Federal Court  Cour fédérale

Date: 20240724

Docket: IMM-11947-23

Citation: 2024 FC 1167

Vancouver, British Columbia, July 24, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

XIAOSHAN LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a 53-year-old citizen of China who has been a regular visitor to Canada. When he applied for an open work permit in January 2023, he did not disclose that in May 2014 he had been charged with assault in Whistler, B.C. (The Crown stayed the charge in November 2014.) After considering the applicant's response to a procedural fairness letter bringing this issue to his attention, a visa officer with Immigration, Refugees and Citizenship

Canada (IRCC) found the applicant inadmissible to Canada due to misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The applicant now applies for judicial review of this decision.

[2] For the reasons that follow, I agree with the applicant that the officer's decision is unreasonable. This application will, therefore, be allowed and the matter remitted for redetermination by a different decision maker.

II. BACKGROUND

[3] The work permit application form the applicant completed included the following question under Background: "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".

[4] In fact, in May 2014 the applicant had been arrested and charged with assault in Whistler. When this came to the attention of IRCC as a result of its own inquiries, a procedural fairness letter was sent to the applicant. Subsection 16(1) of the *IRPA* provides that a person who makes an application must answer truthfully all questions put to them. After setting out this obligation and reminding the applicant of his answer to the question set out above, the procedural fairness letter stated: "Based on available information, you did not answer all questions put to you truthfully as it appears you were charged with assault on or about 2014/11/12." (The date given is actually the date the charge was stayed, not when the applicant was charged. Nothing turns on this.) The letter then set out paragraph 40(1)(a) of the *IRPA*, which provides that a permanent resident or foreign national is inadmissible to Canada for misrepresentation "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." The applicant was given an opportunity to respond to the letter within 15 days.

[5] In his response, the applicant explained that the charge of assault arose from a misunderstanding following an argument with his then domestic partner over the education of their children. He and his family were living in Whistler at the time. Among the documents the applicant provided with his response was a copy of the Information. This document reflected that the applicant had been arrested and charged with assault on May 29, 2014, in relation to an incident alleged to have occurred in Whistler on May 26, 2014; that the alleged victim was the applicant's then domestic partner; and that, after several court appearances, the Crown had stayed the charge on November 12, 2014.

[6] Under the heading "Why I did not report it to IRCC", the applicant wrote:

> I think I am a man of integrity and I have never committed any crime. When faced with the question of "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country or territory?", I chose "No" without thinking carefully. I have never attempted to misrepresent any of my background. I apologize for my carelessness.

[7] The officer's reasons for finding the applicant inadmissible for misrepresentation are set out in Global Case Management System (GCMS) notes. After quoting the passage from the applicant's response to the procedural fairness letter set out above, the officer wrote:

> He was arrested and charged with a crime so it does not appear to make sense that the applicant says he never committed a crime, and that he answered without thinking. His explanation in and of itself is contradictory.

> Therefore, I put very little weight to the "honest mistake" argument. The applicant is ultimately responsible for ensuring that all information in the applicant [*sic*] is accurate and truthful.
>
> I am an officer designated under the Act to make a determination under A40. Based on a balance of probabilities, I am satisfied that the applicant knowingly withheld his criminal charge 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 the IRPA. Therefore, the applicant is found inadmissible under A40 for misrepresentation and remains inadmissible for a period of five years.

[8] As a result of this finding, the officer refused the work permit application.

III. ANALYSIS

[9] The parties agree, as do I, that the officer's decision should be reviewed on a reasonableness standard. 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 (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*.).

[10] For a decision to be reasonable, a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov*, at para 102, internal quotation marks and citation omitted). On the other hand, "where reasons are provided

but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov*, at para 136).

[11] In my view, the officer's decision suffers from a failure of internal rationality (*Vavilov*, at para 101). As *Vavilov* states, "a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis" (at para 103). Further, a decision will be unreasonable "where the conclusion reached cannot follow from the analysis undertaken" or "if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point" (*ibid.*). All of these characterizations apply to the decision under review.

[12] This Court has recognized that the objective of section 40 of the *IRPA* is to promote the integrity of Canada's immigration scheme by deterring misrepresentation and thereby seeking to ensure that applicants provide complete, honest, and truthful information in every respect (*Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 at para 16). At the same time, both IRCC (in an operational manual) and this Court have acknowledged that honest errors and misunderstandings sometimes occur in completing application forms and responding to questions and, further, that accepting that such errors do not constitute misrepresentation does not undermine the important objective served by section 40 of the *IRPA* (*Gill*, at para 16). Consequently, this Court has found that an "innocent" mistake or misrepresentation should not lead to a finding of inadmissibility under paragraph 40(1)(a) of the *IRPA* (*Gill*, at para 17). While there is debate in the jurisprudence about what an applicant must establish to come within this exception (see *Gill*, at paras 18-20), there is no question that the exception exists.

[13] Where, as the applicant did, a party raises the innocent mistake or misrepresentation exception to inadmissibility on grounds of misrepresentation, the administrative decision maker must determine whether the exception applies or not. If the decision maker concludes that the exception does not apply and that decision is then challenged on judicial review, the reviewing court must determine whether the decision is reasonable in the sense that it is transparent, intelligible and justified. As *Vavilov* explains, "What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place" (at para 15).

[14] In the present case, I simply cannot understand from the reasons in the GCMS notes why the officer found that the applicant's response to the procedural fairness letter did not "make sense" and that his explanation for not disclosing the assault charge "in and of itself is contradictory." As presented to the officer, there is nothing inconsistent or contradictory about the applicant's explanation for why he answered the question incorrectly. The officer's reasons for finding otherwise are entirely opaque. As a result, I cannot understand why the officer concluded that the applicant's "honest mistake" argument was "therefore" entitled to "very little weight." Reading the reasons in conjunction with the record is of no assistance. In short, it is not possible to understand the officer's line of reasoning on the critical point.

[15] In fairness to the officer, the applicant's response to the procedural fairness letter could certainly have been clearer. Still, what the applicant appears to be saying is that, since he did not

commit the offence and the charge was ultimately stayed, he focused on the parts of the question asking whether he had ever committed or been convicted of an offence and he carelessly overlooked the other parts of the question asking whether he had ever been arrested or charged. While acknowledging his carelessness in this regard, the applicant maintained that he never intended to misrepresent this aspect of his background. There can be no doubt that the applicant was attempting to demonstrate that he had made an innocent mistake and therefore should not be found inadmissible due to misrepresentation. The officer certainly understood that this was the applicant's position.

[16] The respondent submits that, whatever flaws there may be in the officer's analysis, the applicant's response could not bring him within the innocent mistake exception in any event. There may be some force to this argument. However, this was an issue for the officer to determine in the first instance; it is not the role of the reviewing court to determine this for itself. As *Vavilov* reminds us, "Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome" (at para 96). To the extent that the officer addressed the issue of innocent mistake, the assessment of the applicant's explanation for why he answered the question as he did is simply incomprehensible.

[17] Finally, I cannot agree with the respondent that, even if the reasons are flawed, this does not undermine the reasonableness of the decision as a whole because the flaws relate to a peripheral matter. On the contrary, the flaws are in the analysis of the central question before the officer (*c.f. Vavilov*, at para 100).

[18] In sum, the finding of misrepresentation under paragraph 40(1)(a) of the *IRPA* could very well be justifiable. However, this is insufficient to uphold the decision (*Vavilov*, at para 86). The decision must also be justified by transparent and intelligible reasons from the decision maker. These hallmarks of reasonableness are absent here. As a result, the decision cannot withstand review.

IV. CONCLUSION

[19] For these reasons, the application for judicial review will be allowed. The decision dated July 26, 2023, finding the applicant inadmissible due to misrepresentation and refusing his application for a work permit will be set aside and the matter will be remitted for reconsideration by a different decision maker.

[20] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-11947-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision dated July 26, 2023, finding the applicant inadmissible due to misrepresentation and refusing his application for a work permit is set aside and the matter is remitted for reconsideration 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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APPEARANCES:

Paul E. Briggs	FOR THE APPLICANT
Ely-Anna Hidalgo-Simpson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

PaulBriggsLaw Surrey, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT