

Date: 20080520

Docket: IMM-3537-07

Citation: 2008 FC 625

Vancouver, British Columbia, May 20, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

YING QUAN LU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by Manager Brian Beaupre at the Canadian Consulate General in Hong Kong dated July 6, 2007, refusing the Applicant's application for permanent residence in Canada. Mr. Beaupre concluded that the Applicant misrepresented the legality of his accumulated personal net worth and business and was therefore inadmissible to Canada on grounds of misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

I. Background

[2] Mr. Lu is a 46-year-old citizen of the People's Republic of China. On May 23, 2005, he filed an application for permanent residence in Canada under the economic class, investor category. He is the general manager of the New Western City Water-washing Factory in Xintang, China. He listed a personal net worth of CDN \$1.2 million as of the lock-in date of May 23, 2005.

[3] A visa officer concluded that a verification of the documents submitted with the application was required and the Quality Assurance (QA) unit was asked to verify the authenticity of: (1) the existence of the Applicant's business; (2) his role in that business; and (3) an audit report issued by Guangzhou Zengxin Certified Public Accountants Co. Ltd. (the CPA firm), which had been submitted by the Applicant with his visa application.

[4] On April 19, 2007, the visa officer received a verification report from the QA unit, which revealed a concern regarding the authenticity of the CPA firm's audit report, which it found to be fraudulent. The verification form in the Certified Record summarizes its finding as follows:

03Apr07: We have contacted this CPA firm in the past. I called the CPA firm and talked to Ms. Deng and faxed the audit report to her for checking.

15:56pm: I called Ms. Deng and she confirmed that the audit report was not issued by them. She said that the stamp was a bit too small and the auditor Li Lian Hua should have left in 2002. Ms. Deng mentioned that Li was about 70-80 years old and it was not possible for him to sign an audit report dated in 2005. This is because he is overage and not qualified to sign an audit report. In addition, an audit report required two signatures and this one had one signature.

[5] In response to the verification report, the visa officer issued the Applicant a letter of concern, dated May 7, 2007, which stated in part:

This is to advise you of my serious concern that you do not appear to qualify for selection as an investor. I note that when [sic] Guangzhou Zengxin Certified Public Accountants Co. Ltd., the CPA firm confirmed that they did not issue the No. 1212 audit report which you submitted with your application. I was also informed that the CPA, whose name appeared as the preparer of the report, has already retired and has no authority to sign an audit report. This led to my concern on the legality and legitimacy of the accumulation of your personal net worth.

I would therefore request that you send me any information or documents which you consider might respond to this concern within sixty (60) days. I must also advise you that failure to disabuse me of my concern could lead to the refusal of your application pursuant to subsections 11(1) and 16(1) of Canada's *Immigration and Refugee Protection Act*.

[6] On June 26, 2007, the Applicant responded by forwarding a letter from the CPA firm addressing the visa officer's concerns by describing the situation as a misunderstanding.

Specifically, the letter from the CPA firm stated:

Our accounting firm has been serving Mr. Lu Yingquan [sic] as accountant and auditor of his accounting statements for many years. As our accountant previously serving Mr. Lu is of old age and has been retired already. When your representative called us for inquiry, the person who received the call was not well informed and therefore replied that there was no such person he asked for. This has caused a big misunderstanding. We are very sorry about it. We are writing this letter to express our apology for this.

[7] The Applicant's response also included audit reports from 2005 and 2006, as well as information relating to the Applicant's son, who had been studying in Canada since January 2007.

[8] On July 3, 2007, the visa officer considered the Applicant's additional submissions, including the letter provided by the CPA firm. In the Computer Assisted Immigration Processing System notes (the CAIPS notes), the visa officer recorded the following observations:

Response from applicant reviewed. Applicant failed to address the concern that the audit report No. 1212 being fraudulent. When the CPA firm was contacted, the firm confirmed that they did not issue the aforementioned audit report. In addition, the CPA whose name appeared on the report has already retired in 2002. Noted that the report was issued in 2005. In response to the concern raised, applicant submitted a report for a different time period. Applicant also submitted a ltr from the CPA firm stating that it was a misunderstanding. However, we have been doing verification with the said CPA firm in the past and have been clearly told that the report was fraudulent.

[9] Accordingly, the visa officer forwarded the Applicant's file to Manager Beaupre for consideration of whether the Applicant should be found inadmissible for misrepresentation under paragraph 40(1)(a) of the Act. After reviewing the file, Manager Beaupre concluded that a misrepresentation had occurred and that the Applicant was inadmissible.

[10] The Applicant was notified by letter of July 6, 2007, that his application for permanent residence had been refused. The letter stated, in part:

On your application we received on May 23, 2005, you misrepresented or withheld the following material facts:

- the legality of your accumulated personal net worth and your business.

I reached this determination because verification of the audit report No. 1212 from Guangzhou Zengxin Certified Public Accountants Co. Ltd. was found to be fraudulent. You have been clearly notified of the concern on May 7, 2007. After reviewing the additional documents you submitted on June 26, 2007 in response to the concern raised, I am still not satisfied that the report you submitted was not fraudulent. The misrepresentation or withholding of this/these material fact(s) induced or could have induced errors in the administration of the Act.

II. Issues

[11] The Applicant raises two issues for consideration:

- a. Did Manager Beaupre err in concluding that the Applicant was inadmissible due to misrepresentation? and
- b. Did the Respondent breach the duty of fairness in arriving at the impugned decision?

III. Standard of Review

[12] In light of the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), it is clear that the standard of review of this decision is reasonableness. This implies, as the Supreme Court held at paragraph 49 of *Dunsmuir*, that this Court should give “due consideration to the determinations of decision makers” when reaching a conclusion.

[13] Regarding the second issue raised by the Applicant, the standard of review is correctness. Accordingly, if a breach of procedural fairness occurred, no deference is due and the decision will be set aside: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

IV. Analysis

A. Did Manager Beaupre err in concluding that the Applicant was inadmissible due to misrepresentation?

[14] Subsection 12(2) of the Act states that foreign nationals may be selected as members of the economic class on the basis of their ability to become economically established in Canada.

The evidentiary burden lies with the Applicant. Under paragraph 40(1)(a), an applicant for

permanent residence is inadmissible to Canada for misrepresenting or withholding a material fact.

The section, which is set out below, is not dependent on whether the misrepresentation was intentional:

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(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;

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

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;

[15] The Applicant argues that the recommendation of the visa officer and the decision of Manager Beaupre are unreasonable because they were premised on communications between the Consulate and the CPA firm that were not disclosed within their correspondence to the Applicant, or in the CAIPS notes. As the Applicant states in his written submissions at paragraph 16:

Review of all the material raises questions as to when the CPA Firm was contacted, by what means, by whom at the Immigration section, to whom did they speak with at the CPA Firm and what exactly was said.

[16] On this basis, the Applicant submits that the lack of detail raises questions as to the reasonableness of the decision and the consideration given to his response to the concerns raised.

[17] The Applicant further argues that the letter from the CPA firm properly addresses the concerns raised regarding the audit report, and that Manager Beaupre had no evidentiary foundation for disbelieving either the Applicant or the explanation provided for in the CPA firm's letter.

[18] The recommendation of the visa officer and the refusal of Manager Beaupre need to be assessed against the following two considerations: (1) was the information provided to the Applicant sufficient to adequately address the concerns raised in the visa officer's May 7, 2007 letter; and (2) if so, was the Applicant's response to the concerns such that Manager Beaupre's conclusion was unreasonable?

[19] With respect to the first consideration, the record establishes that the visa officer's recommendation was premised on a verification report conducted by the QA unit. The question is whether the Respondent was required to disclose that specific information to the Applicant or whether the concerns set out in the May 7, 2007 letter were sufficient. In my view, the letter of concern from the visa officer sufficiently conveyed the concerns and that disclosure of the specifics in the verification report was not required.

[20] While the verification report from the QA unit outlined a number of reasons why the document was considered fraudulent, the primary reason was that it was signed by an accountant who retired in 2002, three years before the audit report was issued. In light of this finding, the visa officer issued a letter of concern to the Applicant, which stated that the CPA firm did not issue the

audit report in question. Further, the visa officer noted the reason for this conclusion, stating: "I was informed that the CPA, whose name appeared as the preparer of the report, has already retired and has no authority to sign an audit report."

[21] Given these reasons, it is clear that the Applicant was being asked to provide an explanation as to why the report was signed by an accountant who retired sometime prior to the report's creation. Alternatively, he could have asked the CPA firm to confirm the validity of the audit report in question. On this basis, I cannot find that the Applicant was given insufficient information to be able to provide an adequate response to the query.

[22] As noted, the Applicant also states that the decision was unreasonable in that the response provided in the letter from the CPA firm sufficiently addressed any concerns raised in the visa officer's May 7, 2007 letter. Having reviewed the letter in question, I cannot concur with that view. In order to effectively address the visa officer's concerns, it would have been necessary that the letter from the CPA firm, at the very least, account for why the report was signed by an accountant who had retired some time before the audit report was issued.

[23] The CPA firm's response does not address the visa officer's explicit concern of why the report was signed by an accountant that had allegedly retired before it was produced, nor does it actually confirm that the audit report submitted by the Applicant was a true document.

[24] On this basis, I must conclude that the CPA firm's letter does not adequately address the express concerns of the visa officer in the May 7, 2007 letter. Accordingly, since the visa officer provided the Applicant with a sufficient explanation of the concern over the authenticity of the audit report, and since the letter from the CPA firm did not adequately address those concerns, I cannot find any reviewable error in the decision of Manager Beaupre. For these reasons, this application cannot be allowed on grounds that the decision was unreasonable.

[25] The Applicant relies on the decision of Mr. Justice Harrington in *Guo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 626, [2006] F.C.J. No. 795, for the proposition that the Respondent had no evidentiary basis to disbelieve the Applicant's explanation or the CPA letter. However, in this case, the response simply failed to address the real concerns of the visa officer.

B. Did the Respondent breach the duty of fairness in arriving at the impugned decision?

[26] The Applicant further argues that the visa officer and Manager Beaupre breached the rules of procedural fairness in reaching the decision in question. The argument of the Applicant was that the visa officer and Manager Beaupre did not carefully document the reasons for their concern in their notes and did not provide the Applicant with all the information needed to properly address those concerns. It is submitted that in failing to properly document these concerns, the visa officer and Manager Beaupre "unfairly limited" the Applicant's ability to respond to the concerns, and compromised his "ability to provide new information or question the officer's interpretation of the facts."

[27] In support, the Applicant relies on the decision of Mr. Justice Gibson in *Menon v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273, 53 Imm. L.R. (3d) 85. In that case, Mr. Justice Gibson recognized that a high degree of fairness is required when assessing whether the applicant committed a misrepresentation in his or her application for permanent residence. I agree. However, the duty of fairness is properly satisfied where the applicant is given a reasonable opportunity in all of the circumstances to meaningfully participate in the decision-making process: *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (C.A.).

[28] In this case, concern was raised over the authenticity of the audit report submitted by the Applicant as proof of his accumulated net worth. As I have already concluded, the visa officer properly conveyed these concerns to the Applicant in the letter of concern dated May 7, 2007. In my view, this letter and the 60 days that the Applicant was given to respond to those very specific concerns was sufficient to give him a reasonable opportunity to meaningfully address the concerns raised. Accordingly, I cannot find that the Applicant's procedural rights were breached in reaching the decision at issue.

V. Conclusion

[29] On this basis, and for the foregoing reasons, this application for judicial review must be dismissed.

[30] I must add that it was truly unfortunate for Mr. Lu that no one provided the response to the Consulate that was attempted by his counsel to be included in the Record before this Court, namely, an affidavit from the CPA firm attesting that the 2005 audit report that was being questioned was *bona fide*. As was agreed to by all at the hearing of this matter, that affidavit did not form part of the record before the decision-maker and cannot form part of the record before this Court. However, as was also agreed to by all, had that affidavit been submitted in response to the query of the visa officer, Mr. Lu's application would most likely have been accepted by the Manager. The fact that it was not submitted prior to the decision being rendered is not, in any part, the fault of the Respondent, nor can it change this Court's decision. However, should Mr. Lu decide to submit another application, I trust that these reasons and the affidavit of the CPA firm that was attempted to be filed here will be included with that application as evidence that despite the findings of the Manager, the 2005 audit report was valid.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and
2. There is no certified question.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3537-07

STYLE OF CAUSE: YING QUAN LU v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: May 15, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: May 20, 2008

APPEARANCES:

Daniel Lo FOR THE APPLICANT

Helen Park FOR THE RESPONDENT

SOLICITORS OF RECORD:

Remedios & Company FOR THE APPLICANT
Vancouver, BC

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, BC