Federal Court  Cour fédérale

Date: 20130607

Docket: IMM-10964-12

Citation: 2013 FC 614

Ottawa, Ontario, June 07, 2013

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

FANG WU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Fang Wu [the Applicant] has applied for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Immigration Appeal Division of the Immigration and Refugee Board [the IAD] dated October 9, 2012, dismissing her appeal of a determination that she did not meet the residency requirements set out in s. 28 of the Act [the Decision].

[2] For the following reasons, the application will be allowed.

Background

[3] The Applicant, who is a citizen of China, obtained permanent residence status in Canada in 2001 as a member of the investor class. In 2002 she purchased a home and moved to Canada with her husband and children. However, the house was sold and from 2003 onwards the Applicant and her family resided primarily in China. There, she was employed by a Canadian company called Jahoo Education Management [Jahoo]. She believed that the time she spent in China working for a Canadian employer would count toward her residency requirement under s. 28(2)(iii) of the Act.

[4] On January 22, 2009, an immigration officer at the Canadian Embassy in China [the Officer] determined that the Applicant was in breach of her statutory residency requirement because she was physically present in Canada only 213 of the required 730 days during the relevant 5 year-period. The Officer was of the view that the Applicant had not provided the supporting documentation he needed to allow him to conclude that she was employed on a full-time basis by a Canadian business pursuant to s. 28(2)(iii) of the Act.

[5] The Applicant appealed to the IAD. She disputed the legal validity of the Officer's determination and also sought discretionary relief on humanitarian and compassionate [H&C] grounds.

The Decision

[6] The IAD upheld the Officer's view of the insufficiency of the evidence dealing with the Applicant's employment with Jahoo and found that there were insufficient H&C grounds to allow the appeal.

The Issues

[7] There are three issues:

a. Was the record the Officer prepared for the IAD incomplete?

b. Was there a breach of the rules of procedural fairness?

c. Were there errors of fact in the Decision?

Discussion

a. Was the record the Officer prepared for the IAD incomplete?

[8] The Applicant alleges that the record the Officer provided to the IAD was incomplete [the Record] because:

a. It did not include a faxed copy of a letter from the CEO of Jahoo [the Jahoo Letter].

b. The Officer's Computer Assisted Immigration Processing System [CAIPS] notes suggested that other employment documents had been received by the Officer [the Other Documents].

[9] The Officer's CAIPS notes confirm that he considered the Jahoo Letter. However, it was not included in the Record. In my view, this was an oversight and it is, in any event, immaterial because the Jahoo Letter was before the IAD. The *do novo* nature of the IAD appeal permitted the Applicant to submit it along with any other supporting documents she deemed important.

[10] There are two arguments which suggest that the Officer had the Other Documents.

[11] The first submission rests on a narrative entry in the CAIPS notes on January 14, 2009 [the First Entry] which says: "Docs Rec'd:". In my view, this entry logically refers to the prior request letters of January 7 and January 9, 2009 which show that the Applicant was asked to provide further employment information and an original record of her entries and exits to and from China between 2004 and 2009.

[12] However, since the First Entry does not describe the contents or nature of the documents, I have concluded that the First Entry alone is not evidence that multiple documents about employment were before the Officer and omitted from the Record. This conclusion is supported by a second entry of January 19, 2009 [the Second Entry] which, following reference to the Jahoo Letter, reads:

> No other supporting documentation provided regarding employment with Canadian Business. As Applicant did not provide supporting documentation as requested, I have concerns that Applicant was not employed on a full-time basis by a Canadian business.

[13] In these circumstances I am persuaded that the First Entry did not deal with employment documents.

[14] The second argument depends on a document entitled "Checklist for Travel Document Application". It is not clear who authored and who completed this form. It is written in English and Chinese. Item 12 has a checkmark beside it and reads as follows:

> If the applicant or his/her Permanent Resident spouse has been employed by a Canadian business outside of Canada, please provide
>
> - Detailed documentation regarding the Canadian business.**

- Detailed documentation demonstrating full-time employment (contract, evidence of remuneration, evidence of continued business activity, etc.) **

** Please see the Application for a Travel Document Guide for specific business documentation that should be included in your application.

[15] The checklist is signed by the Applicant, on January 6, 2007. However, there is no evidence from the Applicant about what documents, if any, she provided and the CAIPS notes of January 7, 2009 say in an entry, "Applicant provided docs to demonstrate employed by Canadian company abroad – No".

[16] From this, and the Second Entry described above, I conclude that the only document the Officer ever received about the Applicant's employment in China was the Jahoo Letter.

b. Was there a breach of the rules of procedural fairness?

[17] The Applicant also took the position that the IAD breached the rules of procedural fairness by going "behind closed doors" into its own file for information about the complicated and protracted history of the Applicant's appeal in order to discredit her. In its Decision, the IAD dealt at length with the Applicant's evasive conduct and concluded that she had delayed the appeal. Her counsel argued that the issue of whether her conduct caused delay was not raised by either party or by the IAD during the appeal. In these circumstances, the Applicant submits that when, after the hearing, the IAD decided to address that issue, it should have given the parties an opportunity to make submissions.

[18] Counsel for the Respondent argued that the IAD was entitled to deal with the Applicant's conduct without giving notice because she had put fairness in issue on the appeal and her own conduct was relevant to her allegations of unfair treatment. However, since her allegations of unfairness did not relate to the IAD, I am persuaded that the Applicant had no reason to believe that it would review her conduct during the appeal and identify delay as an issue.

[19] I agree with the Applicant's argument that it was not open to the IAD to discredit the Applicant on the basis of a finding that she delayed the appeal. While there was nothing wrong with the IAD reviewing its own file and reaching negative conclusions about the Applicant's behaviour, procedural fairness dictates that the parties should have had notice and an opportunity to make submissions. This error means that the appeal must be reconsidered.

c. Were there errors of fact in the Decision?

[20] Finally, the Applicant alleges that there were factual errors in the Decision. However, since there will be a redetermination, this issue need not be considered.

Costs

[21] The Applicant seeks costs but, in my view, there is no special reason to justify costs as required by s. 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22.

A Direction

[22] The Applicant also asks the Court to direct the IAD to allow her to attend the reconsideration of her appeal in person. Given the difficult procedural history of this case the IAD

will be directed to take the steps necessary to allow her to enter Canada to prepare for and attend her appeal.

Certified Question

[23] Counsel for the Applicant proposed the following question for certification:

> In rendering a decision after the conclusion of a hearing is it proper for an IAD member to search IAD's internal file for evidence not presented at the hearing? [the Proposed Question]

[24] I have considered the Applicant's submissions and the Respondent's written response, dated May 22, 2013.

[25] In my view, the answer to the Proposed Question will vary depending on the facts and the issues before the IAD. For this reason, it will not be certified.

ORDER

THIS COURT ORDERS that

The Decision is hereby set aside and this matter is referred back for redetermination by a differently constituted panel of the IAD.

The IAD is to take the necessary steps to permit the Applicant to enter Canada to prepare for and attend her appeal before the IAD.

The Proposed Question is not certified.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10964-12
STYLE OF CAUSE:	FANG WU v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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