

Federal Court



Cour fédérale

Date: 20160920

Docket: IMM-847-16

Citation: 2016 FC 1069

Toronto, Ontario, September 20, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JIAM RU YU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Rendered from the Bench at Toronto, Ontario on September 20, 2016)

I. Overview

[1] The Court duly notes that the Applicant was not represented by counsel and allegedly does not speak English; and, was not asked as to whether she understood the interpreter. That is ultimately significant. As lack of clarity rather than contradiction resonates in the transcript.

[2] Although the right to counsel is not absolute, the Board did not question the Applicant as to whether she required counsel, that, also, in light of the fact that she allegedly does not speak English.

[3] This judgment is in response to an application for judicial review of a decision by the Immigration Appeal Division [IAD], that determined the Applicant did not meet her residency requirements pursuant to section 28 of the *Immigration and Refugee Protection Act, SC 2001, c 27* [IRPA].

[4] The residency requirements as set out in section 28 of the IRPA necessitate, at least, two years of physical presence in Canada in a five-year period. According to that which was understood, as analyzed, at the hearing and concluded upon was that the Applicant had spent only 236 days out of the minimum of 730 days required in Canada.

[5] The IAD concluded that the Applicant, due to failure to meet the minimum residence requirements, was denied a travel document by a Visa Officer in Hong Kong.

[6] In addition, humanitarian and compassionate grounds were denied subsequent to consideration of criteria that were considered inadequate thereon.

[7] The illness of the Applicant's mother in China was considered not to have justified the duration of the Applicant's absence from Canadian territory.

[8] The Board also found that inconsistencies existed between the Applicant's background information and her testimony.

[9] The decision also raised ambiguities and inconsistencies in respect of the time spent by her three children in Canada.

[10] The Court duly notes that the Applicant was not represented by counsel and allegedly does not speak English; and, was not asked as to whether she understood the interpreter. That is ultimately significant. As lack of clarity rather than contradiction resonates in the transcript.

[11] The issue before the Court turns on whether procedural fairness was breached due to circumstances of the lack of representation before the Board by the Applicant, all of which must be considered according to the correctness of the appropriate standard of review in such a case.

[12] Although the right to counsel is not absolute, the Board did not question the Applicant as to whether she required counsel, that, also, in light of the fact that she allegedly does not speak English.

[13] The Court considers that the Board may have very well reached the proper determination based on its analysis, composed of testimony and evidence as considered; however, as per

arguments of the Respondent's counsel, the lack of minimum query as to counsel is a significant lacuna in the file, thus, noticed by its absence in the transcript.

[14] It is by this absence, that the Court concludes that an opportunity in respect of such query was, and is, necessary, under the circumstances due, especially to the alleged lack of English language ability by the Applicant.

[15] Although the decision may continue to be as rendered in the case before the Court; however, it is readily conceivable that the Applicant may have had certain explanations or evidence to submit had an opportunity for counsel been considered thereon.

[16] Therefore, the application for judicial review is granted; and the Court concludes that the matter is returned to a differently constituted panel to analyze the matter anew.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted; and, that the matter be remitted to the Board to a differently constituted panel for a decision anew. There is no serious question of general importance to be certified.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-847-16

STYLE OF CAUSE: JIAM RU YU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 20, 2016

JUDGMENT AND REASONS: SHORE J.

DATED: SEPTEMBER 20, 2016

APPEARANCES:

Peter Lulic FOR THE APPLICANT

John Loncar FOR THE RESPONDENT

SOLICITORS OF RECORD:

Peter Lulic FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada
Toronto, Ontario