Federal Court  Cour fédérale

Date: 20220420

Docket: IMM-4642-20

Citation: 2022 FC 559

Ottawa, Ontario, April 20, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ANA MARIA DEL PILAR CAPETILLO MENDEZ
GONZALO DE VIERNA RAMOS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of decision of the Immigration Section of the Canadian Embassy in Mexico refusing the Applicants' application for permanent residence on the basis that they are inadmissible due to misrepresentation, pursuant to ss 40(1)(a) and 42(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Background

[2] The Applicants are a married couple, Ana Maria Del Pilar Capetillo Mendez [Female Applicant] and Gonzalo De Vierna Ramos [Male Applicant] and are citizens of Mexico. They were sponsored for permanent residence by their daughter, Alejandra Fabiola De Vierna Capetillo [Sponsor] who is a Canadian citizen and who was successful in obtaining a spot in the 2018 lottery to sponsor a parent or a grandparent. In their applications, the Applicants responded "no" to the question 4(a) asking whether they had been convicted of, or were a party to a crime or offence, or the subject of any criminal proceedings in any country.

[3] As a part of the application process, by letter dated September 12, 2019, the Applicants were requested to complete medical examinations and submit police certificates from the Fiscalia General de la Republica, [FGR], the Mexican federal police. The response from the FGR concerning the Male Applicant is dated October 8, 2019 and was received by the Immigration Section on November 11, 2019. The FGR states that "there was found registered data of a criminal nature". On November 25, 2019, the Immigration Section sent a procedural fairness letter advising that the Male Applicant's police certificate shows that he was convicted of driving while impaired on November 27, 1998. The letter further advised that the Immigration Section believed that the Applicants may be inadmissible to Canada pursuant to s 40(1)(a) of the IRPA for misrepresentation and gave them 30 days to provide responding submissions.

[4] The Applicants' submissions in response to the procedural fairness letter state that the Male Applicant had believed he was answering the question correctly, as he understood that his

prior convictions had been expunged by operation of Mexican law in 2000 when his sentences were completed. However, if the Applicants were found to be inadmissible, they sought consideration of their application on H&C grounds.

[5] The application was refused by letter dated August 21, 2020.

Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c 27

> **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.
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> **25(1)** Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.
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> **40(1) A** permanent resident or a foreign national is inadmissible for misrepresentation
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> > **(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;
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> **42(1)** A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if
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> > **(a)** their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or

Decision under review

[6] The August 31, 2020 refusal letter states that the Male Applicant misrepresented or withheld the fact of his previous criminal convictions in Mexico and that the H&C grounds submitted by the Applicants were not sufficient to overcome the finding of inadmissibility due to misrepresentation.

[7] Included in the certified tribunal record [CTR] are the Global Case Management System [GCMS] notes which contain the reasons of the officer who initially considered the application, made the finding of misrepresentation and also conducted the H&C analysis [Officer], as well as the officer who reviewed and confirmed the misrepresentation finding [Review Officer].

[8] The Officer records that the Male Applicant was convicted on November 11, 1998 of driving while under the influence of alcohol and was fined. The fine was paid in full on January 28, 1999. A second conviction, also for driving while under the influence of alcohol, occurred on November 27, 1999. A fine was paid on December 10, 1999 and the imprisonment portion of the sentence, which had been replaced with a diversion program, was completed on July 14, 2000. The Officer records that both convictions were expunged on November 5, 2019. The Officer was satisfied that the Male Applicant was not criminally inadmissible, as he appeared to be deemed rehabilitated.

[9] The Officer notes that the Male Applicant had answered “no” to the question “Have you ever been convicted of, or are you currently charged with, on trial for, or party to a crime or

offence or subject of any criminal proceedings in any country?". The Officer records that in response to the procedural fairness letter the Male Applicant explained that he did not disclose the convictions because he believed that they had been expunged when he completed his sentence and, therefore, that they would not be reflected in his police clearance letter. The Officer states that it appeared that the Male Applicant was aware of the convictions and that the procedural fairness letter was not the impetus to expunge the record. The Officer found that the question on the application was clear. The Officer was not satisfied that the Male Applicant had been truthful in his application.

[10] The Review Officer's notes state that the question being asked of the Male Applicant was clear and did not leave space for interpretation, nor was it for the Male Applicant to decide what is pertinent for the officer to consider. The Review Officer described the Male Applicant's explanation as: "he believed his criminal record had been expunged and that his PC would be clear". The Review Officer records that the question in the application does not ask whether somebody has a criminal record, but rather if they had ever been convicted, and the Male Applicant had to answer that question truthfully. The Review Officer concluded that the failure to disclose the convictions was a misrepresentation that could have led to an error in the administration of the IRPA and that the Male Applicant was therefore inadmissible for a period of five years.

[11] As to the Applicants' request for H&C relief, the Officer considered the seriousness of the misrepresentation, and found that the Male Applicant ought to have erred on the side of caution and declared as much information as possible so that a clear and informed admissibility

assessment could have been made. The Officer also noted that the Male Applicant had not declared the criminal convictions on previous temporary resident visa and electronic travel authorization [eTA] applications, demonstrating a timeline of non-declaration dating much earlier than the expungement in 2019. And, regardless of whether the Male Applicant would have been found to be rehabilitated, the failure to declare the past convictions removed from the immigration officer the ability to make a fully informed assessment.

[12] The Officer also found that there would be little to no hardship faced by the Applicants remaining in Mexico and that they are not strongly established in Canada. Nor was family separation a compelling factor in the circumstances of this family. The Officer was not satisfied that the elements presented in support of H&C grounds rose to a level sufficient to overcome a finding of misrepresentation.

[13] The Male Applicant was found to be inadmissible pursuant to s 40 of the IRPA, and the Female Applicant was inadmissible because of her inadmissible family member, pursuant to s 42 of the IRPA.

Issues and standard of review

[14] The sole issue in this matter is whether the officer's decisions were reasonable. More specifically:

i. Was the inadmissibility finding reasonable? and

ii. Was the H&C decision reasonable?

[15] The parties submit, and I agree, the reasonableness standard applies when assessing the merits of the officers' decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25). To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

Inadmissibility finding

Applicants' position

[16] The Applicants submit that the officers failed to properly consider whether the misrepresentation was an innocent error because the officers misunderstood the Applicants' explanation for the incorrect response on their application forms. The Male Applicant subjectively and reasonably believed that his convictions had been expunged, which would have justified answering "no" to the question. The Applicants submit that while the officers were not bound to accept the Applicants' explanation, they did have to properly consider it.

Respondent's position

[17] The Respondent emphasizes that an applicant for permanent or temporary residence has the obligation to produce all the relevant documentation and information in support of their application, and has an obligation to ensure the materials are accurate and complete. The narrow, innocent errors exception to the application of s 40(1)(a) applies only in exceptional circumstances and where the applicant honestly and reasonably believed that they were not

misrepresenting a material fact. Here, the Male Applicant was aware of his prior convictions but chose not to disclose them. Accordingly, he did not hold an honest and reasonable belief that he did not misrepresent them. It was also apparent from the officers' reasons that they did not accept that the error was innocent and, therefore, they were not required to consider the exception. Nor was the officers' decision predicated on a factual error.

Analysis

[18] In *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368, I addressed s 40 and stated as follows:

> [15] I have previously summarized the general principles concerning misrepresentation in *Goburdhun v Canada (Citizenship and Immigration*), 2013 FC 971 at para 28. For the purposes of this application they include that s 40 is to be given a broad interpretation in order to promote its underlying purpose (*Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at para 25 ("*Khan*")), its objective being to deter misrepresentation and maintain the integrity of the immigration process. To accomplish this, the onus is placed on the applicant to ensure the completeness and accuracy of their application (*Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 23 ("*Oloumi*"); Jiang at para 35; *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at paras 55-56 ("*Wang*")).
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> [16] In this regard an applicant has a duty of candour to provide complete, honest and truthful information in every manner when applying for entry into *Canada (Bodine v Canada (Citizenship and Immigration)*, 2008 FC 848 at paras 41-42 ("*Bodine*"); *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15 ("*Baro*"); *Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at para 11 ("*Haque*")). Section 40 is intentionally broadly worded and applied and encompasses even misrepresentations made by another party, including an immigration consultant, without the knowledge of the applicant (*Jiang* at para 35; *Wang* at paras 55-56).

> [17] The exception to s 40 is narrow and applies only to truly extraordinary circumstances where an applicant honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control (*Masoud v Canada (Citizenship and Immigration)*, 2012 FC 422 at paras 33-37 ("*Masoud*"); *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at para 40 ("*Goudarzi*")). That is, the applicant was subjectively unaware that he or she was withholding information (*Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345 (FCA) ("*Medel*"); *Canada (Citizenship and Immigration) v Singh Sidhu*, 2018 FC 306 at para 55 ("*Singh Sidhu*")).
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> [18] In determining whether a misrepresentation is material, regard must be had for the wording of the provision and its underlying purpose (*Oloumi* at para 22). It is necessary, in each case, to look at the surrounding circumstances to decide whether the withholding of information constitutes a misrepresentation (*Baro* at para 17; *Bodine* at paras 41-42; *Singh Sidhu* at paras 59-61). Further, a misrepresentation need not be decisive or determinative. It is material if it is important enough to affect the process (*Oloumi* at para 25).
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> [19] Nor can an applicant take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application. The materiality analysis is not limited to a particular point in time in the processing of the application (*Haque* at paras 12, 17; *Khan* at paras 25, 27, 29; *Shahin v Canada (Citizenship and Immigration)*, 2012 FC 423 at para 29 ("*Shahin*")).

(See also *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at paras 38-39; *Tuiran v Canada (Citizenship and Immigration)*, 2018 FC 324 at paras 25-28).

[19] In order to find that an applicant is inadmissible under s. 40(1)(a) of the IRPA, there must be a misrepresentation by the applicant and the misrepresentation must be material in that it could have induced an error in the administration of the IRPA (*Malik v Canada (Citizenship and*

Immigration), 2021 FC 1004 [*Malik*] at para 11; *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 27 [*Bellido*]).

[20] There is no requirement within section 40(1)(a) that the misrepresentation be intentional, deliberate or negligent (*Bellido* at paras 27-28; *Bains v Canada (Citizenship and Immigration)*, 2020 FC 57 at para 63). Therefore, even if the truth of an applicant's explanation for a misrepresentation is accepted, subject to the narrow honest mistake exception, an applicant will still be inadmissible because an innocent failure to provide material information still constitutes misrepresentation (*Tofangchi v Canada (Citizenship and Immigration)*, 2012 FC 427 at paras 33, 40; *Coube de Carvalho v Canada (Citizenship and Immigration)*, 2019 FC 1485 at paras 18 – 21; *Jiang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 942 at para 35; *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at paras 56-58; *Wang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 647 at paras 24-25; *Smith v Canada (Citizenship and Immigration)*, 2018 FC 1020 at para 10).

[21] As to the honest mistake, or innocent misrepresentation exception, as stated in *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043:

> [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.

[22] The main theme of the Applicants submission is that the officers' innocent error exception analysis was predicated on a factual error. Specially, that the officers misunderstood the Applicants' submission.

[23] The Applicants submit that the evidence was not that the Male Applicant believed that because of the *official expungement* that he did not have to declare the convictions. Rather, it was because of his understanding of the law in Mexico that he believed the convictions did not have to be declared. He thought they were minor in nature and had been expunged from his record *automatically* upon completion of the diversion program in July 2000. The Applicants submit that this is key subjective and objective evidence of the Male Applicant's honest but mistaken belief and was misunderstood by the officers who drew a significant negative inference based on this misunderstanding.

[24] Upon review of the record and the officers' reasons, I am not persuaded that the officers misunderstood the Applicants' submission or predicated their treatment of the claim of an innocent error on that misunderstanding.

[25] In that regard, in the response to the procedural fairness letter, the Male Applicant stated that in Mexico, once a sentence has been completed, the conviction is removed from the person's criminal record as it is not meant to penalize the offender for the rest of their life. As he had completed the diversion program in July 2000, the conviction was no longer listed on the Mexican police reports as evidenced by the "Constancia de Antecedentes Penales" which he states he "submitted toward my application" and this was the reason he had not disclosed the conviction on his immigration application.

[26] The December 24, 2019 submission to the Immigration Section made by the Applicants' former counsel repeats this and adds that the Male Applicant's sentence was completed in Mexico two decades ago "and the entries were supposedly permanently removed from Mr. de Vierna Ramos' criminal record". Which is confirmed by the enclosed "Official notice of court decision concerning Gonzalo de Vierna Ramos issued by the First Court of Enforcement of Sentences of the State of Aguascalientes, Mexico. The couple did not believe they were misrepresenting their circumstances, and this was the reason neither party did not disclose Mr. de Vierna Ramos' convictions…". The referenced attached document is an expungement order dated November 5, 2019. The background content of the expungement order confirms that the Male Applicant completed the diversion program with respect to his second office on July 14, 2000 but does not indicate that this alone would have triggered the removal of the convictions from his record.

[27] The timeline of events and documents is not entirely clear from the above submissions of the Male Applicant and his former counsel. However, what is apparent is that after responding

"no" to the question about prior convictions and as part of the application process the Applicants were required to obtain federal police clearances letters from Mexico. The FGR letter with respect to the Male Applicant is dated October 8, 2019 and identifies record of a criminal nature.

[28] The "Constancia de Antecedentes Penales", or Mexican state clearance letter, referenced by the Male Applicant, is dated October 31, 2019. Accordingly, it was obtained only *after* the Applicants became aware of the federal non-clearance by the FGR. As such, it could not have formed an objective basis for the Applicants' stated belief that the Male Applicant's record was automatically expunged in July 2000 as the Applicants seem to suggest. The Male Applicant then sought an expungement of the convictions, which was granted on November 5, 2019.

[29] Similarly, while in the submissions made in this judicial review the Applicants assert that they relied upon and "misread" the recital contained in the expungement order indicating that records shall be expunged when the imposed sentence has been fulfilled, and they failed to appreciate that an order had to be applied for and issued to effect the expungement, the expungement order was obtained after they made their applications. They could not have relied upon its content to support a subjective or objective belief that the expungement was automatic.

[30] In any event, the impetus for obtaining the expungement order was the FGR non-clearance letter. The procedural fairness letter followed on November 25, 2019, in response to which the Male Applicant explained that his understanding of Mexican law was that his record would be expunged automatically once his sentence had been completed.

[31] In the reasons, the Review Officer states that the application question “Have you ever been convicted of, or are you currently charged with, on trial for, or a party to a crime or offence, or subject of any criminal proceedings in any country” is clear and does not leave space for interpretation. Nor is it for the Applicants to decide what information is pertinent for the officer to consider. Further, that it is mandatory that all questions be answered truthfully. The Review Officer notes that in response to the procedural fairness letter, the Male Applicant answered that he believed his criminal record had been expunged and that his police clearance would be clear. However, that the question does not ask whether someone has a criminal record, but rather if they have ever been convicted and the Male Applicant failed to answer that question completely and truthfully.

[32] With respect to the Applicants’ submissions as to an innocent mistake and that the misrepresentation was not material because the Male Applicant submitted the FGR police (non)clearance letter identifying the convictions, the Review Officer states that the Male Applicant chose not to mention the previous convictions because he believed that his police clearance would be clear. The Review Officer added that at the time of the submission of the application the Male Applicant’s criminal record had not yet been expunged, this happened a year later.

[33] Similarly, the Officer noted that the expungement occurred on November 5, 2019, after the lock-in date for the application (October 14, 2018) but before the procedural fairness letter was sent (November 25, 2019). That Officer concluded that it appeared that the Male Applicant was aware of the convictions and that the procedural fairness letter was not the impetus to

expunge the record; that the Male Applicant had taken it upon himself to have the convictions expunged.

[34] The Officer rejected the submission made by the Applicants' representative that the misrepresentation was not material as it would have been revealed in any event by the police clearance letter. The Officer stated they were concerned that the Male Applicant had not disclosed the convictions "thinking his record was expunged" and, therefore, that the convictions would not appear on his police clearance. Thus, had his police clearance been clear, as the Male Applicant anticipated, he would have averted or discouraged a line of inquiry.

[35] In other words, the Male Applicant was aware of the convictions. However, he chose not to disclose them because he mistakenly believed that his record had been expunged in 2000. Based on that belief, the Male Applicant thought the convictions would not show up on the FGR police clearance. Therefore, they would not come to the attention of the Canadian immigration authorities. Because the Male Applicant thought that the convictions would not come to the attention of the Canadian Immigration authorities, he chose not to disclose them.

[36] The Officer states that the question was clear and, based on the information on file, they were not satisfied that the Male Applicant was truthful in his application, nor did the response to the procedural fairness letter alleviate the Officer's concerns. In the context of their H&C consideration, the Officer noted that the Applicants' representative had submitted that the misrepresentation was minor and that the Male Applicant had not meant to "dupe" the visa officer but believed that his record had been expunged. The Officer referred to the clarity of the

question and stated that added that the Male Applicant ought to have erred on the side of caution and declared as much information as possible so that the immigration officer could make an informed admissibility assessment. And, while the Male Applicant indicated that he believed his record was expunged, it was clear that it had not been at the time of the application.

[37] In my view, the above reasons clearly demonstrate that the officers understood the Applicants' submission to be that the Male Applicant had mistakenly believed that his record had been expunged in 2000. However, the date of the expungement – be it the mistaken date of 2000 or the actual date of 2019 – did not assist the Applicants. This was because, as the officers stated, the Male Applicant knew when he answered the question in the application asking if he had ever been convicted of a crime, that the Male Applicant had been convicted of two offences. For the reasons set out, the officers did not accept that the misrepresentation was immaterial or innocent.

[38] In effect, what the Applicants are arguing is that they were not obliged to disclose the convictions because they believed they had been expunged and the convictions were therefore not material or relevant to the officers' decision. They clearly state that is *why* they did not disclose the convictions. In my view, the officers did not err in finding that it is not open to the Applicants to determine what is or is not relevant information that must be disclosed.

[39] *Smith v Canada (Citizenship and Immigration)*, 2018 FC 1021 is a factually similar circumstance. There the applicant completed an on-line application for an eTA. Although he had been charged with criminal offences in the United States [US] and Bermuda he responded "no" to the question "Have you ever committed, been arrested for, been charged with or convicted of

any criminal offence in any country?". He was found inadmissible for misrepresentation. On judicial review, the applicant argued that officer erred by not considering his explanation and by not considering if the innocent mistake exception should apply to his circumstances. Specifically, that because the US charge was dismissed and because his Bermudan criminal record was expunged, he did not believe it was necessary to declare these matters in response to the question on the eTA.

[40] Justice MacDonald found:

> [14] Mr. Smith argues that the Officer over-emphasized the clarity of the question and did not accept his explanation for the mistake. I agree that in certain cases an officer may have an obligation to consider in more detail the surrounding circumstances, such as where the question at issue could be subject to various interpretations or where the unique circumstances are not responsive to the question at issue. Here, however, I agree with the Officer that the question in this case — "Have you ever committed, been arrested for, been charged with or convicted of any criminal offence in any country?" — is not vague or misleading.
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> [15] On judicial review it is not the role of the court to re-weigh the evidence provided that the officer's decision is reasonable (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61). Here the decision is reasonable and was within the Officer's exercise of discretion and is therefore owed deference by this Court.

[41] In this matter, the Male Applicant clearly was aware of his prior convictions. And the question he was asked is very clear. As the officers found, the reason the Male Applicant did not disclose the convictions was because he mistakenly believed that his record had been expunged in 2000 and, therefore, they would not show up in his police clearance.

[42] However, this presupposes that the Canadian immigration authorities would be in agreement with the Male Applicant's view that fact of the expungement entitled him to answer "no" to the question of whether he had ever been convicted of a criminal offence. That may, or may not, be so. As the Respondent notes, the question in the application immediately preceding the one at issue in this matter asks if the applicant has been convicted of a crime or offence in Canada "for which a pardon has not been granted". The following question asks if an applicant has been convicted of any crime or offence in any country and contains no similar reporting carve out for crimes that have been pardoned, expunged or otherwise mitigated.

[43] Further, in *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153, the applicant argued that as he had been granted an amnesty he did not have to disclose his previous arrests and detention. The amnesty implied that he had never committed any criminal or penal act. Accordingly, there could not have been any misrepresentation in failing to divulge an arrest predating the amnesty. Justice Gascon did not agree and held:

> [26] I am ready to accept that events or arrests that were subsequently subject to an amnesty cannot be held against an applicant if the inadmissibility was based on criminality. Indeed, paragraph 36(3)(b) of the IRPA was drafted in such a way that "[c]onvictions [were] not to be taken into consideration where pardon has been granted or where they have been reversed" (Cha v Canada (Minister of Citizenship and Immigration), 2006 FCA 126 [Cha] at para 30). However, the situation is different here, as Mr. Kazzi's inadmissibility was based on misrepresentation. Nothing in the IRPA precludes finding inadmissible for misrepresentation someone who omits to divulge a previous arrest, even when an amnesty or a pardon was granted. The fact that an amnesty was issued does not mean that Mr. Kazzi was relieved from his obligation, clearly enacted in subsection 16(1) of the IRPA, to provide truthful answers in his applications to the Canadian immigration authorities.

[44] Here, and as the officers pointed out, the determination of what is material to their assessment of the application does not lie with the Applicants. As stated in *Vetharaniyam v Canada (Citizenship and Immigration)*, 2011 FC 1116: "... it is not for the Applicant to decide what to answer for and what is material and what is not. He is not to foreclose any possible investigations that might be conducted by the Officer. The purpose of subsection 40(1)(a) is to ensure that Applicants provide complete, honest and truthful information …" (at para 23).

[45] Further, having rejected the Applicants' explanation for the misrepresentation and having found that the Applicants were aware of the convictions and that the Male Applicant had failed to answer that question completely and truthfully, it was not incumbent upon the officers to consider the innocent error exception. In that circumstance they were not required to assess whether the Applicants' belief that they were not withholding material information was not only honest but reasonable, in light of the wording in the relevant question in the application form. The exception has no potential application in the absence of a conclusion that the error was innocent (*Alalami v Canada (Citizenship and Immigration*) FC 328 at paras 16, 20; *Malik* at para 36).

[46] For these reasons, I do not agree with the Applicants that the officers erred by misunderstanding their submission and, therefore, in failing to consider whether the misrepresentation was innocent. The officers understood the submission, found that the Applicants were not truthful in their applications and, therefore, that the misrepresentation was not innocent and, the officers did not accept that the misrepresentation was not material.

H&C

Applicants' position

[47] The Applicants submit that in assessing the seriousness of the misrepresentation the Officer simply treated the existing inadmissibility finding as dispositive of the claim for H&C relief under s 25(1). The Officer mistakenly placed significant emphasis on the timing of the expungement as demonstrated by the Officer's reference to prior examples of non-disclosure, despite the Applicants' explanation that he innocently believed that the convictions did not need to be disclosed. The Officer's consideration of the possibility of rehabilitation and remorsefulness was similarly flawed. Despite finding that there was not criminal inadmissibility, the Officer unreasonably returned to the materiality of the misrepresentation. The Officer's establishment analysis adopted the wrong frame of reference, and should have focused on whether the Applicants could establish themselves in Canada versus whether they had significant establishment in Canada which is only applicable when assessing inland applications. Further, the Officer minimized the hardship that would be caused by family separation.

Respondent's position

[48] The Respondent submits that the Officer was not bound to reconsider the same explanation already rejected in assessing admissibility, as demonstrating that the misrepresentation was not serious. Further, when assessing the weight to be given to the misrepresentation, the Officer was entitled to consider that the Applicants had misrepresented the same facts on four prior applications for visas and eTAs. The Respondent submits that the

Officer's assessment of the Applicants' establishment was responsive to their submissions, which did not reference the Applicants' ability to become established in Canada, nor did they refer to any potential lost opportunity to apply for permanent residence because they might be precluded from immigrating to Canada in the future as they initially applied under the lottery program. The Officer's conclusion that the Applicants would suffer minimal hardship was based on the facts advanced to them, and was reasonable.

Analysis

[49] Pursuant to s 25(1) of the IRPA, the Minister may, on request by a foreign national who applies for a permanent resident visa outside of Canada, examine the circumstances of the foreign national, and may grant permanent resident status or an exemption for any applicable criteria or obligations of the IRPA if the Minister is satisfied that "it is justified by humanitarian and compassionate considerations relating to the foreign national taking into account the best interests of a child directly affected". The purpose and application of s 25(1) was addressed by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. There the Supreme Court held that the H&C discretion provided by s 25(1) permits the mitigation of the rigidity of the law where the facts warrant the granting of special relief from the effect of the IRPA in order to relieve the misfortunes of another (*Kanthsamy* at para 13, 19; see also *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 at para 25).

[50] The discretionary granting of relief pursuant to subsection 25(1) of the IRPA is reserved for exceptional situations. The H&C circumstances of an applicant must justify their exemption

from the otherwise applicable provisions of Canada's immigration laws. A decision maker engaged in an H&C assessment must apply these equitable concepts to the factual circumstances of the particular applicant. Because s 25(1) presupposes that an applicant has failed to comply with one or more of the provisions of the IRPA, a decision maker must assess the nature of the non-compliance and its relevance and weight against the applicant's H&C factors in each case (*Dela Pena v Canada (Citizenship and Immigration)*, 2021 FC 1407 at para 17; *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23; *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at para 27).

[51] In their submissions on judicial review, the Applicants repeat their arguments concerning misrepresentation when addressing the Officer's assessment of their submission about the seriousness of the misrepresentation. More specifically, they assert that there was no assessment of their explanation for why they had innocently omitted information and how the innocence of the representation might alleviate the consequences. The Applicants assert that there was no justification for why this explanation did not warrant H&C relief. I agree with the Respondent that the Officer did not need to repeat, within the H&C analysis, their findings and again explain why they did not accept the Applicants' explanation.

[52] I note that in their submissions to the Officer the Applicants asserted the seriousness of the misrepresentation was diminished because it was likely that had they answered "yes" to the question about criminal convictions their inadmissibility would have been assessed, they would have been found to be admissible and the Male Applicant likely would have been found to have been rehabilitated.

[53] In their H&C reasons, the Officer in fact did restate the Applicant's explanation that the Male Applicant believed his record had been expunged when he answered the question. The Officer also stated that regardless of whether the Male Applicant would have been found to be rehabilitated (i.e. not inadmissible for criminality), the failure to declare the past convictions removed from the immigration officer the ability to make an informed assessment. The Officer also noted that the Male Applicant had not declared his convictions in previous TRV and eTA applications, which the Officer found demonstrated a history of non-disclosure that predated the expungement of his record in 2019.

[54] I would agree that the Officer could have more clearly expressed their weighing of the seriousness of the misrepresentation against the request for H&C relief but, ultimately, it is apparent that the Officer was satisfied that the seriousness of the misrepresentation was such that the factors presented in favour of H&C relief did not overcome the inadmissibility finding.

[55] A history of misrepresentation is relevant when weighing the nature of the non-compliance against the request for H&C relief. While the Applicants may have believed that that the Male Applicant's criminal record was expunged when they made previous TRV and eTA applications, the Officer's point was that they still failed to declare the prior convictions in those applications. That is, they had not merely made a single inaccurate statement on the current application, but had made similar misrepresentations on several other applications. The Officer did not err by considering these prior inaccurate declarations as part of the "nature of the non-compliance" against which the H&C request would be weighed.

[56] I also do not agree with the Applicants' submission that the Officer engaged in a "hollow exercise" by relying on the scheme of the IRPA to deny the H&C, as was the case in *Bhalla v Canada (Citizenship and Immigration)*, 2019 FC 1638 at para 26).

[57] In their submissions to the Officer, the Applicants also put forward as an H&C factor the possibility of rehabilitation and remorsefulness. They noted that the Male Applicant would be deemed rehabilitated and enclosed a rehabilitation application should it be necessary.

[58] When addressing this submission, the Officer states:

> I note there is a possibility of rehabilitation, and present officer found that applicant may likely have been deemed rehab after reception of all documents following PFL. Nonetheless, as indicated previously, material facts required to assess criminality and rehabilitation were not submitted in full with the original application.

[59] In fact, the Officer had previously found that the Male Applicant was rehabilitated and was not criminally inadmissible:

> I am satisfied that the PA is not presently criminally inadmissible. I note the timeline of the charges and convictions and expungement. Even if expungement is not taken into account, PA appears to be deemed rehab. PA does not require a rehab application. Though documents for a rehab application were provided, no fee was provided. As such, no refund was required.

[60] Regardless, the Officer was required to assess the nature of the non-compliance (misrepresentation) and its relevance and weight this against the Applicant's H&C factors (rehabilitation and remorse). The Officer acknowledged the rehabilitation and weighed it against

the misrepresentation. In effect, the Applicants are asking the Court to reweigh the evidence, but that is not the role of the Court on judicial review (*Vavilov* at para 125).

[61] As to establishment, in their submissions to the Officer the Applicants identified this as an H&C factor to be considered and framed it as the "Length of time spent in Canada and the degree to which the appellant is established in Canada". They made a brief submission stating that although they had not yet lived in Canada they have travelled here many times to spend time with their daughter and had established friendships and a community here. The Officer acknowledges these submissions but found that the Applicants have lived their entire lives in Mexico, save for short trips, and are not presently strongly established in Canada. The Officer found that the Applicants were strongly established in Mexico and, although they have a desire to emigrate to Canada, there would be little to no hardship faced by them in remaining there.

[62] Contrary to the Applicants' submissions in this application for judicial review, the Officer was not incorrectly applying an H&C assessment applicable to an inland application, the Officer was responding to the submission as made by the Applicants. I see no error in this assessment of hardship.

[63] Finally, as to family separation, the Applicants submitted to the Officer that the family is very close. They submitted that their daughter who lives in Canada would be devastated if they were not granted permanent residence. She had recently married and hoped to soon start a family and it was important to her that her parents be significant contributors to the lives of such future

children. The Applicants submitted that it would be contrary to the principles of family reunification not to grant permanent residence to them.

[64] The Officer accepted the close family relationship but noted that the Applicants' daughter had made an informed decision to move to Canada, which entailed separation from her parents, but that there did not appear to be any impediment to her visiting them in Mexico. Nor was this situation especially unique. Further, that the bar to admission to Canada is not forever and would expire after five years. And, finally, that family reunification had to be weighed against the inadmissibility.

[65] While the Applicants make various arguments in this application for judicial review, I am not convinced that the Officer's findings with respect to family separation were unreasonable. This is not a situation where an officer failed to grasp the personal circumstances of the applicant, such as *Epstein v Canada (Citizenship and Immigration)*, 2015 FC 1202, and other cases relied upon by the Applicants. Further, the Officer did consider the submissions in the context of hardship. The Applicants' current submission, that given the lottery-based eligibility for parental sponsorship their hardship is more than likely not temporary, was not before the Officer. Nor am I satisfied that the Officer applied an unreasonably high hardship threshold.

[66] The Officer concluded, based on all of the information before them, that the H&C factors presented by the Applicants in support of H&C relief did not rise to level that would overcome the finding of misrepresentation.

[67] Considering the limited submissions made by the Applicants and the Officer's reasons, I am not persuaded that the Officer's finding was unreasonable. The Officer did not overlook any elements upon which the claim was based. The Officer balanced the H&C factors, having considered and weighed all of relevant facts and factors before them, when deciding not to grant the exceptional, discretionary remedy sought (*Kanthasamy* at para 25; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15; *Bhalla v Canada (Citizenship and Immigration)*, 2019 FC 1638 at para 21).

Conclusion

[68] Contrary to the Applicants' submissions, the officers understood the Applicants' submissions and the officers' reasons are justified, transparent and intelligible. The reasons permit the Applicants to understand why their application for permanent residence was rejected due to misrepresentation and why the H&C factors they presented did not overcome that finding.

JUDGMENT IN IMM-4642-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4642-20
STYLE OF CAUSE:	ANA MARIA DEL PILAR CAPETILLO MENDEZ, GONZALO DE VIERNA RAMOS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	MARCH 23, 2022
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	APRIL 20, 2022

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