Federal Court  Cour fédérale

Date: 20180427

Docket: IMM-4112-17

Citation: 2018 FC 457

Ottawa, Ontario, April 27, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

PENG HE AND LIPING ZHOU

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application by the Minister of Citizenship and Immigration under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD or the Board], dated August 24, 2017 [Decision], which allowed the Respondents' appeal of a visa

officer's determination that the Respondents breached the residency obligation for permanent residents contained in s 28 of the Act.

II. BACKGROUND

[2] Peng He [Male Respondent] and Liping Zhou [Female Respondent] are a husband and wife who are citizens of China. The Male Respondent immigrated to Canada as a skilled worker and the couple became permanent residents in 2006.

[3] In 2007, the Male Respondent was hired by Team Solutions Industrial Services [Team Solutions], a Canadian company that provides specialized industrial cleaning services. He initially worked in Markham, Ontario, but was terminated in 2009 because of work shortages. Team Solutions later sought to expand its operations in China. Because of the Male Respondent's experience with the company, he was re-hired in April of 2010 to work in China as one of two key personnel for an affiliated company controlled by Team Solutions.

[4] The Respondents have lived in Shanghai, China since April of 2010. On November 20, 2013, the Female Respondent applied for a travel document to return to Canada. The Male Respondent did the same on May 20, 2014. In letters sent to the Respondents dated June 24, 2014, a visa officer refused to issue the requested travel documents because the visa officer determined that neither Respondent met the residency obligation under s 28 of the Act. The visa officer found that the Male Respondent was only in Canada for 341 of the required 730 days and the Female Respondent was only in Canada for 523 of the required 730 days. The visa officer questioned the authenticity of documents supporting the Male Respondent's

employment with Team Solutions and was not satisfied that the Male Respondent's employment met the requirements of s 61(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. Therefore, the visa officer did not count the days the Respondents spent in China while the Male Respondent worked for Team Solutions towards fulfillment of the Respondents' residency obligation pursuant to ss 28(2)(a)(iii) or (iv) of the Act.

[5] The Respondents appealed the visa officer's determination to the IAD.

III. DECISION UNDER REVIEW

[6] The IAD determined that the Male Respondent's employment met the requirements of s 61(3) of the Regulations and that both Respondents had not breached the residency obligation contained in s 28 of the Act. The IAD therefore allowed the Respondents' appeal.

[7] After laying out the background to the Respondents' appeal, the Board notes that s 28(2)(a)(iii) of the Act allows time spent "outside Canada employed on a full-time basis by a Canadian business" to count toward the residency obligation. *Canada (Citizenship and Immigration) v Jiang*, 2011 FC 349 [*Jiang*], and *Bi v Canada (Citizenship and Immigration)*, 2012 FC 293 [*Bi*], define the test for determining whether an employee "is assigned on a full-time basis as a term of the employment or contract" to a position outside of Canada under s 61(3) of the Regulations. The Decision quotes Justice Noël's statement in *Bi*, above, that:

> [21] It was this Court's view in *Jiang* that to have time spent outside of Canada count toward the residency requirement, the permanent resident must be assigned temporarily, must maintain a connection with his employer, and must return to work for it in Canada following the assignment.

[8] The Board also points out that if the Male Respondent's employment counts towards the residency obligation under s 28(2)(a)(iii) of the Act, then the Female Respondent was accompanying her spouse as allowed by s 28(2)(a)(iv).

[9] The Board finds that the Male Respondent and Team Solutions' Human Resources Manager, Mr. Martin Griffin, both gave credible and consistent testimony at the IAD hearing. Mr. Griffin testified that the Male Respondent was identified as a good candidate to help in the company's Chinese expansion because of his cultural knowledge, his experience in the automotive market, and because of the skills he acquired while working for the company in North America. Mr. Griffin explained that the Male Respondent attends monthly senior management meetings by videoconference and reports to the President of Team Solutions in Canada and the Account Manager for the company's Asian operations who is located in the United States. Mr. Griffin stated that the Male Respondent is valuable to the company in China while growing business there and that his return to Canada to work for the company is a possibility because he has the capability to progress into senior management in North America.

[10] Based on Mr. Griffin's testimony, the Board finds that it is clear that the Male Respondent maintains a connection with the Canadian company while working as the Operations Manager in China.

[11] The Board also finds that the Male Respondent's assignment abroad is temporary because his contract with Team Solutions contains an implied term that he will return to Canada at the completion of his assignment in China. The Board notes that Team Solutions' job offer does not

specify the Male Respondent's date of return to Canada, but says that a term may be implied into a contract "(1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary 'to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed'": *MJB Enterprises Ltd v Defence Construction (1951)*, [1999] 1 SCR 619 at para 27 [*MJB*], quoting *Canadian Pacific Hotels Ltd v Bank of Montreal*, [1987] 1 SCR 711 at 775 [*Canadian Pacific Hotels*]. The Board finds that the evidence supports implying a term because the presumed intention of the parties makes the term necessary to give business efficacy to the contract.

[12] The Board frames the question of whether the contract contains an implied term as asking "what would the parties say that they had obviously assumed"? The focus is on the intent of the actual parties and evidence of a contrary intention by either party precludes implication of a term based on presumed intent. See *MJB*, above, at para 29. The Board also notes that the power imbalance common to employment relationships renders contracts of employment susceptible to the implication of terms. See *Haldane v Shelbar Enterprises Ltd* (1999), 46 OR (3d) 206 at para 15 (CA). The Male Respondent and Mr. Griffin were consistent that the present intention of the parties was for the Male Respondent to remain in China and grow the company's business in Asia. The Board finds that there is no inconsistency in the evidence about the parties' intention that the Male Respondent would return to Canada in the future. Any uncertainty in the anticipated timeframe of the Male Respondent's return is attributable to a difference in the parties' perspectives: Team Solutions is focussed on the Male Respondent's ability to grow their

business in Asia, while the Male Respondent wants to return to Canada to maintain his permanent resident status. But both witnesses testified that the Male Respondent's return to Canada was a possibility. The Board notes that Mr. Griffin did not contradict the Male Respondent's testimony that it was the understanding of both parties that his assignment was temporary and that he would return to Canada once he trained his replacement. Nor did Mr. Griffin contradict testimony that the Male Respondent expressed his desire to return to Canada because he is a permanent resident, and was told that his experience in Canada already qualified him to return to work for the company in Canada.

[13] The Board also finds that implying a term into the contract is consistent with Parliament's intention to allow flexibility in the types of employment opportunities permanent residents may pursue abroad while complying with their residency obligation. See the Regulatory Impact Analysis Statement for the registration of the Regulations, (2002) C Gaz II, Vol 136, No 9, 212.

[14] Based on the evidence of Team Solutions' salary structure in each region in which it operates, the Board accepts that the Male Respondent perceived the job offer in China to be a promotion even though he accepted a lower salary. The Board notes that this is consistent with the signing bonus he received and the apartment in Shanghai with which his family is provided as part of his employment.

[15] Since the Board finds that the Male Respondent's employment outside of Canada is temporary and that he maintains a connection with his Canadian employer, it concludes that he did not breach his residency obligations. The Board also concludes that, since the

Female Respondent was accompanying the Male Respondent, she did not breach her residency obligation and allows both Respondents' appeals.

IV. ISSUES

[16] The Applicant submits that the following issues arise in this application:

1. Is the IAD's determination that the Male Respondent's contract with Team Solutions contains an implied term that his employment outside of Canada would be temporary and that he would be able to return to Canada to resume employment with the Canadian business unreasonable?
2. Is the Decision not based on the evidence and unreasonable?

V. STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[18] The standard of review applicable to the Board's determination that the Respondents fulfilled their residency obligation because the Male Respondent's employment outside of Canada meets the requirements of s 61(3) of the Regulations is reasonableness. See *Bi*, above, at para 12. This is so even though the Board's application of s 61(3) involves an application of the common law doctrine of implied contractual terms. As the Supreme Court of Canada explained in *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at paras 43-45, while common law doctrines "emanate from the courts," they may be properly adapted to the circumstances of administrative decision-making without eliminating the deference that would otherwise be afforded to a decision-maker's interpretation and application of its own governing statute. Both issues the Applicant raises will therefore be reviewed under a reasonableness standard.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[20] The following provisions of the Act are relevant in this application:

Residency obligation

28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.

Application

(2) The following provisions govern the residency obligation under subsection (1):

(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are

(i) physically present in Canada,

(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,

(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,

(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or

Obligation de résidence

28 (1) L'obligation de résidence est applicable à chaque période quinquennale.

Application

(2) Les dispositions suivantes régissent l'obligation de résidence :

a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :

(i) il est effectivement présent au Canada,

(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(v) referred to in regulations providing for other means of compliance;	(v) il se conforme au mode d'exécution prévu par règlement;

[21] The following provisions of the Regulations are relevant in this application:

Employment outside Canada	**Travail hors du Canada**
61 (3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression ***employed on a full-time basis by a Canadian business or in the public service of Canada or of a province*** means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the employment or contract to	61 (3) Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les expressions ***travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale et travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale***, à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une entreprise canadienne ou de l'administration publique, fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture :
(a) a position outside Canada;	a) soit à un poste à l'extérieur du Canada;
(b) an affiliated enterprise outside Canada; or	b) soit à une entreprise affiliée se trouvant à l'extérieur du Canada;
(c) a client of the Canadian business or the public service outside Canada.	c) soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du

Canada.

VII. ARGUMENT

A. *Applicant*

(1) Implied Contractual Term

[22] The Applicant submits that the IAD's finding that there is an implied term in the Male Respondent's contract of employment with Team Solutions to the effect that his employment outside of Canada is temporary and that he would return to work for Team Solutions in Canada once his assignment abroad concludes is unreasonable. The Applicant points out that the Board accepts that the job offer does not specify a date for the Male Respondent's return to Canada and that Mr. Griffin testified that future employment in Canada was only a "possibility." The Applicant says that the Board's implication of a term into the Male Respondent's contract of employment based on the presumed intention of the parties is unreasonable because it was not necessary to imply a term into the contract in order to give business efficacy to the contract as required by the third criterion in *MJB*, above, at para 27.

(2) Ignoring Evidence

[23] The Applicant also submits that the IAD's finding that the Male Respondent's employment in China is temporary in nature and that there was an expectation that he would return to work in Canada is not based on the evidence and is unreasonable.

[24] The Applicant says that this Court's jurisprudence on the meaning of "assigned" within s 61(3) of the Regulations has rejected the proposition that working outside of Canada for a Canadian business indefinitely is sufficient to retain permanent resident status. See *Jiang*, above, at paras 42-43 and 47, and *Jian v Canada (Citizenship and Immigration)*, 2016 FC 523 at para 6, quoting *Bi*, above, at para 21. Accepting such an interpretation would be inconsistent with the objective of promoting "the successful integration of permanent residents into Canada" set forth in s 3(1)(e) of the Act because it exempts permanent residents from establishing themselves in Canada if they work abroad for a Canadian company. See *Baraily v Canada (Citizenship and Immigration)*, 2014 FC 460 at para 25 [*Baraily*]. After quoting from Justice Boivin's decision in *Jiang*, Justice Noël stated the following in *Bi*, above, at para 15:

> Clearly, the Court was opposed to an employee accumulating days towards meeting their residency requirement simply by being hired on a full-time basis outside of Canada by a Canadian business. Instead, it was this Court's view that the permanent resident must be assigned temporarily, maintain a connection with his or her employer, and to continue working for his or her employer in Canada following the assignment.

[25] In *Wei v Canada (Citizenship and Immigration)*, 2012 FC 1084 at para 53 [*Wei*], Justice O'Keefe held that *Jiang* and *Bi* "indicate that the concept of assignment in subsection 61(3) of the Regulations requires that the employee return to work for his or her employer in Canada following the assignment." He went on to hold that it was reasonable for the IAD to conclude that there was no "assignment" as required by s 61(3) of the Regulations because there was no job available for the applicant to return to in Canada. See *Wei*, above, at para 60. And in *Xi v Canada (Citizenship and Immigration)*, 2013 FC 796 [*Xi*], the IAD found that the applicant failed to show that his assignment was temporary. The IAD noted that his employment contract did not indicate that the employment outside Canada would be temporary;

nor was there an indication that there was a position to promote him to in Canada. Justice Shore held that "[t]he question at issue under subsection 61(3) is the temporary character of the principal Applicant's employment outside Canada" and that it was reasonable for the IAD to conclude that the applicant was not "assigned" to his position. See *Xi*, above, at paras 52-53.

[26] The Applicant says that the evidence does not support the IAD's finding that the Male Respondent was temporarily assigned to China and that there was an expectation that he would return to work for the company in Canada. His employer's Human Resources Manager, Mr. Griffin, testified that the Male Respondent was hired to work in China because of his expertise there and that he is important to the company in Asian markets. Future employment with the company in Canada was only a "possibility" and the Male Respondent is presently more valuable to his employer in China. Neither the Male Respondent's job offer from his employer nor the letters provided to support his request for a travel document make reference to his employment in China being temporary. They also do not set out a time for his return to Canada or refer to any possibility of return to employment with the company in Canada. The Applicant submits that the IAD's determination defeats Parliament's intent in enacting s 61 of the Regulations because it allows the Male Respondent to work outside of Canada for an indefinite amount of time, even if he never returns to Canada, while still counting the days spent abroad toward to the Respondents' residency obligations as permanent residents.

[27] The Applicant also submits that the Respondents' request for costs fails to identify any special reasons that would justify costs as required by Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

B. *Respondents*

[28] The Respondents submit that the Applicant simply disagrees with the Decision and is attempting to re-try the matter on judicial review. The Respondents note that the Male Respondent worked for his employer for several years in Canada before being assigned to work for a subsidiary of the company in China. The IAD found that this assignment to China was temporary based on an implied contractual term in the Male Respondent's employment contract. The IAD based this finding on the testimony of the Male Respondent and his employer's Human Resources Manager, both of whom the Board found to be credible. Since the Male Respondent was outside of Canada working on assignment by a Canadian business, those days count towards his residency obligation under s 28(2)(a)(iii) of the Act. Similarly, since the Female Respondent was outside of Canada accompanying her spouse who was working outside of Canada on assignment by a Canadian business, those days count towards her residency obligation under s 28(2)(a)(iv) of the Act.

[29] The Respondents submit that the cases relied on by the Applicant are distinguishable. They note that in *Bi*, the applicant had only been a permanent resident of Canada for about a month before returning to China and was unemployed in China for over a year before being hired by a Canadian company. See *Bi*, above, at paras 2-3. Similarly, in *Xi*, the applicants had only been permanent residents of Canada for eight days before they returned to China and the principal applicant never worked for his Canadian employer before accepting a job offer after returning to China. See *Xi*, above, at paras 4-10. In comparison, the Male Respondent resided in Canada for several years as a permanent resident and worked for his employer during part of that

time before accepting an assignment to work for a subsidiary of his employer in China. The Respondents say that this is also distinguishable from *Wei*, because in *Wei* the applicant had worked for different businesses before being specifically hired to represent his Canadian employer in China. See *Wei*, above, at paras 5-6 and 54.

VIII. ANALYSIS

[30] It is clear from the record before me that in finding that the Male Respondent's employment abroad by Team Solutions qualified under s 61(3)(a) of the Regulations – and so counted towards compliance with the residency obligation under s 28(2)(a)(iii) of the Act – and that the Female Respondent had met her residency obligation by accompanying her husband while he was employed abroad pursuant to s 28(2)(a)(iv) of the Act, the IAD made reviewable errors of fact and law, so that this application must be allowed and the matter returned for reconsideration.

[31] The heart of the Decision is as follows:

> [25] The evidence supports an implied term of contract that the Appellant would return to Canada at the completion of the assignment, based on the third criterion of the presumed intention of the parties where the implied term must be necessary to give business efficacy to a contract.
>
> …
>
> [28] The testimonies are consistent that the intention of the parties is for Mr. He to remain in China at the present time to manage the existing contracts, and to continue growing the business in China by acquiring more contracts. Mr. He also plays a role in the company's expansion into Thailand.
>
> [29] There are no conflicts or inconsistencies between the testimonies of Mr. He and Mr. Griffin, only a difference in

perspective arising from the employment relationship: Mr. Griffin focused on the benefit to Team Solutions for Mr. He to remain in China and acknowledged the possibility of his return to Canada because he has the qualifications to resume a supervisory role in the Canadian operations. Mr. He focused on his desire to return because he is a permanent resident of Canada.

[30] The uncertainty rests in the timeframe of when Mr. He would no longer be needed in Asia. Although there is not a specific date for Mr. He to return to work for Team Solutions in Canada, both witnesses testified to the possibility of Mr. He returning at the completion of the assignment. Mr. Griffin testified that Mr. He has the capabilities to progress into senior management in North America as he would be an asset in advising North American resources on the Asian market. Mr. He testified that the understanding of both parties is that his position abroad is temporary because at the end of the assignment, he would train his replacement and return to Canada. As it turned out, business in China is good, but profits have not met the expectations of senior management. Hence, the plan is for Mr. He to continue building the operations in China. The final goal is to localize the business which entails finding a person to run the Asian operations within a two to three year timeframe, so he can return to Canada.

[31] At the time of accepting the offer of employment, Mr. He expressed his wish to return to Canada because he is a permanent resident of Canada. Mr. He was met with the response from his employer that his experience qualified him to return to work in Canada because he was already a supervisor before being re-hired for the China position. Although Mr. Griffin did not specify a timeframe for his return because the purpose of Mr. He's work in China is not yet completed, Mr. Griffin's testimony did not contradict Mr. He's understanding that he would return to Canada at the end of the assignment abroad.

[32] The finding of an implied term of contract for Mr. He's eventual return to Canada is consistent with the intent of Parliament to provide flexibility in the types of employment opportunities a permanent resident could engage in while abroad for compliance with the residency obligation. This intention was expressed in the *Regulatory Impact Analysis Statement*:

> Various options were considered in establishing criteria for complying with the residency obligation. The objective was to achieve an appropriate balance between allowing long-term absences, ensuring permanent residents would maintain genuine ties to

> Canada and limiting the potential for abuse. A more restrictive definition and provision for "Canadian business" and "employment abroad" were considered. This option was rejected as it did not provide sufficient flexibility in the types of employment opportunities a permanent resident could engage in while abroad.
>
> [Footnote omitted.]

[32] The contract under which the Male Respondent is presently employed by Team Solutions makes it clear that he occupies a full-time position as Operations Manager that requires him to be onsite in Shanghai, China, and that travel within China might be required of him from time to time. The employment contract is for an indefinite duration and there is no provision that, either explicitly or implicitly, deals with the Male Respondent's returning to work in Canada at any time.

[33] Citing the Supreme Court of Canada decision in *Canadian Pacific Hotels*, above, at 775, the IAD found an implied term in the Male Respondent's employment contract to the effect that he would return to work for Team Solutions in Canada at the end of his assignment abroad. This implied term, the IAD said, was, in accordance with *Canadian Pacific Hotels*, based upon the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed."

[34] The "presumed intention of the parties" in the present case was found by the IAD in the evidence provided by the Male Respondent and Mr. Griffin, the Human Resources Manager for Team Solutions.

[35] Mr. Griffin made it quite clear that the Male Respondent is essential to Team Solutions in the Asian market and he presently has extensive responsibilities that require him to be resident in China. As the Asian market is growing, the company's intention is for the Male Respondent to develop the business in Asia, and Mr. Griffin testified that it benefits Team Solutions for the Male Respondent to remain in China because his job is to develop the market in China where the company is still growing its business.

[36] When it comes to the future and a return to Canada for the Male Respondent, Mr. Griffin would go no further than to say that the "possibility" exists for the Male Respondent to return to Canada.

[37] The evidence does not support the IAD's conclusion that it was the understanding of both parties that the Male Respondent would return to Canada and work for Team Solutions in Canada at the conclusion of his stay in China. It was not necessary to import an implied term into the employment contract that the Male Respondent would return to Canada to work for Team Solutions in order to give business efficacy to the contract; nor did the evidence show that both parties had obviously assumed that this would be the case. Whatever the Male Respondent might now wish had been included in the contract, Mr. Griffin made it clear that he has no more than a "possibility" of employment by Team Solutions in Canada. A "possibility" does not impart a contractual commitment. In fact, it clearly means there is no contractual commitment to that effect.

[38] The Male Respondent's evidence was tellingly inaccurate about his employment relationship with Team Solutions. He testified that he had been employed by Team Solutions in Canada for three years before he went to work for the company in China. The documentary evidence, however, makes it clear that he worked as a Supervisor for Team Solutions for about two years, but that his employment was terminated for work shortages in April 2009. He was then re-hired in April 2010 to be the Operations Manager in Shanghai, China for an affiliate company under a contract of indefinite duration that requires him to be in China. He has been there ever since.

[39] Mr. Griffin's testimony does, in fact, contradict the Male Respondent's understanding that he would return to Canada to work for Team Solutions at the end of the assignment period. The term of the present contract is indefinite and Mr. Griffin's clear testimony that future employment of the Male Respondent with the company in Canada is no more than a possibility, is a direct contradiction. The Male Respondent may well wish to return to Canada if he loses or relinquishes his job in China, but there was never any understanding that when he did so, he would be employed by Team Solutions in Canada. As things now stand, Team Solutions is clear that it wants the Male Respondent to remain in China for an indefinite period. In *Baraily*, above, the Court recognized that assurance had been given, but this was not enough:

> [27] The principal Applicant testified at the hearing before the IAD that his employer had provided him "some assurances" regarding the possibility of a position in Canada after his work abroad (IAD Decision at para 12); however, the Court agrees that this alone is not sufficient evidence to establish that the principal Applicant would continue working for his employer in Canada after his contract expired.
>
> [Emphasis in original.]

In the present case, the company acknowledged there was a “possibility” the Male Respondent might be employed in Canada at some later date. In my view, this is less of a commitment than the “some assurances” that Justice Shore found insufficient in *Baraily.*

[40] In conclusion, the evidence shows that the Male Respondent was re-hired specifically to work in China for an indefinite period, that he left Canada to work in China, and that he continues to work in China and will do so for an indefinite period. It also shows that he has not returned to Canada since he left in April 2010 to fulfil his contractual obligations to Team Solutions. The documentary evidence and the evidence of the Male Respondent’s employer (through Mr. Griffin) is clear that he was not assigned on a temporary basis to work in China and that his employment obligations require him to reside in China, for an indefinite period. There is a “possibility” that, at some time in the future, his present employer may hire him to work in Canada, but this is not a contractual commitment. On the evidence, no implied term can be read into the contract of employment that the Male Respondent is on assignment in China and will be returning to work for the company at some future date.

[41] My findings do not mean, of course, that the Male Respondent will not be able to return to Canada. The IAD did not consider humanitarian and compassionate [H&C] grounds. Upon return for reconsideration, the Respondents will now be able to press their H&C case.

[42] Counsel agree there is no question for certification and I concur.

JUDGMENT IN IMM-4112-17

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different member in accordance with these reasons.
2. There is no question for certification.
3. The Respondents' request for costs is refused.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4112-17
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v PENG HE AND LIPING ZHOU
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 5, 2018
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	APRIL 27, 2018

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