Federal Court  Cour fédérale

Date: 20100426

Docket: IMM-3493-09

Citation: 2010 FC 450

Ottawa, Ontario, April 26, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

QIANGHUA CAO
CHUGANG WU
ZHIMIN WU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This concerns an application submitted pursuant to sections 72 and following of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") by Qianghua Cao (the "principal Applicant"), her husband Chugang (or Chuguang) Wu, and her son Zhimin Wu, all citizens of the People's Republic of China, seeking judicial review of a decision dated June 23, 2009 of Susan Burrows, Consul (Immigration) at the Canadian Consulate General in Hong Kong (the "Senior Officer") rejecting, pursuant to paragraph 40(1)(a) of the Act, the principal Applicant's application for permanent residence in Canada on the ground of misrepresentation.

[2] This application for judicial review shall be dismissed for the reasons set out below.

Background

[3] The principal Applicant submitted an application dated April 30, 2007 for permanent residence in Canada as a business immigrant. In this application, she describes herself as “Board Chairman & General Manager” (at page 163 of the Tribunal Record).

[4] In her background declaration dated October 26, 2008, the principal Applicant mentioned, with respect to her educational achievements, studies at Guangzhou Radio School and part-time studies in economic management. She did not mention any training, curriculum, degree or certificate in law. The principal Applicant also mentioned that she had been employed, since 1994, as “Legal Representative, President and General Manager” by the Guangzhou Haizhu District Xinda Real Estate Consultant Service Center (“Xinda”) (at page 167 of the Tribunal Record). She did not mention any employment or association with a law firm.

[5] In a document attached to her application and dated October 28, 2008, the principal Applicant claims to hold 67% of the shares of Xinda. She states that Xinda is active “mainly in analysis and consultancy on investment project (sic) of real estate, supplementary service for real estate exchange, legal consultancy service, etc.” and she states that she is employed in Xinda as “legal representative and concurrently general manager” (at page 174 of the Tribunal Record).

[6] Numerous documents setting out the principal Applicant's experience and education were attached to her application for permanent residence, but none concerning any legal training or any association with a law firm. Some of these documents appear to be official registrations for Xinda in which the principal Applicant is described as Xinda's legal representative, and the corporate purposes of Xinda are said to include real estate information consulting.

[7] An organizational chart of Xinda was also submitted with the application, and it designates the principal Applicant as the General Manager of the business responsible for three departments, namely Finance, Personnel and Marketing. A distinct Deputy General Manager position is also set out in this chart responsible for "Law Consulting Service" and "Information Service" (at page 123 of the Application Record).

[8] While her application for permanent residence was being processed, the principal Applicant also submitted to Canadian immigration authorities an application signed August 11, 2008 to obtain the required authorization for the purpose of temporary travel plans to Canada. In this temporary residence application, the principal Applicant stated that she was employed as a "lawyer" by "Everwin Law Office" in Quangzhou where she was a "partner" (at pages 154-55 of the Tribunal Record). Moreover, the principal Applicant made no mention whatsoever of Xinda in her temporary residence application.

[9] The officer reviewing her permanent residence application eventually took note of the discrepancies, and a letter dated March 17, 2009 (the "fairness letter") was sent to the principal

Applicant informing her of the apparent misrepresentation, and asking her for information or documents which might clarify the situation.

[10] The principal Applicant responded on April 9, 2009 stating that she had always been the "Legal Representative and General Manager" of Xinda since 1994. However, since Xinda is active in real estate consulting, the types of legal problems the business encounters are manifold. This was said to explain why she obtained a lawyer's licence after two years of self-study, and passed the National Lawyer Qualification Examination to become a lawyer in June of 1997. However, she claims that in order to be able to practice law, she needed to register her license and join a licensed law firm. Consequently, she claims that she registered as a part-time lawyer with the Everwin Law Office ("Everwin") in 1998. She states that she only works as an in-house lawyer for Xinda and thus provides legal advice to Xinda's clients and never does any work for Everwin. In sum, the Applicant asserts that her arrangement with Everwin is simply one of convenience.

[11] In her April 9, 2009 response, the principal Applicant explained as mistakes by her travel agency the statements in her temporary visa application concerning her employment as a lawyer for, and a partner of, Everwin. She claims she gave that agency all required documents, including Xinda's documents and her lawyer's license. She adds that it was the travel agency that prepared the application and made the mistakes. She thus blames her travel agency for the inclusion of the wrong information in the temporary residence application.

[12] As to the absence of any mention of Everwin in her permanent residence application, the Applicant explains this omission as follows: “I might not mention much about my part time job as a lawyer with “Everwin” because I don’t have to deal with them at all and I never have to report duty to them, that sometimes makes me forget about them.”

The impugned decision

[13] The notes in the record dated June 19, 2009 from the Senior Officer set out the details of her decision to deny the application for permanent residence on the ground of misrepresentation:

> It is clear to me that the applicant misrepresented material facts related to her work experience. Such facts could have led to an error in the administration of the act as we may have omitted crucial backgrounds checks related to her admissibility. Her explanation of blaming discrepancies on an agency that completed her forms is a common one but not a credible one. She is responsible for ensuring that her applications are complete and truthful. She was given an opportunity to explain her omissions and did not provide a credible explanation. By my authority, I am refusing this application as per section A40 and sending a refusal letter to that effect. This renders her inadmissible to CDA for all purposes for two years.

Relevant provisions of the Act

[14] The relevant provisions of the Act are subsection 16(1) and paragraphs 40(1)(a) and 40(2)(a), which read as follows:

16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	**16.** (1) L’auteur d’une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents

	et présenter les visa et documents requis.
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40.** (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(*a*) 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; […]	*a*) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi; […]
(2) The following provisions govern subsection (1):	(2) Les dispositions suivantes s'appliquent au paragraphe (1):
(*a*) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; […]	*a*) l'interdiction de territoire court pour les deux ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi; […]

Position of the principal Applicant

[15] The principal Applicant submits that no issue of misrepresentation is raised in this case. Specifically, the principal Applicant argues that in assessing misrepresentation, it was not open to the Senior Officer to consider the temporary residence application, since that application was

unrelated to the permanent residence application at issue in these proceedings. Consequently, the real issue to be addressed by this Court is rather whether the principal Applicant withheld material facts relating to a relevant matter that induced or could induce an error in the administration of the Act in relation to her permanent residence application.

[16] The principal Applicant further argues that the Court cannot find that she withheld information under paragraph 40(1)(a) of the Act, unless she was expected to provide the information because specific questions had been asked or she had been otherwise made aware that she had to disclose a relevant fact. Applicants should not be exposed to the risk of being declared inadmissible for having unintentionally withheld information.

[17] Consequently, the principal Applicant submits that she answered correctly the questions on her work experience in her permanent residence application by advising the authorities of her activities since 1994. She asserts that all the information provided was correct, she disclosed that she was the legal representative and general manager of Xinda and that this enterprise supplied legal services related to real estate consultancy work. Moreover, she had no duty to disclose her registration with Everwin since this relationship was entered into as a mere formality that enabled her to provide advice to Xinda.

[18] The principal Applicant further submits that even if this Court were to find that she did withhold information, it did not concern material facts relating to a relevant matter that induced or could induce an error in the administration of the Act. Her registration with Everwin was simply

pro forma, and could have no influence on her application for permanent residence as a business immigrant. The information withheld must be shown to have led to an error in the administration of the Act, and this has not been shown in this case. The Senior Officer does not explain why the principal Applicant, who applied for permanent residence as a successful businesswoman and manager of a real estate company, would have required less scrutiny than she would now require given that it was revealed that in addition to these functions, she was also a part-time lawyer providing legal advice to the same company.

[19] Moreover, the principal Applicant corrected the information supplied after receiving her fairness letter; hence, it is submitted by the principal Applicant that under paragraph 40(1)(a), an applicant is not barred from correcting a misrepresentation or providing withheld information as long as no official has acted on the basis of flawed information.

Position of the Minister

[20] The Minister first submits that the applicable standard of review in this case is that of reasonableness.

[21] The Minister is of the view that the principal Applicant did not provide complete, honest and truthful information both when she submitted her application for permanent residence and subsequently submitted her application for temporary residence. Both applications are clearly contradictory; therefore, there has been a misrepresentation on the part of the principal Applicant.

These misrepresentations were material and directly or indirectly induced or could have induced an error in the administration of the Act.

[22] The Senior Officer considered the explanations given by the principal Applicant concerning these discrepancies and found them not to be credible. Such a decision was reasonable in the circumstances, was based on the evidence, and was open to the Senior Officer to make. Consequently, this Court should not disturb this finding.

Standard of review

[23] The decision of the Senior Officer in this case raises essentially questions of fact: did the principal Applicant make misrepresentations or withhold information? If the answer is affirmative, were those misrepresentations or withheld information material in that they could have induced an error in the administration of the Act?

[24] As noted in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*") at paragraph 53, decisions from administrative bodies concerning issues of fact usually attract a standard of reasonableness in judicial review proceedings. This is the standard applicable in this case to the determinations of facts made by the Senior Officer.

[25] However, the decision is also being challenged by the Applicant on the basis that the Senior Officer misapplied or misconstrued paragraph 40(1)(a) of the Act. The interpretation of that provision is a question of law. In addition, it was stated by the Supreme Court in *Dunsmuir* (at

paragraph 54) that a standard of reasonableness may also apply where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. However this is not always the case. Here, a consideration of various factors leads me to conclude that the Senior Officer's decision must be reviewed on a standard of correctness if the interpretation of paragraph 40(1)(a) of the Act is at issue.

[26] I come to this conclusion in view of a number of factors; in particular, the Senior Officer is not an administrative tribunal but rather an officer of the Crown entrusted with a non-adjudicative function; the Senior Officer's decision is not covered by a privative clause; the Senior Officer holds no special expertise in the interpretation of the Act and, in view of the general scheme of paragraph 40(1)(a), no deference is due to the Senior Officer on questions of law raised in a determination of misrepresentation.

[27] In addition, the approach described above is consistent with the pre-*Dunsmuir* case law of this Court. It was held in *Khan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 512, [2008] F.C.J. 648 (QL) (at paragraph 22) that questions of statutory interpretation related to paragraph 40(1)(a) of the Act are subject to a standard of correctness. It has also been held that determinations of misrepresentations under that paragraph call for deference in judicial review proceedings, since they are factual in nature: *Baseer v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1005, [2004] F.C.J. 1239 (QL) at paragraph 3 and *Bellido v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 452, [2005] F.C.J. 572 (QL) at paragraph 27.

Analysis

[28] Under paragraph 40(1)(a) of the Act, the Applicant is inadmissible to Canada if she has misrepresented or withheld material facts on a relevant matter that induces or could induce an error in the administration of the Act. I conclude that this provision, read in combination with paragraph 16(1) of the Act, imposes a general and broad duty on the Applicant to disclose all facts which may be material to her application for permanent residence. The Canadian immigration system rests on the premise that all persons applying under the Act will provide truthful and complete information on the basis of which decisions regarding their eventual admission into Canada will be made. The integrity and credibility of that system requires that this duty be taken seriously by all those concerned, including in this case the Applicant.

[29] In the light of these principles, I disagree with the Applicant, who submits that her temporary visa application cannot be taken into account in determining whether she misrepresented information or withheld information in her permanent residence application. The temporary visa application is a proper document for the Senior Officer to consider, and the argument that a misrepresentation in the temporary residence application cannot attract the application of paragraph 40(1)(a) is not cogent.

[30] The information provided by the Applicant in her temporary residence application is clearly inconsistent with the information she provided in her permanent residence application. In one application she claims to be a lawyer and a partner of the law firm of Everwin, while in the other she claims to be a senior manager and majority shareholder of Xinda. Obviously the Applicant has

made a misrepresentation in at least one of these applications, and this in and of itself sufficient to attract the application of paragraph 40(1)(a) of the Act.

[31] The Applicant admits to the misrepresentation in her temporary residence application, but argues that this was an error of her travel agent. Again, that does not bar the application of paragraph 40(1)(a) of the Act. The Applicant signed her temporary residence application and consequently must be held personally accountable for the information provided in that application. It is as simple as that.

[32] The Applicant denies having withheld information in her permanent residence application, and rather attributes her omission to mention her legal training and certification and her association with Everwin as facts that simply slipped from her mind. The Senior Officer did not find this explanation credible and this finding is clearly reasonable in the circumstances. It indeed defies belief that a difficult legal training leading to certification as a lawyer would have been forgotten by the Applicant in submitting her permanent residence application. In addition, the Applicant's claim lacks credibility in the light of her own admission that she viewed this information as relevant for the purposes of her temporary residence application. If it was relevant for the latter purposes, it follows logically that it was relevant for the purposes of her permanent residence visa application.

[33] The Applicant further asserts that her association with Everwin is purely one of convenience since she simply acts as legal counsel to Xinda. However the organizational structure of Xinda

provided by the Applicant rather shows that the Deputy General Manager of Xinda, and not the Applicant, is responsible for Xinda's legal department.

[34] Finally, the Applicant argues that the misrepresentation or withholding was subsequently cured when she provided the information after she received the fairness letter. I disagree. When the Minister uncovers the fact that a misrepresentation has been made or that information has been withheld, a simple subsequent correction of the record or the communication of the information in question will not normally act as a bar to the application of paragraph 40(1)(a): *Khan v. Canada (Minister of Citizenship and Immigration)*, *supra* at paragraph 25.

[35] I turn now to the question of the relevance and materiality of her misrepresentations. The Senior Officer found that those misrepresentations or omissions could have led to an error in the administration of the Act in that crucial background checks related to the Applicant's admissibility may not have been carried out. This is a finding of fact closely related to the procedures and policies applied by the immigration authorities working out of the Hong Kong office. Deference is owed by this Court in reviewing this finding. Unless it can be demonstrated that this finding is unreasonable, it should not be overturned in a judicial review proceeding.

[36] The Senior Officer noted at paragraph 11 of the affidavit she signed in the context of this judicial review proceeding that certain occupations, such as that of lawyer, could be subjected to background checks. This affidavit was not challenged by the Applicant, and no evidence was presented to me to show that such background checks were not carried out by the Hong Kong office

for lawyers seeking permanent residence in Canada. Consequently, the Applicant has failed to convince me that the finding of the Senior Officer on this matter was unreasonable or otherwise flawed.

Conclusion

[37] This application for judicial review is dismissed.

[38] This case raises no question to be certified pursuant to paragraph 74(d) of the Act.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3493-09
STYLE OF CAUSE:	QIANGHUA CAO ET AL v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 25, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Mainville J.
DATED:	April 26, 2010

APPEARANCES:

Krassina Kostadinov	FOR THE APPLICANT
Brad Gotkin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman and AssociatesBarristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT