Federal Court Cour fédérale

Date: 20220909

Docket: IMM-1215-21

Citation: 2022 FC 1274

Ottawa, Ontario, September 9, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ZHIHUI YAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Zhihui Yao is a citizen of China. She seeks judicial review of a decision by a visa officer [Officer] to refuse her application for a work permit under the Temporary Foreign Worker Program.

[2] The Officer was not satisfied Ms. Yao had truthfully answered a question on the application form regarding whether any family members would accompany her to Canada. The Officer denied her request for a work permit, and also declared her to be inadmissible to Canada for a period of five years for misrepresentation pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The explanation Ms. Yao provided for misunderstanding the question on the application form was straightforward and plausible. The Officer unreasonably dismissed the explanation as “bizarre and confounding”, or as an attempt to play on “semantics and technicalities”. The application for judicial review is allowed.

II. Background

[4] In May 2020, Ms. Yao received an offer from the Canadian affiliate of her Chinese employer, Pharmaster (Ningbo) Technology Co Ltd, to assume the role of business development director in British Columbia. The term of the position was two years. According to a letter from her employer, she was to return to China at the end of the term. She expected to begin her new employment on August 3, 2020.

[5] Ms. Yao applied for a work permit. The application form included a question regarding whether any family members “will accompany you to Canada, yes or no”. She responded “no”.

[6] Ms. Yao has a dependent son who was 13 years old at the time of the application. He had applied separately for a permit to study in Canada. Ms. Yao's parents and her brother live in British Columbia.

[7] On November 19, 2020, the Officer sent Ms. Yao a procedural fairness letter [PFL] identifying concerns about the truthfulness of her responses on the application form. The Officer noted that Ms. Yao's son's application for a study permit indicated she would accompany him to Canada, and then return to China to continue her employment there.

[8] Ms. Yao responded to the PFL on November 23, 2020. She said she had misunderstood the question on the application form. She explained that her son would not accompany her to Canada, because he would arrive before her. She understood the question to ask whether they would be travelling together, not whether they would be in Canada at the same time.

[9] Ms. Yao's son began the process of applying for a study permit in 2019 after receiving an acceptance letter from a school in British Columbia. However, the processing of his application was delayed by the COVID-19 pandemic. He received a second acceptance letter in February 2020. He underwent a medical assessment in May 2020, and submitted his application for a study permit the following June.

[10] Ms. Yao's response to the PFL emphasized that she had no intention to misrepresent either her circumstances or those of her son. She noted that she had arranged a guardian for her

son, which she would not have done if she expected to remain with him in Canada. The guardianship document dated from 2019, and coincided with her son's first acceptance letter.

[11] According to the Officer's notes in the Global Case Management System [GCMS], the Officer compared the timelines of Ms. Yao's application with those of her son's application, and concluded as follows:

> Given the timelines above, it is apparent that the applicants both had sufficient amount of time to submit correct information. The representative also gave a bizarre and confounding explanation for why the applicant did not disclose that her child would also be travelling and living in Canada. This appears to be an attempt to play off of semantics and technicalities of a question, which in the end does not appear to answer my concern.

[12] The Officer referred the matter to the Minister's delegate for decision. The delegate was not satisfied with Ms. Yao's response to the PFL, and determined that her misrepresentation was material. Ms. Yao's application for a work permit was rejected on January 4, 2021, and she was declared inadmissible to Canada for a period of five years.

III. Issue

[13] The sole issue raised by this application for judicial review is whether the Officer's decision was reasonable.

IV. Analysis

[14] The Officer's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[15] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[16] The Officer's GCMS notes form a part of the decision under review (*Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89 at para 5).

[17] Ms. Yao says that the wording of the question on the application form was clear and specific. Her response that her son would not accompany her to Canada was truthful, because he would travel to Canada before her: hence he would not be accompanying her.

[18] Ms. Yao says there was no intention to misrepresent, because her son's application for a study permit was being processed by the same government agency. In *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421 [*Karunaratna*], Justice Yves de Montigny noted

that the officer had access to the applicant's previous unsuccessful applications, and this was not a case where the applicant had tried to conceal or misrepresent a material fact. Given the circumstances, the officer could not reasonably ignore or dismiss the explanation provided in response to the procedural fairness letter (*Karunaratna* at paras 16-17).

[19] Ms. Yao also relies on Justice de Montigny's decision in *Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931 [*Koo*]. In that case, the applicant failed to disclose his previous name and a previous unsuccessful immigration application, resulting in a finding of misrepresentation by the officer. However, Justice de Montigny held that the applicant's explanation of human error and inadvertence was reasonable, in part because the previous name appeared in supporting documentation and had not been actively concealed (*Koo* at para 25).

[20] In *Sbayti v Canada (Citizenship and Immigration)*, 2019 FC 1296 [*Sbayti*], Justice Peter Pamel found that an applicant who answered "no" to a question about previous immigration refusals did not engage in misrepresentation. The online form prompted the applicant to answer either "yes" or "no" to the question: "Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country or territory?" The applicant had lost his status as a student in the United States, and his visa was deemed void. However, he left under a voluntary departure order before he became subject to a formal deportation order. He therefore answered the question with "no", because he genuinely believed he had not been ordered to leave the US.

[21] Justice Pamel noted that the form did not allow an applicant to offer an explanation if the question was answered "no". The opportunity to provide further information arose only if the

applicant answered “yes”. It was reasonable for the applicant in *Sbayti* not to provide additional background information where none was sought (*Sbayti* at para 51). Ms. Yao maintains that her situation is similar.

[22] Persons seeking to enter into or remain in Canada must provide true, correct and complete information (IRPA, s 16(1)). Permanent residents or foreign nationals are inadmissible for misrepresentation if they, directly or indirectly, misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of the IRPA.

[23] Paragraph 40(1)(a) of IRPA is written broadly, and may apply in situations where (i) a misrepresentation is adopted, but clarified before a decision is rendered (*Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at para 25), or (ii) a misrepresentation is made by another party without the knowledge of an applicant (*Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at paras 50-53, 55, 58). As Justice James O’Reilly observed in *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299: “Even an innocent failure to provide material information can result in a finding of inadmissibility” (at para 15).

[24] A fact need not be decisive or determinative to be considered material. It must only be important enough to affect the process undertaken or the final decision (*Yang v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1484 at para 13). I agree with the Respondent that whether Ms. Yao’s dependant son remained in China or accompanied her in Canada for the

duration of her proposed stay was relevant and material to the Officer's assessment of whether she would leave Canada at the end of her authorized stay.

[25] The Respondent says that the jurisprudence relied upon by Ms. Yao is all distinguishable. The innocent misrepresentation exception is narrow and will excuse withholding material information only in extraordinary circumstances where the applicant honestly and reasonably believed he or she was not misrepresenting a material fact, knowledge of the misrepresentation was beyond the applicant's control, and the applicant was unaware of the misrepresentation (citing *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at para 18).

[26] The Respondent argues that Ms. Yao's case is analogous to *Adepoju v Canada (Citizenship and Immigration)*, 2022 FC 438 [*Adepoju*]. In that case, a married couple submitted separate applications for study permits while maintaining that the other spouse would remain in Nigeria, in a fraudulent attempt to demonstrate strong ties to their home country. Justice Russel Zinn dismissed both applications for judicial review as abuses of the Court's process, holding as follows (*Adepoju* at paras 28 and 30):

> I am satisfied on the balance of probabilities that this couple misrepresented the true nature of their intentions when they applied to IRCC for a study permit. That misrepresentation has been carried through to this Court in their respective Applications for Leave and Judicial Review.
>
> […]
>
> As noted above, I am convinced that Deborah Adepoju and Ayodeji Adeyanju are guilty of misconduct in misrepresenting their true intentions. There may not be a positive obligation on applicants to voluntarily fully disclose that their spouse is also applying for a study permit; however, there is an obligation not to

> conceal the true state of affairs or to couch applications in a misleading manner.

[27] I am not persuaded that Ms. Yao's situation is comparable, or that she clearly sought to mislead immigration authorities respecting her intentions and those of her son.

[28] Ms. Yao explained that her initial plan was to return to China after accompanying her son to Canada to begin his studies. However, her son's application was delayed due to the pandemic. The Officer does not appear to have recognized that her son was first accepted by the school in British Columbia in September 2019. He received a second acceptance letter in February 2020.

[29] In *Karunaratna*, Justice de Montigny acknowledged that the purpose of s 40 of the IRPA is to deter misrepresentation and maintain the integrity of the immigration process, and ensure that applicants respect the duty of candour to provide complete, honest and truthful information when applying for entry into Canada. However, he also noted the ample jurisprudence holding that honest and reasonable mistakes or misunderstandings may fall outside the scope of s 40 (*Karunaratna* at paras 13-14).

[30] The explanation Ms. Yao provided in her response to the PFL was straightforward and plausible. As Justice Zinn observed in *Adepoju* at paragraph 21, albeit in a different context:

> […] One cannot "accompany" the other to Canada and also remain in Nigeria. The word "accompany" in its usual and ordinary meaning means "to go with: escort" (*Canadian Oxford Dictionary*, 2d ed). It does not mean to follow at a later date. […]

[31] The Officer failed to consider the delay in processing the application of Ms. Yao's son for a study permit, or to recognize that at the time of his first acceptance by the school in British Columbia, Ms. Yao did not expect to remain with him in Canada. In all of the circumstances, the officer could not reasonably dismiss the explanation she provided in response to the PFL as "bizarre and confounding", or as an attempt to play on "semantics and technicalities".

V. Conclusion

[32] The application for judicial review is allowed, and the matter is remitted to a different visa officer for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different visa officer for redetermination.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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