Federal Court  Cour fédérale

Date: 20160510

Docket: IMM-5158-15

Citation: 2016 FC 523

Vancouver, British Columbia, May 10, 2016

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

WANG JIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Immigration Appeal Division(IAD) dated November 2, 2015 wherein the appeal of the Applicant from a determination of a visa officer outside Canada that the Applicant had failed to comply with the residency obligations under the *Immigration and Refugee Protection Act* (IRPA) SC 2001, c. 27 as amended, was dismissed.

[2] The Applicant is an adult male citizen of China. He obtained permanent resident status in Canada in February, 2002. His first wife, a Canadian citizen, is deceased. His second wife is a Chinese citizen in Canada on a temporary resident visa. An officer at the Canadian Embassy in Beijing determined, as set out in a letter dated August 27, 2014 that the Applicant has breached his Canadian residency requirements, hence lost his permanent resident status. He appealed unsuccessfully to the IAD.

[3] The relevant facts as found by the IAD are not in dispute. The Applicant, while in China, signed an employment agreement with a British Columbia corporation, Libra, apparently engaged in the rice business, as a "Business Coordinator or such other position as (Libra) may require". The Applicant remained in China carrying out tasks which were not clearly described by the Applicant in the Record. In the relevant five year period, the Applicant spent a maximum of 185 days in Canada and was accompanying a Canadian citizen for 69 days. Clearly, these time periods are insufficient unless the Applicant can bring himself under the exception of being "on assignment" as provided for in section 61(3) of the Regulations under IRPA which state:

61 (3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression employed on a full-time basis by a Canadian business or in the public service of Canada or of a province means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the	**61 (3)** Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les expressions travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale et travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale, à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une

employment or contract to	entreprise canadienne ou de l'administration publique, fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture :
(a) a position outside Canada;	a) soit à un poste à l'extérieur du Canada;
(b) an affiliated enterprise outside Canada; or	b) soit à une entreprise affiliée se trouvant à l'extérieur du Canada;
(c) a client of the Canadian business or the public service outside Canada.	c) soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du Canada.

[4] The determination by the IAD with respect to section 61 (3) is set out at paragraphs 9 to 13 of its decision:

> [9] I find that the determinative factor in this case relates to the question of whether the appellant was in fact assigned to a job in China. The Federal Court in *Jiang* addressed the question of defining assignment for the purpose of the application of section 61 (3) of the *Regulations*. The court set out that:
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> > The word "assigned" in subsection 61 (3) of the *Regulations* means that an individual who is assigned to a position outside Canada on a temporary basis and who maintains a connection to a Canadian business or to the public service of Canada or of a province, may therefore return to Canada.
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> [10] I find that the appellant was not assigned to work in China within the meaning of section 61 (3) of the *Regulations*. Although the employment contract notes that it was signed in Richmond, British Columbia on January 1, 2012, the documentary evidence and the testimony confirmed that the appellant was in China on that date. However, the signing of a contract of employment with a Canadian company for employment in another country does not mean that the substance of assignment as required by the *Regulations* has been met. The evidence in an individual case must

> be examined and a factual determination made about whether an assignment as required by the *Regulations* has occurred.
>
> [11] The appellant was in China at the time he was hired for his position with Libra. The appellant did not work for Libra in Canada and the position in the employment contract is in China only, with no reference to Canadian employment. The evidence does not support that the appellant was entitled to return to Canada to work with the company. I find that the mere signing of the employment document with a Canadian company does not establish that there was, in fact, any assignment. The appellant was living in China at the time the contract was signed; the job was to work in China and only in China. Indeed, the testimony of the witness and the documentary evidence indicated that the appellant was hired for the position due to his strong connections in China. I find that the appellant's contract was one of a local hire in a foreign country.
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> [12] I accept the testimony of the witness that the appellant would now have a position in Canada. However, I find that the concept of assignment is a forward looking one that occurs at the time the assignment is made. The later existence of a position in Canada cannot convert a foreign local hire into an assignment. I find that the appellant was not assigned to a position outside of Canada as required by the *Regulation*s.
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> [13] On the basis of the testimony and the materials contained in the record and the exhibits, I find that the appellant has not met the residency requirements imposed under section 28 of the *Act* and the refusal to issue travel document is valid in law. I find that the breach was a significant one as the appellant fell well short of the requisite 730 days.

[5] Applicant's counsel argued that the reliance of the IAD in paragraph 9 of its decision upon the Federal Court's decision in *Jiang (Minister of Citizenship and Immigration v Jiang*, (2011 FC 349)) was misplaced. Counsel argued that *Jiang* was concerned with a memorandum of understanding with Investissement Québec and residency requirements set out therein.

[6] While *Jiang* was concerned with the memorandum of understanding, the finding, especially as set out in paragraph 9 of the IAD decision, is of more general application. This more general understanding was set out by Justice Noël of this Court in *Bi v Minister of Citizenship and Immigration*, 2012 FC 293, at paragraph 21

> [21] It was this Court's view in *Jiang* that to have time spent outside of Canada count toward the residency requirement, the permanent resident must be assigned temporarily, must maintain a connection with his employer, and must return to work for it in Canada following the assignment. Even if a translation error occurred during the hearing which caused a misunderstanding as to the Applicant's continued connection with his employer, there is no doubt the Applicant was not assigned to temporarily work abroad. Instead, his work abroad began from the moment he was hired and continued to the expiry of his contract nearly three years later. Furthermore, there is simply no evidence his employer had agreed to keep the Applicant on in Canada after this period. The Applicant only indicated at the hearing that he now wanted to talk to the employer to tell him or her that he wanted to work in Canada and inquire as to whether another employee could be sent abroad in his place (TR at 28, Transcript of Proceedings at lines 10-15). As a result, I find the IAD's conclusion that the Applicant did not meet his burden of establishing that he had satisfied the requirements under subsection 61(3) of the IRPR to be reasonable.

[7] Justice Shore of this Court expressed the same understanding in *Baraily v Minister of Citizenship and Immigration*, 2014 FC 460 at paragraphs 24 and 25:

> [24] Contrary to the Applicants' argument, the Court sees no basis upon which not to follow the decision in *Jiang* or *Bi*, above. Without establishing a material difference between the factual and evidential basis for this Application and these other decisions, a difference between the issues at bar, that there is legislation or binding authority that the decisions did not consider that would change the outcome, or that injustice would result from following these decisions, the doctrine of judicial comity applies (*Xi*, above, at para 51).
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> [25] The Court disagrees with the Applicants' assertion that subsection 61(3) of the Regulations allows permanent residents to accumulate days towards meeting their residency requirement

> simply by being hired on a full-time basis by a Canadian business outside of Canada. To accept such an interpretation of subsection 61(3) would be inconsistent with the objective set forth in paragraph 3(1)(e) of the IRPA "to promote the successful integration of permanent residents into Canada". It would hardly promote "successful integration" of permanent residents into Canada if the IRPA exempted immigrants from having to establish themselves in Canada on the sole basis that they work for a Canadian company abroad. Clearly, Parliament's intent in imposing the 5-year residency obligation was to prevent these types of situations. This intent is further evidenced by the addition of subsection 61(2) in the Regulations, which excludes businesses that serve primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada from the definition of a "Canadian Business" under subsection 61(1). The Applicants' interpretation would also arguably be inconsistent with the objective set forth in paragraph 3(1)(a) of the IRPA "to permit Canada to pursue the maximum social, cultural and economic benefits of immigration".

[8] The decision under review here is entirely consistent with all these authorities and entirely reasonable given the factual circumstances here. I will not set it aside.

[9] No party requested a certified question.

JUDGMENT

FOR THE REASONS PROVIDED, THE COURT ADJUDGES that:

1. The application is dismissed.

2. No question is certified.

3. No order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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