

Federal Court



Cour fédérale

Date: 20240105

Docket: IMM-9785-22

Citation: 2024 FC 20

Ottawa, Ontario, January 5, 2024

PRESENT: Madam Justice McDonald

BETWEEN:

ZHENQUAN PENG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision made by an immigration officer [Officer] refusing Zhenquan Peng's application for a Temporary Resident Permit [TRP] and a Work Permit [WP] finding that Mr. Peng was inadmissible under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] as a result of a criminal conviction for impaired driving.

[2] For the reasons that follow, this judicial review is dismissed.

I. Background

[3] Mr. Peng is a citizen of China who entered Canada on September 4, 2013, on a multiple entry Temporary Resident Visa.

[4] In October 2019, while in China, Mr. Peng was arrested for driving under the influence of alcohol [DUI]. He was charged and received a two-month sentence. He completed his sentence in February 2020.

[5] On February 2, 2020, Mr. Peng re-entered Canada. He did not disclose his DUI conviction upon re-entry to Canada.

[6] On April 7, 2020, Mr. Peng applied for a TRP and WP and answered “Yes” to question 3(a) on the application which asked if he was ever convicted of a criminal offence in any country or territory. He provided the following explanation: “One offence – Impaired driving on October 22, 2019 in China. Completed sentence. Please refer to submission and supporting proofs for details.”

[7] On May 20, 2021, Mr. Peng applied to extend his stay in Canada on his visitor visa through a visitor record application. On this visitor record application, he failed to disclose his DUI conviction.

[8] On March 24, 2022, the Officer sent Mr. Peng a procedural fairness letter [PFL] seeking clarification on the failure to disclose his criminal conviction on the visitor record application. The letter indicated that a response was required by March 31, 2022.

[9] Mr. Peng responded to the PFL on March 25, 2022 and submitted his British Columbia Provincial Nominee Program certificate and business ownership information.

[10] On June 23, 2022, the Officer determined that Mr. Peng was inadmissible to Canada pursuant to paragraph 36(1)(b) of the IRPA. The Officer noted that as Mr. Peng was convicted of a DUI offence after December 18, 2018, and as the Canadian Criminal Code, RSC, 1985, c C-46) was amended to change the DUI punishment from the maximum jail time of 5 years to 10 years, this makes a DUI offence a serious criminal offence. The Officer also noted that the conviction occurred within the last 5 years of his application; therefore, Mr. Peng was not eligible for criminal rehabilitation. The Officer also made note of Mr. Peng's failure to disclose the conviction to the port of entry officer.

[11] The Officer's decision was reviewed and approved by a manager at Immigration, Refugees and Citizenship Canada [IRCC].

II. Decision under review

[12] On September 18, 2022, the Officer refused Mr. Peng's application for a TRP and WP under subsection 24(1) of IRPA [Decision].

[13] As noted above, the Officer's Global Case Management System [GCMS] notes indicate that Mr. Peng's application was refused on the grounds that he is inadmissible due to serious criminality under paragraph 36(1)(b) of the IRPA. The Officer also noted that the offence occurred within the last 5 years, which makes Mr. Peng ineligible for criminal rehabilitation.

[14] The Officer was also not satisfied with Mr. Peng's explanation that his failure to disclose his conviction to the port of entry officer was an honest mistake. The Officer's GCMS notes indicate: "Even though I consider to give him a reasonable benefit of [doubt] in this particular instance, I am not satisfied that the omission was unintentional without aiming to deceive POE Officers in order to gain entry to Canada by knowing that his recent convictions made him inadmissible."

[15] Finally, the Officer noted Mr. Peng expressed remorse, but overall was not satisfied there were compelling or sufficient grounds to justify the issuance of a TRP.

III. Preliminary issue

[16] The Respondent objects to the admissibility of a letter dated July 4, 2022 attached to the Applicant's Affidavit. The Respondent argues that there is no evidence that this letter was received by IRCC and was, therefore, not before the Officer to form part of the Officer's decision-making. This letter is not included in the Certified Tribunal Record, which suggests that even if it was sent by the Applicant, it was not considered by the Officer.

[17] The Respondent raised this objection for the first time in their Further Memorandum of Argument and because of that the Applicant did not have an opportunity to file written submissions in response to this objection.

[18] The letter of July 4, 2022 addressed to “Dear Officer” indicates that the Applicant is still awaiting a response on his WP application and provides an update on his business ventures in Canada. In my view, this letter does not contain new information that was not otherwise before IRCC. I will not strike the July 4, 2022 letter as inadmissible.

IV. Relevant provisions

[19] The following provisions of IRPA are relevant to this matter:

| | | |
|------------------------------------|---|--|
| Application before entering Canada | 11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. | Visa et documents 11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi. |
| ... | ... | ... |
| Obligation on entry | 20 (1) Every foreign national, other than a foreign national referred to in section 19, who | Obligation à l'entrée au Canada 20 (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver : |
| | | ... |

seeks to enter or remain in Canada must establish,

...

(b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.

...

Temporary resident permit

24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

...

Serious criminality

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

...

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum

b) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

...

Permis de séjour temporaire

24 (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

...

Grande criminalité

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

...

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

term of imprisonment of at least 10 years;

V. Issue and standard of review

[20] The only issue raised by the Applicant is the reasonableness of the Officer's Decision to refuse the TRP and WP.

[21] A decision is reasonable when it is based upon an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision-maker. The hallmarks of reasonableness are transparency, intelligibility, and justification (*Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 69 at paras 85 and 99 [*Vavilov*]).

[22] Not all flaws or errors in a decision render it unreasonable. An unreasonable decision must contain flaws that are sufficiently central or significant to the matter. Moreover, reviewing courts must exercise deference to the decision-maker by refraining from reweighing evidence or reviewing factual findings absent exceptional circumstances (*Vavilov* at paras 100 and 125; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 57).

VI. Analysis

A. *Is the Officer's decision reasonable?*

[23] The Applicant argues that the Officer failed to properly consider if there were compelling reasons for the issuance of the TRP under section 24 of IRPA that outweighed any risks if the Applicant remained in Canada. He argues that the Officer did not adequately assess the fact that

he expressed remorse, proved that he had no other criminal convictions, provided evidence demonstrating his economic contributions, and his need to stay in Canada to continue managing and operating his businesses.

[24] The Applicant argues that the following statement by the Officer indicates a misunderstanding of the statutory power under section 24: “I also noted that a temporary resident permit is not intended to circumvent the objectives of IRPA or to overcome inadmissibility because it carries a lot of power compared to other documents.” He submits that this demonstrates that the Officer did not understand the purpose of a TRP. When this statement of the Officer is put into context, I do not agree that there is any misunderstanding by the Officer. Specifically, the statement follows the Officer’s finding that the Applicant is inadmissible because of the DUI charge and that he had taken into consideration the Applicant’s businesses in Canada. It also follows the Officer’s finding of not being satisfied “that the omission was unintentional without aiming to deceive POE Officers in order to gain entry to Canada by knowing that his recent convictions made him inadmissible.”

[25] The objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of IRPA where there may be ‘compelling reasons’ to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA (*Bhamra v Canada (Citizenship and Immigration)*, 2020 FC 482 at para 22 [*Bhamra*]; citing *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 22)

[26] When assessing criminal inadmissibility under subsection 24(1) of IRPA, the Officer should consider the following factors as noted in *Stewart v Canada (Citizenship and Immigration)*, 2022 FC 858 at paras 33-34 [*Stewart*] (citing *Cojuhari v Canada (Citizenship and Immigration)*, 2018 FC 1009 at para 21):

... the time elapsed since the sentence was served, whether the applicant is eligible for rehabilitation or is deemed rehabilitated, asses[s] the odds if further offences will be committed, whether the influence of alcohol was a factor in the commission of the offence, whether there is a pattern of criminal behaviour, whether the sentence has been completed and fines paid and eligibility for record suspension. [Emphasis in original]

[27] An officer's decision on a TRP application is highly discretionary (*Bhairon v Canada (Citizenship and Immigration)*, 2022 FC 739 at para 26) and the applicant bears the burden of proof to establish that there is a compelling need for the applicant to remain in or enter Canada (*Stewart* at para 33).

[28] In this case, the Officer considered the Applicant's position and the evidence submitted. On the matter of criminality, the Officer looked at the circumstances surrounding the offence, the fact that the nature of the offence made it "serious criminality", the fact that the offence was committed within the last 5 years, and the fact that the Applicant was not eligible for criminal rehabilitation. In his submissions, the Applicant did not challenge these findings of the Officer.

[29] Although the Officer did question the Applicant's right to own and operate businesses in Canada based upon his WP status, the Officer nonetheless highlighted and addressed the Applicant's submissions on his economic contributions to Canada.

[30] On the issue of failing to declare his criminal conviction upon re-entry to Canada, the Officer was not convinced that the Applicant's failure to do so was an honest mistake.

[31] The Officer noted that the Applicant expressed remorse concerning his conviction but was not satisfied that there were "compelling or sufficient grounds to justify the issuance of a temporary resident permit document which carries more weight."

[32] In my view, the Officer provided sufficient reasoning to justify the Decision. The burden of proof was on the Applicant to provide compelling grounds as to why a TRP should be granted. The Officer weighed the evidence and provided reasons on the Applicant's serious criminality leading to inadmissibility to Canada and noted the Applicant's evidence on his economic contributions to Canada. The Officer weighed the relevant considerations, and ultimately exercised their discretion to refuse the Applicant's TRP application. The Applicant has not highlighted any significant flaws or omissions in the Officer's reasoning to render this Decision unreasonable (*Vavilov* at para 100).

VII. Conclusion

[33] This judicial review is dismissed. There is no question for certification.

JUDGMENT IN IMM-9785-22

THIS COURT'S JUDGMENT is that:

1. This judicial review is dismissed.
2. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-9785-22

STYLE OF CAUSE: PENG V THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BC

DATE OF HEARING: NOVEMBER 9, 2023

JUDGMENT AND REASONS: MCDONALD J.

DATED: JANUARY 5, 2024

APPEARANCES:

Robert Leong FOR THE APPLICANT

Andrew W. Scarth FOR THE RESPONDENT

SOLICITORS OF RECORD:

Patriam Immigration Law FOR THE APPLICANT
Vancouver, BC

Attorney General of Canada FOR THE RESPONDENT
Vancouver, BC