Federal Court  Cour fédérale

Date: 20220818

Docket: IMM-4861-21

Citation: 2022 FC 1210

Vancouver, British Columbia, August 18, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

LINXIANG JI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Linxiang Ji was charged with assault with a weapon after an altercation with his roommate. Mr. Ji did not disclose this charge when he subsequently applied to extend his student permit. The Immigration Division [ID] of the Immigration and Refugee Board of Canada found this was a material misrepresentation and Mr. Ji was therefore inadmissible under paragraph 40(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] Mr. Ji seeks judicial review of this finding, raising two primary arguments. First, he argues that the charge could not have affected his admissibility to Canada since it was later stayed pursuant to an agreement with the Crown, and that the ID did not reasonably explain why it nonetheless found the misrepresentation to be material. Second, he argues the Canada Border Services Agency (CBSA) was estopped from raising the misrepresentation with the ID since an officer with Immigration, Refugees and Citizenship Canada (IRCC) restored his temporary resident status and issued a new student permit after the misrepresentation concern had been raised but before the CBSA requested an inadmissibility hearing.

[3] Despite the skill with which these issues were argued by Mr. Ji's counsel, I conclude they do not show the ID's decision to be unreasonable. The ID sufficiently and reasonably explained its conclusion that the misrepresentation was material because it could have affected the processing of Mr. Ji's student permit application. I cannot accept Mr. Ji's argument that his failure to disclose information about the charge against him was not material since there was an agreement to stay the charge at the time of the misrepresentation. Nor can I accept that the intervening restoration of Mr. Ji's status by IRCC amounted to a decision with respect to his inadmissibility for misrepresentation that effectively precluded an inadmissibility hearing before the ID.

[4] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[5] As mentioned above, Mr. Ji's application for judicial review raises the following two issues:

A. Did the ID err in finding the misrepresentation to be material or in failing to adequately explain its conclusions on this issue?

B. Did the ID err in finding that issue estoppel did not apply to preclude the misrepresentation finding?

[6] The parties agree, as do I, that these issues are reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Pepa v Canada (Citizenship and Immigration)*, 2021 FC 348 at para 16.

[7] Reasonableness review requires the Court to assess whether the decision is reasonable in both outcome and reasoning, considered in light of the factual and legal constraints that bear on it: *Vavilov* at paras 81, 83, 87, 99. A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision maker, and the submissions of the parties: *Vavilov* at paras 81, 85, 91, 94–96, 99, 127–128. As Mr. Ji points out, the requirement for justification means that it is not enough for the outcome to be *justifiable*; it must also be *justified* by the reasons given for the decision: *Vavilov* at para 86.

III. Analysis

A. *The ID reasonably concluded the misrepresentation was material*

(1) Background to the misrepresentation hearing

[8] Mr. Ji, a citizen of China, came to Canada on a four-year study permit in 2012. In 2016 and 2017, he applied for and obtained renewals of the study permit, the latter of which was valid through 2019.

[9] In December 2018, Mr. Ji was involved in a fight with his roommate. As a result, he was charged with assault with a weapon on August 6, 2019. After some initial appearances, the court apparently advised Mr. Ji on October 7, 2019 that the charge would be dropped and he would have no criminal record if he completed a community service obligation within two months. In November, Mr. Ji's lawyer followed up with Crown counsel, as Mr. Ji had not been contacted for community service. An agreement was then reached that the charge would be stayed if Mr. Ji issued an apology letter to the victim. Mr. Ji sent an apology letter, and the Crown entered a stay of the charge at a court attendance on December 9, 2019.

[10] In the meantime, Mr. Ji filed a further application for renewal of his study permit on November 15, 2019. The application form included the question "Have you ever committed, been arrested for or been charged with or convicted of any criminal offence in any country or territory?" Mr. Ji responded to that question by checking the "No" box.

[11] On February 6, 2020, a CBSA officer prepared a report under subsection 44(1) of the *IRPA*, stating their opinion that Mr. Ji was inadmissible for misrepresentation for having failed to disclose the assault with a weapon charge on his study permit application. In the following days, a delegate of the Minister of Public Safety and Emergency Preparedness referred the subsection 44(1) report to the ID for an admissibility hearing, pursuant to subsection 44(2) of the *IRPA*. The admissibility hearing was ultimately conducted on June 1, 2021 by teleconference.

[12] Between the February 2020 referral and the June 2021 admissibility hearing, IRCC sent Mr. Ji a procedural fairness letter relating to his study permit renewal application. The letter, dated September 18, 2020, stated that in reviewing his file, it appeared that his application may have to be refused for failure to meet the requirements of the *IRPA*. In particular, the letter referred to the assault with a weapon charge and stated that further information was required to determine his criminal admissibility. It also noted that Mr. Ji had failed to disclose the charge and raised his potential inadmissibility for misrepresentation under paragraph 40(1)(*a*) of the *IRPA*. The letter asked Mr. Ji to submit within seven days all police reports and court records regarding the charge and an explanation of why he did not disclose it on his study permit application.

[13] Mr. Ji prepared a letter, dated September 25, 2020, that ultimately did not reach IRCC because Mr. Ji uploaded it to IRCC's online system but did not submit it. In the letter, Mr. Ji apologized for not providing an explanation of the charge with his application. He then explained the circumstances of the charge, and explained that before he applied to extend his study permit, a settlement to stay the charge had been reached "[t]hrough the mediation" of his lawyer and the

Crown. I note as an aside that it is unclear from this reference or the other evidence whether a form of mediation process occurred, as counsel suggested in argument, or whether the resolution was simply the result of discussions between counsel. In any case, this does not affect the issues on the application.

[14] As Mr. Ji's response letter was not received, an immigration officer wrote to Mr. Ji on October 2, 2020, refusing his study permit application. The officer referred to the charge, noted the lack of response to the procedural fairness letter, and stated they were not satisfied Mr. Ji was criminally admissible to Canada. As the ID noted, this refusal was based on criminal inadmissibility, not misrepresentation.

[15] After receiving this refusal, Mr. Ji filed with IRCC a request for restoration of his status and a new study permit. In support of this application, Mr. Ji provided a letter dated October 17, 2020. The letter referred to the October 2, 2020 refusal, described Mr. Ji's mistake in uploading but not submitting his response to the procedural fairness letter, and gave details regarding the assault with a weapon charge and its resolution. It also made the following statement about his initial application:

> When I got accepted by the University of Saskatchewan, I was so excited and happy. I soon filled the application form for my study permit extension and got ready to move to the new University. [It] was not my intention to hide anything from your office. Please forgive my innocent mistake and I am willing to provide as much detail as I can for this matter. I simply overlooked the question and made such mistake.
>
> [Emphasis added.]

[16] On November 4, 2020, eight weeks before the CBSA requested an admissibility hearing, IRCC restored Mr. Ji's temporary resident status pursuant to section 182 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], and issued him a new study permit.

(2) The ID's decision on inadmissibility

[17] The ID correctly noted that for a foreign national to be inadmissible for misrepresentation, (1) there must be a misrepresentation, and (2) the misrepresentation must be material, in that it could have induced an error in the administration of the *IRPA*: *IRPA*, s 40(1)(*a*); *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 27.

[18] The ID found Mr. Ji's failure to disclose the charge in his November 15, 2019 study permit extension application amounted to a misrepresentation. Mr. Ji does not challenge this finding.

[19] The ID also found the misrepresentation to be material. It rejected Mr. Ji's argument that the subsequent stay of the charge rendered the misrepresentation immaterial for the following reasons:

> The criminal charge was stayed by the Crown on December 9, 2019. The fact that the charge was stayed does not assist Mr. Ji for two reasons. Materiality is to be determined at the time that the misrepresentation is made, [*Inocentes v Canada (Citizenship and Immigration)*, 2015 FC 1187 at para 16]. At the time the application was submitted Mr. Ji was clearly the subject of a criminal charge. Secondly, to be material a misrepresentation does not have to be decisive or determinative. It is material if it is enough to affect the process, [*Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at paras 28, 37; *Afzal v Canada (Citizenship and Immigration)*, 2012 FC 426 at para 26]. A person

> is criminally inadmissible and would not be granted an extension of a student permit if they have been convicted in Canada of assault with a weapon. Mr Ji's misrepresentation could have stopped an officer dealing with his application from looking into the disposition of his criminal charge. The misrepresentation was material because it is apparent that it could have affected the process.
>
> The misrepresentation must be with respect to a relevant matter. Here the relevant matter was Mr. Ji's application to extend his student permit.
>
> The misrepresentation must be one that could have induced an error in the administration of the Act. Mr. Ji's misrepresentation could have resulted in a criminally inadmissible person being granted an extension of their student permit. That would have been an error in the administration of the Act.
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> [Emphasis added; citations clarified.]

(3) The ID's decision was reasonable

[20] Mr. Ji argues that on an application to renew a student permit, an applicant need only satisfy an IRCC officer that they (i) will leave Canada at the end of their stay, (ii) meet the relevant requirements of the *IRPR*, (iii) have satisfied medical examination requirements, (iv) have been accepted to undertake a qualified program of study, (v) have complied with their conditions of entry, and (vi) are admissible to Canada: *IRPR*, ss 216, 217; *IRPA*, s 47. In the present case, he argues, the only concern was his potential inadmissibility to Canada for criminality or serious criminality under section 36 of the *IRPA*. To be inadmissible under section 36 in respect of offences committed in Canada, a foreign national must be convicted of the offence: *IRPA*, ss 36(1)(*a*), 2(*a*). Mr. Ji therefore argues that given the mediated agreement that the charge he faced would be withdrawn, there was no potential inadmissibility, and no possible relevant avenue of investigation was foreclosed.

[21] Mr. Ji points to this Court's decisions in *Singh Dhatt* and *Murugan* as examples in which misrepresentations were found not to be material: *Singh Dhatt v Canada (Citizenship and Immigration)*, 2013 FC 556 at paras 31–43; *Murugan v Canada (Citizenship and Immigration)*, 2015 FC 547 at paras 12–14. In *Singh Dhatt*, Justice Mactavish found the submission of a fraudulent birth certificate for an adopted daughter not to be a material misrepresentation since the material fact, the daughter's adopted status, was never concealed or misrepresented: *Singh Dhatt* at paras 31–33. This decision confirms the importance of looking at the particular circumstances of the case in assessing materiality. However, it has little other bearing on the current circumstances given the factual dissimilarities, particularly the lack of any other disclosure of the charge by Mr. Ji at the time of his first renewal application or at any time before IRCC raised the issue.

[22] *Murugan* has greater factual similarity. There, applicants for permanent residence incorrectly answered "No" to a question about whether they had been refused a visitor visa. In fact, they had previously been refused a visitor visa based on a concern that they would not leave Canada at the end of their stay. Justice Simpson accepted the applicants' argument that this misrepresentation could not be material in the context of the applicants' permanent residence, since a prior refusal based on a concern that the applicants might stay in Canada could not have had an impact on an application for permanent residence: *Murugan* at paras 13–14.

[23] Mr. Ji essentially argues that his misrepresentation similarly could not have had an impact on the administration of the *IRPA*. He argues that since the settlement and subsequent staying of the charge against him meant that he could not possibly be criminally inadmissible,

the non-disclosure could not possibly have induced an error by allowing a criminally inadmissible person to obtain status, as the ID suggested. In his particular circumstances, therefore, he claims the misrepresentation cannot have been material.

[24] I cannot agree. In my view, Mr. Ji's arguments effectively assert that since the outcome of his renewal application would have been the same—since he was never criminally inadmissible—the misrepresentation was not material. However, this Court has confirmed that a misrepresentation need not be decisive or determinative, but need only affect the process: *Goburdhun* at para 28, citing *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25; *Afzal* at para 26. Even if the process would have yielded the same result in the circumstances, the misrepresentation may nonetheless be material. This approach reinforces the importance of the underlying purpose of paragraph 40(1)(*a*) of the *IRPA*, namely to deter misrepresentation and maintain the integrity of the immigration process by placing an onus on every applicant to ensure the completeness and accuracy of their application: *Afzal* at para 24; *Inocentes* at para 17, citing *Sayedi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 420 at paras 23–24; *Goburdhun* at para 28.

[25] As the ID noted, Mr. Ji's misrepresentation could have prevented an officer from, at the least, inquiring into the nature and disposition of the charge, as they did in the procedural fairness letter. Even if this inquiry would ultimately have resulted in a conclusion that Mr. Ji was not inadmissible for criminality, the failure to disclose the conviction could have affected the process of administration of the *IRPA*.

[26] Mr. Ji also cites *Song* and *Vavilov* for the principle that reasons must reasonably explain and justify the materiality finding, and argues the ID's reasons did not adequately do so in this case: *Song v Canada (Citizenship and Immigration)*, 2019 FC 72 at paras 29–31; *Vavilov* at paras 86, 98, 102–105.

[27] In my view, the ID's decision fully meets the qualities of justification, transparency, and intelligibility required of a reasonable decision: *Vavilov* at para 99. The ID explained that it was assessing materiality at the time of the misrepresentation. It further explained that Mr. Ji's misrepresentation "could have stopped an officer dealing with his application from looking into the disposition of his criminal charge." This is undoubtedly true, regardless of whether that inquiry yielded information showing an agreement to stay the criminal charge. I am satisfied the ID explained why it found the misrepresentation material.

[28] Mr. Ji contends that the ID's assertion that his misrepresentation "could have resulted in a criminally inadmissible person being granted an extension of their student permit" is in error since neither the non-disclosure nor the charge could possibly have had that result in this case. However, the ID's statement must be read in the context of its prior discussion of the integrity of the process and the timing of the materiality assessment. The ID's reasons as a whole clearly explain its concern that the failure to disclose the charge, at the time of the application, could have interfered with the officer's review and investigation into a relevant aspect of the application.

[29] In this regard, I cannot accept Mr. Ji's argument that the ID unreasonably failed to address the fact that at the time of Mr. Ji's application, a settlement had been reached that the charge would be stayed upon either community service or, later, the delivery of an apology letter. The ID's reasons must be read in the context of the submissions made to it: *Vavilov* at paras 94, 106, 127–128. In his closing submissions to the ID on materiality, Mr. Ji referred to the outcome of the charge and his subsequent disclosure of the charge, but did not rely on the timing of the mediation or settlement compared to that of the renewal application. In these circumstances, the ID cannot be faulted for not directly addressing the timing of the settlement of the charge, as opposed to those of the stay itself.

[30] I therefore conclude that Mr. Ji has not met his onus to demonstrate that the ID's decision that there was a material misrepresentation was unreasonable.

B. *The ID reasonably concluded that issue estoppel did not apply*

(1) The ID's decision on issue estoppel

[31] As noted above, the CBSA prepared a section 44 report and referred it to the ID in February 2020, but did not request an admissibility hearing until December 2020. In the interim, IRCC had refused Mr. Ji's renewal application after not receiving a response to its procedural fairness letter, and then subsequently restored his status and issued a study permit in November 2020. Mr. Ji argued that the IRCC officer implicitly concluded he was not inadmissible for misrepresentation, and that the CBSA was therefore estopped from re-litigating that issue before the ID.

[32] The ID set out the three-part test for issue estoppel confirmed in *Danyluk*, namely that (1) the same issue must have been previously decided; (2) the prior decision said to create the estoppel must have been final; and (3) the parties to the prior decision must be the same as the parties to the proceeding in which the estoppel is raised: *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25; *Liu v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 849 at para 45.

[33] The ID, citing this Court's decision in *Liu*, found that issue estoppel did not apply as no IRCC officer had determined the issue of whether Mr. Ji had made a misrepresentation on his study permit renewal application: *Liu* at paras 3, 45–54. In particular, the ID noted the officer who first refused the renewal application did so on the basis of criminal admissibility and not misrepresentation, and the officer who addressed the subsequent restoration and study permit application did not mention the misrepresentation regarding the prior application.

(2) The ID's decision is reasonable

[34] Mr. Ji argues that the ID erred because, unlike the situation in *Liu*, the IRCC officer who restored his status and issued a study permit in November 2020 (i) must have been aware of the initial misrepresentation, and (ii) must have implicitly made a determination with respect to it. He argues the former because IRCC had previously issued the September 18, 2020 procedural fairness letter identifying the misrepresentation concern and Mr. Ji referred to that letter in his explanation letter on the restoration application. He argues the latter because subsection 182(1) of the *IRPR* requires the officer not to restore an applicant's temporary resident status if they are inadmissible. That subsection reads as follows:

Restoration	**Rétablissement**
182 (1) On application made by a visitor, worker or student within 90 days after losing temporary resident status as a result of failing to comply with a condition imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c), an officer shall restore that status if, following an examination, it is established that the visitor, worker or student meets the initial requirements for their stay, has not failed to comply with any other conditions imposed and is not the subject of a declaration made under subsection 22.1(1) of the Act.	**182 (1)** Sur demande faite par le visiteur, le travailleur ou l'étudiant dans les quatre-vingt-dix jours suivant la perte de son statut de résident temporaire parce qu'il ne s'est pas conformé à l'une des conditions prévues à l'alinéa 185a), aux sous-alinéas 185b)(i) à (iii) ou à l'alinéa 185c), l'agent rétablit ce statut si, à l'issue d'un contrôle, il est établi que l'intéressé satisfait aux exigences initiales de sa période de séjour, qu'il s'est conformé à toute autre condition imposée à cette occasion et qu'il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.
[Emphasis added.]	[Je souligne.]

[35] In my view, it was reasonable for the ID to conclude that the officer who restored Mr. Ji's status and issued a study permit did not decide the issue of inadmissibility for misrepresentation.

[36] It is important to note that the doctrine of issue estoppel is designed to avoid re-litigation. That is, it is designed to prevent litigants from attempting to re-argue issues that have already been decided by a decision maker. It is a "doctrine of public policy that is designed to advance the interests of justice": *Danyluk* at paras 18–21.

[37] As the Supreme Court has held, issue estoppel may apply to issues even if they were only implicitly decided in an earlier decision. However, as Justice Binnie explained in *Danyluk*, the

issue must be fundamental and necessary to the earlier decision. In discussing the doctrine, Justice Binnie underscored the definition of issue estoppel as pertaining to questions "distinctly put in issue and directly determined" by an earlier decision maker, a stringent definition adopted by both the majority and dissent in *Angle v Minister of National Revenue*, [1975] 2 SCR 248 at pp 255, 267–268; *Danyluk* at para 24. Based on this approach, Justice Binnie held that:

> The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
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> [Emphasis added; *Danyluk* at para 24.]

[38] In the present case, there is no indication that the misrepresentation on the renewal application was "distinctly put in issue and directly determined" by the officer who granted restoration. While Mr. Ji's explanation letter filed in support of the restoration application refers in passing to the earlier procedural fairness letter that raised the misrepresentation, it only briefly mentions his "mistake" in failing to disclose the charge, in the passage reproduced at paragraph [15] above. The explanation letter, which is primarily an explanation of the assault with a weapon charge and not the misrepresentation issue, did not address the issue of materiality. While Mr. Ji contends that the concern about the misrepresentation would have been known to the officer, either through their direct involvement or through file notes, it is unclear whether the officer addressing the restoration application would necessarily have been consciously aware of the misrepresentation issue.

[39] Further, even if they were aware of it, I cannot agree with Mr. Ji that the restoration of his status means that the misrepresentation issue was "necessarily (even if not explicitly) determined" by the IRCC officer. To the extent that the officer was presumed to be aware of the misrepresentation issue, they can be presumed to have also been aware that the issue had been referred to the ID and would be decided by it at an admissibility hearing. It is difficult to conclude in such circumstances that the officer intended to or did make a decision on the issue in a manner that would pre-empt the ID's admissibility hearing. Nor can I agree that in such circumstances the IRCC officer was "necessarily" obliged by section 182 of the *IRPR* to address Mr. Ji's inadmissibility for misrepresentation even if they were aware of it. In any case, even if they were obliged to address it, there is no indication that they actually did.

[40] In this regard, the situation appears closer to that in *Liu* than Mr. Ji contends. In that case, Ms. Liu had made a misrepresentation on an application for permanent residence under the Canadian Experience Class [CEC]. That application was rejected for other reasons, but Ms. Liu made a second, successful, spousal application for permanent residence: *Liu* at para 1. In assessing the spousal application, two officers considered the misrepresentations made on the spousal application related to Ms. Liu's employment history, but not the misrepresentation made on the CEC application: *Liu* at paras 3, 48–50.

[41] Ms. Liu argued that granting the spousal application meant that the CBSA was estopped from raising the misrepresentation on the CEC application in an admissibility hearing. Chief Justice Crampton concluded that estoppel did not apply since there was no evidence that the officers who processed the spousal application considered the misrepresentation on the

CEC application: *Liu* at para 47. In other words, although Ms. Liu made a misrepresentation related to her employment history in both the CEC application and the spousal application, Chief Justice Crampton concluded that no explicit or implicit decision had previously been made regarding the misrepresentation that was the subject of the admissibility hearing, namely the one in the CEC application: *Liu* at para 50.

[42] Contrary to Mr. Ji's submission, there is no indication in *Liu* that the IRCC or the officers in question were entirely unaware of the misrepresentation on the CEC application. As Chief Justice Crampton stated, the CBSA had by the time of the spousal application discovered the misrepresentation on the CEC application *and* brought it to the attention of IRCC: *Liu* at para 2. The reasons of the officer who granted the spousal application refer to the earlier CEC application, although not to the misrepresentation in it: *Liu* at para 49. Nonetheless, since they did not address the earlier misrepresentation or make any decision with respect to it, Chief Justice Crampton concluded they did not reach any explicit or implicit conclusion or decision with respect to that misrepresentation: *Liu* at paras 50–52. The same is true in this case, regardless of any imputed awareness of the misrepresentation issue.

[43] As noted, issue estoppel is a rule against re-litigation of issues that have been previously decided. It is not a rule designed to allow a party to avoid having to face an issue because they received a permit that might have been refused had the issue been addressed and decided against them. In the present case, Mr. Ji's inadmissibility for misrepresentation was not previously "litigated" before either the IRCC officer on the initial refusal or the IRCC officer on the

restoration application, and it was reasonable for the ID to conclude that it was not previously decided.

[44] I therefore conclude that Mr. Ji has not met his onus to show that the ID's decision on the question of issue estoppel was unreasonable.

IV. Conclusion

[45] The application for judicial review will therefore be dismissed.

[46] Neither party proposed a question for certification and I agree that none arises in the matter.

JUDGMENT IN IMM-4861-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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