’s letter, the Applicant explained that he had simply approached the U.S. border for the purpose of flagpoling. He stated that he was unaware that flagpoling is considered a denial of entry into a country, and as such, his failure to disclose that he had previously been denied entry into the United States was an inadvertent error.

III. DECISION

[9] Despite the Applicant’s response, the Officer refused the Applicant’s TRV in a letter dated May 11, 2023. The standard form decision letter simply indicated that the Applicant was inadmissible to Canada in accordance with paragraph 40(1)(a) of the IRPA 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 IRPA.

[10] The letter further indicated that, in accordance with paragraph 40(2)(a) of the IRPA, the Applicant will remain inadmissible to Canada for a period of five years.

[11] In notes inputted into the Global Case Management System [GCMS], which form a part of the reasons for decision, a referring Officer further stated that the Applicant's reply to the procedural fairness letter [PFL] had been carefully considered, but that they were not satisfied that their misrepresentation concerns had been sufficiently disabused. The Officer noted that the Applicant did not disclose the flagpoling, and bore the responsibility of ensuring that all information provided on their application was accurate and authentic. The referring Officer therefore forwarded the file to a Delegated Officer who made the inadmissibility finding.

[12] As an aside, I note that the decision letter rejecting the Applicant's application appears to have utilized a study permit template – it references a study permit application – while the Applicant did not apply for a study permit, but rather, a TRV. I assume this was simply an inadvertent error, about which the Officer was unaware, and I do not find that anything turns on it.

IV. ISSUES

[13] The broad issue to be determined on this application is whether the decision under review was reasonable.

V. STANDARD OF REVIEW

[14] The standard of review in this case is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*].

VI. ANALYSIS

A. *Legal Framework*

[15] Our immigration system is predicated on the understanding, indeed the requirement, that applicants for status in Canada complete their applications honestly and accurately.

[16] The centrality of this requirement is reflected in section 40 of the IRPA, paragraph 40(1)(a) of which provides that:

> A permanent resident or a foreign national is inadmissible for misrepresentation
>
> > (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;

[17] Underscoring the importance of full and frank disclosure, subsection 40(2) imposes a five-year period of inadmissibility for those found inadmissible for misrepresentation.

[18] As the Minister points out, a number of principles related to section 40 of the IRPA have also arisen in the jurisprudence, most notably: i) that section 40 of the IRPA should receive a broad interpretation in order to promote its underlying purpose; and ii) applicants have the onus and a continuing duty of candour to provide complete, accurate, honest, and truthful information

when applying for entry into Canada: see *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 paras 38-39 [*Kazzi*].

[19] However, as the Applicant points out, the jurisprudence has also carved out a clear, if narrow, exception to the application of section 40. This exception only applies in "truly exceptional circumstances where the applicant honestly and reasonably believed they were not misrepresenting a material fact": see *Paashazadeh v Canada (Citizenship and Immigration)*, 2015 FC 327 at paras 18-19; *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 32. In *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 18, my colleague Justice Martineau synthesized the jurisprudence on the innocent misrepresentation exception as follows (citations omitted):

> The innocent misrepresentation exception is narrow and shall only excuse withholding material information in extraordinary circumstances in which the Applicant honestly and reasonable believed he was not misrepresenting a material fact, knowledge of the misrepresentation was beyond the Applicant's control, and the Applicant was unaware of the misrepresentation…Courts have not allowed this exception where the Applicant knew about the information, but contended that he honestly and reasonably did not know it was material to the application; such information is within the Applicant's control and it is the Applicant's duty to accurately complete the application.

[20] There remains some ambiguity in the jurisprudence as to whether knowledge of the misrepresentation must have been, as mentioned above, "beyond the Applicant's control": see *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 at paras 18-20 [*Gill*]. In *Gill*, Justice McHaffie acknowledged that this component of the innocent misrepresentation exception has been frequently adopted, but also expressed some misgivings with it (at para 20):

> I also question whether this requirement is consistent with the very purpose behind the exception, namely to recognize that mistakes can happen and "honest errors" can occur.

[21] While I share Justice McHaffie's concerns, I will not seek to resolve the matter here as I have concluded that, on any understanding of the innocent misrepresentation exception, the Officer's decision in this matter was unreasonable.

B. *Adequacy of the Reasons for Decision*

[22] The Officer's reasons in this matter were clear in their conclusion – that the Applicant had engaged in misrepresentation – but were deficient in their explanation and justification for that conclusion. Even when read holistically, I find that the reasons fail to disclose a rational chain of analysis.

[23] In considering the Applicant's response to the PFL, the bulk of the Officer's reasons are as follows:

> The PA's response from their representative states that they made a mistake and were not aware that flagpoling is considered as denied entry. The PA had US enforcement actions taken on or around 2022/09/30. The PA did not disclose this and has the responsibility of ensuring that all information provided on their application is accurate and authentic before final submission.

[24] I take it from the above that the Officer did not doubt that the Applicant was unaware that the flagpoling process involved a notional refusal of entry into the United States. Rather, the Officer found that the Applicant had a responsibility to ensure that the information he provided to IRCC was accurate, and he failed to meet this responsibility.

[25] In arriving at the misrepresentation finding, the Officer did not need to cite Federal Court jurisprudence or any formal test for evaluating the situation, but the Officer was required to demonstrate that they had assessed whether the Applicant had "honestly and reasonably believed they were not misrepresenting a material fact." As noted, the Officer appeared to accept that the Applicant's error was an honest one. The crucial consideration for the Officer, then, was whether it was reasonable in the circumstances for the Applicant to have erred in failing to realize that, technically at least, he had been refused entry into the United States.

[26] As Justice McDonald noted in *Singh v Canada (Citizenship and Immigration)*, 2021 FC 828 at para 16, an individual's explanation for an alleged misrepresentation should be considered in context. Central to the context of this case was that the Applicant did not know he had ever been refused entry into the United States, and that this refusal arose solely from the flagpoling process. Contextually, it was also important to consider that the Applicant did not actually seek entry into the United States, but was simply following a common procedure - one permitted under Canadian immigration law - to extend a visa to remain in Canada.

[27] In other words, it was important in this case for the Officer to consider whether it was reasonable for the Applicant, who does not appear to have been represented by counsel, to have been unaware that a U.S. entry refusal was a by-product of the flagpoling process. In the circumstances, I find that the Officer did not reasonably assess these important considerations. Once again, I find the reasoning of Justice McDonald in *Singh* to be particularly applicable to this case. At paragraph 18 of her reasons, Justice McDonald stated:

> The challenge for this Court on review is the Officer's terse treatment of the Applicant's response. On a reasonableness review,

> it is difficult to assess if or how the Officer considered the Applicant's explanation. While I acknowledge the duty of the Officer to provide reasons is not onerous, an intelligible decision requires the Court to be able to understand why the Officer was not "disabused" of his concerns. Here, however, it is impossible to discern from the Officer's words why the Applicant's response "failed to disclose that he has derogatory immigration history in the USA" when the Applicant provided his explanation of the US Visa application.

[28] The context of the U.S. entry refusal also required a clearer explanation from the Officer as to why the misrepresentation was material to the Applicant's TRV application, which is a requirement under paragraph 40(1)(a) of the IRPA – see: *Kazzi* at para 31. The Officer stated:

> As indicated in the PFL, I am concerned that the PA may be inadmissible for misrepresentation for directly misrepresenting a material fact that could have induced an error in the administration of the Act. Had the applicant's declarations been accepted as genuine, it could have led the officer to be satisfied that the applicant was not inadmissible and met the requirements of the Act with respect to purpose of travel to Canada and the likelihood that they would depart Canada at the end of the period authorized based on previous international travel demonstrating past compliance with foreign immigration laws, in accordance with R179(d). The PA could have been granted a visa without satisfying the requirements of the Act.

[29] While the above passage explains – in standard form language – that the omission of the Applicant's U.S. refusal could have led to the issuance of the Applicant's visa, it does not explain how the Applicant's previous attempt to flagpole at the United States border could have been material to the TRV determination.

[30] As mentioned above, the process of flagpoling seems to result, as a matter of course, in a denial of admission into the U.S. If this is the case, the process itself would not appear to result

in an inadmissibility or a failure to meet the requirements of the *Act*. If it were otherwise, the process would not exist, as everyone who did it would have to be denied re-entry into Canada. As a result, it is difficult to comprehend how a failure to mention a flagpoling attempt in a subsequent visa application is, on its own, particularly material to that application. Perhaps there were other reasons why the Applicant's attempt to flagpole raised material concerns, but those are not apparent from the Officer's reasons and, to this extent, the decision is also unreasonable.

VII. CONCLUSION

[31] As a result of the above, I grant this application for judicial review and remit the matter to a different decision-maker for determination. The parties did not propose a question for certification, and I agree that none arises.

JUDGMENT in IMM-8000-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.

3. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8000-23
STYLE OF CAUSE:	MANINDER SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 22, 2024
JUDGMENT AND REASONS:	GRANT J.
DATED:	SEPTEMBER 3, 2024

APPEARANCES:

Arshdeep Kahlon Gursukhman Singh	FOR THE APPLICANT
Michael Butterfield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kahlon Law Office Barrister and Solicitor Brampton, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT