

Federal Court



Cour fédérale

**Date: 20190315**

**Docket: IMM-3607-18**

**Citation: 2019 FC 320**

**Toronto, Ontario, March 15, 2019**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**YANJUNG DONG (A.K.A. YANJUN DONG)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Yanjung Dong, challenges a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD) which refused his appeal from the issuance of an exclusion order. Mr. Dong's immigration difficulties stem from an admitted misrepresentation in connection with a bogus marriage from which he obtained permanent residency.

[2] Mr. Dong's claim to relief was based on asserted humanitarian and compassionate [H&C] considerations. The IAD was not convinced by the evidence he presented and it dismissed his appeal. He brings this application on the strength of an allegation that the immigration consultant who represented him before the IAD was incompetent. Mr. Dong takes particular issue with the consultant's failure to adequately corroborate the difficulties he would face in China as a gay man suffering from respiratory challenges.

[3] The IAD accepted Mr. Dong's claim to be gay but discounted its significance because the evidence he presented did not establish that gay men faced a high level of hardship in China. The IAD also discounted his medical history of asthma and allergies because he had suffered from and received treatment for those conditions in China and, in any event, he could live in China in a non-polluted area.

[4] It is apparent that Mr. Dong followed the Federal Court protocol for cases involving allegations of incompetence against a professional representative. His allegations were transmitted to his prior consultant who, in turn, responded through legal counsel. Mr. Dong alleged that his consultant failed to instruct him to obtain corroboration for his Canadian education, his prior ownership of a condominium, his history of Canadian employment, his current medical status and his sexual orientation risk in China.

[5] The consultant either denied Mr. Dong's allegations or attempted to put them into a larger context. For instance, he stated that Mr. Dong's previous ownership of a condominium

was irrelevant to his current establishment. He also stated that Mr. Dong's employment history in Canada was so weak that it was not worthy of further proof.

[6] The only two issues Mr. Dong has attempted to exploit on this application concern his medical status and his sexual orientation risk in China. He argues that the consultant should have presented a more robust case describing conditions in China for homosexuals and showing a serious pollution risk for asthmatics. Mr. Dong takes particular umbrage at the consultant's allegation that Mr. Dong had advised him that he was not gay and had fabricated "any stories related to his homosexuality". This assertion, he says, is completely inconsistent with the evidence Mr. Dong gave to the IAD under questioning by the consultant.

[7] Mr. Dong has not put any evidence forward on this application that would tend to prove a degree of Canadian establishment beyond the vague testimony he offered to the IAD. At the time of the hearing he was unemployed. When asked about how he sustained himself for 10 years he gave the following cryptic answer:

APPELLANT: I just doing partners with other friends doing small business and sometimes I just buy something like...it is like those people stay in China an they asking for something in Canada, I will just buy for them and I will earn like some exchange currency, exchange rate or like some other fees, various fees.

[8] He also testified that he had essentially no social relationships in Toronto and no family in Canada. Further testimony to the IAD indicated that he had no meaningful social or community engagements or activities. His last romantic relationship ended in 2008. In the face of this evidence, the IAD concluded its decision as follows:

[21] I found the appellant committed a deliberate misrepresentation in order to fraudulently obtain status in Canada, for which I find the appellant will require a very high threshold of H&C consideration to warrant special relief.

[22] Although the appellant spent over 15 years in Canada, he was unable to provide evidence of his establishment. He does not have family ties in Canada and the evidence did not suggest he benefited from community support, I gave little weight to the fact that the appellant is affected by allergies, because he can get treated for these in China and move to a location with less pollution. I also gave little weight to the hardship he would be exposed to as a consequence of his sexual orientation. The appellant can choose to live away from his family in China, as he did in Canada to avoid their pressure. The evidence further did not support that the treatment of homosexuals in China may result in important hardship, but that conservative attitude still prevails in many parts of the country. This is why I gave little weight to the hardship the appellant would be exposed to because of his sexual orientation.

[23] Given the above, I find the appellant has insufficient H&C considerations to warrant special relief. Therefore, the appeal is dismissed.

[9] Mr. Dong's primary argument is that the consultant should have presented much stronger evidence about conditions facing gays in China. He also relies on the consultant's grave ethical breach in either falsifying a response to the allegation of incompetence or in allowing Mr. Dong to provide false testimony to the IAD about his sexual orientation.

[10] I take Mr. Dong's point that, one way or another, the consultant acted unprofessionally. If he was told by Mr. Dong that Mr. Dong was not gay, it was unethical to elicit evidence from Mr. Dong to the contrary. The only other possibility is that the consultant was being dishonest about what Mr. Dong told him.

[11] Mr. Dong's allegation of incompetence, however, relates to the consultant's failure to present corroborating evidence to the IAD about the difficulties experienced by gays in China. I take Mr. Dong's point that a better case on this issue could have been made than the one presented, but that is true for almost every case presented to a decision-maker. There is no such thing as a perfect evidentiary record because better or stronger evidence will always be arguably available.

[12] The legal test for setting aside a decision based on representational incompetence was recently articulated by Justice Patrick Gleeson in *Badihi v Canada*, 2017 FC 64, 277 ACWS 3d 163, in the following passage:

[17] Justice James Russell set out the test for addressing allegations of ineffective or incompetent assistance of counsel in *Galyas*, where he stated at paragraph 84:

[84] It is generally recognized that if an applicant wishes to establish a breach of fairness on this ground, he or she must:

- a. Provide corroboration by giving notice to former counsel and providing them with an opportunity to respond;
- b. Establish that former counsel's act or omission constituted incompetence without the benefit and wisdom of hindsight; and
- c. Establish that the outcome would have been different but for the incompetence.

[Sources omitted]

[18] The burden is on the applicants to establish the performance and the prejudice components of the test to demonstrate a breach of procedural fairness. The parties agree that the threshold is very high. As noted by Justice Richard Mosley in *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paragraph 9:

[9] [...] The party making the allegation of incompetence must show substantial prejudice to the individual and that prejudice must flow from the actions or inaction of the incompetent counsel. It must be shown that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different."

[13] I am not satisfied that Mr. Dong has met the high burden referenced above. Given the seriousness of his own misconduct and the profound weakness of his case for Canadian establishment, the likelihood of a favourable H & C finding is doubtful at best. Indeed, the evidence he proffered on this application did not establish that any serious hardships would likely await him in China based on his health status or his asserted sexual orientation. Ultimately, this was about as weak a case for H & C relief as could be found and it is not surprising that a stronger case was not presented: there simply was no meaningfully stronger case to be made.

[14] Neither party proposed a certified question and no issue of general importance arises on this record.

**JUDGMENT in IMM-3607-18**

**THIS COURT'S JUDGMENT is that** this application is dismissed.

“R.L. Barnes”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3607-18

**STYLE OF CAUSE:** YANJUNG DONG (A.K.A. YANJUN DONG) v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 11, 2019

**JUDGMENT AND REASONS:** BARNES J.

**DATED:** MARCH 15, 2019

**APPEARANCES:**

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