Federal Court  Cour fédérale

Date: 20220916

Docket: IMM-4337-21

Citation: 2022 FC 1304

Toronto, Ontario, September 16, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

ROSE MARIAM MUNOZ GALLARDO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of an April 26, 2021 decision [Decision] of an overseas visa officer of Immigration, Refugee and Citizenship Canada [IRCC], refusing the Applicant's application for a work permit under the Temporary Foreign Worker Program [TFWP]. The Applicant did not list a past refusal for a temporary resident visa [TRV] and past refusals for electronic travel authorizations [eTA] in her application. The Decision-Maker concluded that the Applicant had omitted material information from her application, contrary to paragraph 40(1)(a)

of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the Applicant was rendered inadmissible to Canada for a period of five years, pursuant to paragraph 40(2)(a) of the IRPA.

[2] For the reasons set out below, the application is allowed as the record before the Court does not disclose sufficient justification for the underlying paragraph 40(1)(a) finding as no analysis was provided on the materiality of the omission, thus rendering the Decision unreasonable.

I. Background

[3] The Applicant, Rosa Miriam Munoz Gallardo, is a farm supervisor and a citizen of Mexico. On July 3, 2020, she submitted an application for a work permit under the TFWP in the agriculture stream, supported by a Labour Market Impact Assessment completed by her prospective Canadian employer.

[4] On August 8, 2020, an entry was placed in the Global Case Management System [GCMS] notes indicating concerns with the Applicant's application. The reviewing IRCC officer's integrated search revealed that the Applicant had been refused a previous TRV and four eTAs since her eighteenth birthday and only the most recent eTA refusal was referenced in the application.

[5] The officer sent the Applicant a procedural fairness letter [PFL] dated August 25, 2020, notifying her of these concerns and giving her an opportunity to respond. The Applicant's then

representative, an immigration consultant registered with the Immigration Consultants of Canada Regulatory Council [ICCRC], responded to the PFL stating that the omission of the previous refusals was an unintentional mistake and inadvertent omission, and that the Applicant thought that by providing the most recent refusal, her remaining immigration history would become accessible to the officer through the system. She provided a list of the Applicant's prior refusals and indicated that an additional eTA request remained outstanding.

[6] On September 22, 2020, the same officer made an entry in the GCMS notes outlining the Applicant's response. The officer noted the Applicant's responsibility to provide accurate information in support of her application and commented on the fact that the Applicant's representative was a consultant, registered with the ICCRC who had represented her since submission of the application. As stated by the officer, the representative "[knew] or reasonably ought to have known that the applicant is responsible for answering all questions truthfully, including providing details about all previous refusals." The officer found the Applicant "may have directly/indirectly misrepresented or withheld material information pertaining to a relevant matter which could have induced an error in the administration of the Act." The file was sent to the Minister's delegated authority [Decision-Maker] for a decision regarding section 40 of the IRPA.

[7] A further entry in the GCMS notes from the Decision-Maker indicates that they reviewed the relevant facts and information and were "satisfied that [the] applicant directly or indirectly misrepresented or withhold (sic) material facts relating to a relevant matter that induces or could induce an error in the administration of the IRPA." The Applicant was found inadmissible to

Canada for a period of five years, in accordance with paragraphs 40(1)(a) and 40(2)(a) of the IRPA.

II. Preliminary Matter – Style of Cause

[8] As a preliminary matter, I note that the style of cause for this proceeding has been amended to reflect the correct Respondent – The Minister of Citizenship and Immigration.

III. Issues and Standard of Review

[9] The sole issue raised on this application is whether the Decision was reasonable.

[10] An administrative decision regarding a finding of misrepresentation on a work permit application is reviewable on the standard of reasonableness: *Badmus v Canada (Citizenship and Immigration)*, 2022 FC 1031 at para 9; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. None of the situations that would rebut the presumption of reasonableness review is present here: *Vavilov* at paras 16-17.

[11] In conducting a reasonableness review, the Court must determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A reasonable decision, when read as a whole, bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[12] The Applicant argues that the omission of information relating to her past visa refusal and eTAs was an innocent mistake. She asserts that the reasons provide inadequate justification and are not transparent as they do not address the argument made in her response to the PFL that an honest mistake was made; nor do they discuss whether the misrepresentation made was material so as to satisfy paragraph 40(1)(a) of the IRPA.

[13] The Respondent asserts that the Decision was reasonable. The honest mistake exception does not apply and the nature of the omission made is inherently material. As such, no further explanation was warranted.

[14] The reasonableness of the Decision in this case thus turns on its justification.

[15] As set out in *Vavilov*, 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 the individual (at paras 91, 103).

[16] A visa officer has a minimal duty to give reasons for a denied TRV application, as long as the reviewing court can understand why the officer made the decision: *Alkhaldi v Canada (Citizenship and Immigration)*, 2019 FC 584 [*Alkhaldi*] at para 17; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 21. However, a finding of misrepresentation, which bears the consequence of a five-year period of inadmissibility from Canada, imposes a greater consequence and requires the decision-maker's reasons to reflect the stakes and the perspective of the affected individual: *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 [*Gill*] at

para 7; *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 27, citing *Vavilov* at para 133.

IV. Analysis

[17] Paragraph 40(1)(a) of the IRPA provides that a foreign national is inadmissible for misrepresentation where they withhold material facts that could induce an error in the administration of the IRPA. The facts must be material for there to be a misrepresentation and there must be clear and convincing evidence that an applicant, on a balance of probabilities, has withheld material facts for a finding of misrepresentation to be made: *Chughtai v Canada (Citizenship and Immigration)*, 2016 FC 416 at para 29.

[18] Paragraph 40(1)(a) is to be given a broad and robust interpretation: *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 38 [*Kazzi*]; *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 [*Oloumi*] at para 23. The purpose of paragraph 40(1)(a) is to preserve the integrity of the immigration process and ensure that applicants provide complete, honest, and truthful information when seeking to enter Canada: *Kazzi* at para 38; *Bodine v Canada (Citizenship and Immigration)*, 2008 FC 848 at para 41.

[19] In extraordinary circumstances, a narrow exception to a misrepresentation finding under paragraph 40(1)(a) may apply where an applicant is able to show that they honestly and reasonably believed that they were not withholding material information: *Kazzi* at para 38; *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhun*] at para 31; *Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345, [1990] FCJ

No 318 (QL) (FCA). In *Alkhaldi* at paragraph 19, this was described as involving a subjective test, where the decision-maker asks whether the person honestly believed that he was not making a misrepresentation; and an objective test, where the decision-maker asks whether it was reasonable on the facts that the person believed that he was not making a misrepresentation.

[20] In *Oloumi*, the subjective element was discussed further. As explained at paragraph 36 of that decision, the exception is narrow and pertains to information of which the applicant was subjectively unaware or which was beyond their control:

> [36] When considered within its factual context, therefore, the exception in *Medel* is relatively narrow. As Justice MacKay noted while distinguishing the case before him in *Mohammed v Canada (Minister of Citizenship & Immigration)*, [1997] 3 FC 299:
>
> > 41 The present circumstances may also be distinguished from those in *Medel* on the basis that the information which the applicant failed to disclose was not information regarding which he was truly subjectively unaware. The applicant in the present case was not unaware that he was married. **Nor was it information, as in *Medel*, the knowledge of which was beyond his control.** This was not information which had been concealed from him or about which he had been misled by Embassy officials. The applicant's alleged ignorance regarding the requirement to report such a material change in his marital status and his inability to communicate this information to an immigration officer upon arrival does not, in my opinion, constitute "subjective unawareness" of the material information as contemplated in *Medel*.
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> (Emphasis added)

[21] The Applicant argues that the innocent mistake exception has been viewed more broadly in other cases, such as *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421

[*Karunaratna*], where the Court found an innocent mistake despite the applicant's knowledge of the omitted information. In *Karunaratna,* the omission of a prior refused TRV in the applicant's permanent residence application was found to be an innocent mistake where the officer had access to the past refusals, the applicant had previously disclosed the refusal in another TRV application, and the applicant had updated the form on her own without the help of her consultant. In that case, the explanation given by the applicant's consultant to the procedural fairness letter supported a finding that the omission was truly inadvertent.

[22] While the undisclosed information was clearly known to the applicant in *Karunaratna,* I do not view *Karunaratna* as taking away from the preponderance of the jurisprudence that has followed *Oloumi* and *Goburdhun*. Rather, the findings in *Karunaratna* are specific to the facts and context of the omission that arose in that case. I do not consider the same circumstances that were at play in *Karunaratna* to be at issue here.

[23] In my view, the situation here is similar to that which was before the Court in *Malik v Canada (Citizenship and Immigration),* 2021 FC 1004 [*Malik*], which involved an omission of information relating to a past US visa refusal from a study permit application and involved the Court considering the adequacy of the reasons provided. As stated by Justice Southcott at paragraphs 31-35 of *Malik*:

> [31] .... 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.
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> [...]

[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.

[24] Like *Malik*, it was clear from the response to the PFL in this case that the Applicant intentionally did not provide the remainder of the immigration information. When the Applicant submitted her application, she was not only aware of the existence of the remaining refusals, as acknowledged in the response to the PFL, she was also aware that she had omitted that information from her application. It was not a situation of the information not being known to the Applicant. The Applicant asserted in her procedural fairness response that she believed listing the further refusals was not required because the officer would be able to access this information in the system from the most recent refusal.

[25] As in *Malik*, while the reasons could have been more fulsome, the officer did not err by failing to state explicitly that the innocent mistake exception did not apply. The reasons of the reviewing officer acknowledge the Applicant's response to the PFL, which confirmed that the Applicant was aware of the further visa and permit refusals and that she knowingly omitted the information. Regardless of whether the misrepresentation was intended to mislead, the innocent mistake exception had no application. There was no error in failing to consider it more fully.

[26] Further, in this case, like *Malik*, it is clear that the officer did not accept the Applicant's explanation that the omission of the prior refusals was an honest mistake. The reasons of the reviewing officer refer to the Applicant being represented by an immigration consultant

throughout the process and that such consultant “reasonably ought to have known” that the Applicant was “responsible for answering all questions truthfully, including providing details about all previous refusals.”

[27] Identification of prior visa or permit refusals was specifically requested in the work permit application form. The application form did not ask for the details of only the recent refusal. Rather, it asked for the details of whether the Applicant had ever been refused a visa or permit. A full and complete answer to this question was mandatory, not discretionary. There should have been no ambiguity as to what was required or relevant. In my view, the notes of the reviewing officer reflect this perspective and are reasonable on this point.

[28] However, I take a different view with respect to the second argument raised by the Applicant. The Applicant separately challenges the reasonableness of the Decision as it relates to the sufficiency of the analysis on the materiality of the omissions. As she correctly submits, the failure to conduct an analysis of the materiality of an alleged misrepresentation can constitute a reviewable error: *Koo v Canada (Citizenship and Immigration)*, 2008 FC 931 at para 29.

[29] The Applicant argues that the Decision provides nothing more than a bare conclusion as to the issue of materiality without any analysis making it impossible for the Applicant to connect the dots to understand the officer’s chain of analysis: *Tung v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 917 at paras 14-16.

[30] As I have done above, I have viewed the Decision as comprising the cumulative comments of both the reviewing officer and the Decision-Maker, on the understanding that it is not necessary for the Decision-Maker to repeat the same reasons already in the notes of the reviewing officer when it is clear that the Decision-Maker accepts the review conducted: *Hasham v Canada (Citizenship and Immigration)*, 2021 FC 881 [*Hasham*] at paras 29-31.

[31] The notes of the Decision-Maker state only the following conclusion which mirrors the language of the IRPA:

> I have reviewed all facts and information before me. I am satisfied that applicant directly or indirectly misrepresented or withhold [sic] material facts relating to a relevant matter that induces or could induce an error in the administration of the IRPA. As such I am satisfied that AP is inadmissible to Canada in accordance with paragraph 40(1)(a) of the Immigration and Refugee Protection Act (IRPA). In accordance with paragraph A40(2)(a), AP will remain inadmissible to Canada for a period of five years from the date of this letter or from the date a previous removal order was enforced.

[32] Similarly, the reviewing officer notes only that the Applicant "failed to declare 4 of the 5 refusals" and cites the refusals by their date, ultimately concluding after a review of the procedural fairness response that the "PA may have directly/indirectly misrepresented or withheld material information pertaining to a relevant matter which could have induced an error in the administration of the Act." No statement is made about the nature of the refusals omitted and why the officer considers them material to the pending application.

[33] The Respondent argues that a substantive materiality analysis was not required in this instance, where four of the five prior refusals were not provided and all of the omitted information related to prior refusals filed in Canada. It notes that at least two of the omitted

refusals related to the Applicant not being able to satisfy a visa officer that they would leave Canada at the end of their stay. The Respondent argues that on their face, it would be apparent that the omitted refusals could have affected whether a future TRV might issue, and as concluded by the Officer, could have induced an error in the administration of the IRPA.

[34] However, I do not accept that materiality can be presumed. As stated in *Patel v Canada (Citizenship and Immigration)*, 2017 FC 401 at paragraph 23, "visa officers must provide a materiality analysis; that is, they must make an assessment of the false [or omitted] information and provide some basis for the conclusion that the information is material." The stakes involved in inadmissibility requires an analysis and conclusion that the misrepresentation is material, meaning relevant to the matter actively being considered by the officer and could affect the outcome of the officer's review: *Hasham* at para 26. Although the misrepresentation need not be decisive or determinative, this does not change the need for the officer to provide an explanation for how the omission in question might affect the process or the administration of the IRPA: *Kazzi* at para 38; *Gill* at para 29.

[35] In my view, the complete absence of any analysis on the issue of materiality – an essential element under paragraph 40(1)(a) of the IRPA – renders the Decision without sufficient justification and unreasonable. The application accordingly will be referred to a different officer for reconsideration.

[36] The parties did not raise a question for certification and none arises in this case.

JUDGMENT IN IMM-4337-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to correctly identify the Respondent as The Minister of Citizenship and Immigration.

2. The application is allowed, the decision set aside, and the matter is referred back for redetermination by a different officer.

3. There is no question for certification.

"Angela Furlanetto"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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