Federal Court  Cour fédérale

Date: 20220509

Docket: IMM-2049-20

Citation: 2022 FC 684

Toronto, Ontario, May 9, 2022

PRESENT: Madam Justice Go

BETWEEN:

KHALID AHMED MARKAR
SAIMA KHALID AHMED MARKAR
NUREIN AHMED MARKAR
NURAIZ KHALID MARKAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Mr. Khalid Ahmed Markar, is a business consultant. In 2017, he was offered full time employment in Toronto. After obtaining a positive Labour Market Impact Assessment [LMIA], Mr. Markar applied for a work permit, as well as a work permit for his

spouse, and study permits for their minor children [together the Applicants]. They are all citizens of India.

[2] Together with the work permit application, Mr. Markar submitted an application for criminal rehabilitation, in order to overcome inadmissibility stemming from a 1998 conviction in the United States [US] for selling or delivering marijuana, for which he was deported from the US. Mr. Markar's application for criminal rehabilitation was approved on October 30, 2019.

[3] Meanwhile, during the processing of the work permit application, parts of the application were lost by the High Commission of Canada Visa Office in New Delhi. Eventually, in September 2019, the Applicants received a procedural fairness letter [PFL] stating that Mr. Markar was suspected of misrepresentation and given an opportunity to respond. The alleged misrepresentation related to a question in the work permit application form, which asked: "Have you previously applied to enter or remain in Canada?" [Question 2c]. Mr. Markar checked "no." However, Mr. Markar had previously applied to enter Canada and been rejected.

[4] On September 20, 2019, the Applicants responded to the PFL. Mr. Markar disclosed that he had submitted a study permit application, which was refused in March of 2002; a visitor visa application, which was refused in April 2001; and a visitor visa application refused in August of 1991. He stated that his answer to Question 2c was an honest mistake and he had not attempted to deceive anyone.

[5] The work permit application was rejected on October 30, 2019 [Decision] by an immigration officer at the High Commission of Canada in New Delhi, India [the Officer] based on misrepresentation pursuant to s. 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Officer also refused the applications of his wife and children. The reasons for the Decision are contained in the Global Case Management System [GCMS] notes.

[6] I grant the application as I find the Decision failed to analyse whether the innocent mistake exception applied, and whether the misrepresentation could induce an error in the administration of *IRPA*.

II. Issues and Standard of Review

[7] The Applicants raise the following issues: (1) whether the Principal Applicant answered Question 2c wrongly, (2) whether the Officer applied misrepresentation law correctly, (3) whether the alleged error falls under the "innocent error exception", (4) whether the alleged error was material, and (5) whether the Decision was reasonable in the circumstances.

[8] The Applicant argues that according to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], questions of law are reviewed on a correctness standard and questions of mixed fact and law and questions of fact are reviewable on a reasonableness standard, which would appear to be a misinterpretation of *Vavilov.*

[9] In my view, this application does not raise questions of procedural fairness and there is no other reason to depart from *Vavilov*'s presumption that reasonableness is the standard of review: *He v Canada (Citizenship and Immigration)*, 2022 FC 112 at para 12.

[10] 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 para 85. The onus is on the Applicant to demonstrate that the RPD decision is unreasonable. To set aside a decision on this basis, the 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": *Vavilov*, at para 100.

III. Analysis

Relevant Legislation

[11] The Principal Applicant was found to be inadmissible under s. 40(1)(a) of *IRPA*, which reads as follows:

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; […]
Inadmissible	**Interdiction de territoire**
(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).	**(3)** L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.

[12] I need not address all the issues raised by the Applicants. Instead, I focus my analysis on the following three issues:

a) Did the Officer err by failing to consider whether the "innocent error" exception applied?

b) Did the Officer fail to meaningfully analyze whether the misrepresentation was material?

c) Did the Officer fail to consider whether the misrepresentation could induce an error in the administration of *IRPA*?

A. *Did the Officer err by failing to consider whether the "innocent error" exception applied?*

[13] The Applicants submit the Officer erred by failing to consider the "innocent error" or "innocent mistake" exception in misrepresentation law regarding his response to question 2(c).

[14] In his response to the PFL, Mr. Markar explained as follows: “I misinterpreted the question thinking of being able to enter and/or to prolong a stay in Canada, and then making a further application. Since I had been refused the visas and I had never been in Canada, how could I have entered or remained in Canada. I was confused and now I understand that a visa application is an application to enter the country.”

[15] Mr. Markar further explained: “During the process of my study permit application in 2002 I was invited for an interview at the Canadian Embassy in India. At the time of the interview, it was evident for me that the immigration official had information of my previous applications. I had the perception that my pervious applications with Canada were clearly a record in the file under my name.”

[16] With that in mind, he pointed out that on the same form, he had answered “yes” to the question “Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?” [Question 2b], and that he had given details about his deportation from the US after his 1998 conviction, since he knew it was not part of his Canadian record. He further explained that “I had no reason to conceal my previous applications, especially when I earnestly thought that they were part of my personal record with Immigration Canada.”

[17] The Applicants argue that according to *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 [*Alalami*] at para 16, an officer should consider whether an applicant’s “belief that he was not withholding material information was not only honest but also reasonable, in light of the wording of the relevant question in the application form.”

[18] I note that in *Alalami*, the Court concluded that the officer was in fact not required to consider the innocent error exception because the officer had not concluded that the error was indeed innocent. However, the Court set out the relevant legal propositions at paras 15 to 16:

> [15] Mr. Alalami submits that the innocent error exception, which can apply to preclude findings of inadmissibility under s 40(1) of IRPA, should have been applied or at least considered by the Officer before making the finding of inadmissibility. While even an innocent failure to provide material information can result in a finding of inadmissibility, the jurisprudence does recognize an exception where an applicant can show an honest and reasonable belief that he or she was not withholding material information (see, e.g., *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15). Mr. Alalami submits that this exception has been applied in circumstances where an applicant failed to disclose information of which he or she was aware (see, e.g., *Punia v Canada (Citizenship and Immigration)*, 2017 FC 184). He also argues that it can be a reviewable error for a visa officer to fail to conduct a meaningful analysis of the innocent error exception where there is evidence supportive of its application (see *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 [*Berlin*]).
>
> [16] I accept all these propositions as a matter of law…
>
> [emphasis added]

[19] The Applicants also rely on *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 [*Berlin*] at para 22, which found that the officer failed to conduct a meaningful analysis of the innocent mistake exception.

[20] I also note in *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 [*Gill*], Justice McHaffie provided a helpful summary of this Court's somewhat conflicting jurisprudence on the innocent mistake exception:

> [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 CanLII 16384 (FC), [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] The Respondent argues that even an innocent failure to provide material information can result in a finding of inadmissibility, and although an exception arises where applicants can show

they honestly and reasonably believed that they were not withholding material information, this exception is narrow: *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 31 [*Goburdhun*], citing *Medel v Canada*, [1990] FCJ No 318 (CA)(QL) and *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at paras 35-56.

[22] I acknowledge that the exception is narrow. However, I find the Decision unreasonable as it did not consider whether the innocent mistake exception applied, as the Officer was required to do.

[23] According to the GCMS notes, the first officer who reviewed the Applicants' matter did not provide any indication as to whether they accepted the Applicants' argument based on the innocent mistake exception:

> The information provided in the sworn affidavit and explanation letter indicated that the applicant seemed to have acted in ignorance. It is however notable that the applicant had engaged the counsel in September 17 (IMM5476 signed 2017/09/27) and had provided voluminous documentation for criminal rehab. It appears unlikely that the applicant would have on his own filled out the forms and relevant questions on background information on background information was misrepresented and left out under the assumption that they were already part of the Canadian records.

[24] In my view, the use of the words "appears unlikely" and "seemed to" fall short of rejecting the innocent mistake argument. At best, they signal the first officer's doubts about the Applicants' argument and for that reason their file was sent to the Unit Manager "for review and decision on the case."

[25] The reasons give by the Unit Manager for the refusal were equally brief and read in part:

> Applicant claims he made an honest mistake. Despite this, the applicant is still solely responsible for ensuring that his application contains all of the required information, and that this information is correct and truthful. On balance of probabilities, I am therefore of the opinion that the applicant misrepresented himself under A40(1)(1) by providing incorrect information that could have induced an error in the administration of IRPA.

[26] That the Applicant is responsible for ensuring this application contains correct and truthful information is a given. The reasons did not explain, however, why the innocent mistake exception did or did not apply in this case. No reference was made anywhere in this one brief paragraph to any of the explanations provided by Mr. Markar as to why he answered the questions the way he did.

[27] Read as a whole, I find the Decision's lack of analysis is "a deficiency [arising] from the Officer's failure to acknowledge the potential significance of the relevant mitigating evidence" that the Applicants have provided: *Berlin*, at para 22.

[28] As Justice McHaffie noted at para 21 of *Gill*:

> 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.

[29] The same conclusion, in my view, applies. Regardless of which approach is taken to the innocent mistake exception, the Officers in this case did not provide an adequate justification for their conclusion which rendered the Decision unreasonable.

B. *Did the Officer fail to meaningfully analyze whether the misrepresentation was material?*

[30] Under s. 40(1)(a) of *IRPA*, a person becomes inadmissible for misrepresentation by "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" [emphasis added]. The Applicants argue that the Officer failed to meaningfully analyze whether the omission was material.

[31] The Applicants cite *Berlin* at paras 20-21, arguing that it is hard to imagine why 20-year-old refusals would be material in this case, other than for their relevance to Mr. Markar's criminal inadmissibility which was overcome when his application for criminal rehabilitation was granted. The Applicants point out that he had already disclosed his criminality and had already disclosed in Question 2b that he had previously been denied entry to Canada. The Applicants argue that the Officer failed to properly explain the materiality requirement in s. 40(1)(a) of *IRPA*, contrary to *Ali v Canada (Citizenship and Immigration)*, 2008 FC 166.

[32] The Applicants further cite *Lamsen v Canada (Citizenship and Immigration)*, 2016 FC 815 at para 24, in which the Court found that a visa application must be considered in its totality, and that the officer erred in not considering that while the applicant had misstated the duration of employment in one part of the application, she had detailed it accurately in another part of the application and had confirmed these details in her response to the PFL.

[33] The Respondent relies on *Goburdhun* at para 43, in which the Court rejected the applicant's argument that "because CIC has access to the whole of his immigration history, an incorrect answer in his application is not material."

[34] The Respondent also argues that the GCMS notes display a meaningful analysis of materiality, particularly the following passage:

> FOSS search shows a previous SP refusal, however applicant's PFL response indicates he has had three previous Canadian TRV refusals. Applicant did not declare any of these visa refusals on his application…he only declared a previous US deportation. This information is relevant as it relates to his credibility; additionally, knowing the background history of an applicant factors in the eligibility and admissibility assessment. Applicant claims he made an honest mistake…the applicant is still solely responsible for ensuring that his application contains all of the required information, and that this information is correct and truthful…

[35] While I do not share the Respondent's confidence about the Officer's analysis being "meaningful", I have to agree that the reasons do provide some rationale, albeit extremely brief, as to the materiality of the misrepresentation. As the Officer explained, the materiality relates to Mr. Markar's credibility, and "knowing the background history of an applicant factors in the eligibility and admissibility assessment."

[36] Thus, while I do share the Applicants' query as to why 20-year-old refusals would be material in this case, the Decision did offer an explanation, which I cannot conclude to be unreasonable.

C. *Did the Officer to consider whether the misrepresentation could induce an error in the administration of* IRPA*?*

[37] Inadmissibility for misrepresentation requires, according to s. 40(1)(a), that the misrepresentation “induces or could induce an error in the administration of this Act.”

[38] In their reply, the Applicants raise the argument that the Officer failed to consider whether the misrepresentation could have induced an error in the administration of *IRPA*. The Applicants argue that the Officer did not explain how information about 20-year-old visa applications could have induced the Officer to err in applying *IRPA*, and that the Officer only noted the omission was relevant without further explanation. The Applicants submit that the Visa Office and Immigration, Refugees and Citizenship Canada [IRCC] both had information about Mr. Markar’s previous applications and that these previous applications were revealed in the response to the PFL.

[39] The Respondent submitted at the hearing that it was not up to the Applicants to decide what is or is not relevant to their application. Their obligation was to answer the question truthfully and they failed to do so. The Applicants did not provide enough reasons as to why their case falls within the narrow application of the innocent mistake exception.

[40] I agree with the Applicants. The brief reasons contained in the GCMS notes offered no explanation as to how the information about Mr. Markar being refused a study permit in 2002 and a visitor visa in 2001 - let alone a 31-year old refusal of a visitor visa - would have induced an error in applying *IRPA*.

[41] The lack of analysis is particularly disconcerting in this case when Mr. Markar has already obtained a LMIA for his job offer, signalling at the very least that his presence in Canada is considered by the Canadian government as necessary to fulfil a labour market need. In addition, while the GCMS notes state that background history "factors in the…admissibility assessment", there is no analysis of the impact of Mr. Markar's successful application for criminal rehabilitation.

[42] The impact of the inadmissibility finding is severe, not only on Mr. Markar but his entire family, as they would all be barred from entering Canada for five years. The Officer's failure to explain how the misrepresentation could induce an error in the application of *IRPA*, in light of all the circumstances of this case, means the Decision lacked the requisite justification, transparency and intelligibility as required by the law: *Vavilov*, para 81.

IV. Conclusion

[43] The application for judicial review is allowed and the matter is returned for redetermination by a different officer.

[44] There is no question to certify.

JUDGMENT in IMM-2049-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different officer.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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