Date: 20090317

Docket: IMM-2242-08

Citation: 2009 FC 274

Ottawa, Ontario, March 17, 2009

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

WANG YING GUAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Mr. Wang Ying Guan, the Applicant, is a citizen of the People's Republic of China (the PRC). He was born in Fuzhou, PRC, on September 6, 1962.

[2] He applies for judicial review of the March 9, 2008 decision by Immigration Counsellor, Martina Stvan, (the Officer), wherein his application for permanent residence was rejected. The

application is brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the Act).

II. Overview

[3] In his application for permanent residence, the Applicant claimed that his daughter, Wang Huan Huan, was his biological child. When the Beijing Visa Office (the visa office) insisted on DNA testing, the Applicant admitted that he and his wife had adopted Wang Huan Huan. Upon being pressed for proof of the adoption, the Applicant finally admitted that Wang Huan Huan had never been legally adopted. As a result, the Officer found that because Wang Huan Huan was not the Applicant's biological or adopted child, she did not qualify as a "dependent child" under the Act. The Officer concluded that the Applicant was inadmissible to Canada for misrepresentation and rejected his application for permanent residence.

II. Facts

[4] The Applicant married Lin Li Zhen on November 29, 1984.

[5] They are the biological parents of four children: Wang Xiao Ji, born December 21 1985; Wang Xiao Bin, born March 13, 1987; Wang Xiao Peng, born July 22, 1989; and Wang Xiao Jun, born on June 30, 1992.

[6] Lin Li Zhen found their fifth child, Wang Huan Huan, outside Taijiang District Hospital on November 15, 1997. The Applicant and his wife cared for her ever since, but the child has never

been officially adopted. The Applicant believes Wang Huan Huan was born on November 12, 1997 as she had a note with that date of birth on it on her person when Lin Li Zhen found her.

[7] On August 25, 2005, a Certificate of Nomination under the Province of Manitoba's Provincial Nominee Program was issued in the Applicant's name. The Certificate listed as "Accompanying Dependents" the Applicant's spouse, Lin Li Zhen, and only two children, Wang Xiao Ji, and Wang Xiao Bin.

[8] On September 6, 2005, the visa office received the Applicant's application for permanent residence in Canada. The Applicant applied as a skilled worker under the Manitoba Provincial Nominee Program. In his application, the Applicant listed as family members his spouse and five dependent children, including Wang Huan Huan listed as a "daughter". He provided notarial certificates with his application attesting to the children's births and parentage, including a certificate stating that he and his wife were Wang Huan Huan's parents.

[9] On December 7, 2005, the visa office received a letter from the Applicant, responding to its request for birth certificates, explaining that he could not provide birth certificates for his children. He explained that by reason of a two-child policy in the rural town in which he lived, only his first two children were born legally at home and were registered on the family's "hukou" (family household registration books which are held by all Chinese nationals residing in China). He further indicated that his wife went into hiding until the other children, including Wang Huan Huan, were born. He provided proof that fines were paid for his third and fourth sons which allowed for their registration on the family "hukou". As for Wang Huan Huan, the Applicant explains that they were

able to purchase a “lanyin hukou”, a temporary resident registration book, which according to the Applicant, “anyone could buy”. He also provided a receipt for a “city population increase fee”.

[10] In response to a second request by the visa office for DNA testing for Wang Huan Huan, the Applicant’s immigration consultant stated that, “Wang Huan Huan is [sic] adopted by Mr. Wang’s family right after her birth” and claimed that a letter explaining this had been sent in July 2006. The evidence indicates that the visa office had no record of this letter, and only received a copy from the consultant on December 21, 2006.

[11] As Wang Huan Huan’s legal status remained unclear, the visa office sought clarification and documentary proof of her legal status. Numerous letters and other documents were exchanged between the Applicant and the visa office including a certificate from the Dongping Village Villagers’ Committee, which stated that Mr. Wang and his wife had adopted Wang Huan Huan at the end of 1997.

[12] On May 3, 2007, a visa officer sent a letter to the Applicant stating that Wang Huan Huan must be legally adopted to qualify as a dependent child under the Act. The visa officer further indicated that she was not satisfied that Wang Huan Huan had been legally adopted and required a certificate of legal adoption and evidence of a genuine parent-child relationship between them. The visa officer further stated:

> If you are unable to provide a legal adoption certificate with sufficient evidence of [sic] parent-child relationship with 60 days upon receipt of this letter, Wang Huan Huan will be deleted from your application to immigrate to Canada.

[13] On June 19, 2007, the visa office received a letter from the Applicant which clarified his relationship with Wang Huan Huan. In the letter the Applicant stated: “as we all know there was no legal procedure for adopting an abandoned child several years ago, and it is [sic] still lacks of exercisable regulation.”

[14] In a subsequent letter to the visa office, received on February 22, 2008, the Applicant complained of the delay in approving his application and stated that Wang Huan Huan had been found on the roadside and brought her home “without handling with any legal adoption procedures.” He explained that, given he already had four sons, it was impossible to deal with the formal procedures at government offices to resolve the issue.

[15] On March 9, 2008, the Officer found the Applicant inadmissible to Canada under paragraph 40(1)(*a*) of the Act for misrepresenting that Wang Huan Huan was his biological daughter. She consequently denied the application for permanent residence.

[16] On May 14, 2008, the Applicant filed the within application for leave and for judicial review of the Officer’s decision.

III. Impugned Decision

[17] The Officer’s decision, dated March 9, 2008, can be summarized as follows:

> The Applicant does not qualify for immigration to Canada as a member of the Provincial Nominee Class due to inadmissibility flowing from misrepresentations (paragraph 40(1)(*a*)).

The misrepresentation is the Applicant's attempt to pass Wang Huan Huan off as his biological child. The evidence of this misrepresentation is as follows:

- A fraudulent notarial certificate of birth naming the Applicant and his wife as parents;
- The Applicant originally explained his failure to provide a birth certificate for Wang Huan Huan by stating that his wife hid her pregnancy so as to avoid being caught by the two-child policy;
- Only after the request for DNA testing did the Applicant admit that Wang Huan Huan is not his biological child; and
- Legal adoption has not been proven. The "lanyin hukou" and the declaration from the Villager's Committee of Dongping Village do not constitute evidence of Wang Huan's legal adoption.

IV. Issues

[19] In his written submissions, the Applicant raises the following issues:

A. Did the Officer err in finding that the Applicant was inadmissible to Canada pursuant to paragraph 40(1)(*a*) of the Act for misrepresenting that Wang Huan Huan is his biological child?

B. Did the Officer err in finding that the Applicant was inadmissible to Canada pursuant to paragraph 40(1)(*a*) of the Act for misrepresenting that he and his spouse legally adopted Wang Huan Huan?

C. Did the Officer err in determining that paragraph 40(1)(*a*) of the Act applies to situations where the misrepresentation in question is clarified prior to a decision being rendered on the application?

[20] In my view the outstanding issues in this application are better stated as follows:

A. Did the Officer err in finding that the Applicant is inadmissible to Canada pursuant to paragraph 40(1)(*a*) of the Act for misrepresenting that Wang Huan Huan is his biological child?

B. Does the Applicant's belated admission of his untruthfulness overcome his inadmissibility for misrepresentation under section 40 of the Act?

C. Did the Applicant, in the circumstances, have a legitimate expectation that his misrepresentation would be forgiven and his application approved?

V. Standard of Review

[21] To the extent that the questions raised relate to a breach of procedural fairness due to delay or the doctrine of reasonable expectations, the Court does not undergo a traditional pragmatic and functional analysis in order to determine the appropriate standard of review, but rather intervenes if the breach in fact occurred. *Ali v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 283, at paragraph 18.

[22] Questions of pure statutory interpretation are reviewable on the correctness standard. *Khan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 at paragraph 22. However, a visa officer's finding that a misrepresentation could have induced an error in the administration of the Act is a finding of fact or mixed fact and law reviewable on the reasonableness standard. *Bellido c. Canada (M.C.I.)*, 2005 FC 452, at paragraph 27; *Dunsmuir v. New Brunswick*, 2008 SCC 9, 1 S.C.R. 190 at paragraph 51.

VI. Analysis

[23] Paragraph 40(1)(*a*) of the Act 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 the Act.

[24] Here it is clear the Applicant did directly misrepresent his relationship with Wang Huan Huan in his application by stating that she was his biological child. As stated above, the misrepresentation was only admitted after persistent inquiries by the visa office.

[25] To be admitted as a permanent resident Wang Huan Huan must be a “dependent child” of the Applicant. A “dependent child” under the Act is either the biological child or the adopted child of the parent. Given that Wang Huan Huan is shown to be neither, it follows that the misrepresentation here is material in that, had the misrepresentation gone undetected, Wang Huan Huan would likely have been granted status in Canada in violation of the applicable statutory and regulatory provisions. In my view, since Wang Huan Huan’s status is clearly a relevant matter in the circumstances, the misrepresentation could have induced an error in the administration of the Act. It follows that the officer did not err in finding the Applicant inadmissible pursuant to paragraph 40(1)(*a*) of the Act for misrepresentation. This disposes of the first issue.

[26] Regarding the second above stated issue, the Applicant argues that he cannot be found inadmissible for misrepresentation because he admitted his untruthfulness before a decision was made. He further argues that, given the visa officer’s letter of May 3, 2007 wherein it was explained that without proof of legal adoption his daughter would be dropped from the application, the misrepresentation was not material to his own application since the only consequence is the dropping of Wang Huan Huan from the application. Quite apart from the issue of legitimate expectation, allegedly created by the letter, the Applicant maintains that the misrepresentation is not material in the circumstances and therefore cannot form the basis for rejecting the application.

[27] I do not find the Applicant’s argument persuasive. The purpose of the Act is to ensure that visa officers are made aware of all material facts in considering an application in order to gauge whether an Applicant is admissible to Canada as a permanent resident. (*Bodine v. Canada (M.C.I.),*

2008 FC 848, at paragraph 44.) Clearly, to allow a subsequent admission of a material misrepresentation to excuse the untruthfulness would be counter to the purpose of the Act. If this interpretation of paragraph 40(1)(*a*) were accepted, it could lead to abuse in cases, such as the instant case, where only misrepresentations that are "caught" by the visa officer would be clarified. *Khan v. Canada (M.C.I.)*, 2008 FC 512, at paragraphs 27-28.

[28] I also reject the Applicant's contention that the May 3, 2007 letter from the visa officer renders the misrepresentation immaterial. As stated by the Respondent, if it had been established that Wang Huan Huan had been legally adopted, the fact that she was not the Applicant's biological child would not have been material as this misrepresentation would not have led to an error in the administration of the Act. Consequently, the Applicant would not have been inadmissible for misrepresentation. The cited last paragraph of the May 3, 2007 letter simply afforded a further opportunity to the Applicant to establish Wang Huan Huan's status before making a final determination of his application. It cannot be interpreted to suggest that the misrepresentation was no longer an issue. This disposes of the second issue.

[29] Finally, the Applicant suggests that the May 3, 2007 letter creates a legitimate expectation that should Wang Huan Huan be found to not be a dependant child, the only consequence would be her deletion from the application and that the visa office would continue to process the application.

[30] As stated above, the impugned passage of the May 3, 2007 letter dealt with Wang Huan Huan's status. The visa office was seeking to clarify whether she had been adopted in order to determine if she was admissible as a dependent child. It is clear the processing of the application

was ongoing, since no finding as to Wang Huan Huan's status had yet been made. Had proof of adoption been provided, the processing of the application would have continued. This passage cannot, however, be read to suggest that the application would be approved should Wang Huan Huan be deleted from the application. The materiality of the misrepresentation could only be determined once the issue of Wang Huan Huan's status was clarified.

[31] I find no promise in the May 3rd letter that would engage the doctrine of legitimate expectations. Even if I were satisfied that such a promise had been made by the visa officer, the doctrine of legitimate expectations is a common law doctrine relating to procedural fairness, which does not create substantive rights, and which cannot displace Parliament's clearly expressed intent that foreign nationals guilty of misrepresentation are inadmissible to Canada. *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, at paragraph 26; *dela Fuente v. Canada (M.C.I.)*, 2006 FCA 186, at paragraph 19.

[32] The Applicant further argues that the undue delay by the Minister in rendering a decision has been prejudicial to him and is unfair. The Applicant contends that by virtue of paragraph 40(2)(*a*) of the Act, the two-year exclusion period within which he is precluded from making a subsequent application starts to run as of the date of the decision. Had the decision been made in June 2007 when it was reasonably clear that Wang Huan Huan was not legally adopted, the Applicant would not now have to wait an additional nine months before making another application. He also points to serious disruptions caused by the delay to members of his family, including his son's education in Australia.

[33] It is true that it could have been speculated in June 2007 that Wang Huan Huan was not adopted, but it is only in February 2008 that the Applicant clearly stated that there was no formal adoption. The decision issued on March 8, 2008. In any event, given the practical realities and volumes of applications that must be dealt with by foreign visa offices, I do not find the nine month period to be an undue delay in the circumstances of this case.

V. Conclusion

[34] I find that the Officer did not breach the Applicant's right to procedural fairness and did not err in finding that the Applicant was inadmissible for misrepresentation. As a result, the application for judicial review will be dismissed.

[35] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the Act and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Adrian D. Huzel Darryl W. Larson Vancouver, B.C.	FOR THE APPLICANT
Ms. Lisa Laird Vancouver, B.C.	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Embarkation Law Group Vancouver, B.C.	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT