Federal Court  Cour fédérale

Date: 20181114

Docket: IMM-87-18

Citation: 2018 FC 1149

Montréal, Quebec, November 14, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

CONG LU
and
LING WEI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS
(Delivered from the Bench at Montréal, Quebec, on November 13, 2018)

I. Nature of the Matter

[1] The Applicants, Mr. Cong Lu and his wife Mrs. Ling Wei, requested a judicial review of a decision by an Immigration Officer from the Immigration Section of the Consulate General of Canada in Hong Kong [Section], pursuant to subsection 72(1) of the *Immigration and Refugee*

Protection Act, SC 2001 c 27 [IRPA]. The decision at issue is a refusal to reopen their application for permanent residence in Canada, since the Applicants did not respond to a letter that was allegedly sent to them.

II. Facts

[2] The Applicants, both aged 53, are citizens of the People's Republic of China who wish to immigrate to Canada with their daughter Wen Xi Lyu, aged 22. In early 2014, they applied for permanent residence in Canada.

[3] Me Jean-François Harvey represented the Applicants, and all communications between the Canadian immigration authorities and the Applicants were effected through Me Harvey's business email.

[4] As part of the file review, the Immigration Officer [Officer] recognized what appears to be a contradiction between an answer on the Applicants' application and the notarial Household Register book. More precisely, when asked about her previous military or paramilitary service, the female applicant answered "NONE", while the notarial Household Register book indicates that she had served and was discharged from active duty.

[5] On January 5, 2017, the Officer prepared a procedural fairness letter (PFL) requesting additional information from the female applicant to allay concerns related to the apparent contradiction. The PFL further specified that the Applicants had thirty days to provide the

information. The Section asserts that an email containing this PFL was sent to Me Harvey on January 5, 2017.

[6] As no response to the PFL had been received from the Applicants, in March 2017, the Officer transferred the file to the Unit manager for a decision on an A40 misrepresentation. The Unit manager concluded that the female applicant had misrepresented or withheld material facts, and, therefore, rejected the Applicants' request for permanent residency. Due to the alleged misrepresentation of material facts, the Applicants became inadmissible to re-apply for permanent residence for five years. This decision was sent to the Applicants on June 12, 2017.

[7] The Applicants, Me Harvey, and one of his staff all affirmed that they had no trace of having received the PFL, either electronically or otherwise. In statutory declarations, the Applicants further clarified that the female applicant had been a "common" nurse, and, that she had never participated in any war, combat or military training, and that she did not have any military rank. These declarations were sent to the Immigration authorities, together with a letter implying that a further review of their file was expected.

[8] Although the Section originally refused to conduct a new review, it eventually informed the Applicants that an Immigration Officer would review the application based on the content of the message sent by Me Harvey, the application and the refusal decision.

[9] The preceding lent its way to the Immigration Officer to verify that the letter was indeed sent. That Immigration Officer confirmed that an email containing the PFL, had indeed been sent

to Me Harvey on June 6, 2017 at 10:42. The Immigration Officer also noted that the email had not been returned as “undeliverable”.

[10] On December 20, 2017, the Section confirmed by email to Me Harvey that a review had been effected by an Immigration Officer, and that the original decision stands.

III. Issues and Standard of Review

[11] The following issue arises in this application:

> Did the Migration Officer breach the duty of fairness by refusing to reopen the application after having received declarations to the effect that the procedural fairness letter had never been received by the Applicants?

[12] The Supreme Court of Canada has determined that issues arising from procedural fairness should be assessed as based on the standard of correctness (*Ellis-Don Ltd. v Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221 at para 65).

IV. Impugned Decision

[13] The Applicants are challenging the decision issued on December 20, 2017, by an Immigration Officer of the Section for refusing to reopen their file, following the receipt of additional documents.

V. Relevant Dispositions

[14] The following dispositions of the IRPA are relevant to this case.

Subsections 40(1) to (3):

Misrepresentation	**Fausses déclarations**
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;
(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or	c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou de protection;
(d) on ceasing to be a citizen under	d) la perte de la citoyenneté :
(i) paragraph 10(1)(a) of the Citizenship Act, as it read immediately before the coming into force of section 8 of the Strengthening Canadian Citizenship Act, in the circumstances set out in subsection 10(2) of the Citizenship Act, as it read immediately before that coming into force,	(i) soit au titre de l'alinéa 10(1)a) de la Loi sur la citoyenneté, dans sa version antérieure à l'entrée en vigueur de l'article 8 de la Loi renforçant la citoyenneté canadienne, dans le cas visé au paragraphe 10(2) de la Loi sur la citoyenneté, dans sa version antérieure à cette entrée en vigueur,
(ii) subsection 10(1) of the Citizenship Act, in the circumstances set out in section 10.2 of that Act, or	(ii) soit au titre du paragraphe 10(1) de la Loi sur la citoyenneté, dans le cas visé à l'article 10.2 de

	cette loi,
(iii) subsection 10.1(3) of the Citizenship Act, in the circumstances set out in section 10.2 of that Act.	(iii) soit au titre du paragraphe 10.1(3) de la Loi sur la citoyenneté, dans le cas visé à l'article 10.2 de cette loi.
Application	**Application**
(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 five 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; and	a) l'interdiction de territoire court pour les cinq 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;
(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.	b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.
Inadmissible	**Interdiction de territoire**
(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).	(3) L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.

VI. Analysis

[15] The decision to refuse to reopen the Applicants' file was based on the fact that the Applicants did not provide information within the allotted timeline, as per the PFL.

[16] The evidence given by the Respondent was not conclusive as to when the PFL was sent, which then leads to the more important question: was the PFL actually sent? As detailed below, the Respondent refers to two different dates at which the PFL was supposedly sent:

- The Global Case Management System (GCMS) Notes dated March 6, 2017 refer to the letter having been sent on **January 5, 2017**;
- The GCMS Notes dated March 10, June 13 and September 8, 2017, state that the PFL was sent on **January 6, 2017**;
- The Respondent's Memorandum (dated April 4, 2018), at paragraph 9, affirms that the PFL was sent on **January 5, 2017**;
- The Respondent's Memorandum, at paragraphs 10, 28 and 29, affirms that the PFL was sent on **January 6, 2017**.

[17] Considering that the Respondent was unable to clearly show when the letter was sent, this Court concludes that the Respondent has not demonstrated that the letter had been sent to the Applicants, and consequently concludes that procedural fairness was breached.

[18] Should the Court have been convinced that the PFL had been sent by email in January 2017, the fact remains that the Respondent had not shown that the email had reached the Applicants. On that point, this Court fully endorse Justice Annis' view with regard to failed emails in cases, wherein he writes:

> I am also in agreement with *Zare* that in many situations it would be unfair to the applicant for the respondent to bear no responsibility for communication delivery, especially when it did not provide a safeguard against possible email transmission failure that was available as a function of the email program.
>
> (*Asoyan v Canada (Citizenship and Immigration)*, 2015 FC 206 at para 20, referring to *Zare v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1024, [2012] 2 FCR 48.)

[19] The application file, including the responses that were provided by the Applicants after the original refusal letter, should be referred to a different Immigration Officer for review anew.

VII. Conclusion

[20] For the above reasons, this application for judicial review is granted.

JUDGMENT in IMM-87-18

THIS COURT'S JUDGMENT is that the application for judicial review be granted. The matter is therefore referred to a different Immigration Officer for a decision anew. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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