

Federal Court



Cour fédérale

Date: 20220614

Docket: IMM-6106-19

Citation: 2022 FC 883

Ottawa, Ontario, June 14, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

**JINHAO GUO, QINGQUAN MI, AND XIAO
MI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family — Ms. Guo, her husband and their minor child, who were both listed as dependents on her immigration application that is under review. Ms. Guo applied for permanent residence under the self-employed persons class. Her application was refused by

an officer at Immigration, Refugees and Citizenship Canada [IRCC] in Hong Kong (“Officer”) on September 26, 2019. Ms. Guo is challenging the refusal in this judicial review.

[2] Ms. Guo has raised two central arguments with respect to the procedural fairness of the process. First, Ms. Guo argued that the manner in which the interview was conducted was unfair in that she was not given sufficient opportunity to respond to the Officer’s concerns. Second, Ms. Guo asserted that the Officer made their decision on the basis of an incomplete record, as a number of the documents she had filed were not included in the certified tribunal record (“CTR”) that was produced by IRCC for this judicial review.

[3] I agree with Ms. Guo that the decision was made on the basis of an incomplete record. I am satisfied that the documents that were not included in the CTR may have affected the Officer’s decision and therefore the matter needs to be sent back to be redetermined. As this issue is dispositive of the judicial review, I found it unnecessary to address the other procedural fairness issue raised by Ms. Guo.

[4] Based on the reasons set out below, the application for judicial review is allowed.

II. Background

[5] Ms. Guo and her family members, who are the Applicants in this judicial review, are citizens of China. In 2018, Ms. Guo made an application for permanent residence under the self-employed persons class (s 100 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]).

[6] In a letter from IRCC Hong Kong, dated March 1, 2019, Ms. Guo was asked to provide further documentation within 30 days. In addition to other identity documents and updated forms, she was asked to submit documents establishing her relevant experience, intention and ability to be self-employed to make a significant contribution to the proposed economic activities being sought in Canada.

[7] Ms. Guo was informed that these documents had to be received via mail and not email, and that all documents had to be in English or French or otherwise accompanied by a certified translation. Ms. Guo provided a package of documents, dated March 19, 2019, to the Officer.

[8] Approximately three months later, Ms. Guo was advised that she was required to attend an interview at the visa office in Hong Kong in September 2019. Ms. Guo was advised in the notice for the interview that she must be prepared to demonstrate that she complies with the selection criteria applicable to the self-employed persons class, including that she had relevant experience, the intention and ability to be self-employed in Canada and make a significant contribution to specified economic activities in Canada. Ms. Guo was also informed that her English or French abilities would form part of the assessment of her application.

[9] Ms. Guo attended the interview with an interpreter. She was not accompanied by her representative. The day after the interview, the Officer refused the application, determining that Ms. Guo did not meet the requirements of the self-employed persons class under section 88(1) of the *IRPR*. The Officer concluded that they were not satisfied that Ms. Guo had established she had the relevant experience and the ability and intent to make a significant contribution to

specified economic activities in Canada. In coming to this conclusion, the Officer made several findings, including that:

- Ms. Guo did not have education or training in graphic design or graphic arts;
- Ms. Guo was unable to describe her work experiences and provided inadequate details about projects she would have undertaken over the past few years as a self-employed graphic designer;
- Ms. Guo's freelance business "Landlady Creative Design Museum" was not searchable on the public domain such as Google or Baidu;
- Ms. Guo was unable to substantiate her income from her self-employed graphic designer jobs in China based on the bank records provided;
- Ms. Guo showed a lack of concrete research into the feasibility, viability and implementation of her business plan; and
- Ms. Guo had very limited English proficiency.

A. *Preliminary Matters*

[10] Both parties raised concerns with the affidavits that were filed in this judicial review.

[11] Counsel for the Respondent argued, at the further memorandum stage, that Ms. Guo's declaration filed at leave should not be considered by the Court because it had been provided as an exhibit annexed to an affidavit of a legal assistant. I do not find it necessary for me to address this issue. As noted above, my decision is focused on the incomplete record issue, which was comprehensively addressed in Ms. Guo's second affidavit that was filed on its own, and not as an exhibit to another one.

[12] Objections were also raised in relation to the affidavit of the Officer who had made the decision. A ten-page affidavit of the Officer was filed at the leave stage. Counsel for Ms. Guo takes issue with a few statements in the affidavit that they argue are in fact either a contradiction with the Officer's notes that formed part of her reasons for the decision, or are really after-the-fact justifications for the decision which constitute new evidence, and therefore should not be considered by this Court.

[13] In my view, the Respondent is not relying on any of these challenged statements in their argument in response to Ms. Guo's procedural fairness claims, and therefore this issue is not relevant as I would not be considering these statements, in any case, in coming to my determination. I raised this point at the hearing. Counsel for the Respondent continued to argue that there was nothing improper about these statements in the Officer's affidavit and that the Court should consider them.

[14] Given the Respondent's position, I will note that I do not accept this view. There are several statements in the Officer's affidavit that explain how they reached their decision, which are not contained in their reasons for the decision or their notes that form the basis of the decision. In my view, it is improper to ask the Court to consider these statements, where these statements are not a response to the procedural fairness issues raised, but instead are further explanations about how the Officer came to their decision (*Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 at para 145; *Dukuzeyezu v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1017 at paras 10-11; *Shahzad v Canada (Minister of Citizenship and Immigration)*, 2017 FC 999 at paras 19-22 [*Shahzad*]). This Court has found that

“[d]ecision-makers are obliged to state and disclose the complete bases for their decision in the decision itself, at the time of the decision and, as such, they cannot be permitted to fill in the gaps in the record or supplement the grounds for decision (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41)” (*Shahzad* at para 22).

[15] The Respondent’s view was that the Officer was only further explaining what was already in the record and therefore if the issue was already raised, it was not improper for the Officer to expand on this in their affidavit to provide context to their decision. I do not agree. For example, the Officer noted in their affidavit that in deciding that the family would not be self-sufficient, they considered that Ms. Guo’s husband had been unemployed since 2019. Reference to Ms. Guo’s husband’s unemployment status was not a stated basis on which the Officer relied upon in making their decision. There is no basis for the Court to consider this statement from the Officer, filed approximately nine months after the Officer rendered their decision. Again, as I have stated, nothing turns on this issue in my decision but the practice of filing new evidence as to the Officer’s thinking at the time of making the decision should be discouraged.

III. Issues and Standard of Review

[16] The issues raised by Ms. Guo relate to procedural matters and not the merits of the decision. Both parties agree that the general presumption of a reasonableness standard of review does not apply in these circumstances (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 77). The question I need to ask is whether the procedure was fair in all the circumstances (*Canada (Citizenship and Immigration) v*

Khosa, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Analysis

[17] Ms. Guo argued that the Officer made their decision on the basis of an incomplete record. Ms. Guo noted that a number of the documents, including bank statements from 2014-2019, recommendation letters, her academic transcript, employment contracts and samples of her design work, had been provided to the Officer but were not found in the CTR. This Court has held that a decision made on the basis of an incomplete record can be a breach of procedural fairness by violating a party's right to be heard (*Vulevic v Canada (Minister of Citizenship and Immigration)*, 2014 FC 872 at para 6; *Togtokh v Canada (Minister of Citizenship and Immigration)*, 2018 FC 581 at paras 13-23 [*Togtokh*]).

[18] The Respondent argued that Ms. Guo has not established that the documents that were not in the CTR were, in fact, properly provided to the Officer. The Respondent argued that Ms. Guo's former representative had provided these documents with a USB key, and not in paper, as had been requested by the Officer. Ms. Guo stated in her affidavit that the documents had been provided on a USB key as well as in paper. This statement accords with the cover letter of her former representative, dated March 20, 2019, which provided a list of documents that were being provided in paper format, along with the application. This letter can be found in the CTR. There are also documents that Ms. Guo declared she provided at her interview, like her academic transcript, which are not in the CTR.

[19] As discussed above, the Officer filed an affidavit in this matter, where they stated they had reviewed Ms. Guo's declaration where she alleged there was an incomplete record. The Officer did not address this allegation in their affidavit. There is no statement from the Officer regarding whether the documents being claimed to have been provided in paper, which are not in the CTR, were in fact provided to them. As noted above, Ms. Guo was also not cross-examined on her affidavit.

[20] I also note, as pointed out by counsel for Ms. Guo, that the CTR is generally not well organized, with documents out of order in a number of places. While this may not be a relevant factor on its own, I note it because it adds support to the view that there were deficiencies as to how the record was produced in this case.

[21] I find that in these circumstances, on a balance of probabilities, the documents Ms. Guo has claimed to have provided to the Officer were provided, but do not form part of the CTR. I do not find that this is a case where the Applicants is making a "bare assertion" that a document has been provided (*El Dor v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1406 at para 32). I find Ms. Guo's version of events is supported by the record. Moreover, as noted by this Court in *Parveen v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 660, "the respondent controls the record that is put before the Court. Thus, any disputes that arise as a result of deficiencies in the record should, in general, be interpreted against the respondent rather than in her favour" (at para 9; *Togtokh* at para 18).

[22] The Respondent also argued that a number of the documents, which Ms. Guo alleged were submitted but were not in the CTR, were not accompanied by a certified translation as is required. I do not find it necessary to address this issue given there are other relevant documents not included where there was a certified translation. I note, however, that the decision to accept a document without a certified translation in English or French is a decision for the Officer to make. There may be circumstances, like in this case, where the document in question is a graphic design sample for an advertisement, where the Officer may exercise their discretion to consider it despite there not being a translation of the words on the advertisement.

[23] The Respondent lastly argues that the remaining documents were not relevant to the Officer's decision. I do not agree. For example, the letters of recommendation may have been relevant to the Officer's determination that Ms. Guo did not have the necessary experience. The Respondent argued that the historic bank statements were of little relevance because more recent bank statements were in the CTR. Given that the Officer found that Ms. Guo was unable to substantiate her income as a self-employed graphic designer, I find that these bank statements from 2014-2019 may have assisted in addressing this concern. I also find that Ms. Guo's academic transcript may have been relevant to the Officer's concern that she did not have any academic background in graphic design. Ms. Guo's transcript indicates that her thesis was written on "advertising media planning and combination of application". This may have supported Ms. Guo's statement in her business plan that she had an academic foundation in graphic design.

[24] Moreover, it is not for this Court to determine whether the missing documents would have altered the outcome of the application (*Togtokh* at paras 20-21). I am satisfied that the missing documents addressed some of the Officer's concerns. The absence of these documents in the record before the Officer resulted in an unfair process for Ms. Guo.

[25] The application for judicial review is allowed. Neither party raised a question for certification and I agree that none arises.

JUDGMENT IN IMM-6106-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The decision of the Officer at IRCC, dated September 26, 2019, is set aside and the matter is remitted for redetermination by a different decision maker; and
3. No question for general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: IMM-6106-19

STYLE OF CAUSE: JINHAO ET AL v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 14, 2021

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: JUNE 14, 2022

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