Federal Court  Cour fédérale

**Date: 20170224**

**Docket: IMM-303-16**

**Citation: 2017 FC 238**

**Ottawa, Ontario, February 24, 2017**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**THI GA NGUYEN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

## I. Introduction

[1] The Applicant, Thi Ga Nguyen [Ms. Nguyen], challenges the decision of Citizenship and Immigration Canada [CIC] dated December 15, 2015, in which an officer found that her father, Van Khai Nguyen [Mr. Nguyen], was inadmissible to Canada for five years following the date of the decision. For the reasons that follow, I am dismissing the application.

## II. Background

[2] Ms. Nguyen applied to sponsor her family's immigration to Canada under the Family Class. The lock-in date for this application was August 8, 2007. Van Giap Nguyen, Ms. Nguyen's brother, was 23 years old at the time of lock-in date. On his application form dated May 5, 2011, he indicated that he was continuously enrolled as a student from September 2004 to May 5, 2011.

[3] At the request of CIC, Mr. Nguyen, Ms. Nguyen's father, submitted police certificates which were received by CIC on February 13, 2015. These certificates indicated that Mr. Nguyen had been arrested in 1988 and sentenced to three years imprisonment. CIC scheduled an interview with him, which was to take place on November 30, 2015.

[4] Before the interview took place, Van Giap Nguyen wrote to CIC where he set out what he had been doing, including he was studying at home, trying to get into further University programs and had been seeking employment between 2012 and 2015. As a result, during the interview, Mr. Nguyen was specifically asked if his son was still a full-time student. He answered that this was the case. He also answered that his son had been a full-time student since the age of 22. The officer advised Mr. Nguyen that his answers contradicted the evidence presented by his son.

[5] At this same interview, the officer asked Mr. Nguyen whether he had ever been convicted of an offence. Mr. Nguyen confirmed that he had been convicted of an offence in 1988 and served a prison term of three years. He also admitted that he had denied having any convictions

on the current application form and on the application form for his temporary resident visa. The officer advised him that he and his son would be found inadmissible for misrepresentation.

[6] The officer sent a decision to Mr. Nguyen on December 15, 2015, which confirmed that Mr. Nguyen was inadmissible to Canada due to misrepresentation. The officer listed both the misrepresentation of Van Giap Nguyen's period of studies as well as Mr. Nguyen's prior conviction as reasons for refusing the application. The officer concluded Mr. Nguyen is inadmissible to Canada for a period of five years from the date of his signed decision.

## III. Issues

[7] Ms. Nguyen raises the following issues in this application:

A. Was there a misrepresentation of eligibility and/or facts?

B. Was there a denial of procedural fairness?

## IV. Standard of Review

[8] The standard of review regarding the first issue is that of reasonableness (*Sharma v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1253). For the second issue of procedural fairness, the appropriate standard of review is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9).

## V. Analysis

### A. *Preliminary Issue*

[9] A preliminary issue was raised at the hearing by Ms. Nguyen. She asked that the affidavit of the officer, Thomas Richter, be struck out or given limited weight as it supplemented the reasons by bolstering the evidence and otherwise does not comply with Rule 81 of the *Federal Courts Rules*, SOR/98-106.

[10] Mr. Justice Pinard held in *Khatun v Canada (Minister of Citizenship and Immigration*) 2011 FC 3, at paragraph 10, that an affidavit by a visa officer cannot supplement their case after the fact as an attempt to buttress the reasons provided in the decision. However, the officer's affidavit in this case does not bolster the evidence; it simply assists the Court by providing the same information as the CAIPS notes in a readable format. What's more, even if I did not give the affidavit any weight, the CAIPS notes are sufficient for me to confirm the reasonableness of the officer's decision.

[11] In her submissions, Ms. Nguyen alleged procedural unfairness and filed her own affidavit including information that was not before the officer. She also relied on portions of the visa officer's affidavit in her oral argument. The hypocrisy of Ms. Nguyen's actions was pointed out to her at the hearing.

[12] Regarding this preliminary issue, I will not strike the affidavit of Officer Thomas Richter. It does not supplement, buttress, bolster, or bootstrap the Respondent's arguments and is compliant with Rule 81.

B. *Misrepresentation of Eligibility and/or Facts*

[13] At the time of Ms. Nguyen's application under the Family Class, a dependent was defined as a person who is under the age of 22 or, if over the age of 22, has been engaged in full-time studies before attaining that age and has continued thereafter (see section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227).

[14] A gap in studies prior to turning 22 years of age did not disqualify a person from being a dependent. What concerns an officer is whether a person was enrolled in full-time studies before turning 22 and whether they continued those studies thereafter. In this case, the Nguyen family indicated in their applications that Van Giap Nguyen was a dependent full-time student. There was no obvious basis for concluding that he did not meet the definition of a dependent.

[15] Based on the police certificates provided by Mr. Nguyen, the officer reasonably requested and conducted an interview. Prior to the interview occurring, Van Giap Nguyen filed a letter stating he was a full-time student. The letter went on to break down when he was attempting to get into University programs, looking for work, studying at home and other courses he took. Given the content of Van Giap Nguyen's letter to CIC which was received before the interview was conducted, the officer investigated whether Van Giap Nguyen was a dependent. As stated

earlier, it was at this interview that Mr. Nguyen, after being warned confirmed his earlier statements, that his son was continuously enrolled as a full-time student.

[16] Ms. Nguyen argues that a misrepresentation requires the concealing of information, and that is not what Mr. Nguyen or his son did. She argues that since the facts of the application under the Family Class were known to the officer, statements made by Mr. Nguyen were a misunderstanding. There was no misrepresentation of the material facts and the officer failed to explain the law. It is also submitted that the officer denied procedural fairness to Ms. Nguyen because the officer sought to punish the Nguyen family for a misstatement.

[17] Ms. Nguyen argued that the CAIPS notes do not indicate that the officer reviewed all the materials, contrary to what is stated in his affidavit. She further argued that the officer's decision was based on selective parts of the interview not the record as a whole making it unreasonable.

[18] By contrast, the Respondent submits that the officer's decision is reasonable and factually similar to the recently decided in *Tran v Canada (Minister of Citizenship and Immigration)*, 2016 FC 805 [*Tran*]. In that case, the court found that it was the officer's duty to investigate evidence presented to confirm that the son did not meet the definition of a dependent. Paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] makes a foreign national 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". The Respondent submits that is exactly what the officer did in this case.

[19] The Respondent bolsters its position with *Lee v Canada (Minister of Citizenship and Immigration)*, [2005] 2 FCR 3 at paragraph 46, which found that the withholding of material facts pertaining to studies and the genuineness as a "dependent child" constituted misrepresentation.

[20] Upon reviewing the file, I believe the officer considered all the materials before him. In addition, I cannot find any piece of material evidence that was not addressed in the CAIPS notes. This argument must fail.

[21] I find the decision reasonable. The record does not support Ms. Nguyen's arguments as presented by counsel. Her arguments were premised facts that come from her now telling the Court what Mr. Nguyen was thinking at the time he made certain statements and surmising what Mr. Nguyen's understanding of what was meant by " studying". We cannot guess what Mr. Nguyen's thoughts were and on the facts before us the officer asked Mr. Nguyen about his son's studies and made known his concerns; the decision, when read with the CAIPS notes, makes it clear that the father misrepresented this information.

[22] This case is distinguishable from *Lamsen v Canada (Minister of Citizenship and Immigration)*, 2016 FC 815 [*Lamsen*] and *Shah v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1012 [*Shah*], upon which Ms. Nguyen relies. In *Lamsen*, above, an officer in Manila refused a permanent resident visa under the Federal Skilled Worker Class because she misrepresented her work experience as a nurse. An officer had contacted the hospital and asked about the applicant's employment positions and history. As a result, a procedural

fairness letter was sent and the applicant explained her errors in dates and provided employment certificates to confirm the facts. On those facts, Mr. Justice Diner found that there was no procedural unfairness as the applicant was told by letter of the officer's concerns and that the duty owed to a visa officer is on the low end of the spectrum. However, Mr. Justice Diner found the decision unreasonable because the officer did not consider the totality of the application.

[23] As I noted earlier, in the matter before me, the officer considered the totality of the Nguyen family's application. It is Ms. Nguyen who has presented one piece of evidence in isolation while ignoring evidence that which does not support her position.

[24] The second case relied on by Ms. Nguyen is *Shah*, above. In that case, Mr. Justice Gleeson was reviewing a decision in which an Indian bookkeeper (by profession) was denied permanent resident status under the Federal Skilled Worker Class. In that case, the officer verified the applicant's employment information online and via telephone, contacted the applicant's son, but did not contact the employer. The son told the officer the applicant was not an employee. A year later, the applicant received a procedural fairness letter and her application was refused on the grounds of misrepresentation. In that case, the officer failed to consider third party information that corroborated the applicant's employment and the procedural fairness letter was not sufficient. Mr. Justice Gleeson found that the decision was not reasonable as it did not address why the officer relied on the evidence of the son, and did not give reasons why the employer was not contacted.

[25] The facts in this case are distinguishable from those before Mr. Justice Gleeson. On our facts, the officer interviewed both Mr. Nguyen and the son, and relied on the documents before and after the procedural unfairness letter. In a clear and transparent decision, the officer gave the reasons why, on the totality of the evidence, he found there was misrepresentation. I find that the officer's decision was reasonable.

C. *Denial of Procedural Fairness*

[26] Ms. Nguyen argued that because of the severe effects of an inadmissibility finding, a high degree of fairness is owed, a degree which was not accorded to her. I cannot agree.

[27] Mr. Nguyen was put on notice about CIC's concerns through procedural fairness emails and letters. An interpreter at the interview confirmed that Mr. Nguyen understood what was being discussed and he had no difficulty in answering any of the officer's questions. There are serious consequences in a misrepresentation finding, but the procedural fairness owed is on the low end of the spectrum. Even if this were not the case, I find that the Nguyen family was accorded procedural fairness and fully understood the officer's concerns.

[28] Finally, Ms. Nguyen argued that the officer put the onus on the Nguyen family to make the legal determination of whether the son fit the legislative qualification of being a dependant. That is a mischaracterization of what occurred. The Nguyen family was asked several times, and in a variety of ways, whether the son had continually been a full-time student. On a correctness standard, I can find no error in the procedural fairness afforded to the Nguyen family.

[29] The application for judicial review is dismissed.

[30] No questions were presented for certification.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-303-16 |
| **STYLE OF CAUSE:** | THI GA NGUYEN V MCI |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 1, 2017 |
| **JUDGMENT AND REASONS:** | MCVEIGH J. |
| **DATED:** | FEBRUARY 24, 2017 |

**APPEARANCES:**

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