Federal Court  Cour fédérale

Date: 20150415

Docket: IMM-286-14

Citation: 2015 FC 463

Ottawa, Ontario, April 15, 2015

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ERSI ZHANG

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ersi Zhang, challenges a decision by a Visa Officer [Officer] made on December 13, 2013 declaring her to be inadmissible because of a misrepresentation in connection with her employment history. The impugned decision was supported by the following reasons:

> On January 18, 2009 you misrepresented the following material facts:

> 1. The applicant claimed to have work experience as a food service supervisor at North-Chinese Restaurant.
>
> I reached this determination because on the balance of probabilities, I am satisfied that the applicant misrepresented facts about her employment in Canada. We were able to confirm this information based on a site visit to the alleged employer in August 2009 and spoke to the owner of the restaurant. The owner indicated that she had never seen Ms. Zhang and further stated that Elaine Gong was not associated to her business. You were advised of our concerns in a letter of September 9, 2013 and you were offered an opportunity to respond to them. However, no additional information was provided disproving these concerns.

[2] Ms. Zhang attacks this decision on an issue of procedural fairness. Thus, the standard of review to be applied to this issue is correctness.

[3] Ms. Zhang argues that the Officer had a duty to inform her of the full particulars of the site visit to her former place of employment. Had she been aware of all of the evidence concerning this visit, she could have taken additional steps to explain the apparent evidentiary discrepancy. Instead, she asked for her application for a visa to be withdrawn. The Officer declined to accede to the request and found a misrepresentation had occurred.

[4] I am not satisfied there was any lapse of procedural fairness. The Officer sent a fairness letter to Ms. Zhang informing her that "[i]t appears that the letter of employment that you provided with your application is not genuine". Ms. Zhang was given 60 days to provide additional evidence in support of her declared employment and she was warned about the possibility of a misrepresentation finding and its consequences. Ms. Zhang was clearly under no illusion about the problem she faced. This is evident from her letter in reply which states:

> I understand that the onus is on me to prove the genuinity of the letter of employment. I was genuinely employed by North East International Group as Food Service Supervisor from May 30, 2007 to Mar 20 2009. I submitted my application in January 2009. However, a great amount of time has elapsed between the time of the submission of my application and that of the Letter, and I have not kept in touch with my then co-workers such that I am currently unable to find any one of them as my reference in respect of this matter. In addition, due to the heated dispute that I had with my former employer in relation to vacation time, my former employer has now refused to provide me with any reference despite his existing obligation and my repeated requests. In this situation, I have no choice but to withdraw my application for immigration under the CEC category effective as of even date.

[5] The circumstances of Ms. Zhang's case are indistinguishable from those described by Justice Yves de Montigny in *Nadarasa v Canada*, 2009 FC 1112, [2009] F.C.J. No. 1350 at para 25:

> [25] But contrary to the applicant's submission, the jurisprudence of this Court is not to the effect that an applicant must actually be given the document relied upon by the decision-maker, but that the information contained in that document be disclosed to the applicant so that he or she has an opportunity to know and respond to the case against him or her. The following quote from Justice Rothstein (then from this Court) in *Dasent v. Canada (Minister of Citizenship and Immigration*), [1995] 1 F.C. 720, at para. 23, is illustrative of that principle:
>
> > The relevant point as I see it is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements. The source of the information is not of itself a differentiating matter as long as it is not known to the applicant. The question is whether the applicant had the opportunity of dealing with the evidence. This is what the long-established authorities indicate the rules of procedural fairness require. In the well known words of Lord Loreburn L.C. in *Board of Education v. Rice*, [1911] A.C.179 (H.L.) at page 182:

> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

Also see *Khoshnavaz v Canada*, 2013 FC 1134, 235 A.C.W.S. (3d) 1068, at para 30.

[6] Ms. Zhang knew the authenticity of her employment reference letter was in doubt and that she needed to submit reliable corroboration to verify her employment. Her responding letter referred to a dispute with her employer precluding access to her employment records and she alluded to problems in contacting others who could verify her employment. The few additional factual details she now says she needed do not displace the knowledge she had or the steps she knew were required to overcome the allegation of misrepresentation.

[7] I agree with counsel for the Minister that it would not be in the public interest to routinely permit the withdrawal of visa applications in the face of evidence of a possible misrepresentation. Such an approach would encourage claimants to misrepresent material information in the expectation their visa applications could simply be withdrawn if the deceit was later uncovered. In these circumstances, Ms. Zhang had no legitimate expectation that her request to withdraw would be accepted. Instead, in the absence of a valid exculpatory explanation, she ought to have understood a misrepresentation finding remained open.

[8] The absence of a breach of procedural fairness does not, however, eliminate my concern about the Officer's misrepresentation finding. Counsel for Ms. Zhang is correct that a

misrepresentation finding is very serious and should not be made except on the strength of clear and convincing evidence: see *Xu v Canada*, 2011 FC 784 at para 16.

[9] This case is particularly troubling because someone involved is clearly lying. Either Ms. Zhang is lying about her employment history or her ostensible employer was lying when she told the Canada Border Services Agency Ms. Zhang was unknown to her. The case is further complicated by the fact that the certified tribunal record [CTR] is incomplete and, in one respect, irregular. The CTR has already been belatedly supplemented with one omitted document. Nevertheless, it remains incomplete as it fails to include an important letter from Ms. Zhang and by the absence of income tax records apparently sent by Ms. Zhang to the Department. It is also of concern that the CTR includes a T4 Statement of Remuneration pertaining to someone other than Ms. Zhang who worked for the alleged employer. Neither party was able to explain how that document got into the CTR. This Court relies heavily on the reliability and completeness of the CTRs it receives from decision-makers. The failure by the Department to fulfill this obligation on this file is, on its own, sufficient to quash the decision.

[10] The failure by the decision-maker to include in the CTR Ms. Zhang's letter in response to the Officer's fairness letter raises a particular concern. The fact that a letter from Ms. Zhang was received is verified by the Department's computer file notes. Those notes, however, inexplicably and incorrectly state "[n]o additional information was provided disproving [the Officer's] concerns". If Ms. Zhang had not kept a copy of her letter, this statement could not have been challenged.

[11] The Respondent does not dispute that the letter in the Application Record is the same letter referred to in the Department's computer file notes and I accept that to be the case. The problem remaining is that the Officer's characterization of Ms. Zhang's letter was misleading. Ms. Zhang informed the Officer that she had a "heated dispute" with her former employer and was unable to verify her employment from that source. This was highly relevant information that, if accepted, could explain the employer's denial of Ms. Zhang's employment. Before the Officer declared a misrepresentation, it was incumbent on her to consider this explanation and not to declare a misrepresentation on the pretext that "[n]o additional information was provided". At the same time, it would also be reasonable to expect that some consideration would be applied to the income tax records Ms. Zhang had submitted. Nowhere in the decision are those documents mentioned.

[12] I am satisfied that the Officer's misrepresentation finding was unreasonable on the evidence before her and for the reasons she gave. The decision is accordingly set aside. It will be open to the Respondent to have the matter reconsidered by a different Visa Officer if it so chooses. In that event, Ms. Zhang will be entitled to submit fresh evidence of her employment. If Ms. Zhang elects not to do so, it will be open to the Department to reconsider the matter on the present record.

[13] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the misrepresentation finding is set aside. At the option of the Respondent, the matter may be redetermined on the merits by a different decision-maker. In that event, the Applicant will be entitled to submit further evidence concerning her alleged employment history.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Max Chaudhary	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Max Chaudhary North York, ON	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, ON	FOR THE RESPONDENT