Federal Court  Cour fédérale

Date: 20170616

Docket: IMM-5388-15

Citation: 2017 FC 594

Ottawa, Ontario, June 16, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

QIYIN GE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND FILES: IMM-5410-15, IMM-5660-15, IMM-5716-15, IMM-5786-15, IMM-5839-15, IMM-5863-15, IMM-5884-15, IMM-5885-15, IMM-5886-15, IMM-5887-15, IMM-5888-15, IMM-5889-15, IMM-5890-15, IMM-5891-15, IMM-5892-15, IMM-5893-15, IMM-5894-15, IMM-5895-15, IMM-14-16, IMM-134-16, IMM-135-16, IMM-137-16, IMM-138-16, IMM-139-16, IMM-140-16, IMM-141-16, IMM-143-16, IMM-144-16, IMM-145-16, IMM-281-16, IMM-282-16, IMM-283-16, IMM-284-16, IMM-285-16, IMM-286-16, IMM-287-16, IMM-288-16, IMM-289-16, IMM-292-16, IMM-394-16, IMM-420-16, IMM-444-16, IMM-445-16, IMM-446-16, IMM-447-16, IMM-448-16, IMM-473-16, IMM-474-16, IMM-475-16, IMM-476-16, IMM-477-16, IMM-478-16, IMM-479-16, IMM-480-16, IMM-481-16, IMM-387-16

JUDGMENT AND REASONS

I. Overview

[1] This decision relates to 57 applications for judicial review, brought by the Applicants in the Court files identified above. Because of the common issues in these applications, they were consolidated to be heard together by Order of Prothonotary Tabib dated March 7, 2016.

[2] These applications challenge decisions of immigration officer Cath Conde [the Officer] of the Consulate General of Canada in Hong Kong, made in November 2015, denying the Applicants' applications for permanent residence under the Federal Skilled Worker class. Broadly speaking, these denials were based on the Officer's determination that the Applicants prepared and submitted their applications with the assistance of an unauthorized and undisclosed immigration representative and failed to be transparent about their relationship with that representative, contrary to requirements in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] Prior to making the impugned decisions, the Officer sent each Applicant a procedural fairness letter, advising the Applicant that there were reasons to believe that he or she had used the services of an unauthorized immigration representative, but had not submitted a Use of Representative IMM 5476 form [IMM 5476 Form]. These letters communicated the Officer's concerns that the Applicant had therefore not met the obligation under s. 16(1) of the IRPA to be truthful and provide documents reasonably required, and may be inadmissible under s. 40(1)(a) of the IRPA for misrepresentation. In the course of the litigation of these applications, the issues between the parties narrowed significantly, so that the position of the Respondent in defence of the Officer's decision was that the Applicants, in responding to these procedural fairness letters, had failed to disclose the true nature of their relationship with their representative, and that this failure constitutes a material misrepresentation under s. 40(1)(a) of the IRPA.

[4] For the reasons explained in greater detail below, these applications are allowed, as I have found that the Officer made her decisions without meeting her obligation of procedural

fairness to identify her concerns arising from the Applicants' responses to the procedural fairness letters and to give the Applicants an opportunity to respond to those concerns.

II. Background

[5] The Applicants are all Chinese citizens who applied for permanent residence in Canada under the Federal Skilled Worker class. None of the Applicants submitted an IMM 5476 Form. Their files were first reviewed by an agent at a Centralized Intake Office of Citizenship and Immigration Canada [CIC] in Canada and then forwarded for further assessment and decision at the Consulate General of Canada in Hong Kong. This review identified a number of similarities between the applications. Although none of the Applicants declared a representative, they all included the same return address, belonging to the company Beijing Fulai Weide Translation which also uses the company name FLYabroad [FLYabroad], and had other similarities, such as the labelling and style of some documents. This raised concerns that the Applicants may be using the services of an unauthorized representative.

[6] On June 17, 2015, procedural fairness letters were sent to the Applicants, advising that even though no IMM 5476 Forms were included with their applications, there were grounds to believe they had used the services of an unauthorized immigration representative. The letters referred to s. 16(1) of the IRPA, as stating that a person who makes an application must answer truthfully all the 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, and to s. 40(1)(a) of the IRPA, as stating that a foreign national is inadmissible for misrepresentation for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter

that induces or could induce an error in the administration of the IRPA. Each letter stated that the information on file appeared to indicate that the Applicant had used the services of an unauthorized immigration representative, but had not submitted a IMM 5476 Form, and expressed concern that the Applicant had not met the obligation to be truthful and provide documents reasonably required, and may therefore be inadmissible to Canada on grounds of misrepresentation. The letters provided each Applicant with an opportunity to respond to these concerns by way of written submissions before a final decision was made, requesting such responses within 20 days. Each of the Applicants responded to the procedural fairness letter.

[7] In the meantime, a request for verification was made to the Risk Assessment Unit [RAU] of the Immigration Section of the Canadian Embassy in Beijing to conduct a site investigation of the FLYabroad location where the applications originated. This request was actioned in July 2015. The RAU conducted a site visit to the FLYabroad office and spoke with the company's Business Services and Human Resources Manager, Ms. Hongxia Zhang. Following this investigation, the RAU manager wrote a report on the site visit, concluding that FLYabroad was likely providing unauthorized immigration advice to its clients.

[8] The investigation also included communications with a couple who had used FLYabroad's services [referred to in the record as Mr. and Mrs. X] and, in response to the procedural fairness letter, stated that they had "fallen prey to the fraudulent activities of a ghost consultant". The couple confirmed that the company provided them with paid advice on Canadian immigration laws and policies, assisted them with completing their forms, and provided them with instructions and a template to respond to the procedural fairness letter. The

couple provided the RAU with a copy of the instructions and the template, as well as the contract that they signed with FLYabroad.

III. The Impugned Decisions

[9] In November 2015, the Officer reviewed the Applicants' responses to the procedural fairness letters and made a decision on their applications, contained in letters sent to the Applicants that month. The reasons for the decision are set out in those letters and in the Officer's Global Case Management System [GCMS] notes. She did not find the explanation by many of the Applicants, that they had obtained information from the FLYabroad website and used FLYabroad for courier and translation services, satisfactory to overcome the concerns expressed in the procedural fairness letters. The Officer found that it was illogical for an applicant to trust a translation company to translate, organize, and send the entire application to CIC.

[10] The Officer also considered that the Applicants' responses to the procedural fairness letters were similar to each other and to the template received by the RAU and concluded that even these responses demonstrated that the Applicants had received advice and assistance from FLYabroad. The Officer was not satisfied that the Applicants had been transparent about the nature of their relationship with FLYabroad and about not using the services of an unauthorized immigration representative.

[11] The Officer found it was more than likely that the Applicants presented applications prepared and submitted by a hidden representative contrary to the requirements of the IRPA and

that they further received application processing advice including advice on how to respond to CIC's procedural fairness letter. Each decision letter issued by the Officer stated that this was material in that it could have induced an error in the administration of the IRPA by creating the incorrect impression that the Applicant was self–represented and could have caused CIC to communicate with a hidden and unauthorized representative. This misrepresentation meant that, from the outset, the application process had been compromised, because CIC was unable to determine if the information received on the application was genuine because it originated from an unknown third party. Therefore, it could have led an officer to be satisfied that the Applicant met the requirements of the IRPA even though he or she was hiding an unauthorized representative, raising concerns about the genuine nature of the information and supporting documents presented in the application.

[12] Based on these conclusions, the Officer determined that each of the Applicants did not qualify for the issuance of a permanent resident visa to Canada and was inadmissible to Canada for a period of five years.

IV. Issues and Standard of Review

[13] Of the 57 Applicants, 54 of them were represented by 5 sets of legal counsel, and 3 were self-represented. While there are significant factual similarities underlying each of the applications, their circumstances are not identical. As such, there were naturally different issues and arguments raised by different sets of Applicants and counsel. However, the Respondent filed one Record and relied on one Memorandum (and Further Memorandum) of Argument in

response to all the applications, identifying the sole issue as whether the Officer erred or breached procedural fairness in finding the Applicants to be inadmissible.

[14] The parties are agreed, and I concur, that the Officer's determination under s.40(1)(a) of the IRPA involves findings of mixed fact and law, reviewable on the standard of reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 53; *Singh v Canada (Minister of Citizenship and Immigration)*, 2015 FC 37, at para 12; *Jiang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 942, at para 19), and that the standard of correctness applies to issues of procedural fairness (see *Juste v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273, at paras 23 and 24; *Olson v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 458, at para 27).

[15] In my analysis below, I will explain in greater detail how the issues between the parties narrowed over the course of the litigation, such that the dispositive issue is whether the Officer met her obligations of procedural fairness, to the extent she based her decisions on the Applicants' responses to the procedural fairness letters.

V. Analysis

[16] In written representations, and even during oral submissions, the Applicants placed substantial emphasis upon a statutory interpretation argument that, even if their relationships with FLYabroad could be characterized as including the receipt of assistance or advice, neither the IRPA nor the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] placed any obligation upon them to disclose these relationships to CIC. As will be explained

below, because of the position taken by the Respondent on this argument, it is not an issue that requires a decision by the Court. However, this argument, and the Respondent's position thereon, do provide context important to an understanding of why my decision turns on fairness considerations arising from the Officer's reliance on the Applicant's responses to the procedural fairness letters in making her decisions.

[17] The statutory interpretation argument relates to the following provisions:

Immigration and Refugee Protection Act/Loi sur l'immigration et la protection des réfugiées

Representation or Advice	**Représentation ou conseil**
Representation or advice for consideration	**Représentation ou conseil moyennant rétribution**
91 (1) Subject to this section, no person shall knowingly, directly or indirectly, represent or advise a person for consideration — or offer to do so — in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act.	**91 (1)** Sous réserve des autres dispositions du présent article, commet une infraction quiconque sciemment, de façon directe ou indirecte, représente ou conseille une personne, moyennant rétribution, relativement à la soumission d'une déclaration d'intérêt faite en application du paragraphe 10.1(3) ou à une demande ou à une instance prévue par la présente loi, ou offre de le faire.
Persons who may represent or advise	**Personnes pouvant représenter ou conseiller**
(2) A person does not contravene subsection (1) if they are	**(2)** Sont soustraites à l'application du paragraphe (1) les personnes suivantes :
(a) a lawyer who is a member in good standing of a law society of a province	**a)** les avocats qui sont membres en règle du barreau d'une province et les notaires qui sont

or a notary who is a member in good standing of the Chambre des notaires du Québec;	membres en règle de la Chambre des notaires du Québec;
(b) any other member in good standing of a law society of a province or the Chambre des notaires du Québec, including a paralegal; or	**b)** les autres membres en règle du barreau d'une province ou de la Chambre des notaires du Québec, notamment les parajuristes;
(c) a member in good standing of a body designated under subsection (5)	**c)** les membres en règle d'un organisme désigné en vertu du paragraphe (5).
…	…
Agreement or arrangement with Her Majesty	**Accord ou entente avec Sa Majesté**
(4) An entity, including a person acting on its behalf, that offers or provides services to assist persons in connection with the submission of an expression of interest under subsection 10.1(3) or an application under this Act, including for a permanent or temporary resident visa, travel documents or a work or study permit, does not contravene subsection (1) if it is acting in accordance with an agreement or arrangement between that entity and Her Majesty in right of Canada that authorizes it to provide those services.	**(4)** Est également soustraite à l'application du paragraphe (1) l'entité — ou la personne agissant en son nom — qui offre ou fournit des services relativement à la soumission d'une déclaration d'intérêt faite en application du paragraphe 10.1(3) ou à une demande prévue par la présente loi, notamment une demande de visa de résident permanent ou temporaire, de titre de voyage ou de permis d'études ou de travail, si elle agit conformément à un accord ou à une entente avec Sa Majesté du chef du Canada l'autorisant à fournir ces services.

Designation by Minister

(5) The Minister may, by regulation, designate a body whose members in good standing may represent or advise a person for consideration — or offer to do so — in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act.

…

Penalties

(9) Every person who contravenes subsection (1) commits an offence and is liable

(a) on conviction on indictment, to a fine of not more than $100,000 or to imprisonment for a term of not more than two years, or to both; or

(b) on summary conviction, to a fine of not more than $20,000 or to imprisonment for a term of not more than six months, or to both.

Désignation par le ministre

(5) Le ministre peut, par règlement, désigner un organisme dont les membres en règle peuvent représenter ou conseiller une personne, moyennant rétribution, relativement à la soumission d'une déclaration d'intérêt faite en application du paragraphe 10.1(3) ou à une demande ou à une instance prévue par la présente loi, ou offrir de le faire.

…

Peine

(9) Quiconque commet une infraction au paragraphe (1) encourt :

a) sur déclaration de culpabilité par mise en accusation, une amende maximale de 100 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines;

b) sur déclaration de culpabilité par procédure sommaire, une amende maximale de 20 000 $ et un emprisonnement maximal de six mois, ou l'une de ces peines.

Immigration and Refugee Protection Regulation/Règlement sur l'immigration et la protection des réfugiées

Required information	**Renseignements à fournir**
10 (2) The application shall, unless otherwise provided by these Regulations,	**10 (2)** La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :
(a) contain the name, birth date, address, nationality and immigration status of the applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;	**a)** les nom, date de naissance, adresse, nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;
(b) indicate whether they are applying for a visa, permit or authorization;	**b)** la mention du visa, du permis ou de l'autorisation que sollicite le demandeur;
(c) indicate the class prescribed by these Regulations for which the application is made;	**c)** la mention de la catégorie réglementaire au titre de laquelle la demande est faite;
(c.1) if the applicant is represented in connection with the application, include the name, postal address and telephone number, and fax number and electronic	**c.1)** si le demandeur est représenté relativement à la demande, le nom, l'adresse postale, le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique

mail address, if any, of any person or entity — or a person acting on its behalf — representing the applicant;

de toute personne ou entité — ou de toute personne agissant en son nom — qui le représente;

(c.2) if the applicant is represented, for consideration in connection with the application, by a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, include the name of the body of which the person is a member and their membership identification number;

c.2) si le demandeur est représenté, moyennant rétribution, relativement à la demande par une personne visée à l'un des alinéas 91(2)a) à c) de la Loi, le nom de l'organisme dont elle est membre et le numéro de membre de celle-ci;

(c.3) if the applicant has been advised, for consideration in connection with the application, by a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, include the information referred to in paragraphs (c.1) and (c.2) with respect to that person;

c.3) si le demandeur a été conseillé, moyennant rétribution, relativement à la demande par une personne visée à l'un des alinéas 91(2)a) à c) de la Loi, les renseignements prévus aux alinéas c.1) et c.2) à l'égard de cette personne;

(c.4) if the applicant has been advised, for consideration in connection with the application, by an entity — or a person acting on its behalf — referred to in subsection 91(4) of the Act, include the information referred to in paragraph (c.1) with

c.4) si le demandeur a été conseillé, moyennant rétribution, relativement à la demande par une entité visée au paragraphe 91(4) de la Loi — ou une personne agissant en son nom —, les renseignements prévus à l'alinéa c.1) à l'égard de cette entité ou

respect to that entity or person; and	personne.
(d) include a declaration that the information provided is complete and accurate.	**d)** une déclaration attestant que les renseignements fournis sont exacts et complets.

[18] Section 91(1) of the IRPA prohibits any person from providing paid representation or advice in connection with an application under the IRPA, other than the categories of persons authorized under s. 91(2). These categories include lawyers, notaries, paralegals and immigration consultants who are members of a governing body approved by ministerial designation. Section 91(9) prescribes penalties for contravention of s. 91(1). However, these provisions all focus upon the unauthorized person providing the representation or advice, not upon the applicant who is the recipient of those services.

[19] On the other hand, 10(2) of the IRPR does focus upon the applicant, in that it prescribes information that must be included in an application under the IRPA. Sections 10(2)(c.1) and (c.2) address representation and require an applicant who is represented in connection with an application to disclose certain information about the representative. Sections 10(2) (c.3) and (c.4) address applicants who receive paid advice in connection with an application and again require disclosure of certain information about the person who provided the advice, but only if the advice was provided by a person or entity referred to in s. 91(2)(a) to (c) or 91(4) of the IRPA. These are the categories of persons authorized to provide immigration representation and advice, as referred to above, and an additional category under s. 91(4) which is not relevant to the present circumstances.

[20] In essence, the Applicants' argument, based on the interaction of these statutory and regulatory provisions, is that there is a distinction between the provision of representation and advice and, while an applicant must disclose to CIC if he or she has a representative, there is no similar obligation to disclose the receipt of advice, unless that advice was received from one of the authorized categories of persons. The Applicants characterize representation as the authorization of a person to act as the contact between the applicant and CIC, which they say does not apply to any of their circumstances which, at most, involved the receipt from Flyabroad of immigration advice. In other words, the Applicants' position is that there is no obligation to disclose the receipt of advice from an unauthorized immigration consultant.

[21] The Applicants rely upon decisions of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada which, while not binding on the Court, they argue to be instructive as to the relevant statutory interpretation. In *Chang v Canada (Minister of Citizenship and Immigration)* [2010] IADD No. 14, No. TA9-00387, [*Chang*], a visa officer identified an individual who was facilitating a number of sponsorship applications, and the Minister refused the applications for failing to disclose this individual as a representative. The IAD found that the applicant was not a person who failed to meet the requirements of s.10(2)(c.2) of the IRPR and that the visa officer's decision to refuse the application was not valid in law. The IAD reasoned that, if no person has been appointed to represent an applicant in dealing with CIC, the applicant has no obligation to provide information on a person who may have assisted him or her.

[22] This reasoning has been followed in other IAD cases (see, e.g., *La v Canada (Minister of Citizenship and Immigration)*, [2012] IADD No. 1830, TB0-12632 at para 22; *Han v Canada (Minister of Citizenship and Immigration)*, [2014] IADD No 1355, VB2-03330, at paras 18-22).

[23] No further analysis of this argument is required. In the Respondent's Further Memorandum of Argument, the Respondent did not take issue with the Applicants' position that, at the outset of the application process, there was no statutory obligation upon them to disclose any receipt of advice from an unauthorized representative. At the hearing of these applications, the Respondent further acknowledged that there is nothing specific in the IRPA or the IRPR requiring such disclosure.

[24] Rather, the Respondent's position is that, once the Applicants received the procedural fairness letters inquiring about their relationship with FLYabroad, they were required to respond truthfully to that letter and to be candid in disclosing the nature of their relationship with FLYabroad, including the receipt of immigration advice from that company. In that respect, the Respondent relies upon s.16 (1) of the IRPA, which requires a person who makes an application to answer truthfully all questions put to them for purposes of the examination, and argues that the Applicants' responses to the procedural fairness letters were untruthful and therefore constituted misrepresentations under s. 40(1)(a) of the IRPA.

[25] The Respondent's position is that, in their responses to the procedural fairness letters, the Applicants concealed the fact that they were receiving immigration advice from FLYabroad. The Respondent also argues that it was reasonable for the Officer to conclude that the Applicants

were receiving such advice, based on the evidence of the applications having been sent from FLYabroad's offices, the similar labelling of the packages, the similarities between the procedural fairness responses and the template provided by FLYabroad, the results of the investigation into FLYabroad, including the information received from Mr. and Mrs. X, and particular acknowledgements made by some of the individual Applicants.

[26] However, given that the Officer's decisions turn on a conclusion that the Applicants misrepresented or failed to disclose material facts, and given that the Respondent relies exclusively on the procedural fairness responses as the source of such misrepresentations or lack of candour, the reasonableness of the decisions turns not just on whether the Officer reasonably concluded the Applicants were receiving immigration advice but on whether she reasonably concluded that the Applicants were not transparent about their relationships with FLYabroad in their responses to the procedural fairness letters.

[27] Analysing the reasonableness of these conclusions would require consideration of each of the individual responses. However, my conclusion is that there is little utility in the Court conducting such an analysis based on the existing record, because of the procedural fairness issue which I consider to undermine the Officer's decisions. Each of the Applicants had the benefit of the procedural fairness letters issued to them on June 17, 2015, which identified CIC's concerns at that time, i.e. that the Applicants had not been truthful and provided documents reasonably required, in that it appeared they had used the services of an unauthorized immigration representative without submitting an IMM 5476 Form. However, the lack of candour on the basis of which the Respondent now seeks to sustain the Officer's decisions is

unrelated to the use of the IMM 5476 Form or indeed any statement or omission predating the responses to the procedural fairness letter. The decisions that the Applicants are inadmissible are argued to be sustainable solely based on statements or omissions in those responses. Yet that concern, that the Applicants had not been transparent in those responses about their relationships with FLYabroad, was never put to the Applicants with an opportunity to respond before the decisions were made.

[28] A finding of inadmissibility requires a high degree of procedural fairness on the part of the officer (see *Iqbal v Canada (Minister of Citizenship and Immigration)*, 2016 FC 533, at para 24; *Menon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273, at para 15). The relevant principles were reviewed by Justice de Montigny in *Chawla v Canada (Minister of Citizenship and Immigration)*, 2014 FC 434, where an applicant was refused permanent residence for misrepresentation under s.40(1)(a), as the officer found that he had provided false information about his previous employment. Inquiries had been made to verify his employment, including a phone call interview with an employee of the restaurant the applicant had included in his employment history, who stated that no one with the applicant's name had worked there. In a procedural fairness letter, the details of the interview were not included, only that investigation staff had conducted verifications on the restaurant and, based on this information, established that he never worked there. Justice de Montigny held as follows at paragraphs 14-16:

> 14 It is well established that procedural fairness requires that applicants for permanent residence be provided a meaningful opportunity to respond to perceived material inconsistencies or credibility concerns with respect to their files: *Qin v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 (F.C.) at para 38; *Abdi v. Canada (Attorney General)*, 2012 FC 642 (F.C.) at para 21; *Zaib v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 769 (F.C.) at para 17; *Baybazarov v. Canada (Minister of*

> *Citizenship & Immigration)*, 2010 FC 665 (F.C.) at para 17; *Hussaini v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 289 (F.C.) at para 5 [*Hussaini*]). This entails that an officer's reliance on extrinsic evidence without allowing an applicant the opportunity to know and reply to that evidence amounts to procedural unfairness: *Amin v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 206 (F.C.).
>
> 15 Indeed, the Respondent's own guidelines provide as follows concerning extrinsic evidence:
>
> > The applicant must be made aware of the "case to be met", i.e., the information known by the officer must be made available to the applicant prior to the decision being made. For example, if an officer relies on extrinsic evidence (i.e., evidence received from sources other than the applicant), they must give the applicant an opportunity to respond to such evidence.
> >
> > *Overseas Processing Manual*, Chapter OP-1: Procedures, s. 8 "Procedural fairness"
>
> 16 In the case at bar, the Applicants were provided very little information as to the Officer's concerns. Apart from stating that an investigation was conducted and that, following this investigation, concerns as to misrepresentation arose, the fairness letter does not provide any other information. It is not stated what reasons led the Officer to conduct an investigation, how the investigation was conducted, or what information gathered during the investigation led to the conclusion that the principal Applicant had misrepresented his employment.

[29] In my view, the concerns on the basis of which the Respondent now seeks to sustain the Officer's decisions were clearly credibility concerns, being determinations that the Applicants were not being candid in their procedural fairness responses. Yet the Applicants were not made aware of these concerns, as they arose only after the Officer received the Applicants' responses, and the Officer made the decisions without any further communications with the Applicants.

[30] There was certainly no obligation upon the Officer to inform the Applicants of the need to be truthful in responding to the procedural fairness letters. However, once the Officer developed the concern that the Applicants had not been truthful in these responses, she had an obligation to put this concern to them and give them opportunity to comment before denying their applications and finding them inadmissible based on that concern.

[31] The Respondent argues that, to obtain relief for a breach of procedural fairness, an applicant must prove that a substantial wrong or miscarriage of justice has taken place. The Respondent's position is that, even if there was a breach of procedural fairness, which the Respondent denies, the Applicants have not explained how the result would have been any different absent the breach, i.e. how their responses would have been different had the Officer provided more detail in her letter or more time to respond.

[32] I do not find this argument to assist the Respondent on these facts. In so finding, I note that in defence of the Officer's decisions, the Respondent relies upon a comparison between the various procedural fairness responses and the template apparently provided by FLYabroad. That comparison is contained in a chart attached to an affidavit of Carmelita Butts, a paralegal with the Department of Justice, in which Ms. Butts identifies nine different elements she found in the template and note how many of those elements are found in each response. Several of the Applicants took issue with the Respondent's introduction of this evidence, arguing that it should be ruled inadmissible or given no weight, as this analysis postdates the decision and was not performed by the Officer.

[33] I agree with the Applicants' position that Ms. Butts' analysis is not admissible evidence and that, as argued by one of the Applicants' counsel, it is at best a set of submissions intended to support the Respondent's position that the Officer's conclusion, that there were similarities between the responses and the template, was a reasonable one. I have treated the comparison chart as submissions rather than evidence. However, more significantly, I consider this comparison to highlight the flaw in the Respondent's argument that any breach of procedural fairness was immaterial. The comparison identifies anywhere between one and nine similarities between a particular response and the template. In oral argument, the Respondent acknowledged that some of the responses were less similar to the template than others, perhaps supporting a conclusion that those particular responses were not based on the template. The Respondent also notes that one Applicant (IMM-387-16) concedes that she received immigration advice from FLYabroad, as her affidavit filed in this application for judicial review acknowledges this, including having received advice on how to respond to the procedural fairness letter.

[34] However, I return to the fact that the basis on which the Respondent seeks to sustain the Officer's decisions is that the Applicants were not truthful in their procedural fairness responses. Again, the reasonableness of the decisions therefore turns not solely on whether the Officer reasonably concluded Applicants were receiving immigration advice but on whether she reasonably concluded that the Applicants were not transparent about their relationships with FLYabroad. It is impossible for the Court to know what comments might have been received from the individual Applicants if they were given an opportunity to comment on the Officer's concerns that their procedural fairness responses misrepresented the relationships with FLYabroad. However, particularly given the variations between the Applicants' responses, as is

evident from the comparison offered by the Respondent, one cannot by any means rule out the possibility that a particular Applicant (or some or all of them) might have convinced the Officer that his or her response did not constitute a misrepresentation, or at least not a material one such as would warrant a finding of inadmissibility under s. 40(1)(a) of the IRPA.

[35] Regardless of how closely a particular Applicant's procedural fairness response may mirror the template, or how compelling or untenable the Officer's determination that a particular Applicant misrepresented his or her relationship with FLYabroad may appear based on the information currently available, it is my conclusion that each of the Applicants was entitled to comment on the Officer's concerns before that determination and the inadmissibility finding were made. It is therefore my conclusion that there was a material breach of procedural fairness and that the Officer's decisions in all 57 applications must be set aside and the applications returned to a different decision-maker for redetermination in accordance with these Reasons.

[36] As the above analysis requires that the Applicants' applications for judicial review be allowed, it is unnecessary for me to address the other issues and arguments raised by the Applicants. Also, if the Respondent proceeds to consider again whether the Applicants have committed a misrepresentation, this must be conducted on an expanded record which includes any comments the Applicants may provide on what the Respondent now considers to be the alleged misrepresentation and its materiality. It would therefore not be fruitful for the Court to comment on the reasonableness of the decisions based on the records as they now stand.

[37] However, I do consider it appropriate to speak to one argument raised by some of the Applicants to the effect that, because there was no statutory requirement for the Applicants to disclose their relationship with FLYabroad when submitting their applications, any misrepresentation in that regard in the responses to the procedural fairness letters cannot have been material.

[38] I have difficulty accepting that such a proposition follows as a matter of law from the absence of a statutory requirement. While the s. 91(1) prohibition against unauthorized persons providing paid immigration advice is directed at the unauthorized person, not at the alleged recipient of the advice, that prohibition does exist. I therefore cannot find fault with an immigration officer, who suspects that prohibition has been breached, making inquiries of the alleged recipient on that subject. Surely the alleged recipient then has an obligation to answer these inquiries truthfully. Whether a misrepresentation in response to such inquiries satisfies the materiality requirement in s. 40(1)(a) of the IRPA, so as to give rise to inadmissibility, must then be considered on the facts of the individual case, including consideration of any submissions received from the applicant after having been afforded the necessary procedural fairness.

VI. Costs

[39] The Applicants have all sought costs. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/2002-232 limits the award of costs in immigration matters as follows:

22. No costs shall be awarded to or payable by any party in respect of an application for	**22.** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande

leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[40] Special reasons that warrant an award of costs may exist if one party has engaged in conduct which is unfair, oppressive, improper or marked by bad faith, or has unnecessarily or unreasonably prolonged proceedings (see *Kargbo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 469, at para 19; *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, at paras 26-27). However, this Court has also held that errors on the part of a visa officer, absent bad faith, would not constitute special reasons for costs (see *Ndererehe v Canada (Minister of Citizenship & Immigration)*, 2007 FC 880; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 54).

[41] I do not find any circumstances warranting an award of costs in the case at hand. The Respondent has not unnecessarily or unreasonably prolonged these proceedings. The record demonstrates that the Respondent agreed to leave being granted in these matters and that it was the Respondent's initiative to arrange consolidation of the 57 applications, which contributed substantially to the efficiency within which these matters were addressed. The Respondent also conceded the merits of the Applicants' statutory interpretation argument, thereby narrowing the issues in these proceedings.

[42] My decision to allow the applications for judicial review turns on a conclusion that the Applicants were not afforded the required procedural fairness. However, to the extent the above-noted jurisprudence supports an award of costs if one party has engaged in conduct which is

unfair, I do not regard it to apply simply as a result of a finding of a breach of procedural fairness by an immigration officer, which is a common ground for judicial review in immigration matters.

[43] The Applicants also argue that an award of costs is appropriate, because the Respondent attempted to rely on affidavit evidence that should not have been introduced in these proceedings (see *Eshraghian v Canada (Minister of Citizenship and Immigration)*, 2013 FC 828 [*Eshraghian*]. I agree that *Eshraghian* supports the proposition that improper attempts to introduce inadmissible affidavit material may support an award of costs. In that case, the respondent had attempted to "bootstrap" the decision of the officer who decided the application by relying on an affidavit of a more senior immigration officer who had no involvement in the decision. However, as explained below, I do not find similarities between the circumstances in *Eshraghian* and those in the cases at hand.

[44] The Applicants took issue with several aspects of the Respondent's affidavits. The Respondent's Record includes an affidavit by the Officer, Ms. Cath Conde, which explained the process by which the CIC developed concern about the Applicants' applications, conducted its investigations, and reached the decisions under review. This affidavit also attached as an exhibit a sample of the courier envelope label showing FLYabroad's address which contributed to the development of CIC's concerns. The Applicants argue that this affidavit is improper as it purports to provide new evidence in the exhibit and to otherwise elaborate upon or embellish the reasons for the decision. For the most part, I find nothing improper in Ms. Conde's affidavit, as the Court can benefit from an explanation of the process followed in reaching a decision, particularly when an application involves allegations of procedural fairness. I do agree with the

Applicants that, as part of that explanation, Ms. Conde repeats and in some cases summarizes the reasons for her decisions as found in the decision letters and GCMS notes. In this respect, the affidavit is not helpful, as the Court must rely upon the reasons as contained in the decisions themselves. However, I do not read the affidavit as an attempt to augment the reasons and do not consider its introduction to warrant an award of costs against the Respondent.

[45] The Applicants also take issue with the affidavit of Mr. Gerald Degenhardt, the manager of the RAU, which explains the investigation in which he was involved, including in particular the site visit to FLYabroad's offices and the communications with Mr. and Mrs. X, and attaches the site visit report and other documentation gathered during the investigation. Again, the Applicants argue that the affidavit purports to add new evidence to support the reasons for the decisions. For the most part, I disagree with this characterization. As I read the evidence of Ms. Conde given during cross-examination on her affidavit, she confirms that the site visit report was considered by her in making her decisions. There were two sets of documentation attached to Mr. Degenhardt's affidavit which the Respondent admits was not before the decision-maker. However, the inclusion of this material appears to have been an error, which the Respondent acknowledged and advised would not be relied upon once it was identified that this documentation should not have been part of the record.

[46] Mr. Degenhardt's affidavit also includes English translations of Chinese language documents that were before the Officer when making the decision. The Respondent acknowledges that these particular translations were not before the Officer but submits that the evidence is that the Officer did have the benefit of translations when making the decisions. As

my decision does not turn on this aspect of the evidence, it is unnecessary for the Court to address what could be legitimate concerns about potential discrepancies between the translations that were before the Officer and those before the Court. However, I do not find anything improper in providing the Court with the benefit of these translations that would warrant an award of costs.

[47] The Applicants also object to certain paragraphs of Mr. Degenhardt's affidavit as providing hearsay evidence from his assistant. Again, given the analysis underlying the Court's decision in these matters, it is unnecessary to address the hearsay concerns. However, while this may have been an evidentiary problem for the Respondent if that evidence proved to be significant, I again do not consider that to warrant an award of costs.

[48] Finally, the Applicants take particular issue with Ms. Butts' affidavit, which attaches the chart comparing the Applicants' procedural fairness responses with the FLYabroad template. As noted above, I agree with the Applicants' position that this chart is not admissible evidence and that, as argued by one of the Applicants' counsel, it is at best a set of submissions intended to support the Respondent's position that the Officer's conclusion, that there were similarities between the responses and the template, was a reasonable one. My analysis has treated it as such, although not to the Respondent's benefit. Again, I do not consider the Respondent's efforts to attempt to introduce this material in evidentiary form to represent the sort of impropriety which warranted an award of costs in *Eshraghian*.

[49] I have therefore found no special reasons which would justify departing from Rule 22 and support an award of costs in these applications.

VII. Certified Questions

[50] As directed at the hearing, the Applicants provided post hearing written submissions on proposed questions for certification for appeal. While there is some duplication among these, in the interests of being complete, the following is the list of questions that have been submitted by certain of the Applicants:

A. What is the purpose of the Use of Representative form in an immigration application and what information should it contain? Must an immigration applicant submit the Use of Representative form to disclose the use of non-legal third-party services related to their application?

B. Is there any obligation on an immigration applicant to disclose the use of an unlicensed legal advisor?

C. Is an unlicensed legal advisor a "representative" if they are not directly communicating with IRCC on an applicant's behalf? Is there any obligation on the part of an immigration applicant to disclose the existence of such an advisor?

D. If it is not *per se* illegal to use the services of an unlicensed immigration advisor, can there be misrepresentation by the failure to disclose the existence of such an advisor?

E. What is the purpose of the Use of Representative form in an immigration application and what information should it contain? Must an applicant submit the use of representative form 5476 to disclose the use of non-legal services of an entity when said entity is not providing representation or advice on behalf of an applicant?

F. Does s. 10(2) of IRPR read together with s. 16(1) of the IRPA oblige an applicant to disclose the use of a person in breach of s. 91(1) of the IRPA in connection with the submission of an expression of interest or a proceeding or application under the IRPA? If the answer is "yes", would a failure to disclose the use of a person in breach of s. 91(1) render the applicant inadmissible for misrepresentation under s. 40(1) of the IRPA?

G. If a visa officer demands a response from an applicant for permanent residence in a procedural fairness letter which is premised upon a material misrepresentation of applicable law, has an applicant's right to procedural fairness been abrogated? If so, should any negative inferences drawn by the officer from the applicant's reply to the procedural fairness letter be disregarded, and the matter remitted to another officer?

[51] The Respondent opposes certification of these questions.

[52] As correctly identified by the Applicants, the test for certification was set out by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Liyanagamage* [1994] FC J No. 1637. This test requires that a proposed question be of broad significance or

general application, so as to transcend the interests of the immediate parties to the litigation, and that the question be determinative of an appeal.

[53] None of the Applicants' proposed questions meet the second element of this test, as they would not be determinative of an appeal in this matter. The Applicants have prevailed in these applications for judicial review. Moreover, the proposed questions mostly surround the issue whether there was a statutory obligation upon the Applicants to disclose their relationship with an unauthorized immigration advisor and, because of the position taken by the Respondent, my decision to allow these applications does not turn on this issue.

[54] I read question D (and possibly G) above as premised on the Applicants' position that, in the absence if a statutory obligation to disclose a relationship with an unauthorized immigration advisor, failure to disclose such relationship, even in response to an immigration officer's inquiries, should not constitute a misrepresentation. However, even if these questions were to be answered as proposed by the Applicants, such answers would not affect the results in these applications, which have been allowed because of the Officer's breach of procedural fairness. These questions would therefore not be determinative of an appeal and are not appropriate for certification.

JUDGMENT in IMM-5388-15

AND FILES: IMM-5410-15, IMM-5660-15, IMM-5716-15, IMM-5786-15, IMM-5839-15, IMM-5863-15, IMM-5884-15, IMM-5885-15, IMM-5886-15, IMM-5887-15, IMM-5888-15, IMM-5889-15, IMM-5890-15, IMM-5891-15, IMM-5892-15, IMM-5893-15, IMM-5894-15, IMM-5895-15, IMM-14-16, IMM-134-16, IMM-135-16, IMM-137-16, IMM-138-16, IMM-139-16, IMM-140-16, IMM-141-16, IMM-143-16, IMM-144-16, IMM-145-16, IMM-281-16, IMM-282-16, IMM-283-16, IMM-284-16, IMM-285-16, IMM-286-16, IMM-287-16, IMM-288-16, IMM-289-16, IMM-292-16, IMM-394-16, IMM-420-16, IMM-444-16, IMM-445-16, IMM-446-16, IMM-447-16, IMM-448-16, IMM-473-16, IMM-474-16, IMM-475-16, IMM-476-16, IMM-477-16, IMM-478-16, IMM-479-16, IMM-480-16, IMM-481-16, IMM-387-16

THIS COURT'S JUDGMENT is that:

1. The Applicants' applications for judicial review are allowed, the Officer's decisions are set aside, and the Applicants' applications for permanent residence are returned to a different decision-maker for redetermination in accordance with the above Reasons.

2. No question is certified for appeal.

3. There is no order as to costs.

4. A copy of this decision shall be placed in each of the Court files identified in the above style of cause.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5388-15
STYLE OF CAUSE:	QIYIN GE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION and 56 RELATED FILES
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 12, 2017
REASONS AND JUDGMENT:	SOUTHCOTT J.
DATED:	JUNE 16, 2017

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IMM-5388-15	Qiyin Ge v MCI
IMM-5410-15	Yang Zhang et al v MCI
IMM-5660-15	Bin Xu v MCI
IMM-5839-15	Hui He v MCI
IMM-5884-15	Wei Zhang v MCI
IMM-5885-15	Bei Feng v MCI
IMM-5886-15	Zhimin Wang v MCI
IMM-5887-15	Jie Yu v MCI
IMM-5888-15	Jia He v MCI
IMM-5889-15	Xin Qi v MCI
IMM-5890-15	Kan Li v MCI
IMM-5891-15	Li Ming Xi v MCI
IMM-5892-15	Bin Zhang v MCI
IMM-5893-15	Yujie Yang v MCI
IMM-5894-15	Yige Pan v MCI
IMM-5895-15	Tianxin Li v MCI

	IMM-134-16	Jing Liao v MCI
	IMM-135-16	Tingting Zhang v MCI
	IMM-137-16	Yingxian Zou v MCI
	IMM-138-16	Qing Zhu v MCI
	IMM-139-16	Dianyong Wang v MCI
	IMM-140-16	Lu Yang v MCI
	IMM-141-16	Junheng Zhu v MCI
	IMM-143-16	Lanyi Zhang v MCI
	IMM-144-16	Ran Liu v MCI
	IMM-145-16	Ao Ye v MCI
	IMM-281-16	You Zhou v MCI
	IMM-282-16	Biyuan Chen v MCI
	IMM-283-16	Chenxu Feng v MCI
	IMM-284-16	Chungang Li v MCI
	IMM-285-16	Xiaojuan Qi v MCI
	IMM-286-16	Junfeng Wu v MCI
	IMM-287-16	Guorun Li v MCI
	IMM-288-16	Peijun Chen v MCI
	IMM-289-16	Yan Kiaoqing v MCI
	IMM-292-16	Anqi Chen v MCI
	IMM-420-16	Na Meng v MCI
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North York, Ontario	IMM-444-16	Wei Yan, et al v MCI
	IMM-445-16	Fanda Kong et al v MCI
	IMM-447-16	Xiaoke Chen et al v MCI
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Czuma, Ritter	IMM-475-16	Tian Yu v MCI
Toronto, Ontario	IMM-476-16	Liping You v MCI
	IMM-477-16	Hui Zhang v MCI
	IMM-478-16	Mengzue Lu v MCI
	IMM-479-16	Yu Xiong v MCI
	IMM-480-16	Yue Song v MCI
	IMM-481-16	Jia Nie v MCI
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Lowe & Company	IMM-5863-16	Jingjing v MCI
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