Federal Court  Cour fédérale

Date: 20241021

Docket: IMM-10573-23

Citation: 2024 FC 1649

Ottawa, Ontario, October 21, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SUKHMANJOT SINGH SAMRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Sukhmanjot Singh Samra [Mr. Samra] seeks judicial review of the July 31, 2023, decision of a Visa Officer [the Officer], who refused Mr. Samra's application for a work permit pursuant to the Temporary Foreign Workers Program. The Officer also found that Mr. Samra was inadmissible to Canada pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] due to his misrepresentation of material facts in

his application for the work permit. The finding of misrepresentation prohibits admissibility to Canada for a five-year period.

[2] In particular, the Officer found that Mr. Samra had failed to disclose that he had previously been refused entry to the United States and ordered to leave and to depart Canada.

[3] Mr. Samra argues that the Officer breached the duty of procedural fairness and that the Officer's decision is not reasonable. Mr. Samra also now argues to this Court that he should not be found inadmissible to Canada because his misrepresentation was innocent due to his honest mistake.

[4] For the reasons that follow, the Application is dismissed.

I. Background

[5] Mr. Samra applied for a "spousal open work permit" in March 2023. He responded "Yes" to the following questions on the application form:

A. Have you ever remained beyond the validity of your status, attended school without authorization or worked without authorization in Canada?

B. Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?

C. Have you previously applied to enter or remain in Canada?

[6] Given his responses, Mr. Samra was required to provide further details. He disclosed that he was out of status from June 6, 2020, to March 14, 2023, was refused the extension of a study

permit in September 2022, and was refused a spousal open work permit in February 2023 and again in March 2023 “at border”. He also disclosed that he was issued a visitor visa in April 2018 and a “[study permit] approved in 2018”. Mr. Samra did not provide details of his March 2023 refusal of entry to the United States.

[7] On June 29, 2023, an officer at the Consulate General of Canada sent a letter to Mr. Samra noting concerns regarding his application (referred to as a procedural fairness letter) and requested a response within 15 days. The officer noted their concern that Mr. Samra did not meet the requirements of subsection 16(1) of the Act, which requires an applicant to answer all questions truthfully and provide all relevant evidence and documents as requested. The officer also noted their concern that Mr. Samra may be inadmissible to Canada, citing subsection 40(1) of the Act, which provides for a finding of inadmissibility for misrepresentation of material facts. The officer stated, “[s]pecifically, I have concerns that upon review of your application, it was determined that you have a derogatory history with the US immigration that you have not declared.”

[8] In his response to the procedural fairness letter, Mr. Samra’s representative disputed the officer’s finding by first arguing that it was a case of mistaken identity and asserting that Mr. Samra had never been to the United States. The representative relayed that Mr. Samra declared that he did not withhold any “substantive information”, “never misrepresented” and that “he has neither made any application to the USA nor ever been to the USA”.

[9] The representative asked the officer to clarify what “derogatory history” was being referred to and disputed that Mr. Samra had any negative history in the US. The representative reiterated the information set out in Mr. Samra’s application, as noted above. The representative asserted that “there seems to be a mix up of identity”.

[10] Mr. Samra’s affidavit sworn on July 7, 2023, which was relied on by his representative, attested that he had not concealed any information, had never “made any application to the USA” and that “there is absolutely no negative history regarding my prior US refusals”. He added, “looks like you have mistakenly identified me as someone else”.

[11] In his affidavit in support of this Application for Judicial Review, Mr. Samra now acknowledges that he did attempt to enter the USA from Canada at a land border in March 2023. He attests that when he applied for his work permit, he did not believe that his denial of entry to the US amounted to a refusal to enter the US or a refusal of a visa application. He notes that he returned to Canada as required and then departed Canada.

[12] Mr. Samra argues that the decision to find him inadmissible is not reasonable as his error not to disclose his US refusal was based on his misunderstanding of the question. He submits to this Court that this was an honest mistake, noting that he revealed the refusals of other study and work permits.

[13] Mr. Samra also argues that the Officer breached procedural fairness by not providing more specific information. Mr. Samra submits that simply being advised that there was

“derogatory information” was not sufficient for him to know the “case he had to meet”. He submits that the Officer ignored his request for more information. He also submits that he did not know the meaning of “derogatory”.

[14] Mr. Samra submits that the Officer withheld the information that his fingerprints and passport number matched those of a person who had sought and been refused entry to the US. He continues to suggest that if this information had been disclosed he could have “explored identity fraud”, even though he now acknowledges that he did attempt to enter the US.

II. Standard of Review

[15] The standard of review of a decision refusing a temporary resident permit, whether for a visitors visa or a work permit, and of a finding of inadmissibility pursuant to paragraph 40(1)(a), which is a factual determination, is reasonableness: *Bains v Canada (Citizenship and Immigration)*, 2020 FC 57 at para 49; *Mehmi v Canada (Citizenship and Immigration)*, 2021 FC 1012 at para 20; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17 [*Vavilov*].

[16] 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 paras 85, 102, 105–07). A decision should not be set aside unless it contains “sufficiently serious shortcomings ... such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100).

[17] Where issues of procedural fairness are raised, the Court must determine whether the procedure followed by the decision-maker is fair having regard to all of the circumstances. The Court must ask "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]). The scope of the duty of procedural fairness is variable and is informed by several factors established in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 21 [*Baker*]. The factors include, where applicable: the nature of the decision, the nature of the statutory scheme, the importance of the decision to the person affected, the legitimate expectations of that person, and the choice of procedure made by the decision-maker.

[18] Based on the application of the *Baker* factors, the jurisprudence has established that the duty of procedural fairness owed to an applicant for a temporary work permit is at the low end of the spectrum (*Kaur v Canada (Citizenship and Immigration)*, 2017 FC 782 at para 19; *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 10). However, where there is a resulting finding of misrepresentation pursuant to section 40 of the Act, the jurisprudence has established that, given the consequences of a such a finding (i.e., a five-year ban on re-applying), the duty owed is somewhat elevated and is more than the minimum duty owed (see for example, *Chahal v Canada (Citizenship and Immigration)*, 2022 FC 725 at paras 21–22).

III. No Breach of Procedural Fairness

[19] Mr. Samra submits that given the consequences of a misrepresentation finding, a higher level of procedural fairness was owed to him (*Likhi v Canada (Citizenship and Immigration)*,

2020 FC 171 at para 27; *Lin v Canada (Citizenship and Immigration)*, 2019 FC 1284 at paras 24–25) and that the Officer breached that duty by not disclosing the source of their concern regarding the derogatory history in the US.

[20] I acknowledge that given the importance of the decision to Mr. Samra, whose spouse is currently in Canada on a study permit, and the consequences of a finding of misrepresentation that would prohibit Mr. Samra from entering Canada for five years, more than the minimum duty was owed (*Baker* at para 25).

[21] In any event, the key issue remains "whether the applicant knew the case to meet and had a full and fair chance to respond" (*CPR* at para 56). In the present case, Mr. Samra did know the case to meet. The onus was on him to provide a complete and truthful application. He was required to respond to the questions in the application form and provide the details of all refusals and other relevant information. He was assisted by a consultant and had made previous applications. The Officer provided Mr. Samra with an opportunity to address the Officer's concern that he had not disclosed his "derogatory history with the US".

[22] The Officer was not required to provide more specific information about the "derogatory information". Given Mr. Samra's recent expulsion at the US border, the term "derogatory" was sufficient to alert Mr. Samra that the Officer was aware of his immigration history in the US that had not been stated on the application form. The Officer was not required to advise Mr. Samra that biometric information confirmed that Mr. Samra had attempted to enter the US and was refused entry.

[23] Mr. Samra's first reaction was to deny that he had been to the US and to suggest that the Officer's information was based on mistaken identity.

[24] Although Mr. Samra now argues that he did not know the meaning of "derogatory", it appears that he did understand the term given that he also responded that he had no "negative" history with the US.

[25] Mr. Samra, and all applicants for work permits or other visas, have an obligation to provide truthful and complete information. It is not the role of a visa officer to remind applicants about their own immigration history and probe them for more information that is within their own knowledge and should be in their recollection. As noted by this Court in several decisions, officers need not provide a "running score" regarding the sufficiency of an application (*Patel v Canada (Citizenship and Immigration)*, 2021 FC 573 at para 20; *Kong v Canada (Citizenship and Immigration)*, 2017 FC 1183 at para 29).

[26] In the present case, Mr. Samra had attempted to enter the US a few weeks before he applied for his work permit and a few months before he received the procedural fairness letter. Given that he was denied entry and turned back at the US border and given a document requiring him to leave Canada, this event should have been top of mind. Moreover, the application form asked: "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?"

[27] Although Mr. Samra described his past refusals of visas, he did not describe that he was denied entry to the US and he was also ordered to leave Canada. The question is not limited, as Mr. Samra now argues, to formal visa or permit applications, but clearly includes denials of entry to Canada or any other country and orders to leave Canada or any other country.

IV. The decision is reasonable

[28] 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 have both been repeatedly highlighted in the jurisprudence.

[29] Section 40 is intended to promote integrity in the immigration system and it has been broadly interpreted: *Malik v Canada (Citizenship and Immigration)*, 2021 FC 1004 at paras 10-11 [*Malik*], *He v Canada (Citizenship and Immigration)*, 2022 FC 112 at para 15; *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 at para 15 [*Wang*]; *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28; *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 23 [*Oloumi*]. The onus is on the applicant to ensure the completeness and accuracy of their application (*Oloumi* at para 23; *Wang* at paras 15–16).

[30] In addition, section 16 sets out the duty to answer truthfully all questions in all applications.

[31] In *Malik* at paras 10–11, Justice Strickland summarized the key principles established in the jurisprudence regarding misrepresentation, as described above, and highlighted two requirements:

> [11] Two factors must be present for a finding of inadmissibility under section 40(1). There must be a misrepresentation by the applicant and the misrepresentation must be material in that it could have induced an error in the administration of the IRPA (*Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 27 [*Bellido*]).

[32] A finding of misrepresentation does not require that the applicant intended to deceive or that the applicant was aware of their misrepresentation: *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at para 15; *Malik* at para 22; *Muniz v Canada (Citizenship and Immigration)*, 2020 FC 872 at para 8. An innocent failure to provide material information still constitutes misrepresentation (*Malik* at para 27).

[33] The Officer's decision is reasonable based on the information before the Officer, including the responses to the procedural fairness letter. The GCMS notes reveal that the basis for the refusal of the visa is the failure of Mr. Samra to disclose his recent refusal of entry to the US. The GCMS notes and letter explain that the finding of misrepresentation is based on the direct or indirect misrepresentation or withholding of "material facts relating to a relevant matter that induces or could induce an error in the administration of the [Act]". The material facts are that Mr. Samra was refused entry to the US, turned back and then was ordered to leave Canada. His failure to disclose this—even if the visa officer could have discovered this information from other sources—amounts to a relevant matter that could induce an error in the administration of the Act.

[34] Mr. Samra did not offer the explanation to the Officer, which he now offers to the Court, that he was advised by his immigration consultant to leave Canada and re-enter in order to apply for his work permit in a more expeditious manner, a practice referred to as “flag-poling”.

[35] The Court acknowledges that the consequences of a finding of misrepresentation are harsh; however, such consequences are necessary to ensure the integrity of the immigration system. Applicants are repeatedly cautioned about the need to be truthful and candid and this was reinforced in the procedural fairness letter.

V. Honest mistake has not been established

[36] Mr. Samra now argues that he made an honest mistake or innocent misrepresentation because he subjectively believed that he was not required to disclose that he was denied entry to the US because this did not arise from any formal application to enter the US. He now offers the explanation that his attempted entry to the US was only for the purpose of “flag-poling”, on the advice of his consultant. Mr. Samra described this as a way to expedite his work permit for Canada rather than submitting an online application, and which required exiting, then re-entering Canada. He submits that he did not regard his “flag-poling” as an entry or a refusal to enter the US.

[37] He notes that he disclosed other refusals and would not have had a reason to withhold the US refusal if he properly understood it to be a refusal.

[38] Mr. Samra did not raise his assertion of honest mistake or his current explanation with the Officer. The “flag-poling” explanation was advanced for the first time to this Court at the oral hearing.

[39] As recently noted by Justice Grant in *Singh v Canada (Citizenship and Immigration)*, 2024 FC 1369 at para 4 [*Singh*]:

> [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.

[40] However, unlike *Singh* and the cases cited therein, the issue is not the legitimacy of this practice, but that Mr. Samra did not disclose that his attempted entry to the US was on the advice of his consultant and for a flag-poling purpose. He adamantly stated that he had never been to the US.

[41] The Officer’s decision is reasonable based on the evidence before the Officer, which included Mr. Samra’s strong assertion that he had never even been to the US and that it “looks like” mistaken identity.

[42] In his written submissions, Mr. Samra relies on *Appiah v Canada* (*Citizenship and Immigration*), 2018 FC 1043 at para 18 [*Appiah*], in support of his submission that his subjective

belief is sufficient to establish an innocent misrepresentation. However, in *Appiah*, Justice Martineau noted that there are several requirements:

> [18] The innocent misrepresentation exception is narrow and shall only excuse withholding material information in extraordinary circumstances in which the applicant honestly and reasonably 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 (*Wang* at paragraph 17; *Li v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 87 at paragraph 22; *Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345). Some cases have applied the exception if the information given in error could be corrected by reviewing other documents submitted as part of the application, suggesting that there was no intention to mislead: *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421 at paragraph 16; *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at paragraphs 18-20. 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: *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at paragraphs 31-34; *Diwalpitiye v Canada (Citizenship and Immigration)*, 2012 FC 885; *Oloumi* at paragraph 39; *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at paragraph 18; *Smith v Canada (Citizenship and Immigration)*, 2018 FC 1020 at paragraph 10.

[43] Contrary to Mr. Samra's submission, it is not enough to have a subjective belief that he was not making a misrepresentation, his belief must also be objectively reasonable on the facts.

[44] In *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 at paras 18–19, Justice McHaffie canvassed the jurisprudence regarding the "innocent misrepresentation exception" and stated:

> [18] There appear to be two strains 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. This approach can be seen in cases such as *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 18; *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421 at para 14; *Punia* at paras 66–68; *Singh Dhatt* at para 27; *Canada (Citizenship and Immigration) v Robinson*, 2018 FC 159 at para 6; *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 at paras 15–16; and *Alkhaldi v Canada (Citizenship and Immigration)*, 2019 FC 584 at para 19.
>
> [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." This additional requirement appears to stem from *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 39, drawing on language from *Mohammed v Canada (Minister of Citizenship & Immigration)*, [1997] 3 FC 299 at para 41. It was then adopted in Justice Strickland's decision in *Goburdhun*, a decision which has been frequently applied: see, e.g., *Suri v Canada (Citizenship and Immigration)*, 2016 FC 589 at para 20; *Brar v Canada (Citizenship and Immigration)*, 2016 FC 542 at para 11; *Tuiran* at paras 27, 30; *Appiah* at para 18.
>
> [Emphasis added.]

[45] The jurisprudence establishes that the "innocent misrepresentation exception" is narrow and that an applicant must show that they subjectively believed they are not misrepresenting the facts and that this belief is objectively reasonable. Mr. Samra asserts only his subjective belief that his denial of entry did not amount to a refusal and that he was not required to disclose this. However, his belief is not objectively reasonable given the wording of the question, his relatively recent denial of entry to the US, his assertion that he had no immigration history in the US and had never even been to the US, and his subsequent acknowledgement that he had been to the US.

[46] In the present case, there is no need to address whether the third requirement applies given that there is no objective basis for his belief. Regardless, the information was not beyond Mr. Samra's control: he was well aware of his immigration history. As noted, his refusal of entry to the US occurred mere weeks before he submitted his application and a few months before he received the procedural fairness letter.

[47] In conclusion, the Court finds that there was no breach of procedural fairness. The Officer's finding that Mr. Samra is inadmissible due to his misrepresentation is reasonable; the decision is transparent and justified by the facts and the law. The honest mistake exception is not applicable in the circumstances. The result is unfortunate but reflects the application of the law.

JUDGMENT in file IMM-10573-23

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10573-23
STYLE OF CAUSE:	SUKHMANJOT SINGH SAMRA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 8, 2024
JUDGMENT AND REASONS:	KANE J.
DATED:	OCTOBER 21, 2024

APPEARANCES:

Kapilkumar P. Rathod	FOR THE APPLICANT
Rachel Hepburn Craig	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kapilkumar P. Rathod Barrister and Solicitor Caledon East, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT