Federal Court  Cour fédérale

Date: 20241025

Docket: IMM-10822-23

Citation: 2024 FC 1695

Ottawa, Ontario, October 25, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

WAI KWONG CHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of Hong Kong, seeks judicial review of the decision made by a visa officer [Officer] on July 12, 2023, refusing his application for a spousal open work permit. The Officer found the Applicant inadmissible to Canada for misrepresentation in accordance with paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for misrepresenting or withholding material facts relating to a relevant matter that induced or could induce an error in the administration of the *IRPA*. Specifically, the Applicant failed to disclose his multiple convictions in Hong Kong.

[2] The Applicant submits that the decision is unreasonable because the Officer: (a) did not grapple with the Applicant's explanation for non-disclosure of his convictions and thus failed to properly consider whether the innocent mistake exception applied; and (b) improperly determined that a motor vehicle infraction under the Hong Kong Transport Department's *Road Traffic Ordinance, Cap. 374*, was a criminal offence.

[3] For the reasons that follow, I am not satisfied that the Applicant has demonstrated the Officer's decision was unreasonable and accordingly, the application for judicial review shall be dismissed.

I. Background

[4] In January 2023, the Applicant submitted an application for a spousal open work permit. In the 'Background Information' section of the application, question 3(a) asks: "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country or territory?" The Applicant responded with: "No".

[5] As part of the processing of his open work permit application, the Applicant was compelled to produce a police clearance certificate from Hong Kong. The certificate issued by the Hong Kong authorities stated that "records held by the Hong Kong Police Force show that [the Applicant] appeared before a criminal court as follows:"

Date	Offence	Result
2018-02-14	A. Dangerous driving (S. 37(1) Cap. 374)	200 hours community service order Disqualified driving license

		6 months (Attend and complete a driving improvement course)
2018-01-31	B. Using a vehicle with visual display unit installed on front dashboard and enables display of stored video images (S. 37(1) & 121(1) Cap. 374)	Fined $600
	C. Using a vehicle which exhaust system was altered and catalytic converter not fitted (S. 5(1)(b) & 121(1) Cap. 374)	Fined $600
	D. Using a vehicle which exhaust emission was excessive (S. 31A(3) & 121(1) Cap.374)	Fined $600 (Case No. FL/4274/17)

[Footnotes omitted.]

[6] On March 8, 2023, Immigration, Refugees and Citizenship Canada [IRCC] sent the Applicant a procedural fairness letter [PFL] advising of concerns that he had misrepresented information on his application. Specifically, IRCC stated that a review of the Applicant's Hong Kong police certificates indicated that he was convicted on two separate occasions in 2018 of multiple offences and thus IRCC was concerned that the Applicant had withheld his conviction history intentionally. The letter warned that if the Applicant was found to have misrepresented, he may be inadmissible under paragraph 40(1)(a) of the *IRPA* and that such a finding may render him inadmissible to Canada for five years. The PFL provided the Applicant with 30 days to respond and requested that he produce a number of documents related to his convictions.

[7] The Applicant responded to the PFL and provided the requested documents. The Applicant explained that he interpreted question 3(a) to mean whether he had been convicted of an offence similar to any "sections found under Canada's Criminal Code." The Applicant further stated that because his charges concerned motor vehicle offences, he "interpreted this to be the same as a provincial highway offence in Canada not criminal."

II. Decision at Issue

[8] By letter dated July 12, 2023, the Officer refused the Applicant's open work permit and found the Applicant inadmissible to Canada pursuant to paragraph 40(1)(a) of the *IRPA* for misrepresentation.

[9] The Global Case Management System [GCMS] notes, which form part of the reasons for decision, contain the following reasons given by the Officer who reviewed the Applicant's response to the PFL. They provide, in part, as follows:

> 1st charge "Dangerous Driving" on July 15 2017: the applicant was driving a motor vehicle, DH2888 and was stopped by the Police for two charges against him and another party of the following offences:
>
> 1) Dangerous Driving (convicted on Feb 14, 2018)
>
> The offence might equate to S219(1), an hybrid offence up to 10 years. Although there are not sufficient details as to whether the applicant had committed an act that had caused bodily harm or endangered others. The case had been trialled and decided by the Magistrates' Courts with punishments imposed on the applicant.
>
> 2) Failed to comply with the regulation for using a vehicle which the visual display unit installed on front dashboard and enables display of stored video images. (convicted on Jan 31, 2018)

3) The motor vehicle was not in good and serviceable condition, exhaust system was altered and the catalytic converted not fitted. (convicted on Jan 31, 2018)

4) Using a vehicle which with excessive exhaust emission (convicted on Jan 31, 2018)

- The remaining three offences might be the offences charged under "On-Road Vehicle & Enginee [*sic*] Emission Regulations" in Canada.

As per PA's own accords, "he interpreted the questions about not having a criminal record as to having no criminality to any similar sections found under Canada's Criminal Code. His charges in HK were dealing with motor vehicle offences and the applicant interpreted this to be the same as a provincial highway offence in Canada not criminal."

PA states that "He is a matured driver now and driving is mainly for work in order raise his family. He had further obtained Vehicle Classification on Medium Goods Vehicle and Heavy Goods Vehicle in my driving license in 2019, thereafter, he did get a few traffic tickets (proofs submitted) with work related incident, eg overloading, carrying load not properly secured etc.. and all fines were paid in full."

I note that the applicant's HK Police Cert issued on Feb 27, 2023 indicates "This conviction is regarded as spent in HK by virtue of Section 2(1) of the RHO in HK "Based on the Section 2(1) of the RHO, it states "..... The spent conviction provisions of the RHO apply only with Hong Kong. Even when a conviction is spend [*sic*] under the RHO, applicants for visas to visit foreign country are required to disclose any convictions they have."

I have fully reviewed all information available including the applicant's response to the A40 PFL, I am not satisfied that the omission is an honest mistake because the applicant is aware of the statutory question asking "3a) 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" to this question on his application form (IMM1295).

The applicant's explanations was that he has different interpretations to the Cdn criminal codes in Canada, the applicant does not see his offences are criminal offences should they be charged and trialled in Canada. I have given less weight to the applicant's response on this as the applicant was convicted for

> "Dangerous Driving" by the Magistrates Courts in HK on Feb 14, 2018. This might be equivalent to S219(1) of the criminal code in Canada.
>
> The applicant is responsible for ensuring all information on the application is truthful, accurate and complete, he failed to fulfill the requirement to truthfully declare on his application of his previous arrest and charges with the offences, where punishments were imposed on the applicant for his commissions of his offences in HK.
>
> As such, my concerns have not been alleviated and this misrepresentation or withholding of material facts could have induced errors in the administration of the Act, as they could have prevented me from making an accurate and informed decision regarding the applicant's admissibility to Canada.

[10] The Officer then referred the case to the "TRU Manager" [Manager] for consideration pursuant to section 40 of the *IRPA*. The GCMS notes contain additional reasons provided by the Manager, the relevant parts of which are as follows:

> The applicant states that he "interpreted the questions about not having a criminal record as to having no criminality to any similar sections found under Canada's Criminal Code". However, the question clearly asks whether an applicant has ever committed, been arrested for, been charged with or convicted of any criminal offence in any country, not whether an applicant interprets a question a certain way or another. For this reason, I put very little weight and consideration to this argument.
>
> […]
>
> 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 their criminal history. As such, I am satisfied that the applicant has misrepresented a material fact that if accepted led to an error in the administration of IRPA.

III. Issue and Standard of Review

[11] The sole issue for determination is whether the Officer's decision was reasonable.

[12] The parties agree and I concur that the applicable standard of review is reasonableness. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8]. 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 [see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adeniji-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

IV. Analysis

[13] It is a fundamental principle of immigration law that foreign nationals do not have an unqualified right to enter into or remain in Canada [see *J.P. v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 262 at para 13].

[14] Subsection 11(1) of the *IRPA* requires that a foreign national must, before entering Canada, apply to an officer for a visa or any other document required by the regulations; and

permits the officer to issue that document or visa if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of the *IRPA*.

[15] Subsection 16(1) of the *IRPA* imposes an obligation on applicants to be truthful:

Obligation — answer truthfully	**Obligation du demandeur**
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.	**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.

[16] Section 40 of the *IRPA* deals with inadmissibility due to misrepresentation. Paragraph 40(1)(a) provides:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(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;	**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;

[17] To trigger inadmissibility under paragraph 40(1)(a), two criteria must be met: (a) there must be a misrepresentation; and (b) the misrepresentation must be material, in that it induces or

could induce an error in the administration of the *IRPA* [see *Singh Dhatt v Canada (Citizenship and Immigration)*, 2013 FC 556 at para 24].

[18] In relation to the first criterion, this Court has recognized a narrow exception for innocent mistakes. As stated by Justice Martineau in *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 18:

> The innocent misrepresentation exception is narrow and shall only excuse withholding material information in extraordinary circumstances in which the applicant honestly and reasonably believed he was not misrepresenting a material fact, knowledge of the misrepresentation was beyond the applicant's control, and the applicant was unaware of the misrepresentation (*Wang* at paragraph 17; *Li v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 87 at paragraph 22; *Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345). Some cases have applied the exception if the information given in error could be corrected by reviewing other documents submitted as part of the application, suggesting that there was no intention to mislead: *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421 at paragraph 16; *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at paragraphs 18-20. Courts have not allowed this exception where the applicant knew about the information, but contended that he honestly and reasonably did not know it was material to the application; such information is within the applicant's control and it is the applicant's duty to accurately complete the application: *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at paragraphs 31-34; *Diwalpitiye v Canada (Citizenship and Immigration)*, 2012 FC 885; *Oloumi* at paragraph 39; *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at paragraph 18; *Smith v Canada (Citizenship and Immigration)*, 2018 FC 1020 at paragraph 10.

[19] With respect to the second criterion, a misrepresentation need not be decisive or determinative to be material. It will be material if it is important enough to affect the process [see *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25].

[20] The Applicant asserts that the Officer issued formulaic reasons that failed to engage or grapple with any of the specifics or details provided by the Applicant in his response to the PFL, such that the Applicant cannot understand why his explanation was rejected. Instead of engaging with his explanation, the Applicant asserts that the Officer improperly reasoned that the wording of the question was determinative of whether the innocent mistake exception applied.

[21] I reject this assertion. It is clear from the GCMS notes that the Officer and the Manager both considered the explanation provided by the Applicant. However, they did not find the Applicant's interpretation of question 3(a) to be reasonable as the question clearly asked whether he had been convicted of any criminal offence in any country, not whether he had been convicted of a criminal offence in another country that was equivalent to an offence under the Canadian *Criminal Code*. Even if the Applicant's interpretation of question 3(a) could be viewed as reasonable (which it cannot), one would have expected the Applicant to have nonetheless disclosed his conviction for dangerous driving given that the Canadian *Criminal Code* includes comparable offences. It is clear from the reasons that the Officer considered the innocent mistake exception and found that it did not apply because the Applicant did not have a reasonable belief that he was not making a misrepresentation, as his interpretation of question 3(a) was not reasonable. I find no lack of justification or intelligibility in the Officer's reasons.

[22] The Applicant asserts that the Officer's equivalency analysis was flawed and that the Officer improperly determined that a motor vehicle infraction under the Hong Kong *Road Traffic Ordinance* constituted a criminal offence. It is important to note that a misrepresentation finding does not require the Officer to conduct an equivalency analysis, as no criminal inadmissibility

determination is being made. To the extent that the Officer conducted such an assessment here, I find that it was intended to demonstrate the unreasonableness of the Applicant's explanation for why he failed to disclose his convictions. I agree with the Respondent that whether a dangerous driving conviction in Hong Kong is actually equivalent to section 219(1) of the Canadian *Criminal Code* does not bear on the reasonableness of the Officer's determination.

[23] The focus of the Court's inquiry is whether the Officer reasonably determined that the Applicant made a misrepresentation by omitting disclosure of his criminal convictions in Hong Kong. The record before the Officer revealed that the Applicant did not have a "clear" police clearance certificate (i.e., no convictions) and that, pursuant to the documentation from the Hong Kong Commissioner of Police, the Applicant's convictions were criminal in nature. The letter from the Hong Kong Commissioner of Police stated, "I refer to your request for a certificate to the effect that you have no criminal conviction in Hong Kong. I regret that I am unable to furnish a certificate to this effect." Moreover, the GCMS notes reveal the Officer considered that the legislation in Hong Kong expressly states that a conviction under the *Road Traffic Ordinance* spent in Hong Kong (which includes the Applicant's dangerous driving conviction) must be disclosed by applicants for visas to visit foreign countries. Based on these considerations, I cannot find that the Officer's determination that the Applicant was obligated to disclose his dangerous driving conviction was unreasonable.

[24] As the Applicant has failed to demonstrate that the Officer's decision was unreasonable, the application for judicial review shall be dismissed.

[25] The parties propose no question for certification and I agree that none arises.

JUDGMENT in IMM-10822-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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