Federal Court  Cour fédérale

Date: 20210927

Docket: IMM-571-20

Citation: 2021 FC 1004

Ottawa, Ontario, September 27, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ARJUMAND BANO AMBER MALIK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

[1] The Applicant is a citizen of Pakistan. In her application for a study permit, she responded "yes" to the question of whether she had ever been refused a visa or permit or denied entry or ordered to leave Canada or any other country. She provided details of a refused Canadian visitor visa in June 2010 and a refused study permit in January 2017.

[2] Following review of her application, a visa officer [Officer] sent the Applicant a procedural fairness letter. This letter advised that the Applicant had stated in her application that she had never been refused a visa or permit from any country other than Canada but that the Officer had concluded that this information was not truthful.

[3] In her response to the procedural fairness letter, the Applicant acknowledged that she had checked "yes" in response to question 2(b): "have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" She stated that the block section of the application form intended for detailing this positive answer had accepted only a limited amount of text. Therefore, she had entered only the information pertaining to Canada and did not specify a refused United States [US] visa. She acknowledged that "there could've been a possibility of attaching a separate sheet specifying all refusals and acceptances of my visa application and therefore, I do accept it as an honest mistake in this part". The Applicant also stated that she had no intent to mislead the Officer. In support of this assertion, she stated that the Officer had access to all of her other applications by way of the IRCC database and pointed out that in a different application – a Quebec Investment Program application for permanent residence, section 6 of Schedule A, Background [Quebec Application] – she had disclosed the refused US visa. Accordingly, the Applicant submitted that there was no reason for her to try to hide that information.

[4] In a negative decision letter dated January 10, 2020, the Officer stated that they were not satisfied that the Applicant had truthfully answered all questions asked of her. The Officer also informed the Applicant that she had been found inadmissible to Canada pursuant to s 40(1)(a) of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 [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. In accordance with s 40(2)(a) of the IRPA, the Applicant would remain inadmissible to Canada for a period of five years from the date of the decision letter.

Issue and standard of review

[5] The sole issue arising in this matter is whether the Officer's decision was reasonable. As an administrative decision, it is presumptively reviewable on the reasonableness standard (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

Analysis

[6] The Applicant submits that the Officer failed to consider that she had disclosed the US visa refusal in her previous and outstanding application for permanent residence. She submits that this is significant because a past disclosure of the information may mean that her failure to disclose it in her study permit application may not result in a finding of misrepresentation. She also submits that the Officer's reasons do not address, and the Officer did not grapple with, the question of whether the Applicant's past disclosure of the refused US visa was relevant as potentially mitigating evidence with respect to misrepresentation. Further, the Applicant submits that the Officer's brief reasons do not reflect the severe consequences of the decision on the Applicant. The Applicant has children who are studying in Canada and the misrepresentation finding will preclude her from visiting them for five years.

[7] The Applicant also submits that the Officer failed to consider whether the doctrine of innocent mistake might apply in these circumstances, even if a misrepresentation were to be found. The Applicant's final argument is that the Officer's decision was unintelligible. The decision did not specify what information had not been disclosed by the Applicant, so the Applicant is uncertain as to the exact basis of the inadmissibility finding.

[8] In my view, it is of assistance to first summarize the legal backdrop relevant to this application. I will then consider the Applicant's submissions against that backdrop.

[9] Section 16(1) of the IRPA requires a person who makes an application to truthfully answer all questions put to them. Section 40(1)(a) concerns misrepresentation:

> 40 (1) 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;

[10] In *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 [*Wang*], I addressed s 40 and stated as follows:

> [15] I have previously summarized the general principles concerning misrepresentation in *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28. For the purposes of this application they include that s 40 is to be given a broad interpretation in order to promote its underlying purpose (*Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at para 25 ("*Khan*")), its objective being to deter misrepresentation and maintain the integrity of the immigration process. To accomplish this, the onus is placed on the applicant to ensure the completeness and accuracy of their application (*Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 23 ("*Oloumi*"); *Jiang* at

para 35; *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at paras 55-56 ("*Wang*")).

[16] In this regard an applicant has a duty of candour to provide complete, honest and truthful information in every manner when applying for entry into Canada (*Bodine v Canada (Citizenship and Immigration)*, 2008 FC 848 at paras 41-42 ("*Bodine*"); *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15 ("*Baro*"); *Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at para 11 ("*Haque*")). Section 40 is intentionally broadly worded and applied and encompasses even misrepresentations made by another party, including an immigration consultant, without the knowledge of the applicant (*Jiang* at para 35; *Wang* at paras 55-56).

[17] The exception to s 40 is narrow and applies only to truly extraordinary circumstances where an applicant honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control (*Masoud v Canada (Citizenship and Immigration)*, 2012 FC 422 at paras 33-37 ("*Masoud*"); *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at para 40 ("*Goudarzi*")). That is, the applicant was subjectively unaware that he or she was withholding information (*Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345 (FCA) ("*Medel*"); *Canada (Citizenship and Immigration) v Singh Sidhu*, 2018 FC 306 at para 55 ("*Singh Sidhu*")).

[18] In determining whether a misrepresentation is material, regard must be had for the wording of the provision and its underlying purpose (*Oloumi* at para 22). It is necessary, in each case, to look at the surrounding circumstances to decide whether the withholding of information constitutes a misrepresentation (*Baro* at para 17; *Bodine* at paras 41-42; *Singh Sidhu* at paras 59-61). Further, a misrepresentation need not be decisive or determinative. It is material if it is important enough to affect the process (*Oloumi* at para 25).

[19] Nor can an applicant take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application. The materiality analysis is not limited to a particular point in time in the processing of the application (*Haque* at paras 12, 17; *Khan* at paras 25, 27, 29; *Shahin v Canada (Citizenship and Immigration)*, 2012 FC 423 at para 29 ("*Shahin*")).

(See also Kazzi v Canada (Citizenship and Immigration), 2017 FC 153 at paras 38-39; Turian v Canada (Citizenship and Immigration), 2018 FC 324 at paras 25-28 [Turian]).

Misrepresentation

[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*]).

[12] In this matter, the first factor is not at issue. The Applicant acknowledged that she omitted the refused US visa from her application in her reply to the procedural fairness letter. She also acknowledged that it could have been possible to include all of the information on an additional sheet and that she should have taken this step. She submitted that she had made an honest mistake in not doing so.

[13] As to the second factor, as pointed out by the Respondent, this Court has previously held that a refused US visa is a material fact. This is because it raises the question of why the US visa was refused. The non-disclosure by an applicant of that material fact could deny a visa officer the opportunity to investigate this further which, in turn, could induce an error in the administration of the IRPA (*Mohseni v Canada (Citizenship and Immigration)*, 2018 FC 795 at paras 39 – 41, 46-47; *Bellido* at para 27; *Goburdhun v Canada (Minister of Citizenship and Immigration)*, 2013 FC 971 at para 42 [*Goburdhun*]).

[14] The Applicant does not take issue with the materiality of the omitted fact in and of itself.

[15] Instead, the Applicant asserts that the Visa Officer erred by failing to consider that, in her reply to the procedural fairness letter, the Applicant had pointed out that she had previously disclosed the refused US visa in an application for permanent residence she submitted in connection with her Quebec Application. She submits that *Koo v Canada (Citizenship and Immigration)*, 2008 FC 931 at paras 28-29 [*Koo*] and *Berlin v Canada (Citizenship and Immigration)* 2011 FC 1117 at paras 21-22 [*Berlin*] suggest that if an Applicant disclosed information in the past, a later failure to identify this information may not result in a misrepresentation finding.

[16] When appearing before me, counsel for the Applicant submitted that the central issue in this matter is that the Officer's reasons did not meaningfully engage with her submission in her response to the procedural fairness letter as to the prior disclosure of the refused US visa. The Applicant submits that this is contrary to the requirements of *Vavilov* (referencing paras 127-130). The Applicant also submits that there is a higher onus on the Officer to provide adequate reasons in light of the harsh consequence the inadmissibility finding will have on the Applicant (referencing *Vavilov* at para 133).

[17] In my view, and as the Respondent points out, *Koo* is factually distinguishable from the matter at hand because the omitted information in *Koo* (a change of name) was readily available to the Officer within the application being considered. In this situation, the information was contained in a different application, which was not referenced in the study permit application. Similarly, in *Berlin*, the Applicant had disclosed the omitted information elsewhere in his

submission at hand as well as in a different application (*Berlin* at para 20; see also *Hashim v Canada (Citizenship and Immigration)*, 2021 FC 880 at para 38-39).

[18] However, the Applicant also points out that *Koo* additionally addressed an allegation of misrepresentation with respect to the applicant's previous application for permanent residence. On that point, the Court found the applicant's previous disclosure supported his claim that he misread the question on the application form and therefore inadvertently ticked off the wrong box. The Court also found that the officer erred by not assessing the materiality of the failure to disclose.

[19] In this matter, unlike *Koo*, the Applicant did not omit the information because she misread the application form. She understood and was aware that all prior visa refusals were to be disclosed. She made a decision not to include the US visa refusal and to only include the Canadian visa information. Thus, this situation is more similar to *Singh v Canada (Citizenship and Immigration)*, 2015 FC 377 [*Singh*] as the misrepresentation was clear, the Applicant was aware of the omission and the Applicant made a deliberate decision not to include it. In effect, the Applicant was deciding that this information was not necessary to her visa application. As stated in *Singh*, "[i]f this was acceptable, the system would fail because applicants would not disclose what they thought should not be considered, and this would seriously undermine the decision-making powers that Parliament has vested in visa officers. This is why s. 40 exists and why the jurisprudence is clear that a misrepresentation – even if honest – can only be excused in truly exceptional circumstances" (para 33).

[20] When appearing before me, counsel for the Applicant suggested that the Applicant only realized that she could have added an extra sheet to her application with the refused US visa information after she had submitted the application. However, on its face, the reply to the procedural fairness letter does not say this. Further, as pointed out by the Respondent, the Applicant did add an extra sheet to her application, a covering letter. I note that in the covering letter the Applicant mentioned that she and her family members had held multiple visit visas in the past and had always left Canada when they were required to do so. She did not mention the refused US visa.

[21] In my view, the Applicant conflates the issue of the materiality of the misrepresentation with the issue of whether the material misrepresentation falls within the narrow innocent mistake exception to s 40.

[22] In her reply to the procedural fairness letter, the Applicant explained why she omitted the refused US visa – an alleged lack of space on the form. She raised her disclosure of the refused US visa in the Quebec Application to support her submission that the omission was an honest mistake. However, a lack of intent to deceive is not a part of the test for misrepresentation.

[23] In *Muniz v Canada (Citizenship and Immigration)*, 2020 FC 872, the applicant answered "no" to the question of whether she had ever been refused a visa and, in response to a procedural fairness letter, submitted that she had misunderstood the question and that she had no intent to lie. On judicial review of the refusal of her application for a travel authorization and finding of misrepresentation and inadmissibility, she argued, among other things, that the officer

unreasonably ignored her previous disclosure of refusals, her prompt correction and the availability of this information when assessing the materiality of her omission. As in this case, she argued that officers must not compartmentalize visa applications but rather that they should be considered in their totality and recognize that errors can sometimes occur in filling out an application. Further, she submitted that not all technical misrepresentations warrant a finding of inadmissibility.

[24] Justice Fuhrer agreed that the officer in that matter had not referred in their reasons to the applicant's prior immigration applications to see if she had previously answered the question at issue correctly, but found that there is no requirement for an officer "to cross-reference multiple applications, submitted at different points in time, to determine if a misrepresentation has occurred innocently in a subsequent application" (para 13). In part, this is because "there is no intent requirement; evidence of prior intention to include this information does not overcome the subsequent omission, in itself. Rather, it speaks to whether the innocent error exception may apply" (para 14).

[25] Here, the Applicant argues that the Officer's decision was unreasonable because they did not mention her reference to the prior disclosure of the refused US visa. I cannot agree. In these circumstances, the Applicant acknowledged that she had not included the refusal in her application and she does not challenge the materiality of the omitted fact. Thus, it is not in dispute that the misrepresentation could have induced an error in the administration of the IRPA. The fact that the Applicant also asserted in her reply to the procedural fairness letter that her misrepresentation was demonstrably innocent because she had previously disclosed it in the

Quebec Application does not impact or cure the material misrepresentation. Therefore, I do not agree that the Officer erred in failing to mention this in the reasons.

[26] Further, the Global Case Management System [GCMS] notes state that the Applicant's response to the procedural fairness letter was reviewed and set out the reason that the Applicant gave for the omission – that the US visa refusal was not mentioned because there was insufficient space/characters allowed in the relevant section of the form. The reasons state that, because of the nondisclosure, the Applicant had not been wholly truthful on her application. This brought into question her actual intentions and overall credibility, and the omission was therefore material. Thus, I also do not agree with the Applicant's assertion that the Officer made no attempt to determine if there was a misrepresentation. Moreover, as discussed above, her own evidence confirmed that there had been a misrepresentation.

[27] It is also apparent that the Officer did not accept the Applicant's submission that the misrepresentation was an honest mistake. It is true that the Officer does not explicitly state this. However, the reasons indicate that the Applicant's credibility was at issue. In any event, there is no requirement within section 40(1)(a) that the misrepresentation be intentional, deliberate or negligent (*Bellido* at paras 27-28; *Bains v Canada (Citizenship and Immigration)*, 2020 FC 57 at para 63). Therefore, even if the truth of an applicant's explanation for a misrepresentation is accepted, subject to the narrow honest mistake exception, an applicant will still be inadmissible because an innocent failure to provide material information still constitutes misrepresentation (*Tofangchi v Canada (Citizenship and Immigration)*, 2012 FC 427 at paras 33, 40; *Coube de Carvalho v Canada (Citizenship and Immigration)*, 2019 FC 1485 at paras 18 – 21; *Jiang v*

Canada (Minister of Citizenship and Immigration), 2011 FC 942 at para 35; *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at paras 56-58; *Wang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 647 at paras 24-25; *Smith v Canada (Citizenship and Immigration)*, 2018 FC 1020 at para 10).

[28] In summary, the Applicant was under an obligation to ensure that her application was complete and accurate. The failure to disclose the US visa refusal was a material misrepresentation. The Officer's reasons confirm that they were aware of and considered the Applicant's reply to the procedural fairness letter. Given that the reasons found that the Applicant's credibility was at issue, it is implicit that the Officer did not accept the Applicant's submission that the omission was an honest mistake and why this was so. Nor am I persuaded that the jurisprudence supports that, in these circumstances, the Applicant's misrepresentation is cured or mitigated by the fact that the omitted information was contained in a different application for permanent residence. Further, the Officer also did not err in failing to explicitly consider the prior disclosure as a mitigating factor because a lack of intent to mislead is not a factor in determining whether a section 40(1)(a) misrepresentation occurred (*Turian* at para 26).

Innocent Mistake

[29] The Applicant submits that the Officer failed to consider whether the doctrine of innocent mistake might apply in her case, even if a misrepresentation were to be found. She also submits that, while it is clear that her explanation that she made an innocent mistake was rejected by the Officer, the reasons for the decision did not permit her to know why this was the case.

[30] In my view, these arguments cannot succeed.

[31] First, as indicated above, the innocent mistake exception to s 40 is narrow and applies only to truly extraordinary circumstances where an applicant honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control. That is, the applicant was subjectively unaware that he or she was withholding information. That is not the circumstance in this case. In her response to the procedural fairness letter, the Applicant acknowledged that she did not provide information about the refused US visa application, attributed this to a lack of space in the application form and acknowledged that she could have attached a separate sheet specifying all refusals. She also stated that she had disclosed the refused US visa in a separate application.

[32] Thus, when the Applicant submitted her student permit application, she was not only aware of the existence of the refused US visa. She was also aware that she had omitted that information from her application.

[33] Therefore, this is not a situation such as *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126. Rather, it is factually more similar to *Tuiran.* In that case, the applicant answered "yes" to the question "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or another country?" and referenced the refusals of the two Canadian TRV applications she had made in 2015 but not a cancelled US visa. The applicant subsequently acknowledged the cancelled visa but claimed that she was confused by the question and thought it only related to Canada. The officer found the applicant inadmissible for misrepresentation. She sought judicial review and argued that the decision was unreasonable

because it failed to consider that she had made an innocent mistake. This Court discussed the narrow innocent mistake exception to s 40(1) and rejected the argument, stating:

> [29] Regardless of whether the Applicant misunderstood the question when filling in her TRV application form or intended or not to misrepresent the status of her US visa, it is simply not plausible that she had no idea that her visa had been cancelled. The Applicant's situation is analogous with that of the applicant in *Baro* because the form specifically requested the information, which was in the Applicant's possession, and she did not provide it. The question clearly indicates "Canada or any other country" and the onus was on the Applicant to provide accurate information, as required by section 16 of the Act.

[34] The jurisprudence discussing an innocent mistake under s 40 is considerable and consistent. The Applicant suggests that *Somal v Canada (Citizenship and Immigration)*, 2021 FC 630 [*Somal*] and *Alves v Canada (Citizenship and Immigration)*, 2021 FC 716 [*Alves*] serve to widen the exception. However, *Somal* does not actually make reference to the exception. *Alves* considered a situation where the officer found that the applicant had misrepresented by failing to provide sufficient specificity about her immigration history, despite correctly answering a question about her history in the affirmative and referencing her adverse immigration status in the US. The officer failed to take into account the relevant evidence provided in her response to a procedural fairness letter. The Court found that the evidence did not justify the officer's finding that the misrepresentation was material and the decision was found to be unreasonable. I do not read *Alves* as serving to widen the existing innocent misrepresentation exception. Furthermore, again, the Applicant in this instance admitted the misrepresentation and the materiality of the representation is not at issue.

[35] In these circumstances, while the Officer's reasons could certainly have been more fulsome, the Officer did not err by failing to explicitly address whether the innocent mistake exception might apply. The reasons demonstrate that the evidence before the Officer – the Applicant's reply to the procedural fairness letter – confirmed that the Applicant was aware of the refused US visa and that she had knowingly omitted the information. Thus, regardless of whether the misrepresentation was intended to mislead, the innocent mistake exception had no application. The Officer therefore did not err in failing to consider it.

[36] In any event, it is clear that the Officer did not accept the Applicant's explanation that the omission of the US visa refusal was an honest mistake, instead finding that the failure to disclose meant that she had not been wholly truthful in her application. As stated in *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 at para 16 [*Alalami*], if her explanation had been accepted, it may have been incumbent upon the Officer to consider the innocent error exception. However, "the exception has no potential application in the absence of a conclusion that the error was indeed innocent" (*Alalami* at para 16). In *Alalami*, the Court concluded that it could not find that the officer erred in failing to expressly consider the application of the exception when the officer had concluded that the applicant intentionally failed to disclose the US visa refusal. This is a like circumstance.

[37] For the same reasons, I also do not agree with the Applicant that the reasons for the decision did not permit her to know why the Officer did not accept her explanation that she had made an innocent mistake.

Intelligibility

[38] The Applicant submits that the decision is unintelligible because the Officer stated only that the Applicant had failed to disclose one or more previous Canadian or NIV refusals and/or other enforcement action and failed to precisely and exactly identify the undisclosed information. For similar reasons as above, this has no merit.

[39] As discussed, the Applicant herself identified the undisclosed refused US visa in her response to the procedural fairness letter. She does not now suggest that there were other matters that were not disclosed. Accordingly, I fail to see how the Officer's use of general terms in the decision to describe the nondisclosure could have led the Applicant to be uncertain as to the exact basis of the inadmissibility finding, as she submits. Nor do I agree with her that the general language calls into question whether the Officer appreciated the facts of the case or grappled with her arguments.

Conclusion

[40] The reasons in this matter are not ideal and it would assuredly have been preferable had the Officer explicitly and simply stated that they did not accept her submission that her disclosure of the refused US visa in her Quebec Application established that she had made an honest mistake. However, reasons are not required to be perfect and, as the Respondent points out, they must be reviewed within the institutional context within which the decision was made (*Vavilov* at para 91). This does not mean that visa officers have a lesser obligation to engage with and be responsive to the factual submissions of applicants. But nor are they required to provide

an explicit discussion of each and every argument raised by the parties, as long as the rationale for the decision is clear (see *Adeleye v Canada (Citizenship and Immigration)*, 2020 FC 640 at para 16). In the context of visa officer decisions, brief, clear and concise justification will often suffice. The reasons in this matter are also sufficient reflect the impact of the decision, inadmissibly for five years. While this is consequential for the Applicant, it is not a circumstance such as a denied refugee claim, where a claimant alleged that they would face a risk to life and where more comprehensive reasons might be necessary to demonstrate that the decision maker appreciated the seriousness of the alleged impact of their decision.

[41] The test for reasonableness is whether the Officer's decision is transparent, intelligible and justified in relation to the relevant factual and legal constraints (*Vavilov* at paras 15, 85, 99). In this case, I am able to understand the Officer's reasoning on the critical points upon reading the reasons in conjunction with the record (*Vavilov* at para 98, 103). And, for the reasons above, I find that the Officer's decision was reasonable.

JUDGMENT IN IMM-571-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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