Federal Court  Cour fédérale

Date: 20220214

Docket: IMM-1232-21

Citation: 2022 FC 197

Ottawa, Ontario, February 14, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

YAN ZHANG

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 by a visa officer [the "Officer"] located at the Embassy of Canada in Beijing, China, dated January 5, 2021, refusing the Applicant's application for a work permit under the Temporary Foreign Worker Program [the "Application"] and finding the Applicant inadmissible in accordance with paragraph 40(1)(a) of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"] [collectively, the "Decision"].

II. Background

[2] The Applicant, Yan Zhang, is a 64-year-old female citizen of China. In June 2020, the Applicant applied for a work permit to Canada. She received a two-year, full-time job offer as a cook with the Grange Hotel Restaurant in Carmangay, Alberta. The offer was supported by a positive Labour Market Impact Assessment (LMIA), which was approved on February 11, 2020.

[3] On July 17, 2020, the Applicant received a "procedural fairness" letter from the Officer indicating concern that the employment record history that the Applicant had submitted in support of her Application was not genuine, and if the Applicant was found to have engaged in misrepresentations in submitting her Application, she may be found inadmissible for five years under paragraphs 40(1)(a) and 40(2)(a) of the *Act*.

[4] The Applicant and the Officer exchanged a number of correspondence in the following months, wherein the Applicant provided additional information regarding her employment as a cook at Jingcan Restaurant in China from 2014 to 2018. This correspondence focussed on the absence of any objective documentary evidence of the Applicant's employment, particularly an insurance policy for employees at the Jingcan Restaurant in 2018, 2019, and 2020.

[5] The Applicant claimed, and provided documents to corroborate, that Jingcan Restaurant had not purchased a policy for employees from 2018 to 2020 because this was optional for small businesses in her town.

[6] The Officer refused the Application by Decision dated January 5, 2021, on the grounds that she had misrepresented the facts of her employment history and the Applicant was found inadmissible to Canada for a period of five years pursuant to paragraph 40(1)(a) of the *Act*.

[7] The Applicant's prospective employer, the Grange Hotel Restaurant, was destroyed in a fire on March 28, 2021. Therefore, the only live issue under review is the misrepresentation finding resulting in the five-year bar on the Applicant's re-application for a work permit.

[8] The Applicant seeks:

i. An Order quashing the Officer's Decision refusing the Application;

ii. An Order quashing the finding that the Applicant is inadmissible in accordance with paragraph 40(1)(a) of the *Act*, and that the Applicant will remain inadmissible for a period of five years from the date of the refusal of the Application; and

iii. An Order remitting the matter back for redetermination by a different Officer.

III. Decision Under Review

[9] The Officer noted several issues in the Application regarding her employment record, including:

i. The Applicant was unable to provide the original insurance policy or similar policies for 2018, 2019, and 2020 to support her employment as a cook at the Jingcan Restaurant;

ii. The Applicant provided a certificate of sick leave and medical record, dated May 18, 2017, when the Applicant was employed as a full-time accountant. Yet, the certificate of sick leave states the Applicant's occupation as a cook at Jingcan Restaurant. In addition, the insurance coverage support letter was not issued in the standard format issued by China Life; and

iii. The Applicant could not produce any other verifiable documents to support her employment at Jingcan Restaurant, such as social insurance or tax contributions.

[10] The Officer stated that the original insurance policy was the only official third-party document that could be verified and provide evidence to support the Applicant's claims.

[11] Based on the available information, the Officer found that, on a balance of probabilities, the Applicant had submitted fraudulent documentation and information in support of her Application, thereby, misrepresenting materials facts, which could have induced an error in the administration of the *Act*, had it gone undetected. As a result, the Officer refused the Applicant's

Application and found the Applicant inadmissible under paragraph 40(1)(a) of the *Act* for a period of five years.

IV. Issues

[12] The issues to be decided on this judicial review are:

(1) Was the Decision reasonable?

(2) Was the Decision procedurally fair?

V. Standard of Review

[13] Where a Court reviews the merits of an administrative decision, such as the Decision in this case, the standard of review is reasonableness [*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 23].

[14] Issues that relate to a breach of procedural fairness are reviewed on the standard of correctness or a standard with the same import [*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 34-35 and 54-55, citing *Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79].

VI. Analysis

[15] A foreign national may be issued a visa if, following an examination, the visa officer is satisfied that the foreign national is not inadmissible and meets the requirements of the *Act* [subsection 11(1) of the *Act*].

[16] A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires [subsection 16(1) of the *Act*].

[17] 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 the *Act* [paragraph 40(1)(a) of the *Act*].

[18] Paragraph 40(1)(a) of the *Act* is to be given a broad interpretation in order to promote its underlying purpose. The objective of this provision is to deter misrepresentation and maintain the integrity of the immigration process. To accomplish this objective, the onus is placed on the applicant to ensure the completeness and accuracy of their application [*Masoud v. Canada (Citizenship and Immigration)*, 2012 FC 422 at paragraph 24].

[19] A foreign national seeking to enter Canada has a “duty of candour” which requires disclosure of material facts. The Court has recognized the importance of full disclosure by

applicants to the proper and fair administration of the immigration scheme [*He v. Canada (Citizenship and Immigration)*, 2012 FC 33 [*He*] at paragraph 17].

A. *Was the Decision reasonable?*

[20] The Applicant argues that the Decision is unreasonable on the following two grounds:

A. The Officer erred in finding the Applicant misrepresented her employment history, solely on the basis that that the documents that she was able to provide are easily manipulated in China; and
B. The Officer erred in basing their Decision on the absence of an original insurance policy from 2017 and similar policies from 2018 to 2020.

[21] The Respondent argues that the Officer's treatment of the evidence was reasonable and that they did not err in their assessment of the documentation; based on the facts, the Officer was open to find that, on a balance of probabilities, the Applicant had misrepresented her employment history with the Jingcan Restaurant.

[22] While an officer is entitled to rely on their own personal knowledge of the local factors and conditions in assessing the evidence and documents provided in support of an application [*Du v. Canada (Citizenship and Immigration)*, 2022 FC 10 at paragraph 34; *Al Hasan v. Canada (Minister of Citizenship and Immigration)*, 2019 FC 1155 at paragraph 10] and fraudulent documents may be generally available in China, this is not a sufficient reason without more to reject foreign documents as forgeries [*Lin v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 157 at paragraphs 53 to 54].

[23] The Officer must examine and weigh the actual documents before it, rather than simply rejecting them out of hand [*Liang v. Canada (Citizenship and Immigration)*, 2020 FC 720 at paragraph 18]. The Officer does not appear to have conducted such an examination in this case. The Officer does state that the letter from the insurer, China Life, is not in the format that they are familiar with and that notarized documents are not normally provided by applicants, but does not speak to any weight assigned to these documents provided by the Applicant to corroborate and reasonably explain the omission of the requested insurance policy. If there were specific reasons why the documents should have been rejected – based on the document itself – then the Officer was required to explain it in the reasons [*Ogbebor v. Canada (Citizenship and Immigration)*, 2021 FC 994 at paragraph 21].

[24] In addition, while the onus lies on the Applicant to provide the best evidence and the Officer does not have to conduct further enquiries, there does appear to be an expectation that an Officer will take it upon themselves to simply use the contact information provided to verify the authenticity of the evidence that is provided [*Paxi v. Canada (Citizenship and Immigration)*, 2016 FC 905 at paragraph 52; *Kojouri v. Canada (Minister and Citizenship and Immigration)*, 2003 FC 1389 at paragraphs 18 to 19; *Hiu v. Canada (Citizenship and Immigration)*, 2011 FC 1089 at paragraph 3; *Huyen v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 904) at paragraph 5]. The Officer, in this case, was provided contact information with the Applicant's documents and did not use this to simply call and verify their authenticity.

[25] The Officer drew a negative inference from the non-inclusion of the Applicant's insurance policy, yet does not appear to reasonably examine or weigh the documents that the

Applicant filed in response or in explanation of the missing policy. The Officer appears to have closed their minds to the explanations provided by the Applicant [*He* at paragraph 27].

[26] The Officer's finding that the letters from co-workers, the restaurant owner, and pay stubs were insufficient, which appears to be based upon pure speculation, was unreasonable, as was their reliance on the finding that the insurance coverage support letter was not provided in the standard format expected from China Life. Again, failing to clearly indicate the basis for finding the evidence provided as not being authentic and implicitly finding the documents relied upon by the Applicant as not being genuine results in a lack of clarity or intelligibility in the Officer's Decision.

B. *Was the Decision procedurally fair?*

[27] Procedural fairness dictates that a visa officer must ensure that an applicant has the opportunity to meaningfully participate in the application process. This includes being informed of and provided an opportunity to respond to perceived material inconsistencies, credibility concerns, accuracy or authenticity concerns, or the reliance of a visa officer on extrinsic evidence [*Bui v. Canada (Minister of Citizenship and Immigration)*, 2019 FC 440 at paragraph 27].

[28] While the decision to issue a temporary visa typically attracts a low or minimal level of procedural fairness, associated findings under paragraph 40(1)(a) of the *Act* attract a higher level or degree of procedural fairness because a finding of misrepresentation precludes an applicant from re-applying for a 5-year period and potentially reflects the applicant's character [*Jiayan He v. The Minister of Citizenship and Immigration*, 2022 FC 112 at paragraph 20].

[29] The Applicant argues that the Officer breached the principles of natural justice when they failed to provide the Applicant with a meaningful and fair opportunity to respond to any credibility issues. More specifically, the Applicant claims that the Officer breached procedural fairness on two grounds:

i. The Officer erred by not providing clear findings on the evidence in their Decision; and

ii. The Officer questioned the truthfulness of the evidence based on their opinion, but failed to disclose their reasoning.

[30] As stated above, while the Officer appears to have considered the documents provided by the Applicant in support of her Application, they fail to provide cogent reasoning why those documents should result in a determination of fraudulent conduct by the Applicant amounting to a misrepresentation. As such, the Officer's reasons were not sufficiently responsive to the submissions and evidence filed by the Applicant in response to the procedural fairness letter.

[31] In addition, if the Officer questioned the Applicant's credibility, it was incumbent upon them to conduct an oral hearing or use the contact information provided with the corroborative documents to verify their authenticity. Where there are credibility concerns not put to the Applicant, there is a lapse in procedural fairness [*Zubova v. Canada (Citizenship and Immigration)*, 2019 FC 444 at paragraph 16 to 19; *Kaur v. Canada (Citizenship and Immigration)* 2011 FC 219 at paragraphs 27 to 28].

[32] The Officer's findings of misrepresentation were not made on the basis of clear and convincing evidence and the reasons provided did not reflect the serious consequence to the Applicant. I find that the Decision was procedurally unfair.

VII. Conclusion

[33] For the reasons above, this Application is allowed.

JUDGMENT in IMM-1232-21

THIS COURT'S JUDGMENT is that

1. The Application is allowed and the matter is remitted to a different officer for redetermination.
2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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