Federal Court Cour fédérale

Date: 20220602

Docket: IMM-2967-20

Citation: 2022 FC 808

Ottawa, Ontario, June 2, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

JING WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of China. In September 2019, he applied for an open work permit for Canada. At the time, the applicant was residing in China but his wife and son were residing in Canada. An immigration consultant in Toronto assisted the applicant with the application.

[2] The work permit application was refused in a decision dated February 14, 2020, on the basis that the applicant had misrepresented information in his application and, as a result, he is inadmissible to Canada under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). Specifically, a visa officer concluded that the applicant had failed to disclose that he had been arrested and charged with offences in the United States in 2013 and that these were material facts the withholding of which could induce an error in the administration of the Act.

[3] The applicant now applies for judicial review of this decision. He contends that the officer's determination is unreasonable. As I explain in the reasons that follow, reluctantly, I agree. Therefore, this application must be allowed and the matter reconsidered by another visa officer.

II. BACKGROUND

[4] The applicant stated in his work permit application that he had previously resided in the United States – first from February 2013 to September 2015 as a visitor, then from February 2016 to May 2018 as a student.

[5] In light of this information, on October 18, 2019, the visa section of the Canadian Embassy in Beijing sent the applicant a letter requesting proof of his status in the United States from February 2016 to May 2018. As well, since the applicant had been in the United States for six months or longer, he was also required to submit an FBI clearance.

[6] The applicant's immigration consultant responded by letter dated October 22, 2019. The consultant enclosed copies of various visas pertaining to the applicant's time in the United States.

[7] The consultant also enclosed a copy of an FBI clearance letter dated March 5, 2019. The letter stated that a check of the applicant's fingerprints had "revealed prior arrest data at the FBI." Specifically, FBI records indicated that the applicant had been arrested on April 25, 2014, and charged with "Failure to Appear Warrant."

[8] Remarkably, the consultant did not comment on or even acknowledge this adverse information in the FBI clearance letter.

[9] After reviewing the FBI clearance letter, the visa officer noted in an entry in the Global Case Management System ("GCMS") that the information that the applicant had been arrested on April 25, 2014, and charged with "failure to appear warrant" raised "concerns that the applicant was not truthful in his omission of his arrest in the USA in 2014" when he completed the work permit application. As a result, a procedural fairness letter was sent to the applicant on October 30, 2019.

[10] The procedural fairness letter begins by making reference to subsection 16(1) of the *IRPA*, which obliges a person making an application to answer truthfully all questions put to them. The letter then states the following:

> Specifically, I have concerns that you were not truthful on your IMM 1295 Application for work permit made outside Canada. For

> statutory question 3a) “Have you ever committed, been arrested for, been charged with or convicted of any criminal offense in any country or territory?”, you answered “No”.
>
> However, the FBI report you submitted on October 23, 2019 indicates that you were arrested by the Police Department of Westboro, Massachusetts, on April 25, 2014. You were charged with “Failure to appear warrant.”

[11] The letter concludes by offering the applicant “an opportunity to respond to this information” within 30 days. The letter also referred to subsections 40(1) and (2) of the *IRPA*, which concern the potential consequence of inadmissibility due to misrepresentation.

[12] I pause at this point to note that the search result provided by the FBI refers to the arresting agency as “Police Department Westboro.” While the officer evidently understood this to be a police department in the State of Massachusetts, there is no express reference to this in the FBI report. Nothing turns on this, however.

[13] The applicant’s immigration consultant responded to the procedural fairness letter with a letter dated November 11, 2019. In summary, the consultant’s letter stated the following:

- As confirmed by the enclosed court records, the applicant’s “case” was dismissed on the recommendation of the Probation Department on July 10, 2014.

- The applicant did not inform the consultant of this matter when the work permit application was being completed because of “an honest misunderstanding on his part that he thought the matter was over” and it therefore did not need to be disclosed.

- Had the applicant provided this information to the consultant, it would have been included in the application.

- In the consultant's submission, "the materiality consideration should address the **truth of the matter** rather than how he checked off a box on the IMM form" (emphasis in original).

[14] Enclosed with the letter were copies of several court records from the Trial Court of Massachusetts, District Court Department, Somerville District Court, specifically: an Application for Criminal Complaint; a Criminal Complaint and a Criminal Docket. Also enclosed was a Driver History Report dated November 1, 2019, from the Massachusetts Registry of Motor Vehicles. This report set out a number of driving offences committed by the applicant along with the fact that, as a result of these offences, his licence had been suspended from March 19, 2013, until October 14, 2013. The court records all pertain to a charge against the applicant of driving with a suspended licence on March 21, 2013. This charge is noted as having been dismissed on July 10, 2014, upon the applicant having paid the requisite court costs. None of the records refer to any arrest or charge dating from April 25, 2014.

III. DECISION UNDER REVIEW

[15] The decision to find the applicant inadmissible due to misrepresentation proceeded in two stages. First, on November 14, 2019, the original visa officer reviewed the material on file, including the consultant's response to the procedural fairness letter, made certain determinations

including that the applicant had committed misrepresentation, and recommended that the matter be reviewed by another officer.

[16] Then, on February 14, 2020, a second officer reviewed "all relevant information" including the first officer's conclusion that the applicant had "submitted a fraudulent document or withhold [*sic*] information in support of this application." On the basis of this information, the second officer concluded as follows:

> The statutory background is clear and the client omitted to provide the information. Applicants [*sic*] had charge against him in USA and despite having been dismissed, the applicant is responsible for the application and to provide truthful information which could have induced errors. On balance of probabilities I am satisfied based on all available information that the applicant did in fact withhold information as part of this application thereby misrepresenting a material fact, and that this act of misrepresentation could have induced an error in the administration of the Act had it gone undetected. Applicant is therefore inadmissible to Canada under section A40 of the Immigration and Refugee Protection Act for a period of five years. Application refused.

[17] The specific determinations made by the first officer and relied on by the second officer will be discussed in detail below.

IV. STANDARD OF REVIEW

[18] The parties agree, as do I, that the decision finding that the applicant had engaged in misrepresentation is to be reviewed on a reasonableness standard.

[19] 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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13.

[20] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. That being said, to be reasonable, a decision must be justified in light of the facts. The decision maker must take the evidentiary record and the general factual matrix that bears on the decision into account, and the decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. See *Vavilov* at paras 125-26.

[21] The onus is on the applicant to demonstrate that the officer's 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).

V. ANALYSIS

[22] As noted above, the misrepresentation determination proceeded in two stages. The first officer made a number of salient factual determinations and noted them in GCMS. There is nothing in the reasons of the second visa officer as recorded in GCMS to suggest that they took a different view of the evidence than their colleague had. Thus, I will proceed on the basis that the reasons for the decision incorporate the findings made by the first officer.

[23] The applicant has not alleged that the immigration consultant provided him with ineffective or incompetent representation when responding to the procedural fairness letter or otherwise. As a result, this application for judicial review turns on whether the officers assessed the documentary evidence reasonably or not. I have concluded that the first officer's decision is unreasonable in key respects. However, before explaining why I have reached this conclusion, in fairness to the officer, I must observe that the immigration consultant's letter of November 11, 2019, responding to the procedural fairness letter was singularly unhelpful and could only have sowed seeds of confusion.

[24] While apparently attempting to respond to the specific concern raised in the procedural fairness letter about the applicant's alleged arrest in April 2014, the consultant provided court records that appear to relate to an entirely different chain of events involving the applicant, one that had begun with a charge of driving with a suspended licence on March 21, 2013, and had ended with the dismissal of the charge on July 10, 2014. On the most charitable reading of the consultant's November 11, 2019, letter, the consultant appears to have thought that it was the

April 25, 2014, charge of "failure to appear warrant" that was dismissed on July 10, 2014. However, on my review of the court records, in fact it was the charge of driving with a suspended licence that was dismissed on that date. The court records provided by the consultant appear to have nothing at all to do with the April 25, 2014, arrest or the disposition of any related charge.

[25] The consultant's letter and its enclosures created two potential problems for the applicant. One is that the original concern about the April 2014 arrest (as communicated in the procedural fairness letter) remained unanswered. The other is that the consultant had provided new information capable of supporting a separate finding of misrepresentation in relation to the 2013 charge (because it had not been disclosed in the work permit application either).

[26] If the officers had concluded on the basis of the FBI report concerning the April 2014 arrest and the non-response to the procedural fairness letter that the applicant is inadmissible due to misrepresentation *in relation to that incident alone*, this finding could well have been unassailable on judicial review (barring an argument based on ineffective representation by the consultant). However, neither officer made this clear finding. Instead, the April 2014 incident became conflated with what appears to be an unrelated series of events.

[27] On the basis of the court records provided by the consultant, the first officer found that the applicant had been arrested on March 21, 2013, and charged with driving with a suspended driver's licence, that he had failed to "present himself for summons in court" on July 17, 2013, and that a warrant for his arrest had therefore been issued. Furthermore, the officer must also

have concluded that the applicant had been arrested and charged pursuant to this warrant. This is because the officer states their ultimate conclusion as follows: "Applicant failed to disclose prior arrest and charges in the United States in 2013, which bring [*sic*] into doubt applicant's credibility in terms of eligibility and admissibility to Canada." There is nothing to suggest the second officer reached a different conclusion on the evidence. (I address the significance of the fact that the first officer refers to the arrest as having occurred in 2013 below.)

[28] The first visa officer would have presumed – quite understandably – that the November 11, 2019, letter and enclosures were responsive to the concern raised in the procedural fairness letter – in other words, that the information provided by the consultant related to the incident in April 2014 mentioned in the FBI report. Having done so, the officer's effort to square the information provided by the consultant with the information in the FBI report led to unreasonable determinations with respect the court records. This was, perhaps, inevitable given that the court records and the FBI report concerned two separate and distinct incidents.

[29] In my view, the first officer's conclusion on misrepresentation rests on three flawed determinations. First, it was unreasonable for the officer to conclude that the applicant had been required to attend court on July 17, 2013, that he had failed to do so, and that a warrant for his arrest had therefore been issued. Second, it was therefore also unreasonable for the officer to conclude that the applicant had been arrested and charged pursuant to this warrant. And third, it was unreasonable to conclude (as both officers appear to have done) that it was the charge of "failure to appear warrant" that was dismissed on July 10, 2014.

[30] Contrary to what the first officer found, the court records provided with the consultant's letter of November 11, 2019, demonstrate a clear and orderly progression of a charge of driving with a suspended licence from the laying of the charge on March 21, 2013, to its ultimate dismissal on July 10, 2014. There is no suggestion that at any point the applicant failed to attend court when he was required to or that, as a result, he had been arrested in connection with the matter to which the court records pertained.

[31] As indicated on the face of the court records provided in response to the procedural fairness letter, the hearing on July 17, 2013, concerned whether the police had established probable cause for the charge of driving with a suspended licence to proceed. The records indicate that this hearing took place on notice to the applicant. While the records also suggest that the applicant was not present in court on July 17, 2013, there is no indication that he was required to be there. Even more to the point, there is no indication that a warrant for the applicant's arrest was issued then or at any other time. Instead, the records indicate that, having found probable cause, on July 17, 2013, a judicial officer issued a summons to the applicant that was presumably returnable on the date of the arraignment – August 26, 2013. The court docket indicates that the arraignment proceeded on August 26, 2013. This clearly suggests that the applicant was present or, at least, represented at the hearing. The matter was then adjourned several times until it was finally resolved on July 10, 2014, when the charge was dismissed after the applicant paid the requisite court costs. Significantly, none of the court records make any mention of a charge of "failure to appear warrant" or the applicant having been arrested on such a charge. They deal exclusively with the charge of driving with a suspended licence.

[32] If there is no reasonable basis to find that a warrant for the applicant's arrest had been issued on July 17, 2013, it is equally the case that there is no reasonable basis to find that the applicant had been arrested pursuant to that warrant.

[33] Finally, contrary to what everyone appears to have thought, there is no indication in the court records that it was the charge of "failure to appear warrant" that was dismissed on July 10, 2014.

[34] In short, the court records do not provide any reasonable basis for concluding that a warrant for the applicant's arrest was issued in relation to the 2013 matter and that at some point in 2013 the applicant had been arrested pursuant to it. This, in turn, undermines the first officer's determination that the applicant had engaged in misrepresentation by failing to disclose these things in his work permit application. The officer's mistakes in drawing these conclusions are certainly understandable given how the consultant responded to the procedural fairness letter. However, be that as it may, this does not make the officer's findings reasonable.

[35] Compounding these problems with the decision, the first officer refers to 2013 charges in the plural. However, there is evidence of only one charge against the applicant in 2013 – that of driving with a suspended licence.

[36] The next question is whether these errors are sufficiently important to the decision to call the reasonableness of the decision as a whole into question.

[37] One possibility I have considered is that they are not because the first officer simply made a typographical error in writing in the GCMS notes that the applicant had been arrested in 2013 (as opposed to in April 2014, as indicated in the FBI report). Similarly, the first officer may have inadvertently referred to 2013 charges in the plural while understanding that there was one charge in 2013 (driving with a suspended licence) and a second charge in 2014 (failure to appear warrant). There is, however, no direct evidence that this is the case. As well, there is no indication that the second officer – the officer who made the ultimate misrepresentation finding – noticed these errors or treated them as typographical errors. In any event, given that the errors relate directly to the central issue in the case, I am not prepared to overlook them as minor missteps.

[38] Furthermore, assuming for the sake of argument that, despite what is written in the decision, the first officer was referring to the arrest and charge on April 25, 2014, the decision does not set out a coherent chain of reasoning that connects this event with the applicant having failed to attend court nearly a year earlier, on July 17, 2013. Such an explanation is required given the evidence before the officer suggesting that nothing had gone wrong at the July 17, 2013, court hearing and that the matter had continued without disruption after that date. This could suggest that, whatever happened on April 25, 2014, it may have had nothing to do with anything that happened on July 17, 2013. The officer's failure to link the two events in the reasons in a way that reasonably takes account of the information in the court records leaves the decision lacking in transparency and intelligibility.

[39] More difficult to determine is whether the flaws in the first officer's reasoning concerning the applicant's alleged arrest (whether in 2013 or 2014) are immaterial because the officers reasonably determined that the applicant had failed to disclose at least one criminal charge dating from 2013 and this alone would be sufficient to warrant a finding of misrepresentation.

[40] Recall that the applicant was asked on his work permit application: "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country or territory?" The applicant answered "No". If the 2013 matter was not criminal, it did not need to be disclosed in answer to the question posed in the work permit application and, as a result, the failure to do so could not amount to misrepresentation. However, all of the court records provided by the consultant suggest that the 2013 matter was indeed a criminal matter. They are variously entitled "Application for Criminal Complaint", "Criminal Complaint", and "Criminal Docket – Offenses". Moreover, the immigration consultant did not suggest that the matter was not criminal. On the contrary, he refers to having received the court documents from the applicant's "criminal lawyer in the US."

[41] Instead of disputing that the 2013 matter was criminal in nature, the consultant suggested that the applicant had made an innocent mistake ("an honest misunderstanding") by thinking that it did not have to be disclosed because the charge had ultimately been dismissed. The consultant also made a frankly incomprehensible argument that "the materiality consideration should address the truth of the matter rather than how [the applicant] checked off a box on the IMM form."

[42] Despite the strong support in the record for a finding of misrepresentation simply on the basis of the failure to disclose the 2013 charge, four considerations lead me to conclude that the decision cannot be allowed to stand.

[43] First, the first visa officer based the misrepresentation finding on the applicant's failure to disclose *both* a criminal charge *and* an arrest in relation to the same matter. It is not enough for a result to be justifiable; to be reasonable, the result must also be justified by the reasons provided: see *Vavilov* at paras 86-87. Even if the finding of misrepresentation may be justifiable on the basis of the failure to disclose the 2013 charge alone, this was not the basis on which the first officer justified the finding. While the second officer's GCMS notes refer only to a "charge" that the applicant had failed to disclose, there is no indication of any disagreement with the first officer's narrative, which included both a charge and an arrest.

[44] Second, and relatedly, it would amount to a significant re-writing of the decision to uphold the result while ignoring a factor the decision maker obviously considered to be material. It is not ordinarily appropriate for a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: see *Vavilov* at para 96.

[45] Third, despite the court records clearly suggesting that they pertain to a criminal matter, neither visa officer makes an express finding that the 2013 driving charge was in fact a criminal matter. At best, this was implicit in their reasoning. The concern, however, is that they may have been conflating the April 25, 2014, charge mentioned in the FBI report (which certainly appears to be a criminal matter) and the charge that was dismissed on July 10, 2014. Given this

potential for confusion, it would be unsafe to rely on an implicit finding that the 2013 incident was a criminal matter.

[46] Finally, while the first officer reasonably rejected the consultant's submission concerning materiality, the decision fails to meaningfully address the innocent misrepresentation argument that the consultant also raised. The officer simply states: "The statutory question was clearly explained and I do not find the applicant's claim of misunderstanding the question to be a strong argument." The second officer's reasons add nothing to this. While I might be inclined to agree with the first officer's conclusion, this is beside the point when applying the reasonableness standard. Similarly, while I could give reasons supporting this conclusion, once again, this is not my role on judicial review. The issue of innocent misrepresentation was raised in the consultant's submissions and, given its centrality to the matter the officers had to determine, it had to be addressed with something more than a mere conclusory statement unsupported by any reasoning or analysis. The failure to do so reinforces my conclusion that the overall reasonableness of the decision has been called into question: see *Vavilov* at para 128.

[47] In summary, I am 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. The flaws I have identified are more than merely superficial or peripheral to the merits of the decision. They are not minor missteps. Rather, they are sufficiently central to render the decision unreasonable. See *Vavilov* at para 100.

[48] I conclude by stressing that this was a very close call. Regrettably, the officers were led astray by the unhelpful response to the procedural fairness letter from the immigration consultant. Nevertheless, the consequences for the applicant of a finding of misrepresentation are serious. As a result of the misrepresentation finding, the applicant was not only denied the work permit for which he applied, he is also inadmissible to Canada (the place where his wife and son live) for five years from the date of the decision: see *IRPA*, paragraph 40(2)(a). The applicant was entitled to a decision that is not tainted by unreasonable factual determinations and that meaningfully engages with a key argument on which he relies. Through no real fault of the officers, the decision that was rendered does not meet these requirements.

VI. CONCLUSION

[49] For these reasons, the application for judicial review is allowed. The decision of the visa officer dated February 14, 2020, is set aside and the matter is remitted for reconsideration by another decision maker.

[50] When he was still self-represented in this matter, the applicant had proposed thirty-two questions for certification under paragraph 74(d) of the *IRPA*. Counsel who appeared for the applicant at the hearing of this matter has confirmed that none of these questions are still being proposed, nor did she propose any others. Counsel for the respondent does not propose any questions for certification either. I agree that none arise.

[51] Finally, the applicant's Notice of Application included a request for costs. This request was not pursued by his counsel in her supplementary written submissions or at the hearing of this matter. In my view, there is no basis for an award of costs.

JUDGMENT IN IMM-2967-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed without costs.
2. The decision of the visa officer dated February 14, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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