Federal Court  Cour fédérale

Date: 20211220

Docket: IMM-2575-20

Citation: 2021 FC 1441

Ottawa, Ontario, December 20, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

LAVDEEP SINGH GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Lavdeep Singh Gill was found inadmissible to Canada for five years on grounds of misrepresentation. He filed a work permit application that disclosed his six prior unsuccessful attempts to obtain Canadian visas but did not disclose an unsuccessful tourist visa application to the United States. The visa officer reviewing the application was not satisfied with Mr. Gill's explanation for not including the US refusal, and found it to be a misrepresentation that could

have caused an error in the administration of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The officer therefore found Mr. Gill inadmissible to Canada for a five-year period under section 40 of the *IRPA*.

[2] Mr. Gill argues the officer did not consider or adequately explain their decision to find him inadmissible, and in particular did not adequately address whether he had made an innocent mistake or whether the misrepresentation was a material one. I agree that the officer's decision was unreasonable as the brief conclusory statements the officer made did not reasonably explain why they did not accept Mr. Gill's explanation of innocent mistake or how, in the context of the facts before them, Mr. Gill's omission of the US visa refusal could have induced an error in the administration of the *IRPA*. The decision as a whole was therefore not transparent, justified, and intelligible.

[3] The application for judicial review is therefore granted and Mr. Gill's application is remitted for redetermination by a different officer.

II. Issues and Standard of Review

[4] Mr. Gill raises two issues in his challenge to the officer's decision:

A. Did the officer fail to adequately address Mr. Gill's allegation that his omission of a US visa refusal on his application form was due to an innocent mistake?

B. Did the officer fail to adequately address whether the omission was material?

[5] The parties agree that the officer's decision is subject to review on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. Reasonableness is concerned with the outcome of the decision and the reasoning process that led to that outcome: *Vavilov* at para 87. A reasonable decision is transparent, intelligible, justified in relation to the facts and law, based on an internally coherent and rational chain of analysis, and responsive to the submissions of the parties: *Vavilov* at paras 15, 85, 95, 127–128.

[6] Mr. Gill's arguments focus on issues of justification and responsiveness. In *Vavilov*, the majority of the Supreme Court of Canada affirmed "the need to develop and strengthen a culture of justification in administrative decision making": *Vavilov* at paras 2, 14. In doing so, the Court noted the importance of reasons in justifying a decision to the individuals subject to it. Part of reasonableness review is assessing whether reasons adequately justify the decision in the administrative context in which it is made: *Vavilov* at paras 85–86, 91–97. As Mr. Gill underscores, a decision must not only be *justifiable*, it must also be *justified* by the reasons given: *Vavilov* at para 86.

[7] What constitutes adequate justification is to be assessed both "with due sensitivity to the administrative setting" and with recognition of the impact of the decision on an individual: *Vavilov* at paras 91, 103. The Court has often recognized that the high-volume administrative setting of visa offices, and the modest impact on an applicant, means that an officer is not required to give extensive reasons for a refusal, as long as they give an understandable explanation of why the visa was refused: *Yuzer v Canada (Citizenship and Immigration)*, 2019

FC 781 at paras 13, 20; *Touré v Canada (Citizenship and Immigration)*, 2020 FC 932 at para 11; *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 at paras 15–17. I agree with Mr. Gill, however, that a finding of misrepresentation, which bears the consequence of a five-year period of inadmissibility from Canada, is no mere visa refusal. As Justice Fuhrer noted in *Likhi*, this greater consequence requires the decision maker's reasons "to reflect the stakes for, and from the perspective of, the affected individual": *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 27, citing *Vavilov* at para 133.

III. Analysis

A. *The officer failed to adequately justify their decision that there was a misrepresentation*

(1) The application and the officer's decision

[8] Mr. Gill applied for a Canadian open work permit from his home in India in February 2020. His hope was to join his wife, who is working in Canada on an open work permit under the Post-Graduation Work Permit Program. The Application for Work Permit form includes the questions "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" and "Have you previously applied to enter or remain in Canada?" Mr. Gill checked the boxes labelled "Yes" in response to each of these questions. Where the form then asks to "please provide details," Mr. Gill wrote the following:

> I have applied 6 times. Last time I applied in Jan,2020 for which I got refusal. I have tried to attach all the documents in several folders, I have attached spouse's new employment letter,NOC detail.

[9] While apparently referring to his six prior Canadian refusals, Mr. Gill did not attach the refusal letters themselves, and did not refer to the refusal he received from US immigration authorities when he applied for a visitor visa in July 2018.

[10] The officer reviewing Mr. Gill's application sent him a "procedural fairness letter" in March 2020, noting that he had "failed to disclose complete answers in [his] statutory questions, namely" the question above about prior refusals. Mr. Gill was asked to explain why the information was not provided and to provide copies of documentation in support, "which may include copies of refusal letters and other correspondence." The procedural fairness letter also cited section 40 and the consequence of misrepresentation.

[11] In response, Mr. Gill apologized for the errors, and provided reasons for not attaching the Canadian refusal letters. He also included the following statements:

> As you have given me this opportunity, I think I should inform you about the other country refusals too. I do not know if it is important for my application but when I and [my wife] searched about **Procedure fairness letter** on the Internet, we came to know that this might be necessary to inform you.
>
> At the time of applying I did not know about other country visa declaration, I thought attaching travel history will be sufficient. Also, I may have misunderstood that question. Let me explain you my previous visa refusals -
>
> a) **I had applied for USA in June 2018 for tourist visa**, so that I can meet [my wife] in Seattle, but they refused my visa. Due to unexpected Work permit refusal in Feb 2018, we thought of meeting In Seattle as it was more than six months since we had seen each other. So, [my wife] and me applied for USA visa, [she] got the visa but my case was refused. […]

[12] The officer concluded Mr. Gill had made a misrepresentation by not disclosing the US visa refusal and was therefore inadmissible to Canada under section 40 of the *IRPA*. The officer's reasons for decision are found in the notes in the Global Case Management System (GCMS). The substance of the decision is found in the following passage:

> The applicant applied for a work permit to work temporarily in Canada. During the course of the review of the application, the officer noted that the applicant applied for VISAs in Canada and the USA that were not disclosed. A procedural fairness letter was sent to the applicant providing an opportunity to disabuse the officer of their concerns. The procedural fairness letter outlined the concerns as well as the consequences of a finding under A40 including a five year bar from entering Canada. The applicant has responded but has failed to disabuse me of the concerns presented. In my opinion, on the balance of probabilities, the applicant was not truthful on his application form and failed to disclose that he has derogatory 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. 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.
>
> (2) Inadmissibility for misrepresentation

[13] Paragraph 40(1)(*a*) of the *IRPA* provides that a foreign national is inadmissible for misrepresentation if they misrepresent or withhold material facts that could induce an error in the administration of the *IRPA*:

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**
(2) The following provisions govern subsection (1):	**(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 of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and	**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 renvoi;
[...]	[…]
[Emphasis added.]	[Je souligne.]

[14] 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: *Singh Dhatt v Canada (Citizenship and*

Immigration), 2013 FC 556 at para 24; *SMN v Canada (Citizenship and Immigration)*, 2017 FC 731 at para 30.

[15] The objective of section 40 is to promote the integrity of Canada's immigration scheme by deterring misrepresentation and ensuring applicants provide complete, honest and truthful information in every manner: *Tuiran v Canada (Citizenship and Immigration)*, 2018 FC 324 at para 20; *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28; *Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 at para 36.

(3) The innocent misrepresentation exception

[16] This Court has recognized that the important objective of section 40 is not undermined by recognizing that honest errors can occur in immigration applications: *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at para 16. Mr. Gill points out that this recognition is also seen in an Immigration, Refugees and Citizenship Canada (IRCC) operational manual dated August 1, 2015, entitled ENF 2/OP 18 "Evaluating Inadmissibility." This manual states that officers are to be guided by a series of principles, including that "[i]t must be recognized that honest errors and misunderstandings sometimes occur in completing application forms and responding to questions": see *Menon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273 at para 15; *Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 at para 41 (citing the manual in referring to the applicant's argument). Although it appears this manual cited by Mr. Gill may be out of date—for example, it refers to the two-year inadmissibility period found in section 40 prior to 2013—the Minister did not argue that this manual was inapplicable or that the principle did not apply.

[17] Given this recognition, the Court has concluded that an “honest mistake” or “innocent misrepresentation” may not lead to inadmissibility based on paragraph 40(1)(*a*): *Berlin* at paras 14–19. This is often referred to as the “innocent misrepresentation exception” or “innocent mistake exception” to inadmissibility on grounds of misrepresentation: *Tuiran* at para 23; *Punia* at para 68; *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 18; *Berlin* at para 19.

[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 Robinsion*, 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.

[20] Mr. Gill argues that the "beyond the applicant's control" requirement is inconsistent with cases such as *Punia*, *Berlin* and *Karunaratna*, in which the undisclosed information was clearly known to the applicant, but the inadmissibility findings were still found unreasonable in light of the innocent misrepresentation exception: *Punia* at paras 68–70; *Berlin* at paras 2, 19–22; *Karunaratna* at paras 5–6, 16. I agree that these cases clearly did not impose a "beyond the applicant's control" requirement. 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. However, the preponderance of this Court's case law, particularly after Justice Strickland's 2013 decision in *Goburdhun*, appears to include this requirement.

[21] In any event, I need not try to reconcile these strains in the case law, as I agree with Mr. Gill that regardless of the approach to the exception, the officer did not provide an adequate justification for their conclusion. 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.

(4) The officer's conclusion was unreasonable

[22] As set out in paragraph [12] above, the officer's decision with respect to the existence of a misrepresentation consisted of two sentences. The first, stating that Mr. Gill "has failed to disabuse me of the concerns presented" in the procedural fairness letter, simply presents the officer's conclusion without explanation. The second expresses the officer's reasons: (i) that on the balance of probabilities, the applicant was not truthful on his application form; and (ii) that he failed to disclose that he has derogatory immigration history in the US. The second of these is conceded. Mr. Gill accepts that he did not disclose his derogatory immigration history in the US. The question is whether this amounted to a misrepresentation or an innocent mistake. On this question, the officer simply stated his conclusion that Mr. Gill "was not truthful."

[23] I agree with the Minister that on a fair reading of this statement, the officer concluded Mr. Gill's omission of the US visa refusal was not "innocent" or honest, an essential aspect of the innocent misrepresentation exception on either formulation. However, I agree with Mr. Gill that the officer provided no explanation for why they considered Mr. Gill to have been untruthful or why Mr. Gill's response, which included his explanation and the disclosure of the US refusal despite the procedural fairness letter not having referred to it, failed to disabuse them of the concerns presented in the procedural fairness letter. This can be contrasted with the officer's decision in *Alalami*, cited by the Minister, which provided more thorough reasons for rejecting the applicant's explanation: *Alalami* at paras 8, 15–16.

[24] An administrative decision must be read in light of the record: *Vavilov* at paras 91–94. The existence of clear language on the application form may thus be relevant to the adequacy of an officer's rejection of an "innocent error" based on misunderstanding: *Li v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 87 at para 21; *Muniz v Canada (Citizenship and Immigration)*, 2020 FC 872 at paras 3, 10; see also *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at para 40. In the present case, unlike in *Li* and *Muniz*, Mr. Gill correctly answered "Yes" to the question about having been refused "a visa or permit, denied entry or ordered to leave Canada or any other country or territory." His asserted misunderstanding was in responding to the subsequent "please provide details" question.

[25] As the Minister points out, this makes the situation akin to that in *Tuiran*, which also entailed a failure to disclose the cancellation of a US visa and an associated inadmissibility determination: *Tuiran* at paras 5–7. However, in *Tuiran* the applicant's explanations for the failure were different and did not initially acknowledge the US visa. It appears that again, the officer's decision better explained why the applicant's explanations were rejected, although this is not entirely clear from the decision: *Tuiran* at paras 7–8, 17, 29–32.

[26] Assessing the reasonableness of a decision focuses in large part on the reasons given for the decision, and not just on the factual context underlying the decision. Despite the similarity with the facts in *Tuiran* in terms of the boxes that were checked, I conclude that in this case the officer's conclusory statements that Mr. Gill failed to disabuse them of their concerns and that he was untruthful do not meet the requirements of a transparent and justified decision.

B. *The officer failed to adequately justify their decision as to materiality*

[27] I reach the same conclusion with respect to the officer's decision on materiality. It is clear the officer was aware of the need to explain that the omission of the US visa was material in the sense that it could induce an error in the administration of the *IRPA*. The officer stated that the omission of the US visa could have caused such an error "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."

[28] As Mr. Gill notes, he was applying for an open work permit based on his spouse being the holder of a post-graduation open work permit. Under this basis for eligibility, Mr. Gill could obtain an open work permit if he satisfied certain program requirements and established he met the requirements of section 200 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. These include the requirement that he would leave Canada at the end of the period authorized for his stay: s 200(1)(*b*). However, I agree with Mr. Gill that it is considerably less clear how the officer's reference to a "genuine temporary purpose for travel to Canada," or the need to "abide by the conditions of entry to Canada" pertain to this requirement or any other applicable requirement in the context of an application for an open work permit under the program for which Mr. Gill applied.

[29] In any event, I agree with Mr. Gill that this brief and fairly conclusory statement does not provide an adequate explanation of how the omission of a refusal of a US tourist visa, in the context of disclosure of six prior Canadian visa refusals, could have satisfied an officer on either

the existence of a genuine temporary purpose or an intent to abide by conditions of entry, even assuming those are relevant assessment criteria. In this context, I recognize that the standard of materiality does not require a misrepresentation to be decisive or determinative but only to "affect the process": *Goburdhun* at para 28, citing *Oloumi* at para 25. However, this does not change the need for an officer to provide a comprehensible explanation of how the omission in question might affect the process or the administration of the *IRPA*.

[30] I cannot accept the Minister's assertion that a foreign visa refusal is invariably material to a visa application. The Minister cites *Mohseni* to this effect, a case in which a recent US refusal for a temporary visa to attend a conference was not disclosed on the applicant's application for a study visa: *Mohseni v Canada (Citizenship and Immigration)*, 2018 FC 795 at paras 1–3, 41. In dismissing the materiality argument as a subsidiary matter, having already dismissed it as a new argument, Justice Roy made specific reference to the nature of the particular misrepresentation in light of the nature of the particular visa applied for: *Mohseni* at para 41. He also noted the need for a "nexus" between the misrepresentation and the application made: *Mohseni* at paras 43–47. I cannot conclude that Mohseni—or the *Alkhaldi*, *Appiah*, *Alalami*, *Patel*, and *Goburdhun* cases the Minister also relies on—stands for the proposition that the non-disclosure of a visa refusal will inevitably be material regardless of the factual circumstances.

[31] I therefore agree with Mr. Gill that the officer's reasons did not show the necessary transparency and justification required of a reasonable decision.

C. *Post-script*

[32] Subsequent to reaching the foregoing conclusions, the Court became aware of the decision of Justice McDonald in *Singh v Canada (Citizenship and Immigration)*, 2021 FC 828, a matter that was argued before Mr. Gill's case was argued before me, but decided after that argument. At paragraph 5 of that decision, Justice McDonald quotes the decision of an officer at the New Delhi Embassy for refusing a tourist visa as being the following:

> …the applicant has responded to the letter but has failed to disabuse me of the concerns presented. In my opinion, on a balance of probabilities, the applicant was not truthful on his application form and failed to disclose that he has derogatory 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. I am therefore of the opinion that the applicant is inadmissible to Canada under section 40 of the Act.

[33] As can be seen, these reasons are word-for-word identical to those given by the officer in this case, who was also in New Delhi, with the exception of referring to "a" balance of probabilities instead of "the" balance of probabilities. As Justice Pamel noted in *Ekpenyong*, the high volume of visa applications can justify the use of efficiencies in decision-making, such as templates: *Ekpenyong v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1245 at para 22. However, even when using templates, "visa officers should bring the necessary modifications or render reasons that would indicate their thought process in an intelligible manner" to establish a basis for understanding how they arrived at their decision: *Ekpenyong* at para 23.

[34] Given that the decision in *Singh* played no part in my decision in the present case, I did not consider it necessary to invite further submissions from counsel on the case. I note, however, that the use of identical template language to express not just the relevant legal test or framework, but the reasoning applicable to an applicant's particular case undermines to at least some degree the presumption that the officer has considered and decided each individual case on its merits. I also note that Justice McDonald reached the same conclusion that I have reached, namely that the reasons in question do not adequately explain the officer's decision: *Singh* at paras 17–20.

IV. Conclusion

[35] The application for judicial review is therefore allowed. Neither party raised a question for certification and I agree that none arises in the matter.

JUDGMENT IN IMM-2575-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. Lavdeep Singh Gill's application for an open work permit is remitted for redetermination by another officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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