Federal Court  Cour fédérale

Date: 20181219

Docket: IMM-1314-18

Citation: 2018 FC 1281

Toronto, Ontario, December 19, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JIANZHONG YU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is the second of two judicial reviews brought by Mr. Yu, both of which impact his permanent residence application. The first was a challenge to a stand-alone application for criminal rehabilitation. In this second judicial review, Mr. Yu challenges the refusal of his permanent residence application, which was denied due to criminal inadmissibility,

misrepresentation, and insufficient humanitarian and compassionate [H&C] grounds to warrant relief or grant a temporary resident permit [TRP].

[2] Like the first, this second judicial review will be denied, given that I do not find the refusal of Mr. Yu's permanent residence to be unreasonable. The first decision may be found at 2018 FC 1280. Given that each of the two related decisions has been issued separately, pursuant to Mr. Yu's request, a certain amount of repetition is unavoidable in the background section of each.

II. Background

[3] Mr. Yu, a Chinese citizen, served as the Vice-President of a Chinese company. He was found to have taken advantage of his position from 1997-1999, collecting bribes in the amount of 1.07 million Yuan from five entities on various occasions. He was convicted of bribery in 1999, sentenced to life in prison, and fined. Mr. Yu's sentence was subsequently reduced in 2001, 2002 and again in 2010. Ultimately, Mr. Yu served his sentence, either in custody or on medical parole, from August 19, 1999 to June 21, 2010.

[4] After serving his sentence, Mr. Yu applied for and obtained a Temporary Resident Visa [TRV] in 2014. He failed to disclose his criminal conviction in that application. Mr. Yu arrived in Canada in March 2015 and married a Canadian citizen some six months later in September 2015. Mr. Yu submitted an application for permanent residence under the Spouse/Common-Law Partner in Canada class, and included his two daughters as dependants. He again failed to disclose his criminal conviction in this application. Mr. Yu only disclosed the

conviction in January 2018 after Immigration, Refugees, and Citizenship Canada learned of his criminal history, and questioned him about it. Shortly thereafter, he submitted an application for rehabilitation, which was refused (see 2018 FC 1280).

III. Decision and Issues Raised

[5] The officer found that Mr. Yu's criminal offence, if committed in Canada, would be contrary to subparagraph 121(1)(a)(ii) of the *Criminal Code of Canada*, RSC, 1985, c C-46. As such, the officer refused Mr. Yu's application for permanent residence finding him inadmissible pursuant to paragraphs 36(2)(b) and 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA].

[6] In the decision, the officer notes:

> … It is determined that althought [*sic*] his crime committed in China is equivalent to s.121(1)(A)(ii) of the *Criminal Code of Canada*, which is a less serious inadmissibility defined in A36(2)(B) of the *Immigration and Refugee Protection Act*, the detailes [*sic*] of the crime in terms of multi-years involved, the large amount of the bribes taken and his continued and repeated engagement in resorting to deceit with the intention to circumvent Canadian immigration law and regulations by gross misrepresentation and his efforts to minimize the offence, has not satisfied the Minister's Delegate that Mr. Yu genuinely understands, acknowledges and takes responsibility for his criminal past, or has demonstrated a conscientious and honesty [*sic*] attitude with his criminal past. He has, instead, continued to resort to deceit with the intention to circumvent the law and regulations for his own benefit whenever he sees fit.
>
> [Emphasis added]

[7] Both parties agree that the standard of reasonableness applies to the review of H&C applications. They are correct. Indeed, this standard equally applies to an officer's assessment of whether to grant a TRP (*Chaudhary v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 128 at paras 18–19). The sole issue raised is whether the refusal of Mr. Yu's application for permanent residence is reasonable.

IV. Analysis

A. *Inadmissibility findings*

[8] In this second judicial review, Mr. Yu raises many of the same arguments that he did in the related file (see 2018 FC 1280 [*Yu I*]); for example, he challenges the rehabilitation decision because it did not take recidivism into account, but rather focused on his past conviction and a failure to disclose his past. I will focus on arguments not already mentioned in *Yu I* rehabilitation decision, namely that (i) that the officer erred in exaggerating the degree and amount of criminal activity; and (ii) Mr. Yu innocently and inadvertently misrepresented himself.

[9] First, Mr. Yu takes issue with the officer's characterization of the amount that he took in bribes as being "large amounts" and the duration of the crimes as being "multi-years".

[10] I am not persuaded that the officer exaggerated the degree and amount of bribes. The officer both reasonably stated the amount of bribes received by Mr. Yu as being 1.07 million

Yuan, and the duration during which he received bribes as being over multiple years, as Mr. Yu indeed received bribes from 1997-1999.

[11] In my view, there is nothing wrong with describing a three year period as spanning multiple years. Multiple can mean ‘more than one or two’ and while that number can go much higher, there is nothing unreasonable about the officer’s choice of words in this instance.

[12] Moreover, the amount of money involved in the bribes is of no moment. Even if the officer made a mistake in the quantum of the bribes, the relevant point for the underlying application was whether the bribes and conviction arose, and if so, whether they satisfied the Canadian equivalency requirement under the criminal inadmissibility provisions. Having done so, the relevant assessment was of Mr. Yu’s likelihood of continuing criminal conduct (*Tejada v Canada (Citizenship and Immigration)*, 2017 FC 933 at para 9). To contest the term “multi-years”, or disagree about the officer’s restatement of the quantum of the bribes, is tantamount to losing the forest for the trees: it elevates form over substance.

[13] Both the inadmissibility and the rehabilitation analyses are more complete in the decision on permanent residence than in the stand-alone rehabilitation decision in *Yu I*. I see no reason to retread the same ground already traversed in that associated decision. All the same commentary and analysis applies.

[14] Second, Mr. Yu claims that his error was inadvertent. He states that he believed his record was clean because his police certificate showed that he had no criminal record. As a

result, he explains that he did not declare his previous criminal conviction in either his application for permanent residence or his TRV application. He argues that the Court failed to analyze the innocent and inadvertent nature of the misrepresentations, and relies on *Medel v Canada (Minister of Employment & Immigration)* [1990] 2 FC 345 [*Medel*] to submit that there is an accepted exception to the application of paragraph 40(1)(a) of IRPA, for innocent and inadvertent misrepresentation.

[15] The Respondent counters that intention is not a requirement for the application of paragraph 40(1)(a) of IRPA (*Paashazadeh v Canada (Minister of Citizenship and Immigration)*, 2015 FC 327 at para 18). The Respondent contends that the exception is "relatively narrow" and will only apply in "truly exceptional circumstances" (*Oloumi v Canada (Minister of Citizenship & Immigration)*, 2012 FC 428 at paras 32, 35–36, 39). The Respondent argues that, in any event, Mr. Yu was aware of the information which he withheld, but chose not to include it.

[16] The officer noted that Mr. Yu falsely stated that he did not have any foreign convictions on both his TRV application and his application for permanent residence. The officer further noted that Mr. Yu falsified personal history by stating that he was employed as the Director of Hunan Provincial Government Engineering Department from 1985-2001 and as the manager of another company from 2001-2009, when he was in fact serving his criminal sentence in custody or on medical parole.

[17] I am persuaded by the Respondent's position. This Court has held that an applicant may be able to take advantage of an exception to the application of paragraph 40(1)(a), but it is only

in exceptional cases where applicants can demonstrate that they honestly and reasonably believed that they were not withholding material information where the knowledge was beyond their control (*Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 at para 22).

[18] This court has not allowed this exception where an applicant knew about the information, but contended that s/he honestly and reasonably did not know it was material to the application; such information is within the applicant's control and it is the applicant's duty to accurately complete the application (*Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 18).

[19] Here, Mr. Yu was aware that he had been convicted of bribery in China, and was aware that he had served a sentence from August 19, 1999 to June 21, 2010, either in custody or on medical parole. Therefore, it cannot be said that he honestly or reasonably believed that he was not misrepresenting anything. Mr. Yu does not fall within the narrow exception set out in *Medel*, as it is simply not plausible that he had no idea that he had a previous conviction. Thus, the officer's finding was reasonable.

B. *H&C analysis*

[20] In his application, Mr. Yu asked that he be exempted from the ordinary requirements of IRPA as a result of a subsection 25(1) H&C consideration, which provides that the Minister may grant permanent resident status to a foreign national who is inadmissible if it is justified by humanitarian and compassionate considerations, taking into account the best interests of the child [BIOC] directly affected.

[21] Mr. Yu submits that the officer (i) lacked the specialized knowledge as to the procedure for obtaining a police certificate in China; and (ii) failed to properly consider the BIOC, by unreasonably basing the determination on: the divorce agreement in evidence, the possibility of other childcare means in China, and the assumption that China has an excellent education system and that the children speak the language, without further analysis on this point.

[22] The Respondent counters that the officer (i) based the police certificate finding on common sense and rationality – not on specialized knowledge; and (ii) that the officer's BIOC analysis was reasonable.

[23] In my view, the officer reasonably undertook a global assessment of the H&C factors by considering Mr. Yu's repeated misrepresentation, as well as the BIOC and any possible financial hardship resulting from separation. With respect to the police certificate, the officer found as follows:

> Based on the information before me, the only conclusion [that] can be reached is that Mr. Yu has engaged in gross misrepresentation repeatedly and intentionally. No matter in what ways and means he obtained the notary certificate of no criminal record, he knew the information was fraudulent.

[24] First, I agree with the Respondent that the officer's finding was based on common sense – the police certificate indicated that he had no conviction, when in reality, he did have a conviction at one time. However, as discussed in *Yu I*, the question posed to the applicant was far broader:

> Have you, or, if you are the principal applicant, any of your family members listed in your application for permanent residence to Canada, ever … b) been convicted of, or are you currently charged

> with, on trial for, or party to a crime or offence, or subject of any criminal proceedings in any other country?

[25] It is well-accepted that a decision-maker can rely on logic and common sense to make inferences from known facts (*Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 at para 38). In this decision, the officer's logic and inferences therefrom, were reasonable.

[26] Second, with respect to the officer's BIOC analysis, I note that *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paragraph 23, emphasized that there will inevitably be some hardship associated with being required to leave Canada, but that this alone will generally not be sufficient to warrant relief on H&C grounds.

[27] Here, the officer reasonably found that there was insufficient evidence demonstrating that the children could not stay with their biological mother upon return to China. While the officer did note that the children are close to Mr. Yu's current wife, Ms. Yang, and that they consider her to be their mother, the officer looked to the evidence and relied on the divorce agreement stipulating that Mr. Yu pay the children's biological mother 200,000 Yuan annually for the children's expenses while they live with her.

[28] The officer noted that Ms. Yang returns to and stays in China frequently, and that she could continue to do so. In the recent past, she has spent months outside of Canada in China. The officer further noted that there was insufficient evidence demonstrating that Mr. Yu could not find other means of childcare in China should he be at work. Finally, the officer also noted a lack of evidence that the children, who attended school in Hong Kong, speak the language, and

have only been in Canada since July 2017, would not reintegrate to life in China, including schooling.

[29] With the exception of comments made regarding the quality of education in China, the officer's observations were reasonable. Many of the points made regarding the children's return to China were lacking in evidence.

[30] Ultimately, the BIOC analysis is highly contextual and must be responsive to the children's particular age, capacity, needs and maturity (*Kanthasamy* at para 35). I am satisfied in this case, viewed holistically and contextually, that the officer's H&C analysis withstands scrutiny on a reasonableness review. The officer was simply stating that if the parents needed to work outside of school hours, the children could be placed in childcare. Furthermore, the evidence was that the children had been well cared for in Hong Kong and Canada, including financially, and there was no evidence as to why this would not be the case should they have to apply from abroad. As noted above, there will inevitably be hardship in leaving Canada (*Kanthasamy* at para 23).

[31] As the Respondent notes, H&C relief is not intended to be an alternative immigration stream (*Havlikova v Canada (Citizenship and Immigration)*, 2018 FC 691 at para 62). The H&C exemption is an exceptional and a highly discretionary remedy in the nature of extraordinary and special relief (*Chokr v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1022 at para 6). While the decision-maker must weigh several relevant factors, there is no rigid

algorithm that determines the outcome (*Douti v Canada (Citizenship and Immigration)*, 2018 FC 1042 at para 4).

[32] The onus was on Mr. Yu to provide sufficient evidence in support of his request for H&C relief. It is clear from the officer's notes that each of Mr. Yu's arguments was appropriately considered. Thus, the officer reasonably found that there were insufficient H&C grounds to exempt Mr. Yu from his inadmissibility.

C. *TRP refusal*

[33] Turning now to the TRP refusal, section 24 of IRPA provides that an inadmissible foreign national may be granted a temporary resident permit if the officer is of the opinion "that it is justified in the circumstances".

[34] I note that it is not necessary to carry out a distinct analysis of a TRP attached to a permanent residence application when the H&C application and the TRP application are intertwined and the same reasoning may apply to both (*Cojuhari v Canada (Citizenship and Immigration)*, 2018 FC 1009 at para 20). Considering my findings above, including with respect to the rehabilitation component of this application in *Yu I*, the officer's refusal of the TRP was also reasonable.

V. Conclusion

[35] This application for judicial review is dismissed. No questions for certification were argued, and I agree that none arise on the facts of this case.

JUDGMENT in IMM-1314-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and none arise.

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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