Federal Court  Cour fédérale

Date: 20150915

Docket: IMM-7036-14

Citation: 2015 FC 1076

Toronto, Ontario, September 15, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

FANG LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2002, Ms Fang Liu arrived in Canada from China based on her successful application for permanent residence, after marrying a Canadian citizen. In 2013, she attempted to sponsor her son from a previous marriage, but an immigration officer concluded that her son was not eligible because he had not been examined at the time of Ms Liu's application for permanent

residence (applying s 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] – see Annex for enactments cited).

[2] Ms Liu appealed the officer's decision to the Immigration Appeal Division. The IAD upheld the decision, finding that s 117(9)(*d*) prevented sponsorship of Ms Liu's son, and concluding that no exceptions to that rule applied in the circumstances.

[3] Ms Liu submits that the IAD's decision was unreasonable because she had mentioned her son in her 2002 application and, therefore, the officer who processed that application must have concluded that her son did not have to be examined. Ms Liu asks me to quash the IAD's decision and order another panel to reconsider the issue of sponsorship.

[4] I agree with Ms Liu that the IAD's decision was unreasonable.

II. The IAD's decision

[5] In an earlier 1998 application for permanent residence, Ms Liu disclosed that she had a dependent son. However, in the later 2002 application, she mentioned her son but did not describe him as a dependent. On these facts, the IAD found that the rule in s 117(9)(*d*) applied – Ms Liu's son could not be considered a member of the family class because he was a non-accompanying family member at the time of Ms Liu's application for permanent residence, and had not been examined.

[6] The IAD noted that the officer who dealt with Ms Liu's permanent residence application in 2002 informed her that she would not be able to sponsor her son in the future if he was not named as a dependent. It appeared to the IAD that Ms Liu had been informed of the need for her son to be examined and she did not present him for that purpose, triggering the application of the rule in 117(9)(*d*) (s 117(11)(*a*)). The IAD did not agree with Ms. Liu's submission that the officer had determined that her son did not have to be examined, which is an exception to the rule in s 117(9)(*d*) (s 117(10)).

[7] Therefore, the IAD dismissed Ms Liu's appeal.

III. Was the IAD's decision unreasonable?

[8] Ms Liu points out that her case presents a fairly novel circumstance. Most cases in which the rule in s 117(9)(*d*) arises deal with situations where a sponsor had failed to disclose the existence of a child or other family member, and then sought to sponsor that person later. Here, Ms Liu clearly disclosed the existence of her son. The question then is whether the failure to examine her son was a product of a decision by the officer not to examine him, or the result of her failure to present him for examination. If the former, the exception in s 117(10) applies and her son is eligible for sponsorship; if the latter, he is ineligible under s 117(11)(*a*).

[9] Ms Liu points out that she had no duty to present her son for examination without being informed of the need to do so. She submits that she was not informed of the possibility of having her son examined and therefore is not caught by s 117(11)(*a*) (117(10)).

[10] Further, she argues that the officer who handled her permanent residence application had to make a determination not only about whether she was inadmissible, but also about whether her non-accompanying dependent son was inadmissible (s 23 IRPR). To make that determination, the officer would have had to decide whether the child should be examined, and must have concluded that an examination was unnecessary. Otherwise, the officer would not have issued her a visa as she would have been inadmissible under s 23 for having custody of or legal responsibility for a non-accompanying, inadmissible dependent child. Therefore, she says, her case falls within the exception in s 117(10).

[11] At the heart of Ms Liu's position is a factual question – did the officer waive the examination, or did the officer inform her of the need to present her son for examination and she failed to do so? The IAD found the latter. I can overturn the IAD's decision only if its findings of fact and analysis were unreasonable.

[12] With respect to the officer's notes stating that Ms Liu was informed that she would not be able to sponsor her son if he was not named as a dependent child, Ms Liu submits that the notes are ambiguous and, in any case, are poor evidence compared to her sworn testimony. Further, she notes that it is standard practice in these situations not just to inform applicants verbally of the consequences of not having a person examined but to have them sign a letter acknowledging their understanding of those consequences. No such letter exists here.

[13] The IAD found that, since the notes were made contemporaneously with Ms Liu's application, they should be given considerable weight. Therefore, according to the IAD, there

was no evidence supporting Ms Liu's contention that the officer had determined that her son did not have to be examined.

[14] In fact, there are a number of notations on the record from immigration officers. The officer who interviewed Ms Liu in 2002 stated that she had been advised that by not declaring her son as a dependent she would not be able to sponsor him in the future. Later, an officer who reviewed Ms Liu's sponsorship application noted that it appeared that Ms Liu had "failed to declare/examine" her son at the time she applied for permanent residence. A second reviewing officer stated that Ms Liu had been counselled about the consequences of not having her son examined.

[15] Ms Liu's application was then sent to the Canadian Consulate in Hong Kong for a decision. Again, two officers were involved. One stated that Ms Liu had been advised that her son would be permanently excluded from future sponsorship if he did not undergo an examination, and noted that Ms Liu had opted not to have him examined. The second officer was even more definitive. He stated that Ms Liu had determined not to have her son examined and "therefore chose to permanently exclude him". Accordingly, the officer concluded that the exclusion was "a direct and foreseeable result of [the] sponsor's own choice".

[16] These entries are confusing. The very first officer, the one who actually interviewed Ms Liu in 2002, simply stated that Ms Liu had been advised that she could not sponsor her son if she did not declare him as a dependent child. Over a decade later, an officer interpreted that entry as proof that Ms Liu had been told that her son had to be examined and would be permanently

ineligible for sponsorship if he were not, and that Ms Liu had decided that she did not want him to be examined, being fully aware of the consequences.

[17] Ms Liu had made the interviewing officer aware of her son and of grounds for concluding that he was a dependent. Yet the officer's note does not say anything about the need for the son to be examined, does not indicate that Ms Liu was informed of the consequences of failing to present her son for an examination, and does not record any statement from Ms Liu reflecting her understanding of those consequences, or any decision on her part one way or the other about her son. And yet, by the time her file was reviewed in Hong Kong, officers read into the original note inferences in respect of all of these matters.

[18] In light of this evidence, it is difficult to accept the IAD's conclusion that the evidence shows that Ms Liu had been fully informed of the consequences of not presenting her son for examination. Over time, the officers' notes seem inexplicably to have evolved toward greater precision and certitude on this point. In my view, in the face of this evidence, the IAD's conclusion that Ms Liu was caught by s 117(11)(*a*) was unreasonable. In the IAD's own words, this issue was at "the heart of this matter". Accordingly, at a minimum, the IAD was obliged to resolve the factual issue before it with reference to the relevant evidence.

IV. Conclusion and Disposition

[19] The evidence before the IAD did not support its conclusion that Ms Liu had been informed of the need to present her son for examination and that she failed to do so. Accordingly, its conclusion that s 117(11)(*a*) applied did not represent a defensible outcome

based on the facts and the law. Therefore, I must allow this application for judicial review and order another panel of the IAD to reconsider the matter. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is remitted to another panel of the IAD for reconsideration.
3. No question of general importance is stated.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlements sur l'immigration et la protection des réfugiés*, DORS/2002-227
Prescribed circumstances — family members	Cas réglementaires : membres de la famille
23. For the purposes of paragraph 42(1)(*a*) of the Act, the prescribed circumstances in which the foreign national is inadmissible on grounds of an inadmissible non-accompanying family member are that	**23**. Pour l'application de l'alinéa 42(1)*a*) de la Loi, l'interdiction de territoire frappant le membre de la famille de l'étranger qui ne l'accompagne pas emporte interdiction de territoire de l'étranger pour inadmissibilité familiale si :
(*a*) the foreign national is a temporary resident or has made an application for temporary resident status, an application for a permanent resident visa or an application to remain in Canada as a temporary or permanent resident; and	*a*) l'étranger est un résident temporaire ou a fait une demande de statut de résident temporaire, de visa de résident permanent ou de séjour au Canada à titre de résident temporaire ou de résident permanent;
(*b*) the non-accompanying family member is	*b*) le membre de la famille en cause est, selon le cas :
(i) the spouse of the foreign national, except where the relationship between the spouse and foreign national has broken down in law or in fact,	(i) l'époux de l'étranger, sauf si la relation entre celui-ci et l'étranger est terminée, en droit ou en fait,
(ii) the common-law partner of the foreign national,	(ii) le conjoint de fait de l'étranger,
(iii) a dependent child of the foreign national and either the foreign national or an accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law, or	(iii) l'enfant à charge de l'étranger, pourvu que celui-ci ou un membre de la famille qui accompagne celui-ci en ait la garde ou soit habilité à agir en son nom en vertu d'une ordonnance judiciaire ou d'un accord écrit ou par l'effet de la loi,
(iv) a dependent child of a	(iv) l'enfant à charge d'un enfant

dependent child of the foreign national and the foreign national, a dependent child of the foreign national or any other accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law.

à charge de l'étranger, pourvu que celui-ci, un enfant à charge de celui-ci ou un autre membre de la famille qui accompagne celui-ci en ait la garde ou soit habilité à agir en son nom en vertu d'une ordonnance judiciaire ou d'un accord écrit ou par l'effet de la loi.

Excluded relationships

117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

Restrictions

117. (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

(*a*) the foreign national is the sponsor's spouse, common-law partner or conjugal partner and is under 18 years of age;

a) l'époux, le conjoint de fait ou le partenaire conjugal du répondant s'il est âgé de moins de dix-huit ans;

…

[…]

(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

Exception

(10) Subject to subsection (11), paragraph (9)(*d*) does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.

Exception

(10) Sous réserve du paragraphe (11), l'alinéa (9)*d*) ne s'applique pas à l'étranger qui y est visé et qui n'a pas fait l'objet d'un contrôle parce qu'un agent a décidé que le contrôle n'était pas exigé par la Loi ou l'ancienne loi, selon le cas.

Application of par. (9)(*d*)

(11) Paragraph (9)(*d*) applies in respect of a foreign national referred to in subsection (10) if an officer determines that, at the time of the application referred to in that paragraph,

(*a*) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available for examination but did not do so or the foreign national did not appear for examination; or

(*b*) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.

Immigration and Refugee Protection Act, SC 2001, c 27

Application before entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Application de l'alinéa (9)*d*)

(11) L'alinéa (9)*d*) s'applique à l'étranger visé au paragraphe (10) si un agent arrive à la conclusion que, à l'époque où la demande visée à cet alinéa a été faite :

a) ou bien le répondant a été informé que l'étranger pouvait faire l'objet d'un contrôle et il pouvait faire en sorte que ce dernier soit disponible, mais il ne l'a pas fait, ou l'étranger ne s'est pas présenté au contrôle;

b) ou bien l'étranger était l'époux du répondant, vivait séparément de lui et n'a pas fait l'objet d'un contrôle.

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

FEDERAL COURT

SOLICITORS OF RECORD

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