Federal Court  Cour fédérale

Date: 20230321

Docket: IMM-456-22

Citation: 2023 FC 392

Ottawa, Ontario, March 21, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

AMRINDER SINGH MALHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a Citizenship and Immigration Canada Officer of the High Commission of Canada, Visa Section in New Delhi, India dated November 25, 2021, wherein the Officer concluded that the Applicant had failed to meet the criteria for the issuance of a spousal open work permit under the Temporary Foreign Worker Program on the basis of misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow, the application for judicial review shall be granted.

I. Background

[3] The Applicant is a 32-year-old citizen of India, residing in India with his daughter. His wife is currently in Canada on a study permit.

[4] On October 25, 2022, the Applicant applied for a spousal open work permit under the Temporary Foreign Worker Program, together with a temporary resident visa for his daughter. The Applicant retained the services of a consultant to assist him with his application. The Applicant had been introduced to the consultant years prior by his uncle and he was aware of others who had successfully used the services of this consultant.

[5] The Applicant asserts that, in working with the consultant to prepare his application, he advised the consultant, among other things, that in December of 2012, he had applied for a Canadian study permit and it was refused. The Applicant did not review or sign any documents or forms prior to the submission of the application. Had he done so, he would have seen that the consultant did not answer "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?"

[6] Upon review of the application and the Applicant's file, the Officer noted that the Applicant had a previous negative immigration history with Canada that had not been disclosed on the application. On July 27, 2021, the Officer sent the Applicant a procedural fairness letter [PFL]

which outlined concerns that the Applicant misrepresented his previous negative immigration history with Canada and provided the Applicant with an opportunity to address these concerns.

[7] The Applicant asserts that he again provided details regarding his previous refusal to the consultant and was under the impression that the consultant had responded to the PFL. However, at the time, the Applicant did not receive or review a copy of the PFL or the response thereto.

[8] No response to the PFL was provided to the Officer by the consultant by the specified deadline.

[9] In the decision dated November 25, 2021, the Officer refused the Applicant's work permit application, having not been satisfied that the Applicant truthfully answered all questions asked of him, as required by subsection 16(1) of *IRPA*. Pursuant to paragraphs 40(1)(a) and 40(2)(a) of *IRPA*, the Officer found the Applicant inadmissible to Canada for a period of five years for misrepresentation.

[10] The Applicant filed a complaint against the consultant with Immigration, Refugees and Citizenship Canada, but has not asserted that he had an incompetent authorized representative as the consultant was not an authorized representative.

II. Issues and Standard of Review

[11] The following issues arise on this application: (i) whether the Applicant's procedural fairness rights were breached; and (ii) whether the Officer's decision is reasonable.

[12] With respect to the first issue, procedural fairness is a matter for the Court to determine. The standard for determining whether a decision-maker complied with the duty of procedural fairness is correctness [see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54]. A Court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances [see *Canadian Pacific Railway Company v Canada (Attorney General)*, *supra* at para 54]. The ultimate question is whether the Applicants knew the case to meet and had a full and fair chance to respond [see *Laag v Canada (Citizenship and Immigration)*, 2019 FC 890 at para 10].

[13] With respect to the second issue, the parties agree and I concur that the applicable standard of review is reasonableness. When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. 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 [see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenjij-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

III. Analysis

A. Relevant Legislation

[14] Section 40 of the *IRPA* deals with inadmissibility due to misrepresentation. Paragraph 40(1)(a) provides:

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;

[15] Subsection 16(1) of the *IRPA* imposes an obligation on applicants to be truthful:

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires	16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

B. The Applicant's procedural fairness rights were not breached

[16] The Applicant asserts that the decision was procedurally unfair as the Applicant fell victim to an unauthorized ghost representative who signed the application (without being the Applicant's authorized representative), omitted information concerning the Applicant's immigration history and failed to submit a response to the PFL.

[17] The Applicant asserts that the Officer had an obligation to uphold the integrity of the immigration system and there was evidence in this matter signalling a concealed representative or at the very least, concerns with the application that should have prompted the Officer to investigate further. The Applicant points to the following facts that he asserts should have triggered a further investigation by the Officer: (a) the signature on the Applicant's passport is different from the signature that appears on the application form; (b) no response to the PFL having been received; and (c) while the contact information for the Applicant's wife was provided in the application, there is no indication that she was contacted to verify the information in the application. The Applicant asserts that he was denied procedural fairness as a result of the Officer's failure to conduct an investigation into the possible existence of a concealed representative. The Applicant further asserts that the various errors committed by the consultant breached his procedural fairness rights.

[18] I am not satisfied that the Applicant has established any breach of his procedural fairness rights. The Applicant has pointed to no authority that would impose upon an officer a pro-active duty to investigate for a possible ghost consultant. I find that the Officer met their procedural

fairness obligation to the Applicant by providing the PFL, setting out in the PFL sufficient information for the Applicant to understand the Officer's concern and providing the Applicant with a meaningful opportunity to provide a response. With no response having been provided to the PFL, it was open to the Officer to proceed and make a determination on the application.

[19] Moreover, accepting the Applicant's assertion that the failure to disclose the prior refusal and to respond to the PFL was due to the conduct of the consultant, I am not satisfied that the conduct of the consultant resulted in a breach of natural justice sufficient to require the setting aside of the Decision. The Applicant had the ability to safeguard his interests by reviewing the application before it was submitted, as well as reviewing the PFL and the consultant's response thereto, none of which he did. There is a duty upon an applicant to make sure that their documents are complete and accurate and it is not open to the Applicant to rely on his failure to review his own application as a basis for asserting a denial of procedural fairness [see *Sayedi v Canada (Citizenship and Immigration)*, 2012 FC 420 at paras 40 and 43].

C. The Officer's Decision was unreasonable

[20] To trigger inadmissibility under paragraph 40(1)(a), two criteria must be met: (a) there must be a misrepresentation; and (b) the misrepresentation must be material, in that it induces or could induce an error in the administration of the *IRPA* [see S*ingh Dhatt v Canada (Citizenship and Immigration)*, 2013 FC 556 at para 24].

[21] In relation to the first criterion, this Court has recognized a narrow exception for innocent mistakes. As stated by Justice Martineau 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.

[22] While the issue of innocent mistake was not squarely before the Officer, I am satisfied that the narrow exception would not have applied in the circumstances of this case as knowledge of the misrepresentation was not beyond the Applicant's control. Rather, the Applicant simply took no steps to ensure that his application was accurate and complete.

[23] With respect to the second criterion, a misrepresentation need not be decisive or determinative to be material. It will be material if it is important enough to affect the process [see *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25]. The Applicant made a number of submissions as to why the Officer's determination that the misrepresentation was material is unreasonable. However, I find that only one of the submissions has merit - specifically, the Applicant's assertion that the Officer's reasons are unintelligible as to how the misrepresentation at issue could have induced an error in the administration of the *IRPA*.

[24] In their reasons regarding the materiality of the misrepresentation, the Officer stated: "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 agree with the Applicant that the Officer's reasons lack intelligibility as the prior refusal was for a Canadian study permit and not for a country with conditions similar to Canada. Moreover, I find that it is unclear from the reasons provided how the denial of a study permit could cause the asserted potential errors. The misrepresentation did not relate to the Applicant overstaying in any country or previously failing to abide by any conditions of entry. While I appreciate that the Officer is not obligated to provide extensive reasons, the reasons provided must be intelligible and sufficient to explain the result reached, which is simply not the case here.

[25] Accordingly, I find that the decision is unreasonable and the application shall be granted.

[26] The parties propose no question for certification and I agree that none arises.

JUDGMENT in IMM-456-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Officer's decision dated November 25, 2021 is hereby set aside and the matter is remitted to a different officer for redetermination.

3. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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