Federal Court  Cour fédérale

Date: 20230627

Docket: IMM-7156-22

Citation: 2023 FC 896

Ottawa, Ontario, June 27, 2023

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

CHI WAI LAWRENCE CHUNG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant was denied a work permit and found inadmissible to Canada on the basis of a misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. More specifically, the Decision-Maker concluded that the Applicant had "knowingly omitted their previous criminal history in order to obtain a work permit in Canada". This omission was considered material because "it could have induced an error in the review of

eligibility and admissibility and led to a work permit being incorrectly issued to a person who is criminally inadmissible to Canada".

[2] The Applicant seeks judicial review of this Decision and argues that it is unreasonable on two grounds. First, he argues that the Decision-Maker failed to consider the innocent error exception to misrepresentation. Second, he asserts that the Decision-Maker erred in finding that the misrepresentation was material for the purposes of paragraph 40(1)(a) of the *IRPA*. For the reasons that follow, this application for judicial review is dismissed. The Applicant has failed to demonstrate that the Decision is unreasonable on either ground.

II. **Background**

A. *Work permit application*

[3] The Applicant, a citizen of Hong Kong, applied for a work permit under the International Mobility Program. In the background section of his application form, the Applicant responded "no" to the question: "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country or territory?"

[4] After submitting his application, the Applicant was advised that an original police clearance certificate from Hong Kong was required to continue the processing of his application. The certificate received from the Hong Kong Police Force Identification Bureau revealed that the Applicant had four prior criminal convictions. In 1996, he had been convicted of impaired driving and careless driving, and in 2005, he was convicted of impaired driving and speeding.

[5] After receipt of this new information, Officer DL [the Reviewing Officer] sent a procedural fairness letter to the Applicant advising he was concerned that the Applicant had not answered the question about previous criminality truthfully given his multiple convictions. The Applicant was further advised that if he engaged in misrepresentation, he may be found inadmissible under paragraph 40(1)(a) of the *IRPA* and that such a finding would render him inadmissible to Canada for a period of five years. The Reviewing Officer provided the Applicant an opportunity to respond to the stated concerns.

[6] In response, the Applicant submitted a letter from a Hong Kong lawyer, as well as an email setting out his personal response. The lawyer explained that the Applicant was under the misapprehension that his 1996 and 2005 convictions were spent in accordance with Hong Kong law. However, the lawyer advised that, in accordance with the Hong Kong Rehabilitation of Offenders Ordinance, only the 1996 convictions were actually spent, as the 2005 convictions did not qualify given the prior offences. The lawyer argued that the Applicant's mistake was "purely inadvertent". Further, the lawyer asserted that these prior convictions should not have a negative impact on his work permit application because they did not involve dishonesty or a "high degree of criminality".

[7] In his personal response, the Applicant advised that it was never his intention to misrepresent or withhold information. He stated that his mistaken belief was that his 1996 and 2005 convictions were considered spent and that, as such, "he did not have to mention them anymore". The Applicant acknowledged that he should have answered "yes" to the question, but that based on his misapprehension of Hong Kong law he answered "no".

B. *The Decision*

[8] After a review of the Applicant's response and evidence submitted, the Reviewing Officer determined that the Applicant had not "sufficiently allayed" his concerns that the Applicant had misrepresented information. In respect of the Hong Kong ordinance, he gave it less weight, finding that it has "no authority over a visa application to enter and work in a jurisdiction outside of Hong Kong". The Reviewing Officer further disagreed that the disclosure of the convictions would not affect his application, stating "the applicant's previous convictions are an important factor in his criminality assessment and the determination on his inadmissibility, regardless of the severity of the punishment". The application was forwarded to a designated officer for a determination.

[9] After reviewing the application, Officer KL [the Decision-Maker] determined that the Applicant was inadmissible to Canada under paragraph 40(1)(a) of the *IRPA* for misrepresenting his criminal history. The Decision-Maker reasoned as follows:

> Based upon my review of the file and submissions, the applicant has failed to provide a reasonable explanation for why they did not declare their previous criminal record on their application. The applicant was aware that he had previously been convicted of the crime of drunk driving on November 7, 1996, and on December 30, 2005; however, did not declare it. Even if the client's charges and convictions were "spent", the applicant should've declared it in his application. I do not find it reasonable that a person who was convicted of a crime twice in his lifetime would not think it appropriate to respond truthfully to the stat question, "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?" The applicant is responsible for ensuring all of the information on their application is accurate and correct. Based on the information on file, it appears the omission of their previous criminal history on their application was intentional as per the response to the officer's procedural

> fairness letter. This information is material as it could have induced an error in the review of eligibility and admissibility and led to a work permit being incorrectly issued to a person who is criminally inadmissible to Canada.
>
> I am an officer designated under the Act to make a determination under A40. Based on a balance of probabilities, I am satisfied that applicant knowingly omitted their previous criminal history in order to obtain a work permit to Canada. As such, I am satisfied that the applicant has misrepresented a material fact that if accepted would have led to an error in the administration of IRPA. Therefore, the applicant is found inadmissible under A40 for misrepresentation and remains inadmissible for a period of five years.

III. **Issues and Standard of Review**

[10] The Applicant alleges that the Decision-Maker made two errors: (i) failed to consider the innocent error exception to misrepresentation; and (ii) concluded the misrepresentation was material in that it could have induced an error in the administration of the *IRPA*.

[11] There is no dispute that the standard of review applicable to both issues is reasonableness. In accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], 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" (at para 85). A decision-maker's reasons are not to be assessed against a standard of perfection (at para 91). Their reasons are to be read holistically and contextually in order to understand "the basis on which a decision was made" (at para 97). A decision must exhibit "the hallmarks of reasonableness—justification, transparency and intelligibility" (at para 99).

IV. **Analysis**

A. *The innocent error exception is not applicable*

[12] In order to find an applicant inadmissible under paragraph 40(1)(a) of the *IRPA*, two criteria must be met: (i) there must be a misrepresentation; and (ii) the misrepresentation must be material in that it induces or could induce an error in the administration of the Act: *Malik v Canada (Citizenship and Immigration)*, 2021 FC 1004, at para 11 [*Malik*]; *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441, at para 14 [*Gill*]; *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153, at para 32 [*Kazzi*].

[13] The jurisprudence recognizes a narrow exception where an applicant can demonstrate an honest and reasonable belief that they were not withholding material information: *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328, at para 15 [*Alalami*]; *Gallardo v Canada (Citizenship and Immigration)*, 2022 FC 1304, at para 19 [*Gallardo*]; *Ram v Canada (Citizenship and Immigration)*, 2022 FC 795, at para 19 [*Ram*]; *Kataria v Canada (Citizenship and Immigration)*, 2023 FC 210, at para 45.

[14] The Applicant argues that the Decision is unreasonable because the Decision-Maker failed to consider the innocent error exception. There is, however, established jurisprudence that, in circumstances where a visa officer does not accept an applicant's explanation for the omission, the officer is not required to consider the exception: *Alalami*, at para 16; *Malik*, at paras 35-36; *Gallardo*, at paras 25-26; *Pal v Canada (Citizenship and Immigration)*, 2023 FC 502, at para 26; *Ram*, at para 20. As explained by Justice Southcott in *Alalami*, "the exception

has no potential application in the absence of a conclusion that the error was indeed innocent" (at para 16).

[15] This reasoning is equally applicable in this case. Here, as reflected in the Global Case Management System [GCMS] notes, the Decision-Maker did not accept the Applicant's explanation for his misrepresentation: "Based upon my review of the file and submissions, the applicant has failed to provide a reasonable explanation for why they did not declare their previous criminal record on their application" [emphasis added].

[16] The Decision-Maker further articulated the reason why they did not accept the Applicant's explanation in the following terms:

> The applicant was aware that he had previously been convicted of the crime of drunk driving on November 7, 1996, and on December 30, 2005; however, did not declare it. Even if the client's charges and convictions were "spent", the applicant should've declared it in his application. I do not find it reasonable that a person who was convicted of a crime twice in his lifetime would not think it appropriate to respond truthfully to the stat question, "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?" [emphasis added]

[17] Ultimately, the Decision-Maker concluded that the misrepresentation was deliberate: "Based on a balance of probabilities, I am satisfied that applicant knowingly omitted their previous criminal history in order to obtain a work permit to Canada".

[18] While the Applicant quarrels with the Decision-Maker's assessment, I cannot conclude that the Decision is unreasonable. Applying *Vavilov*, I find that the Decision "falls within a range

of possible, acceptable outcomes which are defensible in respect of the facts and the law" (at para 86).

[19] The Decision-Maker simply did not accept the Applicant's explanation that his misrepresentation was based on a misunderstanding of Hong Kong law and that he "did not have to mention" his convictions in response to the criminal history question. This is a reasonable conclusion based on the facts and the law. The question at issue asks whether an applicant has "ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?" [emphasis added].

[20] As determined by Justice Barnes in *Bundhel v Canada (Citizenship and Immigration)*, 2014 FC 1147, the question about criminal history "does not allow for ambiguity"—it not only requests information about prior convictions, but also arrests and charges as well (at para 7). In addition, as pointed out by the Respondent, there is no temporal limit on the question given the use of the word "ever".

[21] While the Decision could have been expressed in clearer terms, this perspective is reflected, in my view, in the Decision-Maker's GCMS notes: "Even if the client's charges and convictions were 'spent', the applicant should've declared it in his application. I do not find it reasonable that a person who was convicted of a crime twice in his lifetime would not think it appropriate to respond truthfully to the stat question". In accordance with *Vavilov*, administrative decision-makers should not be held to "the formalistic constraints and standards of academic

logicians". I am satisfied, in this case, that the Decision-Maker's reasoning "adds up" (at para 104).

[22] In my view, the Decision is reasonable on the issue of the innocent error exception. The Decision-Maker clearly did not accept the Applicant's explanation for the misrepresentation and, as such, was not required to conduct an innocent error exception analysis.

B. *The misrepresentation is material*

[23] A misrepresentation is considered material for the purposes of rendering an applicant inadmissible under paragraph 40(1)(a) of the *IRPA* if it "induces or could induce an error in the administration" of the Act: *Malik*, at para 11; *Gill*, at para 14; *Kazzi*, at para 27. Here, the Decision-Maker concluded that the Applicant's failure to disclose his criminal history on his work permit application was a material misrepresentation because "it could have induced an error in the review of eligibility and admissibility and led to a work permit being incorrectly issued to [*sic*] person who is criminally inadmissible to Canada".

[24] While the Applicant acknowledges that "there is no question an Applicant's criminal history would be relevant to an assessment of a work permit application", he argues that the Decision-Maker's materiality finding was unreasonable in the circumstances of this case. In the Applicant's submission, the fact that he complied with the requirement to provide a police clearance certificate undermines materiality. His misrepresentation "did not foreclose necessary investigations or examinations" given the correct information was ultimately disclosed through

the required police clearance certificate. I do not accept the Applicant's arguments for the following reasons.

[25] Under the Applicant's interpretation, a misrepresentation about criminality would never render an applicant inadmissible where a police clearance certificate is a required document in the application process because the truth would always be uncovered before a decision is rendered. Any misrepresentation about criminal history would, in effect, be cured by the correct information provided in the police certificate, such that it would be immaterial for the purposes of paragraph 40(1)(a) of the *IRPA*. This interpretation is wholly inconsistent with the express purpose of section 40 and the established jurisprudence.

[26] The broad purpose of section 40 is to maintain the integrity of the immigration process by deterring misrepresentation. In that respect, the onus is on applicants to ensure the completeness and accuracy of their application: *Singh v Canada (Citizenship and Immigration)*, 2023 FC 747, at para 28 [*Singh*]; *Goburdhun v Canada (Citizenship and Immigration*), 2013 FC 971, at para 28 [*Goburdhun*]; *Kazzi*, at para 38; *Gill*, at para 15.

[27] Furthermore, in accordance with subsection 16(1) of the *IRPA*, applicants have a duty of candour to provide complete, honest and truthful information when applying for entry into Canada: *Singh*, at para 28; *Goburdhun*, at para 28; *Malik*, at para 10. As expressed by Justice Little in *Singh*, "the requirement of candour is an overriding principle of the *IRPA* and aids in the interpretation of various provisions, including section 40" (at para 28).

[28] Most significantly, accepting the Applicant's interpretation would effectively result in absolving applicants of their duty of candour under the *IRPA*. Applicants who fail to truthfully

answer questions about their criminal history would be able to escape an inadmissibility finding under paragraph 40(1)(a) simply because a required police certificate reveals the truth about their previous criminality.

[29] This Court has consistently determined that the fact immigration officials may have the means to uncover the correct information before a final decision is made does not render a misrepresentation immaterial: *Vahora v Canada (Citizenship and Immigration)*, 2022 FC 778, at para 44; *Hasham v Canada (Citizenship and Immigration)*, 2021 FC 880, at para 40; *Goburdhun*, at paras 43-44; *Alalami*, at para 21. Justice Strickland's conclusion in *Goburdhun* is particularly apposite*:*

> [43] […] Accordingly, applicants who take the risk of making a misrepresentation in their application in the hope that they will not be caught but, if they are, that they can escape penalty on the premise of materiality, do so at their peril. The fact that the immigration authorities may have the ability to catch a misrepresentation does not undermine materiality [emphasis added].

[30] Applying this reasoning, the fact that a police clearance certificate may be required to enable immigration authorities to corroborate or otherwise confirm an applicant's criminal history for admissibility purposes cannot undermine the materiality of an applicant's misrepresentation about previous criminality under the *IRPA*.

[31] Finally, I find no merit to the Applicant's argument that the Decision-Maker erred in compartmentalizing his application and failing to consider the totality of the evidence. In support of this argument, the Applicant emphasizes that he "facilitated the submission of his police certificate" and that "he complied with the requirement to provide his police certificate which

showed his criminal history". Despite the Applicant's characterization, I cannot conclude that this is a situation, like *Lamsen v Canada (Citizenship and Immigration)*, 2016 FC 815, or *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117, where the applicant disclosed the correct information in another part of their application.

[32] Rather, this case is similar to *Alalami.* In that case, Justice Southcott determined that the materiality of the misrepresentation was unaffected by the fact that the correct information was discovered "through means independent of the applicant" (at para 23). Here, the truth about the Applicant's criminality was discovered through the police clearance certificate—a document prepared, certified and provided by a third party, the Hong Kong Police Force Identification Bureau. The fact that the Applicant "facilitated" the submission of the police clearance certificate by requesting that the Hong Kong police send it to the immigration authorities has no bearing on the materiality finding. It is simply not comparable to the Applicant having provided or otherwise disclosed the correct information elsewhere in an application form he actually completed and signed.

[33] Based on the foregoing, I find that the Decision-Maker reasonably concluded that the Applicant's omission of his criminal history on his work permit application was a material misrepresentation for the purposes of paragraph 40(1)(a) of the IRPA.

V. **Conclusion**

[34] Having concluded that the Decision-Maker made no reviewable errors in finding the Applicant inadmissible under paragraph 40(1)(a) of the *IRPA*, this application for judicial review is dismissed. The parties did not raise a question for certification and none arises in this case.

JUDGMENT in IMM-7156-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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