Federal Court  Cour fédérale

Date: 20230103

Docket: IMM-5172-21

Citation: 2023 FC 12

Ottawa, Ontario, January 3, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SANDEEP SINGH

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Immigration Division of the Immigration and Refugee Board of Canada [ID], dated July 20th, 2021 [the Decision], which found that the Applicant is a foreign national who is inadmissible to Canada for misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC

2001, c 27 [*IRPA*]. The Decision resulted from the Applicant failing to disclose an arrest in his application for a Canadian visitor visa.

[2] For the reasons set out below, the application for judicial review is dismissed.

II. Background

[3] The Applicant is a citizen of India. He first arrived in Canada with a study permit on December 18, 2016. After he completed his studies, he obtained a Post Graduation Work Permit.

[4] On March 9, 2019, the Houston B.C. police stopped the Applicant in what began as a routine traffic stop. The situation escalated when the Applicant refused to exit his vehicle as instructed. As a result, the Applicant was arrested and charged with willfully resisting or obstructing a peace officer.

[5] On March 26, 2019, the Applicant received a letter from the BC Prosecution Service advising him that it would not be proceeding with criminal charges and a prosecution of the matter.

[6] In June 2019, the Applicant wanted to return to India to attend his brother's wedding ceremony. He retained the services of an immigration consultant to assist him with preparing an application for a Canadian visitor visa. The Applicant advised the consultant of the March 9, 2019 arrest in Houston, B.C., providing her with a copy of the letter he had received.

[7] The Applicant claims that in completing the visa application, the consultant answered "no" in response to the question: "have you ever committed, been arrested for, been charged with, or convicted of any criminal offence, in any country or territory". The Applicant did not review the application himself prior to its submission.

[8] The application was submitted on June 29, 2019 and was subsequently approved.

[9] On December 22, 2019, having discovered the Applicant's failure to disclose his arrest on March 9, 2019, a Canada Border Services Agency (CBSA) officer completed a report under s 44(1) of the *IRPA,* concluding that, on a balance of probabilities, the Applicant was inadmissible for misrepresentation pursuant to paragraph 40(1)(a).

[10] On December 23, 2019, the Royal Canadian Mounted Police attended the Applicant's workplace and advised him of an outstanding immigration warrant for his arrest. This is when he first learned that he was the subject of a subsection 44(1) report for misrepresentation. He was subsequently referred for an admissibility hearing before the ID.

[11] On July 20, 2021, the ID held an admissibility hearing for the Applicant. At the conclusion of the hearing, the ID issued the Decision that is the subject of this judicial review.

III. The Decision

[12] In finding that the Applicant misrepresented for the purposes of paragraph 40(1)(a) of the *IRPA*, the ID considered this Court's jurisprudence in *Goudarzi v Canada (Citizenship and*

Immigration) 2012 FC 425 [*Goudarzi*]. The ID noted that the provision is to be given a broad interpretation to promote its underlying purpose of deterring misrepresentation and maintaining the integrity of the immigration process.

[13] The ID also considered the principles in *Goudarzi* in finding that the Applicant had a duty of candour to disclose the arrest and that his misrepresentation was material. Specifically, the ID found that not disclosing the arrest closed off avenues of inquiry by Immigration, Refugees and Citizenship Canada and that it "very much impacted the process".

[14] The ID then turned to the question of the innocent misrepresentation exception, ultimately deciding that the Applicant's explanation for failing to disclose the arrest did not qualify him for the exception. The ID found that the Applicant's misrepresentation was based on an honest belief, but an unreasonable one, and that the information of the arrest was a fact within the Applicant's control.

[15] Finding that he did not meet the criteria for the narrow innocent misrepresentation exception to s 40, the ID issued an exclusion order against the Applicant.

IV. Issues and Standard of Review

[16] The sole issue in this judicial review is whether the Decision was reasonable.

[17] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice

and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23.

[18] To set a decision aside, a 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. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

[19] The decision-maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

V. Analysis

[20] The Applicant does not dispute that a misrepresentation occurred. However, the Applicant argues that: a) the representation was immaterial in that his response "would not have induced an error in the administration of the application because the information would not have changed the outcome of his visa application" and, b) the ID erred in its application of the innocent misrepresentation exception by failing to consider the Applicant's evidence.

A. *Materiality of the misrepresentation*

[21] The Applicant has not persuaded me that the ID erred in its materiality analysis. The Respondent has correctly pointed out that the jurisprudence is such that the standard of materiality does not require a misrepresentation to be decisive or determinative but only to "affect the process": *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25. The ID engaged with the relevant legal principles and directly addressed how the misrepresentation could have affected the process stating that Immigration Refugees and Citizenship Canada "would have been aware of the arrest, would have made associated inquiries perhaps to get the police report, perhaps to determine whether or not any charges would be pursued, and to examine the circumstances of your arrest".

[22] The Applicant's argument that any such inquiry would not have led to a refusal of the visa application and was therefore immaterial, runs contrary to the jurisprudence and cannot succeed.

B. *The ID did not err in its treatment of the innocent misrepresentation exception*

[23] This Court has repeatedly held that the innocent misrepresentation exception is a narrow one, which was first carved out to address a highly unusual set of facts in *Medel v Canada (Employment and Immigration)*, [1990] 2 FC 345 [*Medel*]. Justice Martineau thoughtfully laid

out this Court's treatment of the exception in *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 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.

[24] The core of the Applicant's submissions is that the ID was not responsive to the record before it in failing to consider the effect of the BC Prosecution Service letter in the Decision. The Applicant states that the letter was submitted to the ID and relied upon to explain why he believed he was correct in answering "no" to the question of whether he had ever been previously arrested. I agree with the Respondent that this argument was never actually made to the ID.

[25] The Applicant's explanation for the misrepresentation has evolved over time.

[26] The Applicant's evidence before the ID was that he told his consultant about the BC Prosecution Service letter, relied on her to properly advise him, complete the application accurately, and that he failed to review it himself before signing it. This evidence was critical to the ID's finding that the Applicant did not meet the criteria for the innocent misrepresentation exception. For context, below is a summary of the evolution of the Applicant's explanation for the misrepresentation.

[27] The first time the misrepresentation was put to the Applicant was in an interview with CBSA, shortly after his arrest for an admissibility hearing:

> Q: On your TRV application why didn't you disclose your arrest?
>
> A: It wasn't filled out by me, it was by Ms. Kaur.

[28] In written submissions to CBSA, the Applicant's former counsel made the following submission, appearing to concede that the issue was that the Applicant failed to review it prior to its submission:

> Sandeep has acknowledged to me that he could have simply answered "yes" to this question #3 and would have attached the letter with the application as to his situation. This information would not have caused any refusal to his application**.** Sandeep acknowledged that he should have **clearly informed his consultant PRIOR to her filling the application** and/or he could have requested the copy of the same for his review prior to the online submission of the same. This is his failure wherein he didn't correct the misinformation in his one *[sic]* application.
>
> [my emphasis]

[29] In written submissions to the ID, Applicant's former counsel submitted the following:

> He made this application without understanding the impacts of each line of the Form. Sandeep was not represented by any practicing lawyer who could have advised him about the difference between being charged and being convicted. Given his lack of knowledge about the terminology within the application form and lack of knowledge of the Immigration Act and Regulations, Sandeep opted to answer NO for the question asked in the Form.
>
> [my emphasis]

[30] In a sworn affidavit submitted to the ID, the Applicant stated the following:

> I have always believed that those charges made against me in March were removed and ended with BC prosecution letter. That is the only reason that I did not click on "yes" to the question in the June Application form. If I would understand the difference between charges and the conviction, I would have filled the correct information. I never had any such experience of being charged or convicted either in India or in Canada.

[31] The Respondent correctly points out that the Applicant in his testimony, affidavit, and submissions before the ID, did not claim that he honestly and reasonably believed he was never arrested. This distinction is critical because it was the undisclosed arrest, and not the charge, which formed the basis of the misrepresentation finding.

[32] I further note that the bulk of the Applicant's testimony was about the reliance he placed on his consultant to properly explain the question to him, together with his own failure to review the application prior to its submission. This is illustrated in the following portions of the hearing transcript:

> **COUNSEL:** Okay, when you filled up the application -- or when your consultant filled up the application 45 *(sic)* for a multiple entry visa in June of 2019 –

> PERSON CONCERNED (without interpreter): Yes, sir.
>
> **COUNSEL:** -- there was a question asked about your arrest or your charges. And you answered, "No."
>
> PERSON CONCERNED (without interpreter): Yes, sir, because I told my consultant that I got this letter from the counsel -- and explaining that your charges had been removed. And I was not even called into the court, and no fingerprints were taken. I was not found guilty, like no conviction was there -- like no -- and not in front of judge. So, I just told her this whole thing, and she filed that thing. And like, I don't know what did she answer. I just -- she just sent me the file, that I should sign, and I just sent her back.
>
> **MEMBER:** Okay, so Counsel, you had asked questions regarding answering, "No," to the multiple entry Visa in 2019. The answer, as I understand it, Mr. SINGH had indicated that he had told the consultant, the charges were dismissed, but he did not know what she answered.
>
> And that is where my notes leave off, so ---
>
> **OBSERVER:** Yes, you are correct.

[33] Significantly, the Applicant's former counsel explicitly raised the BC Prosecution Service Letter during his testimony. Again, the Applicant's response indicates that the honest mistake was really a failure of not reviewing the application before signing it, and that had he done so, he would have attached the letter:

> **COUNSEL:** Okay, and if you would have read -- and would have reviewed the question, then you would have attached the BC Crown's withdrawal letter, with that application?
>
> **PERSON CONCERNED** (without interpreter): Yes, sir.

[34] In this judicial review, the Applicant now says that he is not blaming the consultant for failing to explain the question to him, or himself for failing to review the application before submitting it. The Applicant instead states that because of the letter, he continuously possessed

an honest, reasonable belief that he was not withholding material information at the time the application was submitted. As laid out extensively above, this contradicts the record that was before the ID.

[35] Indeed, the Applicant's reliance on his consultant and his own failure to review the application prior to its submission formed the factual matrix upon which the ID was asked to decide whether the innocent misrepresentation exception applied. Contrary to the Applicant's submissions, that distinction is significant, and in this case, decisive, in finding that the ID's decision was reasonable.

[36] I find the ID reasonably considered the Applicant's evidence in deciding whether the innocent mistake exception applied. Beginning at page 28 of the Decision, the ID explicitly laid out the law and applied it to the facts of the Applicant's case. Referencing the Applicant's failure to review the application as being inconsistent with the duty of candour, the ID made a determination that his belief though honest, was unreasonable. The ID also found that the fact of the arrest was clearly knowledge within the Applicant's control.

[37] I note that the Applicant relies on *Gill v Canada (Citizenship and Immigration)* 2021 FC 1441, *Park v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 786, and *Markar v. Canada (Citizenship and Immigration)*, 2022 FC 684 to support his argument that the failure to reference the BC Prosecution Service letter renders the Decision unreasonable.

[38] However, the ID could not have assessed the merits of an argument or evidence that was not properly before it. The letter does not purport to expunge the Applicant's arrest record and the Applicant did not testify that it led him to believe he was never arrested.

[39] I agree with the Respondent that in light of the factual record and the jurisprudence on innocent misrepresentation, it was reasonable for the ID to conclude that the Applicant's misrepresentation though honest, was not reasonable.

[40] I find that there is no reviewable error on the part of the ID in finding that, on the facts before it, the Applicant did not meet the narrow exception. The reasons are justified, intelligible, and transparent. The Decision is reasonable: *Vavilov* at para 100.

[41] Neither party has suggested a question for certification and none arise on these facts.

JUDGMENT in IMM-5172-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5172-21
STYLE OF CAUSE:	SANDEEP SINGH v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 8, 2022
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	JANUARY 3, 2023

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