Federal Court  Cour fédérale

Date: 20191009

Docket: IMM-5348-18

Citation: 2019 FC 1284

Ottawa, Ontario, October 9, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

CHUNBO LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Chunbo Lin (the "Applicant") is a Chinese citizen who applied for permanent residence under the Saskatchewan Immigrant Nominee Program ("SINP"). On October 18, 2018, a Canadian visa officer (the "Officer") at Immigration, Refugee and Citizenship Canada's ("IRCC") Hong Kong office rejected the Applicant's application. The Officer rejected the application for material misrepresentation pursuant to subsection 40(1)(a) of the *Immigration*

and Refugee Protection Act, SC 2001, c 27 ("*IRPA*"). The misrepresentation resulted in a five-year inadmissibility bar under subsection 40(2)(a) of the *IRPA*. Pursuant to subsection 40(3) of the *IRPA*, the Applicant cannot apply for permanent resident status for the duration of this bar.

II. **Facts**

A. *Pre-First Visa Application*

[2] The Applicant was trained as a welder and an electrical engineer in China. He has significant experience as a welder. He obtained his welding certificate in July 2005 and worked as a welder at three different companies before applying for permanent residence in Canada. The Applicant worked at Yuanhai Shenglin Repair Company from February 2007 to April 2010, Qingao Hailunka Shipbuilding Company from September 2012 to May 2013, and Shandong Haiqing Chemical Machinery Company from December 2013 to March 2015. Additionally, he earned a diploma in electrical engineering and automation in January 2015.

B. *First Provincial Nomination and Visa Application*

[3] With the assistance of an immigration consultant, Mr. Zengtao Lui, the Applicant obtained an offer of employment from HB Welding, a business in Saskatchewan. In September 2014, the Applicant applied for provincial nomination under the SINP. He based his application on his experience as a welder and his job offer from HB Welding, which was an SINP-eligible employer. Saskatchewan approved the Applicant's application and issued a nomination certificate on January 21, 2015.

[4] In March 2015, the Applicant submitted an application for permanent residence, listing his wife, Hua Moa, and child, Runnan Lin, as dependents. The application included his provincial nomination certificate and letters from two employers: Yuanhai Shenglin Repair Company and Shandong Haiqing Chemical Machinery Company. Shortly after submitting his application, the Applicant quit his job at Shandong Haiqing Chemical Machinery Company.

[5] The Applicant began looking for a temporary job that would allow him to provide for his family while they awaited the approval of their permanent residence application. In July 2015, the Production Director of Qingdao Aiborui Vibration Isolation Technology Co. Ltd. ("Qingdao Aiborui"), Mr. Xu Xihua, hired the Applicant. They agreed that he would work as an "unscheduled" or "off-the-books" worker. He worked at Qingdao Aiborui from July 2015 to October 2016.

[6] In August 2015, shortly after Qingdao Aiborui hired the Applicant, the Respondent asked the Applicant to provide additional documents. The Applicant responded to this request in September 2015. His response included an updated "Schedule A", which stated that he had begun working at Qingdao Aiborui in July 2015. His response also included a letter from Qingdao Aiborui's Production Director, Mr. Xihua, confirming the Applicant's employment.

[7] In the meantime, IRCC became skeptical of HB Welding's job offer because the company had offered the Applicant a job without ever interviewing him. The contact between HB Welding and the Applicant had been mediated exclusively through his immigration

consultant. IRCC asked the immigration consultant to provide new job offer documents. The immigration consultant did provide the documents, but the Province of Saskatchewan nonetheless revoked the Applicant's provincial nomination certificate on December 15, 2015. With his nomination certificate revoked, the Applicant's permanent residence application was also refused on January 4, 2016.

C. *First Judicial Review Application*

[8] The Applicant applied for judicial review of both the Province of Saskatchewan's decision to revoke his nomination certificate and the Respondent's decision to refuse his permanent residence application. The Respondent settled the permanent resident visa judicial review application, and the decision was remitted on consent. Shortly after, on May 9, 2016, the Province of Saskatchewan issued a new provincial nomination certificate.

D. *Second Provincial Nomination and Reconsideration of Visa Application*

[9] On June 23, 2016, the Respondent contacted the Applicant and requested that he attend an interview on July 27, 2016. At the interview, the Applicant provided some details about his work at Qingdao Aiborui.

[10] Following this interview, the Respondent reached out to various persons to confirm the details of the Applicant's application. The Respondent continued to correspond with HB Welding to verify that the job offer was still valid and to enquire as to why it was made to the

Applicant in the first place. Between August and September 2016, the Respondent verified the Applicant's credentials, his employment with Shandong Haiqing Chemical Machinery Company, and his employment with Qingdao Aiborui, although Mr. Xihua said that the Applicant was on leave at the time.

[11] On October 10, 2016, the Applicant resigned from Qingdao Aiborui. On November 3, 2016, he wrote to the Respondent to inform them of the change in his employment circumstances.

E. *June 2017 Site Visit*

[12] On February 13, 2017, the Respondent requested a site visit at Qingdao Aiborui to determine whether the Applicant genuinely worked there. The Applicant persists it was unclear why the Respondent wished to conduct this site visit. However, according to a Global Case Management System note dated February 14, 2017, the Respondent became suspicious of the Applicant's application because IRCC discovered that the Applicant's immigration consultant, Mr. Lui, had misrepresented information on two other applications. These misrepresentations were uncovered through site visits of alleged employers on those other applications, and this prompted the Respondent to conduct a site visit to the Applicant's employer as well.

[13] The Respondent requested that the Applicant provide an updated "Schedule A" on February 27, 2017. On March 21, 2017, the Applicant provided the updated document, which stated that he worked at Qingdao Aiborui from July 2015 to October 2016.

[14] The Respondent performed a site visit of Qingdao Aiborui on June 26, 2017. The Respondent visited the company's corporate headquarters, rather than its production site, where the Applicant claimed he had worked. The Respondent noted the Applicant was not present at the company and that none of the staff recognized his name or photograph. There were no records of the Applicant's employment. When the Respondent asked whether it was possible that the Applicant had been hired temporarily as an "off-the-books" employee, the staff stated that it was possible, but were unable to provide additional details.

F. *First Demand Letter and the Procedural Fairness Letter*

[15] The Applicant then began working at Qingdao Izumi Giken Refrigerating Co. Ltd. in July 2017, and he provided an updated Schedule A to that effect in September 2017. Given the delay in processing his application, the Applicant wrote to the Respondent on November 3, 2017 and requested that the Respondent provide a decision within 45 days.

[16] Instead of a decision, the Applicant received a procedural fairness letter ("PFL") on November 7, 2017. The PFL detailed the Respondent's findings from the site visit to Qingdao Aiborui. The Respondent expressed their concerns that the Applicant had misrepresented his work experience and submitted a fraudulent reference letter.

[17] The Applicant provided his response to the PFL on March 17, 2018. The Applicant's response included the following: written submissions arguing there was no misrepresentation and that if there was one, it was immaterial due to his extensive welding experience; a statutory

declaration stating that he had worked at Qingdao Aiborui; a letter from Mr. Xihua confirming that the Applicant had been an "off-the-books" employee; a letter from a Qingdao Aiborui colleague confirming that the Applicant had been an "off-the-books" employee; the Applicant's household registry stating the Applicant was employed by Qingdao Aiborui; and a written employment leave request from the Applicant's time at Qingdao Aiborui.

G. *Second Demand Letter*

[18] The Respondent was silent for the next seven months. On October 11, 2018, the Applicant sent a second demand letter requesting the Respondent to provide a decision within 45 days. By letter dated October 18, 2018, the Officer refused the Applicant's permanent residence application.

III. **Decision under Review**

[19] The Officer rejected the Applicant's permanent residence application on the basis of material misrepresentation under subsection 40(1)(a) of the *IRPA*. The Officer concluded that the Applicant had misrepresented his employment at Qingdao Aiborui. The Officer acknowledged the documents provided by the Applicant in response to the PFL, but found them to be inadequate.

[20] Furthermore, the Officer held that the misrepresentation could have caused an error in the administration of the *IRPA*. The Officer reasoned that a misrepresentation of the Applicant's

employment could have resulted in the Province of Saskatchewan erroneously providing provincial sponsorship, since the Applicant's nomination under the SINP was based in part on his work experience as a welder.

IV. **Issues**

[21] There are two issues arising on this application for judicial review:

A. Was the Applicant unfairly denied an opportunity to respond to the Officer's concerns?

B. Was the Officer's finding that there was a material misrepresentation reasonable?

V. **Standard of Review**

[22] A court determines whether there has been breach of procedural fairness or denial of natural justice on the "correctness" standard: *Mission Institution v Khela*, 2014 SCC 24 at para 79. A court determines whether "a fair and just process was followed" by the decision-maker. In its analysis, a court should show some deference to the decision-maker's own procedural choices. However, a reviewing court must ultimately determine "whether the applicant knew the case to meet and had a full and fair chance to respond": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56.

[23] Determinations of misrepresentations under subsection 40(1)(a) of the *IRPA* are factual in nature and call for deference in judicial review proceedings. Consequently, they are to be reviewed on the reasonableness standard: *Khorasgani v Canada (Citizenship and Immigration)*, 2012 FC 1177 at para 8; *Kobrosli v Canada (Citizenship and Immigration)*, 2012 FC 757 at para 24; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

VI. **Analysis**

A. *Was the Applicant unfairly denied an opportunity to respond to the Officer's concerns?*

[24] The Applicant argues that he was owed a relatively high degree of procedural fairness. A finding of misrepresentation under subsection 40(1)(a) of the *IRPA* carries serious consequences, a five-year inadmissibility bar pursuant to subsections 40(2) and 40(3) of the *IRPA*. The Applicant submits that the severity of these consequences results in a commensurately high procedural fairness duty (*Lamsen v Canada (Citizenship and Immigration)*, 2016 FC 815 at para 24 [*Lamsen*]; *Bao v Canada (Citizenship and Immigration)*, 2019 FC 268 at paras 17-18 [*Bao*]).

[25] I agree with the Applicant's position. Individuals should be afforded a high degree of procedural fairness where they may be found to be inadmissible. As Justice Southcott stated in *Ge v Canada (Citizenship and Immigration)*, 2017 FC 594 at para 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 (F.C.), at para 24; *Menon v. Canada (Minister of Citizenship & Immigration)*, 2005 FC 1273 (F.C.), at para 15).

[26] The Applicant raises procedural fairness concerns over how the Respondent conducted the June 2017 site visit and assessed the Applicant's response to the PFL. In the PFL, the Respondent expressed concerns that no one at Qingdao Aiborui's corporate headquarters recognized the Applicant's photograph or name. In his response to the PFL, the Applicant provided detailed explanations: the Applicant never worked at the corporate headquarters; he was not working at Qingdao Aiborui at the time of the site visit; the Office Manager, whom the Respondent questioned, was only hired in the month the Applicant quit; and Mr. Xihua, who provided multiple letters confirming his employment, was not personally questioned. The Applicant claims that it was particularly unfair that the Respondent did not question Mr. Xihua after the Applicant provided a letter from Mr. Xihua in the response to the PFL. The Applicant argues the Officer's failure to follow up with the specific employment references provided by applicants was a breach of procedural fairness: *Shah v Canada (Citizenship and Immigration)*, 2016 FC 1012 at para 17.

[27] The Applicant claims that the Officer completely disregarded the explanations the Applicant provided in response to the PFL: *Kaur v Canada (Citizenship and Immigration)*, 2011 FC 219 at paras 26-29. He further claims that the Officer erroneously rejected his evidence in favour of the site visit, which suggests a closed mind with disregard for the documentary evidence and an absence of any true weighing of the evidence: *Rong v Canada (Citizenship and Immigration)*, 2013 FC 364 at paras 27, 31. The Applicant asserts that the Officer's decision does not indicate that his response to the PFL was reasonably assessed: *Chhetry v Canada (Citizenship and Immigration)*, 2016 FC 513 at para 34 [*Chhetry*].

[28] The Respondent argues that there was no breach of procedural fairness. The Respondent notes there is ample jurisprudence to support the principle that officers may find responses to PFLs to be deficient without conducting further enquiries. Once the applicant has been given the opportunity to address concerns, the officer is under no obligation to request that better, further evidence be produced: *Sinnachamy v Canada (Citizenship and Immigration)*, 2012 FC 1092 at para 17; *Tofangchi v Canada (Citizenship and Immigration)*, 2012 FC 427 at para 45; *Heer v Canada (Citizenship and Immigration)*, 2001 FCT 1357 at para 19; *He v Canada (Citizenship and Immigration)*, 2012 FC 33 at para 30; *Kandasamy v Canada (Citizenship and Immigration)*, 2012 FC 266 at paras 46-48.

[29] The Respondent asserts that it was reasonable for the Officer to find the Applicant's response to be insufficient to overcome the Officer's concerns. It was not incumbent on the Officer to point out their specific concerns with the Applicant's response and allow a subsequent opportunity to reply: *Sharma v Canada (Citizenship and Immigration)*, 2009 FC 786 at para 8. The duty of procedural fairness does not require the Officer to provide the Applicant with multiple opportunities to address the Officer's concerns: *Thandal v Canada (Citizenship and Immigration)*, 2008 FC 489 at para 9 [*Thandal*]; *Nabin v Canada (Citizenship and Immigration)*, 2008 FC 200 at paras 7-10.

[30] While I agree with the Respondent that there has been no breach of procedural fairness since the Officer provided the Applicant with a PFL with an opportunity to respond, I am of the view that the Officer's decision was unreasonable. The Officer was required to assess the evidence submitted by the Applicant in response to the PFL: *Chhetry* at para 34. The Applicant

had provided additional confirmation from Mr. Xihua that he was employed at Qingdao Aiborui and further documentation establishing his employment. However, the record does not demonstrate that the Officer conducted a meaningful assessment of this evidence. The Officer provides no rationale for why the evidence from the site visit was preferred over the documentary evidence submitted by the Applicant, resulting in an absence of any true weighing of the evidence.

B. *Was the Officer's finding that there was a material misrepresentation reasonable?*

[31] Foreign nationals can be found inadmissible for misrepresentation under subsection 40(1)(a) of the *IRPA*, which reads as follows:

Misrepresentation	**Fausses déclarations**
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 indirectly 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 indirectement, 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;

[32] Madam Justice McDonald lays out the three step test for determining whether there has been a material misrepresentation under subsection 40(1)(a) of the *IRPA* in *Geng v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1155 at para 22:

> There is a three-step process for the assessment of misrepresentations under s.40(1)(a) of the IRPA: (1) there is a misrepresentation by the Applicant; (2) the misrepresentation

> concerns material facts relating to a relevant matter; and (3) the misrepresentation induces or could induce an error in the administration of the IRPA (*Kazzi v Canada (Citizenship and Immigration),* 2017 FC 153 (CanLII) at para 32 [*Kazzi*]).

(1) **Was there a misrepresentation?**

[33] The Applicant submits there was no misrepresentation because he had in fact worked at Qingdao Aiborui during the time period he claimed. Moreover, the Applicant argues that it was unreasonable for the Officer to conclude that he made a misrepresentation in light of the evidence provided in response to the PFL. He claims that the Officer unreasonably examined the alleged misrepresentation in a compartmentalized manner, without regard to the evidence as a whole: *Lamsen* at para 24 and *Bao* at para 18. The June 2017 site visit was inadequate for all of the reasons discussed above, and the Applicant's new documentary evidence should have adequately addressed the Officer's concerns. The Applicant argues it was unreasonable for the Officer to conclude that the Applicant had not worked at Qingdao Aiborui especially given that the Respondent had previously confirmed the Applicant's employment at Qingdao Aiborui in August 2016. Thus, it was unreasonable for the Officer to conclude there was a misrepresentation.

[34] The Respondent contends that the Applicant is merely asking this Court to reweigh the evidence before the Officer, which is not permissible on judicial review. The Respondent submits it was reasonable for the Officer to give more weight to the site visit as opposed to the Applicant's evidence.

[35] I agree with the Applicant that the Officer's finding of misrepresentation was unreasonable. It is unclear why the Officer's concerns over the veracity of the Applicant's employment at Qingdao Aiborui were not alleviated by the documentary evidence provided by the Applicant. The Officer disregarded several additional documents supporting the Applicant's contention that he was employed at Qingdao Aiborui. Moreover, while the Officer gave more weight to the site visit evidence, the Officer fails to provide any rationale for this preferential weighting. The Officer's reasons lacked transparency and intelligibility by rejecting potentially corroborative evidence without providing a rationale, such as issues of credibility, which were not raised in the case at bar.

(2) **Was the misrepresentation material?**

[36] Even if the Officer has found a misrepresentation, the misrepresentation must still be material. In *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 [*Oloumi*], Justice Danièle Tremblay-Lamer stated "…that to be material, a misrepresentation need not be decisive or determinative. It will be material if it is important enough to affect the process": at para 25.

[37] The Applicant submits that if he had misrepresented his employment at Qingdao Aiborui, such a misrepresentation would not be material because he already had fulfilled the SINP requirements. The SINP only requires applicants to have one year of work experience in their chosen profession. When the Applicant applied to the SINP in September 2014, he already had over four years of experience as a welder. The Officer had not expressed any concerns over the Applicant's employment history besides the experience at Qingdao Aiborui. In fact, the Respondent had verified the Applicant's other employment history. The Officer provided no

explanation for why the alleged misrepresentation concerning Qingdao Aiborui was material despite the fact that the Applicant's SINP requirements were fulfilled through his other work experiences.

[38] The Applicant submits that his situation is analogous to the case in *Bao*. In *Bao*, the applicant applied for permanent residence through the SINP on the basis that she would work at a sushi restaurant in Saskatchewan. The applicant had over two years of experience working at a restaurant, which qualified her under the SINP. The applicant's work experience was confirmed by the Respondent. While the application was being processed, the applicant began working at another restaurant. The Respondent conducted a site visit of this new employer and discovered that the applicant had made a misrepresentation. However, the Court ultimately concluded in favour of the applicant and found that the alleged misrepresentation "did not constitute material misrepresentations such that they could have led to an error in the administration of the *IRPA*" (*Bao* at para 20).

[39] The Respondent argues the finding of misrepresentation was material. The Respondent notes that there is a plethora of case law supporting the proposition that a misrepresentation need not be decisive nor determinative to be material: *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 15; *Cao v Canada (Citizenship and Immigration)*, 2010 FC 450 at para 28; *Oloumi* at para 25. The Respondent asserts that this Court has previously found misrepresentations of employment history for provincial nominees to be material, despite these nominees otherwise possessing sufficient work experience: *Paashazadeh v Canada (Citizenship and Immigration)*, 2015 FC 327 at paras 22, 25-26 [*Paashazadeh*]; *Mehreen v Canada (Citizenship and Immigration)*, 2016 FC 533 at para 26 [*Mehreen*]).

[40] In my view, this Court's decisions in *Bao* and *Chhetry* provide applicable guidance to the case at bar, as they discuss the practical, contextual consequences of misrepresentation. The decision in *Bao* is especially helpful, as it involves the same provincial nomination program and an alleged misrepresentation concerning the applicant's employment obtained after the initial provincial nomination certificate was granted.

[41] The Officer's finding of misrepresentation was not material. The Provincial Nominee Class is governed by section 87 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"). Subsection 87(1) of the *IRPR* reads as follows, with my emphasis added:

Class	**Catégorie**
87 (1) For the purposes of subsection 12(2) of the Act, the provincial nominee class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada.	**87 (1)** Pour l'application du paragraphe 12(2) de la Loi, la catégorie des candidats des provinces est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada.

[42] Even if the Officer did not accept the authenticity of the Applicant's employment at Qingdao Aiborui, the Applicant had nonetheless provided sufficient evidence of verified employment to satisfy the SINP requirements and to demonstrate his "ability to become economically established in Canada".

(3) **Is it possible for the misrepresentation to induce an error in the administration of the Act?**

[43] The Officer stated that the alleged misrepresentation could induce an error in the administration of the Act because the Applicant's employment history was a relevant consideration for the SINP. For the same reasons noted above when discussing materiality, the alleged misrepresentation would have had no effect on determining whether the Applicant was a proper provincial nominee under the SINP and under section 87 of the *IRPR*.

VII. **Certified Question**

[44] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[45] For the foregoing reasons, this application for judicial review is granted.

JUDGMENT in IMM-5348-18

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different officer.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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