Federal Court  Cour fédérale

Date: 20231116

Docket: IMM-5378-22

Citation: 2023 FC 1512

Ottawa, Ontario, November 16, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

RAKESH KUMAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of India. He initially entered Canada on a temporary resident visa [TRV], along with his spouse who is not a party to this proceeding, for the purpose of visiting their daughter.

[2] While in Canada, the Applicant attempted to apply for a work permit at the border, based on a positive Labour Market Impact Assessment [LMIA] by leaving and re-entering Canada, a process known as flagpoling. The LMIA had been approved at the time of the Applicant's TRV application in respect of a job offer the Applicant had accepted. The LMIA approval was unknown to the Applicant, however, prior to his arrival in Canada.

[3] The Canada Border Services Agency Officer [Officer] at the border refused to issue the work permit and instead found the Applicant inadmissible for misrepresentation pursuant to section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for failing to disclose an intention to work in Canada on his TRV application. The Officer issued a section 44 report against the Applicant and referred the matter to the Immigration Division [ID] of the Immigration and Refugee Board [IRB] for an admissibility hearing. See Annex "A" below for applicable legislative provisions.

[4] The ID found the Applicant was not inadmissible for misrepresentation under subsection 40(1) of the *IRPA*, but rather that he was a genuine visitor at the time of his initial entry to Canada. On appeal by the Respondent, the Immigration Appeal Division [IAD] of the IRB set aside the ID decision, found the Applicant inadmissible for misrepresentation for failing to disclose his acceptance of the earlier job offer in Canada at the time of his TRV application, and issued an exclusion order against the Applicant [Decision].

[5] The Applicant seeks judicial review of the Decision. The main issue before me is whether the Decision is reasonable, further to the presumptive standard of review which in my view has

not been rebutted here: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 17, 25, 99. In other words, the Court must determine whether the Decision is intelligible, transparent and justified in relation to the applicable factual and legal constraints. The Applicant has the burden of establishing the Decision was unreasonable: *Vavilov*, above at para 100.

[6] I find that the Applicant has met his onus of establishing that the Decision is unreasonable on the basis that the IAD failed to account for "surrounding circumstances" in its application of the legal test applicable to determining inadmissibility for misrepresentation. This issue is determinative in my view, and I therefore decline to consider the other issues raised by the Applicant involving credibility and materiality findings. For the reasons below, I thus grant this judicial review application.

II. Analysis

Applicable Legal Principles

[7] I start my analysis with a summary of the general legal principles applicable to the matter before me for determination.

[8] The requirement of truthfulness or candour stipulated in subsection 16(1) permeates the *IRPA*. It is triggered, for example, when an issue arises regarding whether a foreign national who has applied for a visa has withheld material facts: *Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169 [*Sidhu*] at paras 17, 19.

[9] At least two criteria must be met for a permanent resident or a foreign national to be found inadmissible for misrepresentation under paragraph 40(1)(a) of the *IRPA*: first, there must be a misrepresentation or withholding of material facts relating to a relevant matter that, second, induces or could induce an error in the administration of the *IRPA*: *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 [*Gill*] at para 14; *Gautum v Canada (Citizenship and Immigration)*, 2022 FC 550 at para 19.

[10] Further, the objective of section 40 is to "promote the integrity of Canada's immigration scheme by deterring misrepresentation and ensuring applicants provide complete, honest and truthful information in every manner": *Gill*, above at para 15.

[11] When the withholding of information is at issue, "surrounding circumstances" must be considered to determine if the act of withholding is sufficient to render a permanent resident or foreign national inadmissible for misrepresentation in the particular circumstances: *Sidhu*, above at para 71.

[12] Given that a finding of misrepresentation has the severe consequence of a five-year bar from entering Canada, the decision maker must provide reasons that reflect the stakes for, and from the perspective of, the affected individual: *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 27.

IAD's Application of Legal Test for Inadmissibility for Misrepresentation

[13] Bearing these principles in mind, I note that the IAD framed the criteria for a finding of misrepresentation under section 40 as a series of three questions. First, did the Applicant withhold material facts? Second, were these facts related to a relevant matter? Third, has the withholding induced or could it have induced an error in the administration of the *IRPA*?

[14] This framework, however, fails to add the overlay consideration of whether, based on the surrounding circumstances in the particular case, the act of withholding information is sufficient to culminate in a finding of inadmissibility under section 40. As the Federal Court of Appeal in *Sidhu* guides, this is a balancing exercise that the decision maker must undertake in each case, given the seriousness of an inadmissibility determination.

[15] In my view, the IAD's reasons do not reflect the necessary balancing. Rather, the IAD formulaically applied the framework by determining that the Applicant withheld a fact at the time of his application for a TRV to visit his daughter (i.e. the intention to work in Canada at some indeterminate point, as recognized by the IAD), and that the withheld fact was material to a relevant matter. The IAD concluded that the Applicant had a dual purpose when he applied for a TRV, and his non-disclosure of the intention to work was both relevant and material because it prevented immigration authorities from assessing whether he would leave Canada at the end of his stay for which the TRV was granted.

[16] I am not persuaded, however, that the IAD analyzed the surrounding circumstances as required, rather than simply reciting them. Notwithstanding that the Applicant may have had a

dual purpose, the Decision does not address whether the Applicant should have known that he needed to disclose the intention, either on the TRV application or upon entering Canada.

[17] This Court previously has summarized the *Sidhu* guidance as follows (*Canada (Citizenship and Immigration) v Mattu*, 2020 FC 890 at para 46):

a) the duty of candour is an overriding principle of the act (*Sidhu* at para 70);
b) that there must be reasons given by the tribunal as to why the duty of candour (did or) did not engage in the particular case; and
c) that the reasons why the Appellant in that case did not consider the undisclosed information relevant were required (*Sidhu* at paras 71-77).

[18] I am not convinced that, having regard to the reasons, the IAD reasonably considered, or at all, the question of why the Applicant believed he did not need to disclose the intention to work in the context of the TRV application.

[19] Instead, the IAD considers whether to apply a restrictive or expansive view of the duty of candour. The IAD was required, however, to consider the particular surrounding circumstances including, for example, whether the Applicant had any notice of whether his job offer was material information or whether he should have known that it was material information, and whether withholding this information rose to the level of misrepresentation in the circumstances.

[20] I find in the end that the IAD's analysis focuses unduly on whether the Applicant had the intention to work in Canada, but unreasonably fails to discuss whether the Applicant should have known to disclose this intention. This, in my view, amounts to a reviewable error.

[21] I add that, regarding the IAD's reliance on the decision of this Court in *Singh v Canada (Citizenship and Immigration)*, 2021 FC 959 [*Singh*], I find that the facts are distinguishable. The decision in *Singh* turned on the principle (at para 39) that, while a foreign national is permitted to change their purpose of visit from the original purpose stated at entry, there is a duty to disclose the change of purpose when applying for an extension of a visitor visa. Here, there was no such TRV extension.

[22] Further, the applicant in *Singh* had changed his intention while in Canada, and would have left Canada if his job offer did not pan out: *Singh*, above at para 21. In the case presently before the Court, the record discloses that the Applicant still planned to leave Canada at the end of his stay, even if his work permit was granted. In addition, the applicant in *Singh* argued that the application form to extend his visitor status did not give an option to include a secondary purpose for remaining in Canada, but Justice Lafrenière found that this was not raised before the ID: *Singh*, above at para 41. Here, this was a live issue before ID that was not addressed by the IAD.

III. Conclusion

[23] For the above reasons, I therefore grant the Applicant's judicial review application.

IV. Proposed Certified Question

[24] At the hearing of this matter, the Applicant proposed a serious question of general importance for certification without notice to the Respondent or the Court. The question was

framed as follows: How would a foreign national's intention to, at some point in the future, apply for a work permit and legally work in Canada, affect their application to be a visitor?

[25] Apart from the Applicant's non-compliance with Court's guidance on proposed certified questions at paragraph 36 of the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings,* including five days' notice to opposing counsel, I am not persuaded that the question would be dispositive of an appeal, nor in my view does it transcend the interests of the Applicant.

[26] I therefore decline to certify the proposed question.

JUDGMENT in IMM-5378-22

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted.
2. The May 19, 2022 decision of the Immigration Appeal Division [IAD] is set aside, with the matter to be re-determined by a different panel of the IAD.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27.**

Obligation — answer truthfully **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.	**Obligation du demandeur** **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.
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; … **Application** **(2)** The following provisions govern subsection (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 **(b)** paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility	**Fausses déclarations** **40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants : **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** **(2)** Les dispositions suivantes s'appliquent au paragraphe (1) : **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; **b)** l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jeremiah A. Eastman	FOR THE APPLICANT
Lorne McClenaghan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jeremiah A. Eastman Eastman Law Office Oakville, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT