Federal Court  Cour fédérale

Date: 20150519

Docket: IMM-6163-13

Citation: 2015 FC 647

Toronto, Ontario, May 19, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

FENG QING WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an Application for judicial review of a decision [Decision] of the Immigration Division [ID] of the Immigration and Refugee Board dated September 9, 2013, which found the Applicant, Feng Qing Wang, inadmissible to Canada pursuant to section 40(1)(a) of the *Immigration and Refugee Protection Act*, (SC 2001, c 27) [*IRPA*].

II. Facts

[2] The Applicant is a citizen of China who obtained a Temporary Resident Visa [TRV] and Work Permit [WP] through the Live-In Caregiver Program [LIC] to care for the children of her intended employers [Employers], Ms. Hong Xia [Female Employer] and Mr. Xin Yu Wang [Male Employer].

[3] The Applicant arrived in Canada on July 26, 2011, but she neither worked for the Employers as a caregiver on a full-time basis, nor lived with their family, per the terms and conditions of the LIC. The apparent reason for this non-compliance was that the parents of the Male Employer [the Grandparents] had come to live with her Employers and their family, and care for their grandchildren. The Grandparents assumed the intended caregiving functions of the Applicant, and occupied the room she was to have lived in. The Applicant maintains that she knew nothing about this change to her living and work arrangements prior to her entry into Canada.

[4] A great deal of contradictory evidence was elicited through five days of oral testimony at the ID hearing, provided by each of the Employers, as well as the Applicant. It is difficult to ascertain, through all of the contradictory testimony, who is telling the truth. Some of the key facts elicited at the ID hearing were:

- Citizenship and Immigration Canada [CIC] was never advised by either party that the purpose for which the Applicant came to Canada had ceased to exist;

- The Employers testified that they knew that the Applicant's services would not be required due to the fact that the Grandparents had agreed to assume the child caring role for the two children, and lived in the room that was previously intended for the Applicant;
- The Employers testified that the Applicant's sister [Sister], a friend of theirs who helped arrange for the Applicant's Labour Market Opinion [LMO], was advised of the change before the Applicant arrived in Canada;
- It was on the strength of this positive LMO that the Applicant obtained a WP upon entry into Canada. The Applicant said nothing regarding the changes to the conditions of her employment to Canada Border Services Agency officials who examined her upon her arrival, because, according to her testimony, she did not know anything had changed;
- The Applicant maintained that she only learned of the change in employment and living circumstances approximately three weeks after having arrived in Canada. The Applicant testified that when the Female Employer picked her up at the airport, she advised the Applicant to live with her Sister for a few days, and open a bank account;
- The employment contract between the Applicant and Employers was part of the record for the LMO. The LMO was dated July 9, 2010. The Applicant's TRV was issued in May, 2011. According to the Applicant's affidavit, the Grandparents applied for permanent residence in 2010 and were in Canada in May 2010. At that time, the Grandparents were already looking after the children. This information was confirmed at the hearing (Certified Tribunal Record [CTR], pp 179-181).

III. The Decision

[5] The ID found that the Applicant and the Employers misled the Government into believing that the Applicant was working under the LIC program. This deception was carried out by way of financial manipulation: Mr. Wang issued cheques from his bank account to the Applicant. The Applicant would deposit those cheques, withdraw the cash and return the money to Ms. Xia, who then filed the fictional salary documentation with the Canada Revenue Agency [CRA].

[6] The ID also based its Decision on the following misrepresentations:

i. The Male Employer failed to advise the Government that his parents were residing with him in place of the Applicant, undermining the basis of the LMO which had been issued. As such, the officers processing Ms. Wang's application were prevented from conducting a proper investigation;

ii. The Female Employer testified that she knew that she did not need the Applicant's services on a full-time basis when her in-laws were granted permanent resident status. This occurred well before the Applicant entered Canada, and had this information been communicated to the Government, it could have led to the denial of Ms. Wang's work permit.

[7] The ID concluded, on a balance of probabilities, that the Applicant directly or indirectly misrepresented or withheld material facts relating to a relevant matter pursuant to section 40(1)(a) of *IRPA*, and excluded her from Canada.

IV. Applicant's Position

[8] The Applicant submits that she made no misrepresentation when she presented herself at the airport upon entry to Canada, or to any immigration official, whether direct or indirect, as she had no knowledge about the changes to her employment situation as a result of the arrival of the Grandparents.

[9] The Applicant further argues that the ID's findings of misrepresentation are unreasonable, because the evidence demonstrates fraud and reprehensible conduct on the part of the Employers. However, the ID does not have any jurisdiction over them. In short, the Applicant contends that she cannot be faulted for the Employers' misbehaviour: the Respondent is engaging in a "fishing expedition" to show her to be the perpetrator, but she is truly the victim.

[10] The Applicant also contends that a breach of procedural fairness occurred when the ID refused her request to issue a summons for the examination of one of the Grandparents, the Male Employer's mother. This examination would have helped to clarify whether the grandmother was able and willing to take care of her grandchildren, and if so, when the Employers intended to have her act as a caregiver for the children.

V. Respondent's Position

[11] The Respondent argues that the ID is master of its own procedure, and conducted the hearing fairly. The testimony at the hearing demonstrated that there was indirect misrepresentation to CIC, because the change of plan was known to, at minimum, the Sister, who had been the primary point of contact between the Employers and the Applicant. Indeed, the Sister was the party that had introduced the Applicant to the Employers and facilitated their

contact, leading to the LMO filing. The testimony of the Female Employer indicates that she told the Sister that the Grandparents were providing caregiving services, and the Sister saw them living in the family home.

[12] The Respondent further submits there was no breach of procedural fairness, since the ID concluded that the Male Employer's mother would only have a peripheral effect on the issues of this case, and at some point needed to contain the hearing.

[13] In the end, the Respondent argues that the ID reasonably concluded that the Applicant misrepresented when she failed to disclose her actual state of employment to CIC, as section 40(1)(a) of *IRPA* applies in circumstances where a person misrepresents through a third party.

VI. Issues

[14] The issues are as follows:

1. Was the Applicant denied procedural fairness?
2. Were the ID's findings of indirect misrepresentation reasonable?

VII. Standard of Review

[15] The applicable standard of review pertaining to procedural fairness is that of correctness (*Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at para 34 [*Re:Sound*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79). As noted by Justice Evans in *Re:Sound*, this Court should respect procedural decisions made by the panel that is properly within its discretion, and

"give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other" (*Re:Sound* at para 42).

[16] The applicable standard of review to the ID's findings of indirect misrepresentation is reasonableness, as it involves a question of mixed fact and law. This Court should intervene only if it concludes that the decision is unreasonable, and falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

VIII. Preliminary Matter

[17] The Applicant included a Statement of Claim regarding a civil suit against the Employers in her further affidavit. I agree with the Respondent that this Statement of Claim is to not be considered, because it was not before the ID when it made its Decision (*Hutchinson v Canada (Minister of the Environment)*, 2003 FCA 133 at para 44).

IX. Analysis

A. Was the Applicant denied procedural fairness?

[18] The Applicant submits that the ID breached procedural fairness when it denied the Applicant's request for a summons to examine the Male Employer's mother as to her ability to take care of her grandchildren and when the Employers decided to replace the Applicant as a caregiver for these children. I find that procedural fairness was not breached in this case.

[19] Section 33(2) of *Immigration Division Rules*, SOR/2002-229 stipulates that when a summons is requested, the ID must consider any relevant factors, including:

1. the necessity of the testimony to a full and proper hearing; and
2. the ability of the person to give that testimony.

[20] In the case at bar, the ID heard the Employers' testimony on the extent and chronology of the Grandparents' involvement. The ID thereafter decided that the grandmother's testimony would have a negligible impact on the issues and the outcome of this case. The panel states, in the hearing transcript:

> We've heard some testimony from Mr. Wang with respect to his mother, his parents, and when they came to Canada, when they received status, when he advised the person concerned that he did not require a live-in caregiver any longer and his history in making live-in caregiver applications and those applications were made over a number of years.
>
> So the intentions of his mother at the time when she arrived in Canada versus at the time when she received permanent resident status would, in fact, in my view, have peripheral effect on the issues before me.
>
> So I'm not going to issue a summons for her. […]
>
> (CTR, p 271).

[21] The ID, in my view, correctly decided to deny the Applicant's summons, as it was not necessary for the Applicant's full and proper hearing given the volume of evidence that was already heard on that issue. Nothing particular turned on the grandmother's testimony. Rather, the intentions and actions of the Employers and the Applicant were determinative of the legal questions in dispute. The ID is a specialized tribunal with its own extensive rules and procedures that should be afforded considerable latitude in how it runs its hearings (*Tai v Canada*

(Citizenship and Immigration), 2011 FC 248 at para 66). As Justice Evans stated in *Re:Sound*, relying on paragraph 53 of *Dunsmuir*, "[i]t is therefore not for a reviewing court to second-guess an administrative agency's every procedural choice, whether embodied in its general rules of procedure or in an individual determination" (*Re:Sound* at para 38). Accordingly, there was, therefore, no breach of procedural fairness in this case.

B. Were the ID's findings of indirect misrepresentations reasonable?

[22] The second issue raised in this judicial review concerns the ID's findings of misrepresentation in Ms. Wang's application. I agree with the Respondent that it was within the range of possible, acceptable outcomes for the ID to decide that the Applicant misrepresented when she indirectly, through her Employers, failed to inform CIC about her actual state of employment and engaged in activities intended to deceive Canadian authorities.

[23] Paragraph 40(1)(a) of *IRPA* states:

> 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.

[24] The legislation is clear that a misrepresentation can be made directly or indirectly. The ID found that the Applicant made indirect misrepresentations, as explained in its Decision at paragraph 9 (CTR, pp 4-5).

[25] The jurisprudence is clear that there is no need to show that there has been any intentional misrepresentation (*Khedri v Canada (Citizenship and Immigration*), 2012 FC 1397 at para 21),

and that when a person misrepresents through a third party, paragraph 40(1)(a) continues to apply (*Wang v Canada (Citizenship and Immigration)*, 2005 FC 1059 at para 56).

[26] The crux of the Applicant's argument is, in my view, her contention that she is an innocent party in this matter because it was the Employers who made the misrepresentation regarding the need for her services in obtaining the LMO.

[27] However, I find the ID's Decision to be reasonable.

[28] The Decision noted that Ms. Wang was a participant in a "ruse" intended to mislead CRA officials (CTR, p 4, para 8). Since judicial reviews are extraordinary remedies of a discretionary nature, a Court is entitled to deny relief if the applicant does not come to the Court with clean hands (*Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 30; *Wong v Canada (Citizenship and Immigration)*, 2010 FC 569 at paras 11-13). The doctrine of clean hands prevents an applicant before the Court from seeking relief when wrongful conduct on their part directly relates to the subject matter of their claim, thus ensuring fairness within the legal system (*Volkswagen Canada Inc v Access International Automotive Ltd*, 2001 FCA 79 at paras 21-22). In this case, it appears that the Applicant seeks relief from one of the *bone fide* requirements of the LIC program, the availability of a job, while having actively assisted her "Employers" in masking its lack of vacancy after she arrived in Canada through documentation destined to the CRA.

[29] The application of this doctrine was not pleaded by the parties and it is not determinative, so I need not address it any further, except to say it would have been a sufficient alternate basis on which to dismiss the judicial review. Foreign nationals, including Live-In Caregivers, are rightfully entitled to protection under the law. They should not diffuse that protection by acting in ways that undermine it.

[30] The jurisprudence, as discussed above, indicates that even if the misrepresentation was only made indirectly, such as in this case, by a third party (the Employers), it would still constitute misrepresentation for the purposes of the *IRPA*. For example, in *Kaur Barm v Canada (Citizenship and Immigration)*, 2008 FC 893 at para 20, Justice Russell found that even though the applicant's father misrepresented her age as an accompanying dependant in his permanent residence application, contrary to the applicant's knowledge, this was still a misrepresentation for the purposes of the *IRPA*. Furthermore, there is evidence in this case to indicate that the Applicant, by way of her Sister, may have known that a LIC job was not awaiting her in Canada prior to her arrival. In short, there is evidence of indirect misrepresentation made pursuant to section 40(1)(a). The ID's Decision is thus reasonable.

X. Conclusion

[31] The Applicant was not denied procedural fairness and the ID's conclusions about misrepresentation are reasonable. No intervention from this Court is warranted. The application for judicial review is dismissed and there will be no order as to costs.

XI. Certified Question

[32] The Applicant proposed the following question for certification:

> Whether a foreign national temporary resident of Canada who has fallen short of her obligation under subsection 29(2) of *IRPA* automatically becomes liable for misrepresentation, direct or indirect, under section 40 of *IRPA*.

[33] I find a more appropriate construction is as follows:

> Is a foreign national who is temporarily resident in Canada liable, pursuant to section 40(1)(a) of *IRPA*, for an indirect misrepresentation made by a third party, if the foreign national had no knowledge of the misrepresentation?

[34] The test for certification was laid out by the Federal Court of Appeal in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9. To be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance.

[35] As I concluded, I find the ID's Decision to be reasonable in light of the jurisprudence on the subject to date. Even if I am incorrect on this point, given my position on the application of the clean hands doctrine to this particular case, an answer to the certified question would not be dispositive of the appeal. Consequently, the requirements for certification have not been met, and no question will be certified in this case.

[36] That said, the issue of third party misrepresentation may still be ripe for clarification from a higher court, should the appropriate facts arise.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no award of costs.

3. No question will be certified.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6163-13
STYLE OF CAUSE:	FENG QING WANG v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2014
JUDGMENT AND REASONS:	DINER J.
DATED:	MAY 19, 2015

APPEARANCES:

Cecil L. Rotenberg	FOR THE APPLICANT
Veronica Cham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cecil L. Rotenberg Barrister & Solicitor	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT