Federal Court

Cour fédérale

Date: 20191121

Dockets: IMM-861-19
IMM-862-19
IMM-863-19

Citation: 2019 FC 1484

Ottawa, Ontario, November 21, 2019

PRESENT: Mr. Justice Gascon

Docket: IMM-861-19

BETWEEN:

XIAOXIA YANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-862-19

AND BETWEEN:

ZIMING WANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-863-19

AND BETWEEN:

SHIBIN WANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants in related files IMM-861-19, IMM-862-19 and IMM-863-19 are members of the same family and citizens of China. They are Mr. Shibin Wang [Mr. Wang], his wife Mrs. Xiaoxia Yang [Mrs. Yang] and their son Mr. Ziming Wang [Ziming] [together, the Applicants].

[2] In 2008, Mr. Wang filed an application for permanent residence in Canada, which included Mrs. Yang and Ziming. In December 2013, the Applicants received their permanent resident status in Canada. However, in July 2017, an immigration officer prepared an inadmissibility report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], finding that Mr. Wang had misrepresented or omitted a material fact in his application for permanent residence, contrary to paragraph 40(1)(*a*) of the IRPA, and that the Applicants were therefore inadmissible in Canada. The report found that Mr. Wang answered no

to the question of whether he or his family members had ever “been refused refugee status, an immigrant or permanent resident visa […] or visitor or temporary resident visa to Canada or any country” when he updated his permanent resident application in May 2013. This response was incorrect as, between his initial application in 2008 and the updated application in May 2013, Mr. Wang was refused a visitor visa to the United States [US] on four different occasions, namely, in December 2010, January 2011, May 2011 and March 2013. The US authorities gave limited reasons for these refusals, explaining simply that Mr. Wang’s business travel was not credible, that inconsistencies existed in his requests, and that the invitation letter he submitted was fraudulent.

[3] In a decision issued in January 2019 [Decision], the Immigration Appeal Division [IAD] dismissed the Applicants’ appeals of the Immigration Division’s conclusions, and found that Mr. Wang’s misrepresentation concerning the non-disclosure of his four failed US visitor visa applications were material misrepresentations that could have induced an error in the administration of the IRPA. Removal orders were then issued against the three Applicants.

[4] Mr. Wang, Mrs. Yang and Ziming have each applied to this Court for judicial review of the Decision. They submit that (i) the IAD failed to consider evidence of the circumstances of the misrepresentation to determine whether it was material, (ii) the evidence was insufficient to support the IAD’s finding, and (iii) the IAD erred with respect to the burden of proof imposed by paragraph 40(1)(*a*) of the IRPA. They each ask the Court to quash the Decision and to send it back to the IAD for redetermination by a different panel.

[5] For the reasons that follow, I will dismiss the three applications. Having considered the evidence before the IAD, the reasons for the Decision and the applicable law, I can find no basis for overturning the IAD's Decision. The Decision was responsive to the evidence and the outcome is defensible based on the facts and the law. It falls within the range of possible, acceptable outcomes. Furthermore, even though a passage of the Decision could have been more clearly worded, the reasons for the Decision adequately explain how the IAD concluded that Mr. Wang had repeatedly misrepresented a material fact in his application for permanent residence, and how the evidence was sufficient to meet the requirements of paragraph 40(1)(*a*). There are therefore no grounds to justify this Court's intervention.

II. Background

A. *The IAD's Decision*

[6] The IAD first determined that the finding of misrepresentation was legally valid. The IAD described Mr. Wang's explanations for the problems with his US visa applications, namely that an agency filled out the forms, that he did not understand English, and that he did not deliberately withhold information. The IAD noted that a deliberate or intentional act or omission is not required to be found inadmissible for misrepresentation and that misrepresentation by a third party for an applicant is covered, as evidenced by the use of the term "indirectly" in paragraph 40(1)(*a*) of the IRPA (*Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059; *Mohammed v Canada (Citizenship and Immigration)*, [1997] 3 FC 299 (FC)). Given Mr. Wang's profile and testimony, the IAD did not believe that Mr. Wang would have signed a permanent residency application without understanding its content. The IAD further

indicated that paragraph 40(1)(*a*) requires proof that the Applicants directly or indirectly misrepresented or withheld material facts relating to a relevant matter that induced or could have induced an error in the administration of the IRPA. The IAD emphasized that it is sufficient that the misrepresentation might have resulted in an error, and that Mr. Wang's non-disclosure of the US refusals foreclosed the possibility of further inquiries and background checks. The IAD concluded that paragraph 40(1)(*a*) applied to Mr. Wang, as well as to Mrs. Yang and Ziming since they benefited from the misrepresentation and thus also directly or indirectly withheld material facts.

[7] Having found that there had been a misrepresentation, the IAD considered whether it should grant discretionary relief pursuant to paragraph 67(1)(*c*) of the IRPA. The IAD examined whether, at the time that the appeal was disposed of, taking into account the best interests of the child, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case. The IAD refused to grant special relief, having considered various factors, including the maintenance of the immigration system's integrity, the seriousness of the misrepresentation, the lack of remorse or accountability expressed by the Applicants for the false information, the degree of establishment in Canada, the absence of immediate family in Canada, the letters of support from the community, the degree of hardship caused by a removal from Canada, the degree of establishment in China, and the fact that the Applicants are all adults. This part of the Decision is not contested by the Applicants.

B. ***The standard of review***

[8] This Court has repeatedly held that the interpretation and application of paragraph 40(1)(*a*) of the IRPA raise mixed questions of fact and law that are reviewable on a standard of reasonableness (*Kangah v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 814 at para 15; *Zhou v Canada (Citizenship and Immigration)*, 2018 FC 880 at paras 13-16; *Mohseni v Canada (Citizenship and Immigration)*, 2018 FC 795 at paras 5, 8; *Sidhu v Canada (Citizenship and Immigration)*, 2014 FC 419 at para 12; *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 [*Goburdhun*] at para 19). Since the jurisprudence has already established that the applicable standard of review is reasonableness, there is no need to proceed to a further analysis of the standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 62).

[9] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making process", and the IAD's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). In other words, the reasons behind a decision are reasonable if they "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 16). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the

decision-maker to any relevant factor (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 112).

[10] The standard of reasonableness requires to show deference to the decision-maker as it is "grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing" (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33; *Dunsmuir* at paras 48-49). Under a reasonableness review, when a question of mixed fact and law falls squarely within the expertise of a decision-maker, "the reviewing court's task is to supervise the tribunal's approach in the context of the decision as a whole. Its role is not to impose an approach of its own choosing" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [*CHRC*] at para 57; *Newfoundland Nurses* at para 17).

III. Analysis

A. *Failure to properly consider the evidence*

[11] The Applicants first challenge the IAD's assessment of the evidence and claim that the IAD failed to consider the particular circumstances of Mr. Wang. They submit that, in order to find a permanent resident inadmissible under paragraph 40(1)(*a*) of the IRPA, the IAD had to be satisfied that (a) a direct or indirect misrepresentation was made by the person, (b) the misrepresentation concerned a material fact relating to a relevant matter, and (c) the misrepresentation induced or could have induced an error in the administration of the IRPA (*Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 32). The Applicants further

contend that, to determine whether a misrepresentation is material, all relevant information should be considered, including facts which are personal to the person alleged to have made the misrepresentation (*Murugan v Canada (Citizenship and Immigration)*, 2015 FC 547 at paras 13-14). Moreover, they assert that failure to conduct a proper analysis of materiality constitutes a reviewable error (*Koo v Canada (Citizenship and Immigration)*, 2008 FC 931 at para 38). The Applicants thus argue that the IAD did not conduct a proper analysis of materiality in that it only considered whether the non-disclosure of the US visa refusals foreclosed the possibility of further inquiries and background checks, ignored Mr. Wang's particular circumstances and failed to inquire whether the non-disclosure could have caused an error in this case.

[12] I do not agree.

[13] I am satisfied that Mr. Wang's situation squarely falls under paragraph 40(1)(*a*) of the IPRA, which provides that a permanent resident or a foreign national is inadmissible for misrepresentation "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". It is well accepted that the law does not require misrepresentation to be intentional, deliberate or negligent (*Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 28). In addition, in order to be deemed material, a fact need not be decisive or determinative; it will be material if it is important enough to affect the process undertaken or the final decision (*Chhetry v Canada (Citizenship and Immigration)*, 2016 FC 513 at para 30; *Goburdhun* at para 37; *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25).

[14] In this case, the Applicants have acknowledged before the IAD that Mr. Wang's US visa applications were refused on four separate occasions. The fact that Mr. Wang obtained assistance to complete some of his US applications and the May 2013 update of his application for permanent residence does not absolve him of the responsibility to be truthful to Canadian officials. Further to my review of the Decision and of the evidence before the IAD, I am satisfied that the IAD conducted a reasonable examination of the evidence before concluding that the misrepresentation had the required level of materiality. The IAD specifically found that the non-disclosure of the US refusals foreclosed the possibility of further inquiries and background checks by the Canadian immigration authorities. If Mr. Wang had answered truthfully, immigration officials may have asked additional questions about the refusals to determine if US officials were aware of something unknown to Canadian officials.

[15] All the elements that must be present in order for a permanent resident or a foreign national to be found inadmissible under paragraph 40(1)(*a*) of the IRPA are met here: there was a misrepresentation of a fact and this misrepresentation concerned a material fact, in the sense that it had the potential to induce an error in the administration of the law or have an impact on the process undertaken.

[16] I further agree with the Minister that it is unnecessary to carry out a materiality analysis when the circumstances make it obvious that the misrepresentation creates a risk of error in the administration of the IRPA (*Inocentes v Canada (Citizenship and Immigration)*, 2015 FC 1187 at para 19). This is the case here, as the misrepresentation clearly prevented the Canadian immigration authorities from conducting a more thorough investigation of Mr. Wang's US visa

refusals and could thus have induced an error in the administration of the IRPA. Given the specific question asked about prior refusals of visitor visa in the permanent resident application, and the fact that Mr. Wang omitted to mention four different refusals, it was certainly not unreasonable for the IAD to conclude that his circumstances did not fit within the narrow "innocent misrepresentation" category. In other words, the IAD made a factual finding that fell well within the range of possible, acceptable outcomes in respect of the facts and the law.

[17] I am also not persuaded that the IAD did not consider Mr. Wang's personal circumstances before determining that the misrepresentation was material. On the contrary, this is precisely what the IAD did in the Decision. After evaluating the evidence and Mr. Wang's testimony, the IAD concurred with the Immigration Division's findings that the non-disclosure of the US visa refusals foreclosed the possibility of further inquiries and background checks. The Decision and the evidence on the record show that the IAD thoroughly evaluated the various refusals of US visitor visa, relying on the Applicants' testimonies. The record further shows that all of the Applicants extensively testified with the assistance of their counsel before the IAD on these US visa refusals. In fact, in the Decision, the IAD discussed these testimonies at length before concluding that the Applicants showed little remorse.

[18] In the end, the arguments put forward by the Applicants simply express their disagreement with the IAD's assessment of the evidence. The Applicants ask this Court to prefer their own assessment and reading to that of the panel. In essence, Mr. Wang, Mrs. Yang and Ziming are inviting the Court to reweigh the evidence that was presented before the IAD. However, in conducting a reasonableness review of factual findings, it is not the role of the Court

to do so or to reassess the relative importance given by the decision-maker to any relevant factor or piece of evidence. It suffices to conclude that the IAD's reasoning process is not flawed and is supported by the evidence. I am satisfied that the Applicants' explanations and contentions were all dealt with and considered by the IAD; they were just not retained by it.

[19] I underscore that the question before me is not whether the interpretation proposed by the Applicants could be sustainable or reasonable. What I have to determine is whether the IAD's interpretation was, and whether it falls within the range of possible, acceptable outcomes. The fact that there could perhaps be other reasonable interpretations of the facts underlying Mr. Wang's paragraph 40(1)(*a*) misrepresentation does not imply, in and of itself, that IAD's interpretation was not.

[20] On judicial review, the Court must not to substitute its own judgment for that of the IAD. In a reasonableness review, the reviewing court is concerned with the existence of justification, transparency and intelligibility within the decision-making process and with determining whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*CHRC* at para 55). The Court must focus on "finding irrationality or arbitrariness" such as "the presence of illogic or irrationality in the fact-finding process" or the analysis, or "factual findings without any acceptable basis whatsoever" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99, overturned for other reasons 2015 SCC 61). I find no irrationality or arbitrariness in the IAD's conclusion that Mr. Wang had made a material misrepresentation contrary to paragraph 40(1)(*a*) of the IRPA.

B. *Burden of proof*

[21] The Applicants also contend that the IAD did not apply the proper burden of proof in its Decision. They take particular exception with a passage contained at paragraph 14 of the Decision, where the IAD stated that "[p]aragraph 40(1)(a) requires that the Applicants, on a balance of probabilities, that they did not directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of the [IRPA]". They claim that, pursuant to paragraph 45(d) of the IRPA, if a person subject to a section 44 report is a permanent resident, the burden is on the Minister to prove, on a balance of probabilities, that this person has committed a material misrepresentation that renders him or her inadmissible. The burden to do so is not on the permanent resident.

[22] I disagree with the Applicants' reading of the Decision in that respect. When the IAD's Decision is read as a whole, I find that the Applicants' argument on an alleged reversal of the applicable burden of proof is without merit.

[23] I do not dispute that the Minister carries the onus of proving an alleged misrepresentation under paragraph 40(1)(*a*) of the IRPA (*Canada (Public Safety and Emergency Preparedness) v Amergo*, 2018 FC 996 at para 18; *Hehar v Canada (Citizenship and Immigration)*, 2016 FC 1054 at para 35). I also acknowledge that, as worded, paragraph 14 of the IAD's Decision could be interpreted as suggesting that the IAD effectively put on the Applicants the onus of demonstrating, on a balance of probabilities, that they did not directly or indirectly misrepresent or withhold material facts relating to a relevant matter that could induce an error in the administration of the IRPA. However, in this case, there is no question that there was a misrepresentation, given Mr. Wang's concession that he was refused a US visa on four separate

occasions and the fact that his May 2013 updated application did not declare these refusals. Furthermore, when the extract singled out by the Applicants is put in context and when the Decision is read as a whole, I have no hesitation to conclude that the IAD performed a thorough evaluation of the evidence submitted by the parties, ensured that the Minister had provided the required evidence, and reasonably concluded that the Minister had met his onus on the misrepresentation and its materiality. In other words, further to my review of the Decision and of the record before the IAD, I do not agree that the IAD erroneously interpreted and misapplied the burden of proof imposed by paragraph 40(1)(*a*) of the IRPA.

IV. <u>Conclusion</u>

[24] For the reasons set forth above, the applications for judicial review are dismissed. I am satisfied that the IAD reasonably considered the evidence before it and adequately explained why it concluded, on a balance of probabilities, that Mr. Wang had committed a misrepresentation and withheld material facts in his application for permanent residence. On a standard of reasonableness, it suffices if the decision subject to judicial review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. This is the case here. Therefore, I cannot overturn the IAD's Decision.

[25] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT in IMM-861-19, IMM-862-19 and IMM-863-19

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are dismissed, without costs.

2. No question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-861-19
STYLE OF CAUSE:	XIAOXIA YANG v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-862-19
STYLE OF CAUSE:	ZIMING WANG v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-863-19
STYLE OF CAUSE:	SHIBIN WANG v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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