Federal Court  Cour fédérale

Date: 20190403

Docket: IMM-3587-18

Citation: 2019 FC 402

Ottawa, Ontario, April 3, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

QINGNING YANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision by an officer of Immigration, Refugees and Citizenship Canada [IRCC] dated May 28, 2018, which refused the Applicant's application for permanent residence due to a misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. Background

[2] The Applicant, Qingning Yang, is a citizen of China born July 21, 1970.

[3] The Applicant applied for permanent residence in Canada through the Quebec Selected Investor program on December 1, 2014 [the Application]. The Applicant's husband and daughter were included in the Application.

[4] In 2015, the Applicant applied for and received a permit to study in Canada. The Applicant and her daughter have resided in British Columbia since 2015, and the Applicant has been a student at the British Columbia Institute of Technology [BCIT].

[5] The Applicant hired an immigration agency in China, Globevisa [the Agent], to assist with the Application. The Applicant also retained an immigration representative in Canada. A Quebec lawyer became the Applicant's Canadian Representative in March 2017 [the Canadian Representative].

[6] On June 8, 2017, a letter was sent to the Applicant care of the Canadian Representative, requesting additional details, including an updated Schedule A Background/Declaration form [IMM5669 form] listing the Applicant's personal history and addresses since the age of 18 [the June 8, 2017 Letter]. The Canadian Representative forwarded this letter to the Agent.

[7] On June 12, 2017, the Applicant received a letter from the Agent asking, among other things, (i) whether she had stayed in any country other than China for longer than six months since submitting her Application, and (ii) to provide her residential addresses since 1988.

[8] In response to the Agent, the Applicant outlined that she and her daughter had been studying in Canada since 2015. She did not provide a Canadian residential address.

[9] On June 30, 2017, the Agent wrote to IRCC, in the Applicant's name and bearing her signature, responding to the June 8, 2017 Letter and providing, among other things, an updated IMM5669 form [the June 30, 2017 Letter]. The Applicant had an opportunity to review and sign the updated IMM5669 form prior to its submission.

[10] The updated IMM5669 form listed the Applicant's current address and employment as being in China, and did not disclose that she had been studying in Canada since 2015.

[11] IRCC was aware that the Applicant had resided in Canada since 2015, because their records detailed the issuance of a student permit to the Applicant in order for her to attend BCIT.

[12] On March 9, 2018, IRCC sent a procedural fairness letter to the Applicant, care of the Canadian Representative, outlining concerns that the Applicant's residency in British Columbia and her studies at BCIT were omitted from her updated IMM5669 form [the Procedural Fairness Letter].

[13] Neither the Canadian Representative nor the Agent made the Applicant aware of the Procedural Fairness Letter.

[14] Instead, on March 13, 2018, the Applicant received a letter from the Agent, asking for updated residential addresses, information regarding where she was studying, and details surrounding the Applicant's plans to live in Quebec.

[15] The Applicant responded to the Agent, outlining her residential addresses in British Columbia since August of 2015 and her studies at BCIT. The Applicant also provided the Agent with a statement outlining her plans to eventually live in Quebec [the Quebec Statement].

[16] On March 22, 2018, a letter was sent in the Applicant's name and apparently bearing her signature, which contained, among other things, an altered version of the Quebec Statement [the March 2018 Explanation Letter].

[17] The altered version of the Quebec Statement included the following text, drafted by the Agent and not contained in the original version, in which the Applicant purportedly takes responsibility for the omissions from the updated IMM5669 form:

> First, please allow me to express my sincere apology. Since I have applied for a student permit and failed to timely communicate with my immigration agent, they didn't update my personal address and study and work experiences in the Schedule A form submitted in 2017. I hereby solemnly state that it's not my intention to conceal my personal experiences. It's true that I have been studying in British Columbia Institute of Technology (BCIT) since September 2015. As supplementary, I have attached my study permit and school transcript for your reference this time. I know very well that immigration is a rigorous and serious matter, I feel deeply sorry for

> my negligence. Please allow me to further apologize for causing you so much trouble due to my negligence.

[18] The March 2018 Explanation Letter also contained a statement by Xiaoting Tan, an employee of a subsidiary or contractor of the Agent, indicating that Ms. Tan prepared the documents in the June 30, 2017 Letter on the Applicant's behalf, that the Applicant signed the documents without reviewing them, and further apologizing for the omissions.

[19] On or about April 10, 2018, the IRCC also received a letter from the Canadian Representative, responding to the Procedural Fairness Letter, which effectively adopted the version of events put forward in the March 2018 Explanation Letter, and attributed the blame for the omissions from the updated IMM5669 form to the Applicant.

I. Decision Under Review

[20] As evidenced in the Global Case Management System [GCMS] notes relating to this matter, the March 2018 Explanation Letter was reviewed by two separate immigration officers. The first immigration officer conducted a review on April 18, 2018, concluded that the omissions could have induced a misrepresentation within the meaning of the IRPA, and referred the matter to a second officer for a decision [the First Officer's Review].

[21] In a second GCMS entry dated May 28, 2018, the second officer [the Officer] reviewed the file and concluded that the Applicant was inadmissible.

[22] In a letter dated May 28, 2018, the Officer refused the Applicant's application for permanent residence on the basis that the Applicant had omitted from the updated IMM5669 form any mention of her study and residence in British Columbia [the Decision]. The Officer found that this misrepresentation could have induced an error in the administration of the IRPA, as a visa could have been issued to the Applicant without all the information necessary to make an admissibility assessment.

II. Issues

[23] The issues are:

A. Did the Applicant submit an improper affidavit?

B. Were the Applicant's procedural fairness rights breached?

C. Was the Officer unreasonable to deny the Application?

III. Standard of Review

[24] The standard of review for a substantive review of the Decision is reasonableness.

[25] The standard of review in cases involving allegations of incompetent or negligent misrepresentation is correctness, as issues of procedural fairness are raised (*Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at para 16).

IV. Analysis

A. *Did the Applicant submit an improper affidavit?*

[26] The Respondent argues that the Applicant's affidavit is not properly before the Court, as it was not filed as an affidavit in these proceedings, but was instead attached as an exhibit to an affidavit by Teresa Tran, a legal assistant at the office of counsel for the Applicant. The Respondent notes that this effectively sheltered the Applicant from cross examination, and argues that the Applicant's affidavit should be given little weight.

[27] Rule 12 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, requires that affidavits filed in connection with an application for leave be confined to such evidence as the deponent could give if testifying as a witness before the Court. Ms. Tran would certainly be unable to testify to the contents of the Applicant's affidavit, and the Applicant's affidavit therefore appears to be in violation of Rule 12.

[28] Notwithstanding the procedural error made by counsel for the Applicant, the Respondent raised this issue for the first time in their Further Memorandum, filed less than two weeks before the hearing of this matter. There is no evidence that the Respondent sought to cross examine the Applicant or Ms. Tran, nor does the Respondent materially dispute the contents of the Applicant's affidavit.

[29] Therefore, I find that the Respondent is precluded from challenging *de novo* at this late stage the Applicant's affidavit based on the manner in which it was filed.

B. *Were the Applicant's procedural fairness rights breached?*

[30] The Applicant alleges a denial of procedural fairness due to incompetent representation by the Canadian Representative.

[31] As outlined in *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at paragraph 11 [*Guadron*], in order to succeed on the basis of a procedural fairness violation resulting from incompetent representation, the Applicant must establish that:

i. The representative's alleged acts or omissions constituted incompetence;

ii. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original decision would have been different; and

iii. The representative was given notice and a reasonable opportunity to respond.

[32] The third element of the test is satisfied. In accordance with the Federal Court procedural protocol dated March 7, 2014, the Canadian Representative was notified on October 15, 2018, that the Applicant may allege negligence or incompetence in her application for judicial review.

[33] In an email dated October 22, 2018, the Canadian Representative responded, stating that:

i. from March 2017 onwards, the Canadian Representative had no direct contact with the Applicant;

ii. his retainer was limited to ensuring that any correspondence received was forwarded to the Agent;

iii. he was not consulted about the June 30, 2017 Letter submitted by the Agent, nor did he review a copy of that letter;

iv. the Applicant was not made aware of the Procedural Fairness Letter;

v. a response to the Procedural Fairness Letter was submitted that included fabricated information; and

vi. the fabricated information was due to the actions of the Agent, and the Canadian Representative had no idea that the information had been fabricated.

[34] Addressing the first component of the test, the Applicant argues that the Canadian Representative was incompetent in failing to ensure the Applicant was properly informed of the Procedural Fairness Letter in the spring of 2018, and permitting fabricated information to be submitted on her behalf. The Applicant further suggests that the Canadian Representative's lack of awareness in June 2017, in allowing an erroneous IMM5669 form to be submitted, constitutes incompetence.

[35] The Respondent does not appear to argue against a finding of incompetence.

[36] The Canadian Representative retained counsel and sought leave to intervene in this proceeding. Leave was granted to allow the Canadian Representative to make written submissions on the law of incompetence of counsel.

[37] The Canadian Representative highlighted that the onus is on the applicant to establish acts or omissions that fall outside the wide range of reasonable professional assistance, citing *R v GDB*, 2000 SCC 22 [*GDB*] at paragraph 27:

> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[38] The Canadian Representative also highlighted that a reviewing court should only consider the incompetence element of this test when a claim of procedural unfairness cannot be disposed of on the ground that no prejudice has occurred (*GDB*, above at para 29). When possible, consideration of incompetence is best left to the relevant regulatory body. For the reasons outlined below, it is necessary to consider counsel's incompetence in this matter.

[39] The Canadian Representative claims that he had only a limited retainer, and no knowledge of many or all of the actions undertaken by the Agent which adversely affected the Applicant. This does not excuse his conduct, or warrant finding that his conduct was competent; while his retainer may have been limited, the fact remains that he was the Applicant's authorized representative under section 91 of the IRPA. Without the Canadian Representative, the Agent would not have been able to lawfully act on behalf of the Applicant in relation to her Application. The Canadian Representative became the Applicant's authorized representative in March 2017, and must bear responsibility for the actions taken under his purview beginning at that time, notwithstanding his allegedly limited retainer. To find otherwise would defeat the statutory purpose of section 91, which limits the scope of those authorized to represent

individuals under the IRPA, and undermine the integrity of the permanent residence application process.

[40] I recognize that the Applicant is not blameless in the actions taken in June 2017, as she had the opportunity to review and sign the updated IMM5669 form prior to its submission. Foreign nationals seeking to enter Canada have a duty of candour which requires disclosure of material facts (*Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at paras 13, 15), and the Applicant is partially to blame for the omissions from the updated IMM5669 form. However, her failures do not diminish the responsibilities of her representatives.

[41] This Court has held immigration representatives accountable for failing to submit crucial evidence even in cases where the applicant did not volunteer the evidence. In *Guadron*, above, the applicant alleged a violation of her procedural rights on the basis that her immigration consultant had incompetently omitted crucial evidence regarding four key elements of her case. In concluding that the consultant's failures rose to the level of incompetence, Justice Diner wrote at paragraph 29:

> Rather, I find that as the duly appointed legal representative under the Act, it was the representative's responsibility to make reasonable attempts to seek out crucial information required for the Applicant to overcome the significant hurdles in obtaining a highly discretionary and exceptional H&C remedy. It is not good enough to state that the Applicant (or her family) did not volunteer it. That approach undermines the reason for hiring a licensed representative, be it a lawyer, or a consultant in this case. To find otherwise would posit the question as to why one would bother to hire a professional in the first place.
>
> [Emphasis added]

[42] Unlike *Guadron,* in this matter the Applicant did in fact volunteer the pertinent information, and it was nonetheless omitted from the updated IMM5669 form. This omission falls outside the wide range of reasonable professional assistance that could and should have been provided, and constitutes incompetence by the Canadian Representative.

[43] The actions of the Canadian Representative and the Agent in the spring of 2018 were also incompetent. Rather than make the Applicant aware of the Procedural Fairness Letter, and thereby admit to the mistaken omission from the updated IMM5669 form, the Agent instead took deliberate steps to mislead both the Applicant and the IRCC. While the Canadian Representative may have been unaware of this deliberate attempt to mislead the Applicant, it was taken under his authorization and he must be held responsible. The deliberate withholding by the Agent of the Procedural Fairness Letter, authorized implicitly by the Canadian Representative, again falls outside the wide range of reasonable professional assistance that could and should have been provided.

[44] I find that the actions, or lack thereof, by the Canadian Representative in this matter constitute incompetence.

[45] A finding of incompetence in this context is separate and apart from any proceeding that could be brought under the relevant regulatory body, in this case the Barreau du Quebec. This finding is based only on the facts of this matter, and involved a consideration of the jurisprudence of this Court in relation to the distinct issue of procedural unfairness due to incompetent representation.

[46] Turning now to the second component of the test, whether, but for the alleged conduct, there is a reasonable probability that the original result would have been different.

[47] The Applicant argues that had she been aware of the Procedural Fairness Letter, she could have put forward the facts openly and honestly to assert that the required elements of misrepresentation were not met. The Applicant argues that had she been able to do this, she could have explained that the omissions in her IMM5669 form were caused by the actions of the Agent and/or the Canadian Representative, the Officer would have been compelled to consider the facts and law on inadvertent errors, and the Officer may have come to a different result.

[48] The Respondent argues there is no reasonable probability that the actions of the Agent and the Canadian Representative in the spring of 2018 altered the result. In the March 2018 Explanation Letter, the blame for the omissions from the updated IMM5669 form was attributed to the Applicant. Had the Applicant been alerted to the Procedural Fairness Letter, she would have attributed the blame for the omissions to the actions of the Agent and/or the Canadian Representative. The Respondent argues that this shifting of the blame would not have affected the result of the Decision.

[49] As stated by Justice Annis in *Yang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1189 [*Yang*] at paragraph 21, the applicant has a heady burden to meet:

> Because the Applicant seeks an extraordinary remedy, he is required to put his best foot forward with the view of persuading the Court that there is a reasonable probability that the result of the original hearing would have been different had his representative introduced evidence on the BIOC. Accordingly the Applicant is required to provide the Court with the proposed evidence to

> establish a reasonable probability that the result of the original hearing would have been different.

[50] I accept that the Applicant has failed to show a reasonable probability that, but for the actions of the Agent and the Canadian Representative in the spring of 2018, the result of the Decision would have differed.

[51] However, but for the actions taken in June 2017, by the Agent but under the purview of the Canadian Representative, there is more than a reasonable probability that the result of the Decision would have differed. The omissions from the updated IMM5669 form led directly to the decision to reject the Application. Had the updated IMM5669 form contained the information that the Applicant was studying at BCIT, the entire basis for the Procedural Fairness Letter, and the ultimate rejection of the Application, would have not been an issue for the Officer to consider. The Applicant has met the heavy burden outlined in *Yang*, above.

[52] Therefore, the Applicant has proven each element of the test for procedural unfairness stemming from incompetent representation. I find that the Applicant's procedural rights were breached as a result of incompetent representation by the Canadian Representative.

C. *Was the Officer unreasonable to deny the Application?*

[53] Given that the Applicant's procedural rights were contravened, I will not go on to consider whether the Decision was reasonable – it would not be appropriate to speculate as to what the result might have been but for the procedural unfairness (*Cardinal v Director of Kent*

Institution, [1985] 2 SCR 643 (SCC) at 641; *Ghanoum v Canada (Citizenship and Immigration)*, 2011 FC 947 at para 5).

JUDGMENT in IMM-3587-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed, and the matter is remitted back to a different immigration officer for reconsideration;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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