Federal Court  Cour fédérale

Date: 20171219

Docket: T-363-17

Citation: 2017 FC 1171

Ottawa, Ontario, December 19, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

HANYING CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application under subsection 22.1 (1) of the *Citizenship Act*, RSC, 1985, c C-29 [the Act] for a writ of *mandamus* pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant seeks to compel the Respondent to process her citizenship application.

[2] While the application is said to be for the purpose of obtaining a writ of *mandamus*, the determinative issue turns on the interpretation of section 42 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, [IRPA], namely whether the Applicant would be inadmissible as an accompanying family member of her father who is the subject of ongoing admissibility proceedings.

[3] The Applicant came to Canada with her parents on October 5, 2006 as a permanent resident; her parents were accepted to Canada under the business visa category, and she was an accompanying member.

[4] In March 2015, she began the process of obtaining her Canadian citizenship. The processing of her application has proceeded through all steps and awaits only the final step of taking her oath.

[5] The Respondent has failed to schedule her oath for citizenship. Instead, on September 14, 2015, the Respondent suspended the processing of the Applicant's citizenship application pursuant to subsection 13.1 (a) of the Act, in order to receive information on whether she should be the subject of an admissibility hearing or a removal order under the IRPA.

[6] Section 13.1 of the Act reads as follows:

13.1 The Minister may suspend the processing of an application for as long as is necessary to receive	13. 1 Le ministre peut suspendre, pendant la période nécessaire, la procédure d'examen d'une demande :

(a) any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under this Act relating to the application, whether the applicant should be the subject of an admissibility hearing or a removal order under the *Immigration and Refugee Protection Act*, or whether section 20 or 22 applies with respect to the applicant; and	a) dans l'attente de renseignements ou d'éléments de preuve ou des résultats d'une enquête, afin d'établir si le demandeur remplit, à l'égard de la demande, les conditions prévues sous le régime de la présente loi, si celui-ci devrait faire l'objet d'une enquête dans le cadre de la *Loi sur l'immigration et la protection des réfugiés* ou d'une mesure de renvoi au titre de cette loi, ou si les articles 20 ou 22 s'appliquent à l'égard de celui-ci;
[Emphasis added]	[Soulignements ajoutés]

[7] The Applicant's citizenship application was suspended pending the outcome of her father's admissibility proceedings with respect to matters that occurred before he became a permanent resident said to be in violation of sections 36(1) (serious criminality), 37(1) (organized criminality), and 40(1) (misrepresentation)of the IRPA.

[8] In its memorandum, the Respondent originally submitted that should the Applicant's father be found to be inadmissible, then she would be inadmissible on grounds of being an accompanying family member pursuant to subsection 42(1)(b) of the IRPA, which reads as follows:

42(1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	42 (1) Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour

	inadmissibilité familiale les faits suivants :
[…]	[…]
(b) they are an accompanying family member of an inadmissible person.	b) accompagner, pour un membre de sa famille, un interdit de territoire.
[Emphasis added]	[Soulignements ajoutés]

[9] In her reply, the Applicant submitted that subsection 42(1)(b) does not apply to her as a permanent resident, because the provision only applies to foreign nationals. The term foreign national is defined in the IRPA to exclude permanent residents. The Respondent did not seek leave to respond to this argument in writing. However, the application of subsection 42(1)(b) was the principal issue argued at the hearing of the matter.

[10] During the course of the hearing, the Court indicated that it appeared highly likely that subsection 42(1) would not apply to the Applicant inasmuch as she is a permanent resident. Either in the English wording of the provision by the definition under the IRPA, she is not a foreign national; or by the French wording of the subsection she would be specifically excluded, i.e. “sauf pour le résident permanent”.

[11] At the termination of the hearing, when the issue of certifying a question for appeal was raised, the Respondent indicated that it wished to certify a question, and also sought permission to file further submissions on the applicability of subsection 42(1), which was granted.

[12] The Respondent did not provide a certified question. Rather, the Minister argued that a certified question was not necessary because the admissibility proceedings against the Applicant, if successful on the ground of misrepresentation pursuant to paragraph 40(1)(a), would render her inadmissible in accordance with the decision of Justice O'Keefe in *Wang v Canada (Citizenship and Immigration)*, 2005 FC 1059 [*Wang*].

[13] Paragraphs 40(1)(a) and (b) read as follows:

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or <u>indirectly</u> misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou <u>indirectement</u>, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation	b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations
[Emphasis added]	[Soulignements ajoutés]

[14] The facts in this matter are analogous to those in *Wang*, except that there the admissibility proceedings were undertaken against both the spouse and husband on account of the husband's misrepresentation. The Court concluded that the husband's misrepresentation was attributable to

the applicant as "indirectly misrepresenting" material facts, as that phrase in paragraph 40(1)(a) was interpreted by the Court. For ease of reference, this is what this Court would describe as a "constructive misrepresentation", being where the consequences of one party are visited on a second party, on account of the nature of the relationship between the parties, as opposed to the second party's conduct. The constructive misrepresentation interpretation of "indirectly misrepresenting" in *Wang* has been applied in a number of other cases, a few of them being: *Jiang v Canada (Citizenship and Immigration),* 2011 FC 942; *Khedri v Canada (Citizenship and Immigration)*, 2012 FC 1397; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 378; *Kaur Barm v Canada (Citizenship and Immigration)*, 2008 FC 893; *Shahin v Canada (Citizenship and Immigration)*, 2012 FC 423; *Goudarzi v Canada (Citizenship and Immigration*, 2012 FC 425; *Oloumi v Canada (Citizenship and Immigration),* 2012 FC 428.

[15] The Respondent now argues that upon the father being found inadmissible on the ground of misrepresentation, a section 44 Report will be made against the Applicant. The matter would be referred to the Immigration Division for an admissibility hearing where she would likely be found inadmissible for indirect misrepresentation in accordance with the *Wang* decision. The Minister contends that this would result in an exclusion order against the Applicant and her loss of permanent resident status, making her subject to removal as a foreign national pursuant to section 42.

[16] The Court accepts the logic of the foregoing scenario, except for the submission that section 42 has any bearing on the Applicant's removal. In the eventuality of her being found to have made an indirect misrepresentation, the Applicant would be determined to be inadmissible

pursuant to subsection 40(1)(a). This would render her directly subject to removal without any need to consider her removal as a foreign national pursuant to section 42 as an accompanying family member. The Court concludes that the Respondent's submission referring to section 42 was likely for the purpose of forestalling an argument that the Minister is advancing a completely new submission by its reference to an indirect misrepresentation by the Applicant.

[17] That indeed, was the Applicant's argument. She urges the Court not to entertain the new submission regarding section 40 because it is an entirely separate ground. The Applicant argues that the evidence in the Certified Tribunal Record indicates that the sole alleged ground for her inadmissibility is the triggering of section 13.1 of the Act via section 42 of the IRPA. The Applicant therefore chose in the first instance not to respond to the Respondent's submissions regarding section 40, instead limiting her submissions to an interpretive analysis of subsection 42(1) of the IRPA.

[18] However, the Applicant requested the right to make further submissions should the Court conclude that paragraph 40(1)(a) has applicability, including certifying a question for appeal. Despite its reservations, the Court allowed the Applicant to file further submissions, inasmuch as it is obvious that she was required to consider the new argument of the application of paragraph 40(1)(a) to the facts of the case. However, the Court's displeasure stems from the fact that a party should not advance an argument, while holding back an alternative submission in the hope that it may succeed on the first ground. Particularly in the circumstances where the alternative argument relies on past jurisprudence of this Court, the Applicant should not waste the Court's time in not following the normal procedure, thereby requiring it instead to issue a direction with

the delay that ensues. Normally, such conduct would have some bearing on the awarding of costs were they at issue in this matter.

[19] The Applicant submits that a section 44 Report on inadmissibility could only apply if the Report was made directly against her, and not as an accompanying dependent of her father who is not a foreign national. This relates to the distinction in this matter that the Applicant is not the subject of an admissibility proceeding, as was the case with the accompanying family member in *Wang*. The Court does not agree with this submission, which turns on the interpretation of section 13.1 of the Act. It allows the Minister to suspend the citizenship proceedings when the circumstances arise of "whether the applicant should be the subject of an admissibility hearing or a removal order" [my emphasis]. Given the constructive nature of the finding of an indirect misrepresentation against the Applicant based on the misrepresentation finding against her father, her situation would be one where she should be the subject of an admissibility hearing if her father is found to be inadmissible on grounds of a misrepresentation.

[20] At this juncture, the Court also rejects the Applicant's argument that it should adopt the decision in *Stanizai v. Canada (Citizenship and Immigration)*, 2014 FC 74 [*Stanizai*]. The Court in *Stanizai* found that there was no statutory authority for the Citizenship and Immigration Canada [CIC] to put the applicant's citizenship application "on pause" until the cessation proceedings had been concluded against him. In a word, this decision was rendered on facts arising prior to section 13.1 (2014, c. 22, s. 11.) having application, and must be distinguished on the basis that there now exists statutory authority for the suspension of the citizenship proceedings as described above.

[21] On the basis of the foregoing analysis regarding the requirements of a *mandamus* order and the applicability of section 13.1 of the Act, it appears that two further issues remain for consideration. First, is the Court required to entertain the Respondent's new submissions, and if not, should it entertain them in any event as an exercise of its discretion. Second, does *Wang* apply to the circumstances in this matter, and if so, does it remain good law? The Court concludes that all four questions must be answered in the affirmative, even though the personal consequences for the Applicant seem harsh, unless relieved on humanitarian grounds.

(1) The Court is required to entertain the Respondent's new submissions

[22] The general rule in the Court's adversarial regime is that the parties are required to introduce the evidence before the Court, which forms the basis for its factual conclusions. However, once the factual foundation is in place, it is the Court's obligation to render its decision on the facts as best as it can, based upon the applicable law. In doing so it must proceed fairly, but otherwise, the Court is master of the legal issues and law to be applied to the factual conclusions in arriving at its decision, always subject to any appeal rights that the parties may enjoy.

[23] The Applicant in her letter of November 16, 2017 and subsequent submissions, in response to the Respondent raising the constructive misrepresentation issue; argues that the Minister was making "submissions that were not supported by the evidence in this matter". With reference to the affidavit of the Citizenship Officer [Officer] who had carriage over the file, the Applicant argued that "the sole evidence of any direct investigation of inadmissibility being conducted by the Minister against the Applicant is under section 42 of the IRPA. The

Respondent is not free to raise a speculative new ground of investigation which the evidence does not indicate".

[24] The Court does not agree with the characterization of the relevant affidavit evidence of the Officer as relating to actual or historical facts, as opposed to the expression of an intention of proceeding on those facts based on the Officer's understanding of the applicable law. The Officer's affidavit recounted that the Applicant's application for citizenship was suspended under section 13.1 of the Act pending the outcome of her father's admissibility proceedings, pursuant to the various sections cited of the IRPA, and with respect to matters that occurred before he became a permanent resident. The Officer concluded that "[i]n the event her father is found inadmissible the Applicant falls under the purview of section 42 of the IRPA − accompanying family member of an inadmissible person".

[25] The only relevant facts in the affidavit concerned the father's admissibility proceedings. Reference to proceedings that would follow pursuant to section 42 of the IRPA are statements of intention and are not binding on the Court as evidence upon which a factual determination must be made. They raise only an issue of procedural fairness and being able to respond to a new argument.

[26] The Respondent has placed the issue of the applicability of paragraph 40(1)(a) before the Court and the Applicant first chose not to respond, hoping to avoid having to confront the legal effect of the provision. The Applicant has not claimed prejudice, as this term is used in the procedural sense when a party is taken by surprise without the ability to properly respond in the

circumstances. The Applicant may have been entitled to any costs thrown away as a result of the Respondent's late change of argument, but otherwise, the Court has no concerns about any procedural fairness in the Applicant not having had an opportunity to fully respond to the Respondent's new legal submissions applying to the facts. Given the factual foundation, the constructive misrepresentation issue is a relevant facet of inadmissibility law and must be considered by the Court in rendering its decision.

[27] In exercising any discretion to allow the issue to be heard, if that were the case in these circumstances, such as the Respondent requesting to file further relevant evidence, the Court would only refuse to permit this if the Applicant was placed in a position that it would suffer a prejudice that could not be compensated for by costs.

(2) The Applicant will likely be inadmissible for making an indirect misrepresentation as an accompanying family member of her father if he is found to have made a misrepresentation of a material fact

(a) *The decision in Wang*

[28] As noted, the interpretation of "indirectly misrepresenting" in *Wang* has been applied in other cases, and is therefore generally accepted by the Court. However, the Applicant has made further submissions regarding the issues that it raises, such that the Court will review the underlying reasoning in *Wang* to ensure its applicability to the circumstances.

[29] First, the Court notes in *Wang*, *supra* at para 54 that Justice O'Keefe applied the golden rule of purposive interpretation, being that "[t]oday there is only one principle or approach,

namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament", with the Court citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras 21−23, as one of many cases in support.

[30] Second, Justice O'Keefe noted the somewhat unusual state of the remedial legislation by the enactment of subsection 40(1)(a) in the IRPA, whereby the ambiguous phrase "indirectly misrepresenting" replaced the unambiguous construction in former subsection 22(1)(e) of the *Immigration Act*, RSC 1985, c I-2. Under the *Immigration Act*, the reference was made to misrepresentation of any material fact "whether exercised by [the Applicant] or by any other person".

[31] Conversely, Justice O'Keefe made note of the intrinsic evidence of the explanatory clause by clause analysis of Bill C-11 (now IRPA), which emphasized that section 40 was "similar to provisions of the current act concerning misrepresentation[…] but modifies those provisions to enhance enforcement tools designed to eliminate abuse" [my emphasis]: *Wang*, *supra* at para 57. Justice O'Keefe further notes that "[w] hen Parliament introduced the new IRPA, one of the objects of the Act was to strengthen inadmissibility as seen in the clause by clause analysis prepared for IRPA": *Ibid* at para 43.

[32] The Court concluded that not adopting an interpretation of constructive misrepresentation applying to other persons "would lead to a potential absurdity that an applicant could directly misrepresent an application and bring a person such as the applicant in with him or her, and that

person would then not be removable from Canada if the person had no knowledge of the misrepresentation": *Ibid* at para 56. In addition to avoiding absurdity in the result, this Court observes that the objective of reducing the potential for abuse would be a purpose of the provision, as may be extrapolated from the extrinsic interpretative evidence cited above.

[33] Justice O'Keefe further concluded that the word "indirectly" can be interpreted to cover the situation "where the applicant relied on being included in her husband's application, even though she did not know his being married with a son" [my emphasis]: *Ibid*. The Court agrees that this appears to be the meaning most often adopted to constructively attribute an innocent misrepresentation to a family member. This scenario is somewhat analogous to the principal-agent relationship in contract law, where the principal is indirectly held responsible for the direct conduct of the agent.

[34] When fault is removed as an element of the misrepresentation, responsibility leads back to the Applicant via a constructive interpretation as the person not only relying on, but also benefiting from the misrepresentation. The absurdity is gaining the benefit of entry to Canada by relying upon someone else's misrepresentation, without which the person would never have been admitted to Canada. The abuse arises from the potential of a parent wishing to confer the benefit of permanent residency on the child, even if the parent is removed.

[35] This interpretation is also supported contextually by the sister provision of paragraph 40(1)(b) relating to sponsors. It provides that a permanent resident or a foreign national is inadmissible for misrepresentation "for being or having been sponsored by a person who is

determined to be inadmissible for misrepresentation". The same objective of avoiding abuse by obtaining a benefit from a misrepresentation would appear to be the underlying purpose that supports the person being sponsored to be found inadmissible.

(b) *Subsection 42(1) contextually supports Wang*

[36] Although perhaps not required as part of the analysis, nor considered in *Wang*, the Court will respond to the Applicant's submissions that section 42 should apply to govern her circumstances. This is not a completely irrelevant consideration, inasmuch as the provision specifically deals with the issue of accompanying family members who are permanent residents being exempted from removal on account of the inadmissibility of the principal family member. In addition, given the acknowledged ambiguity of "indirectly misrepresenting", the analysis may not be complete without considering this contextual provision.

[37] Insofar as subsection 42(1) makes an exception for accompanying family members who are permanent residents from being found to be inadmissible, it is the Court's view that the provision is intended to apply only where the misconduct of the principal family member, either a foreign national or a permanent resident, occurs after obtaining permanent residency. Without this distinction there is an apparent absurdity in the differing treatment of accompanying family members based upon whether the principal family member's conduct was a misrepresentation, as opposed to a rise because of serious criminality or organized criminality. If the conduct involves a misrepresentation of the principal family member, the accompanying family member would be removed on the basis of his or her constructive inadmissibility, such that subsection 42 would not apply. Conversely, the accompanying permanent resident family member of a person who

commits a serious criminal act or is involved in organized criminality would stay because section 42 would apply to exempt him or her from removal because it only applies to foreign nationals.

[38] In contradistinction however, depending on when the misconduct occurs this absurdity is avoided by the fact that omitting to advise CIC of previous serious criminality or organized criminality in an application for permanent residency would constitute a direct misrepresentation by omission. Accordingly, the accompanying family members of these persons would also be found to be inadmissible under paragraph 40(1)(a) for indirectly misrepresenting the omitted facts.

[39] This means that subsection 42 only applies if the misconduct of misrepresentation, serious criminality or organized criminality occurs after the family members gain permanent residency while in Canada. In such circumstances, paragraph 40(1)(a) would not apply because only misrepresentations made prior to achieving permanent residency would concern "material facts relating to a relevant matter that induces or could induce an error in the administration of this Act". Conduct of serious criminality or organized criminality that occurs after the person gains permanent residency would give rise to a conclusion of inadmissibility of the individual responsible for the misconduct, but not the accompanying family members. They would not have gained permanent residency by any misconduct of any person before entering Canada.

[40] This assumption in terms of timing of the misconduct of the principal family member occurring before or after obtaining permanent residency would appear to be supported by the Officer's affidavit at paragraph 6. It mentions that the inadmissibility sections related to the

father's misconduct apply "to matters that occurred before he became a permanent resident". It would appear that Parliament concluded that there is no basis for removing permanent resident accompanying family members because they did not gain that status by means of the misconduct of the principal family member, thus no potential for abuse occurs. The distinction made whereby foreign nationals would nevertheless be inadmissible appears to reflect the higher status of permanent resident, as opposed to the foreign national who has no status at all.

[41] In summary, the Court concludes that the *ratio* in *Wang* applies to the circumstances of this matter. There is a high likelihood that if the Applicant's father should be found to have misrepresented a material fact with respect to matters described in subsection 40(1)(a) of the IRPA, she will constructively be determined to be inadmissible for "indirectly" making the same material misrepresentation. This result meets the requirements of section 13.1 of the Act that allows for the suspension of the processing of the Applicant's citizenship application pending the determination of whether she should be the subject of an admissibility hearing under the IRPA.

II. Conclusion

[42] The Court dismisses the application for a writ of *mandamus* requiring the Respondent to complete the processing of the Applicant's application for Canadian citizenship in accordance with the Act and to undertake any other formalities necessary to grant citizenship to the Applicant within three (3) months of this Judgment.

[43] No certification of questions for appeal was requested; none will be certified.

[44] No costs were requested and none are ordered.

JUDGMENT FOR T-363-17

THIS COURT'S JUDGMENT is that the application is dismissed without costs and no question is certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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