Federal Court  Cour fédérale

Date: 20170704

Docket: IMM-4467-16

Citation: 2017 FC 626

Ottawa, Ontario, July 4, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MIN CHUN ZHU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

and

FORMER COUNSEL

Intervener

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board of Canada ("IRB"), dated September

26, 2016, denying the Applicant's appeal, based on humanitarian and compassionate grounds ("H&C"), from an Exclusion Order made against him.

[2] For the reasons that follow, this application for judicial review is dismissed.

Background

[3] The Applicant is a 42 year old citizen of China. There he worked in a factory as a junior manager. On or about 2002, he met Ms. Mei Zhen Dong ("Ms. Dong") and entered into a casual sexual relationship with her. Both the Applicant and Ms. Dong had other relationships. In June 2008, the Applicant received a call from Ms. Dong's sister advising him that Ms. Dong was giving birth to a child and asking him to come to the hospital in Foshan, Guandong. The Applicant claimed that he did not know at that time if he was the father of the child but went to the hospital and provided his identification so that his name could be put on the child's birth certificate.

[4] The Applicant became a permanent resident of Canada, pursuant to the Saskatchewan Nominee Program, on December 9, 2008. On or about February 5, 2010, the Applicant returned to China for a visit and there married Ms. Dong on February 23, 2010. On March 23, 2010, the Applicant requested a DNA test and the result, dated April 15, 2010, confirmed that he is the biological father of the daughter born to Ms. Dong, named Yingyi Zhu. On September 19, 2014 a report was issued pursuant to s 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") indicating that the Applicant was inadmissible pursuant to s 40(1)(a) of the IRPA for misrepresenting a material fact which could induce an error in the administration of the

IRPA, being that he had failed to disclose to immigration officials at the time of landing that he had a child born in China prior to his coming to Canada. An admissibility hearing was held and, in a decision dated May 13, 2015, the Immigration Division ("ID") of the IRB issued an Exclusion Order against the Applicant.

[5] The Applicant appealed to the IAD. He did not challenge the ID's finding of misrepresentation but requested that the IAD exercise its discretion to allow his appeal on H&C grounds pursuant to ss 67(1), 68(1) and 69(1) of the IRPA. The Applicant was represented by counsel ("Former Counsel"), and the hearing before the IAD was held on July 22, 2016. The IAD found that there were insufficient H&C grounds to warrant the relief sought and dismissed the appeal by its decision of September 26, 2016, which decision is the subject of this application for judicial review. On December 5, 2016 the Applicant filed an application, pursuant to s 71 of the IRPA, seeking to re-open the appeal on the basis that the IAD had failed to observe a principle of natural justice arising from the incompetence of his Former Counsel. The IAD dismissed the application to re-open on January 13, 2017.

[6] On November 8, 2016, the Applicant sent a letter to his Former Counsel outlining his concerns with his legal representation during the appeal before the IAD. By letters of November 17, 2016 (erroneously dated July 17, 2016) and November 28, 2016, his Former Counsel responded to the allegations. Former Counsel also submitted a letter to this Court dated February 23, 2017. And, in accordance with the Federal Court's Procedural Protocol, *Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected*

Person Cases before the Federal Court, brought a motion seeking to intervene in this proceeding. By Order of April 28, 2017 that motion was granted.

[7] On June 16, 2017, Former Counsel filed a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 ("Rules"), seeking an order pursuant to Rule 151 that certain material filed in this application be treated as confidential, specifically, that Former Counsel's name be redacted from any published decisions and that other personal and/or identifying details be excluded from any published decisions.

Decision Under Review

[8] As noted above, before the IAD the Applicant did not challenge the legal validity of the Exclusion Order, but requested the IAD to exercise the discretion afforded to it pursuant to ss 67(1), 68(1) and 69(1) of the IRPA, allowing his appeal on H&C grounds.

[9] The Applicant testified in person at the hearing and the IAD found that his testimony was confusing and vague. For example, the Applicant's evidence as to whether Ms. Dong's boyfriend, who at the time of the child's birth resided a two or three hour bus ride away in Hong Kong, knew of the pregnancy, was unclear and the Applicant did not explain why he allowed his name to be put on the hospital birth registration as the child's father, other than that Ms. Dong's sister had asked him to do so. Nor did he explain why he commissioned a DNA test, after his marriage, other than saying that this was because he wanted to know. The IAD did not find the Applicant's testimony to be reliable. It concluded that he had failed to provide clear and cogent

evidence to persuade it that he did not intend to mislead immigration officials and that the misrepresentation was serious and not an innocent mistake on his part.

[10] The IAD acknowledged the Applicant's expression of remorse but found that he seemed to have difficulty in explaining its impact, other than on his wife and child because of the separation from them. He did not establish that he understood the implication to Canadian society. The IAD found, as a positive H&C factor, the Applicant's establishment in Canada over the last eight years, including his employment history, the renovation and assumption of a mortgage on an investment property owned by his aunt and his testimony as to his close relationship with his aunt. It made this positive finding even though the Applicant had failed to provide any information regarding his closeness to his aunt's three daughters, his cousins.

[11] The IAD also found that the Applicant's removal from Canada would likely have an impact on his aunt. However, his aunt has three of her own children in Canada and there was no evidence that they would not step in to assist their mother if the Applicant were not available. For the same reason the IAD also placed limited weight on the emotional impact his removal would have on his aunt. The IAD found that the Applicant does have the support of his aunt and cousins in Canada and referenced the cousins' letters of support, but noted that the focus of those letters was on the relationship that the Applicant had developed with their mother. The IAD found that the letters from his family and his former colleagues were a positive factor in his appeal.

[12] As to hardship suffered by the Applicant if he were to return to China, the IAD considered it to be little more than economic and perhaps disappointing some of his dreams and aspirations for the future. It considered that he grew up in China and, while his prior factory job would not be available to him, that his evidence was that he knew of no other reason that he could not find employment in China. While he believed his income would be lower, he failed to present any documentary evidence that his standard of living would be lowered or lowered to an extent to cause undue hardship. His mother, brother, wife and child reside in China. The IAD found, on balance, that the emotional or economic hardship to the Applicant would be offset by reunifying with his family working and living in China as he did for most of his life.

[13] Moreover, the IAD also considered the best interests of the Applicant's eight-year-old daughter living in China and found that the child would reasonably benefit from the reunification of her parents in China and the day-to-day presence of her father in her life. The IAD acknowledged the Applicant's testimony that because the child did not have her birth registered with the Chinese government she is not permitted to attend a publically funded school and the tuition paid by the Applicant for his daughter's attendance at another school ($1,200 per year), but found that the Applicant had not provided clear evidence as to why his daughter could not attend a public school, as the Applicant testified that her birth had been registered at the hospital and he was noted as the father. And, if the birth could not be registered because the Applicant and Ms. Dong were not married at the time, they had subsequently married. There was no documentary evidence to corroborate that the child could not now be registered, and, his testimony was that he could pay a fine of CDN$10,000 in order for her to attend a public school. He provided no reason as to why he could not have set aside money for this purpose. The IAD

placed little weight on the Applicant's testimony as to the reason why his daughter must stay in her current school as it was confusing and not corroborated. It concluded that it was in the child's best interest to have her father reunite with her and his wife in China, given that there was no reasonable expectation that he could sponsor his daughter to Canada.

[14] In light of the circumstances, the IAD found that there were not sufficient H&C factors to warrant special relief, declined to exercise its discretionary jurisdiction and dismissed the appeal.

Issue and Standard of Review

[15] This application raises just one issue, whether the decision of the IAD should be set aside on the grounds of procedural fairness due to incompetence of counsel.

[16] The parties submit and I agree that allegations of incompetent or negligent representation involve issues of procedural fairness and, as such, the correctness standard of review applies (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mcintyre v Canada (Citizenship and Immigration)*, 2016 FC 1351 at para 16 ("*Mcintyre*"); *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 at para 22). In reviewing a decision for correctness, the Court "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 ("*Dunsmuir*")).

Positions of the Parties

Applicant's Position

[17] The Applicant submits that legal counsel are required to act with reasonable care, skill and knowledge (*Nagy v Canada (Citizenship and Immigration*), 2013 FC 640 at para 25; *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 ("*Guadron*")). Where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence, such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 at para 12 ("*Shirwa*")).

[18] The Applicant acknowledges that here he has the onus of proving his counsel's incompetence (*Yang v Canada (Citizenship and Immigration)*, 2008 FC 269 at para 18 ("*Yang*")) and that before the IAD he had the onus to show why he should not be removed from Canada (*Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (Imm App Bd) at para 14 ("*Ribic*")). The Applicant points out that the IAD commented on the lack of evidence presented during the appeal and references eight excerpts from the IAD's decision to that effect. According to the Applicant, the primary reason why the IAD dismissed his appeal was the paucity of evidence presented (*Kim v Canada (Citizenship and Immigration)*, 2012 FC 687; *McInytre*) which was the result of his Former Counsel's failure to properly prepare both herself and the Applicant for the hearing. He lists examples of this alleged lack of preparation including his Former Counsel's failure to file corroborative documentary evidence to speak to critical

issues such as documents pertaining to the culture of factory workers, the standard of living and economic situation in China, undocumented children, the importance of a certificate from family planning authorities, and the consequences of having unauthorized births in China.

[19] The Applicant submits that his former counsel was incompetent in representing him in the following ways:

i) She failed to adequately prepare for the appeal;

ii) She failed to review the materials relevant to the appeal;

iii) She had little or no knowledge of the Applicant's appeal and the conditions in China relevant to him;

iv) She failed to prepare him for his appeal;

v) She failed to communicate with the Applicant and his cousin, Ms. Yu, in an effective and timely manner;

vi) She failed to advise the Applicant of the legal test he would have to meet for the appeal to be granted;

vii) She failed to advise the Applicant as to the evidence required for the appeal;

viii) She failed to obtain and file corroborative documentary evidence prior to and at the hearing;

ix) She failed to call witnesses at the hearing in support of the Applicant. The affidavits of his cousins, Debbie Louis and Susan Wan, filed in support of his application for judicial review confirm their willingness to testify before the IAD as well as their close relationship with the Applicant. However, they were not aware that they could testify at the hearing;

x) She failed to seek an adjournment to allow the Applicant to review the missing documents previously not discussed and highly relevant to the appeal, namely pages 65 to 79 of the ID record.

[20] The Applicant submits that he has established, on a balance of probabilities, that his Former Counsel represented him in an incompetent and negligent manner, which resulted in a breach of natural justice as the Applicant had no meaningful hearing before the IAD which led to the dismissal of his appeal and his removal from Canada. There is a reasonable probability that, but for the alleged incompetence and negligence of his Former Counsel, the result of the hearing would have been different (*Bedoya v Canada (Citizenship and Immigration)*, 2007 FC 505; *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 at para 21; *Rodrigues v Canada (Citizenship and Immigration)*, 2008 FC 77 ("*Rodrigues*")).

[21] According to the Applicant, it is also notable that the Certified Tribunal Record ("CTR") does not contain documents essential to his appeal, including documents on children born out of wedlock, undocumented children and the culture of factory workers in China.

[22] Further, while his Former Counsel was given opportunities to respond to these allegations her responses were inaccurate and misleading, and sought to put the blame on the Applicant.

Respondent's Position

[23] The Respondent takes no position on whether the conduct of the Applicant's Former Counsel amounts to incompetence. However, even if it does, the Respondent submits that the Applicant has not established a reasonable probability that the result of the IAD hearing would

have been different but for the incompetence. The Applicant has not submitted sufficient evidence to call into question the IAD's conclusion on the lack of H&C grounds.

[24] While not specifically cited, the IAD's decision reflects that the *Ribic* factors were considered in determining whether there were H&C grounds to warrant special relief. Specifically, the seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it; the remorsefulness of the Applicant; the length of time spent in Canada and the impact on the family that removal would cause; the support available to the Applicant in the family and the community; the best interest of the child directly affected by the decision; and, the degree of hardship that would be caused to the Applicant by removal from Canada, including the conditions in the country of removal.

[25] As to the preparation of the Applicant to testify, there is no evidence of what further information the Applicant could have supplied in his testimony which would have established the *Ribic* factors. The IAD accepted the Applicant's remorse, that there would be some hardship to his aunt if he was removed, his establishment in Canada and that he would suffer some economic hardship in China. The IAD's decision was based on the weighing of this against the negative factors, not a lack of evidence in the Applicant's testimony.

[26] With regard to the missing pages of the IAD Record, these were portions of the Applicant's immigration forms, his daughter's birth certificate, submission letter of his former representative, and a transcript of an interview conducted by a Canada Border Services Agency officer. The Respondent submits that these documents pertain to the issue of the Applicant's

misrepresentation, which was not challenged before the IAD. Therefore, adjourning the hearing or allowing the Applicant to review the documents would not have assisted in establishing the *Ribic* factors.

[27] With respect to the testimony of the Applicant's aunt and cousins, the Respondent submits that there is no basis to conclude that oral testimonies would have made a difference in the Applicant's situation. The IAD considered their support letters which expressed in some detail the Applicant's importance to his family in Canada, in particular, to his aunt.

[28] Finally, with regard to the alleged failure to submit more documentation concerning the culture of factory workers, the standard of living and economic situation, undocumented children, the importance of certificates from family planning authorities and the consequences of unauthorized births in China, the Respondent acknowledges that the IAD indicated that the Applicant's explanation as to why his daughter could not go to public school was confusing and that there was a lack of documentary evidence on this issue. Further, that the Applicant did submit some documentation in this application which corroborates that registration with family planning authorities is required to access public schooling and that there may be fines for unauthorized births that must be paid before registration can occur. However, the IAD found that even if a fine was required, the Applicant had assets in Canada to offset that cost and that it was in the best interest of his child to be reunited with her father in China than for him to remain in Canada where he could not sponsor her. Accordingly, even if the documentation had been submitted, it would not have overcome the IAD's conclusion in this respect. The best interests of the child were appropriately considered.

[29] In summary, the Respondent submits that the Applicant has not met his onus as there is insufficient evidence to show that the *Ribic* factors would have been assessed and weighed in a different manner but for the Applicant's Former Counsel's conduct.

Former Counsel's (Intervener) Position

[30] Former Counsel submits that the Supreme Court of Canada in *R v GDB*, 2000 SCC 22 ("*GDB*") established that there are two criteria that must be met in order for a claim of incompetence of counsel to succeed. First, that counsel's act or omissions constituted incompetence and, second, that a miscarriage of justice resulted. There is also a strong presumption that counsel's conduct fell within the range of reasonable professional assistance and the onus is on the applicant to establish otherwise (*GDB* at para 27; also see *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36 ("*Memari*"): *Teganya v Canada (Citizenship and Immigration)*, 2011 FC 336 at para 30). An allegation of incompetence has significant consequences for the reputation and practice of the impugned lawyer and accordingly, such allegations ought only to be made in the clearest of cases. It is not the role of the Court on judicial review to assess each action and decision of counsel in respect of a file. The appropriate venue for a full assessment of the professional competence of counsel ought to be the professional regulatory body which, in this case, notably has not been tasked with reviewing Former Counsel's conduct. Further, if a claim can be decided on other grounds, an assessment or commentary on the conduct of counsel is best avoided (*GDB* at para 29, citing *Strickland v Washington* (1984), 104 S Ct 2052, 466 US 668, 80 L Ed 2d 674 (US Sup Ct)). Accordingly, the Court should only consider the professional conduct of Former Counsel if it is realistic that the threshold for a breach of natural justice can be met. In this case, neither of the

issues raised by the Applicant requires an assessment of Former Counsel's conduct as, on a balance of probabilities, they did not cause a miscarriage of justice.

[31] Former Counsel submits that the Applicant's assertions can essentially be captured within two allegations which could potentially lead to a miscarriage of justice. First, the alleged failure to support the Applicant in his story that he did not know about the birth of his daughter until after the DNA test. Second, the alleged failure to present H&C factors including the current situation in China and having *viva voce* testimony from family members.

[32] Former Counsel submits that the Applicant's story concerning his knowledge of his biological link to his daughter prior to the taking of a DNA test has been inconsistent throughout his immigration proceedings and specifies what Former Counsel views as examples of this. Former Counsel takes the position that the strategy of the Applicant's current counsel is apparently to again return to the IAD to present his fictitious story with "corroborating documents" and a "well-prepared" witness.

[33] Former Counsel submits that the evidence on "black children" (unauthorized children) and access to public schools would presumably be relevant for two purposes and, in both scenarios, no prejudice can be said to have arisen by the failure to present it. The first would be to show that the Applicant only registered himself as the father of the child on her birth certificate as a favour to Ms. Dong and that the documentary evidence as to unauthorized children would render this explanation credible. However, the Applicant does not present any documentary evidence in support of his current counsel's assertion that the "culture of factory

workers in China" would corroborate his story that such favours were a common practice and, in any event, this does not explain the remarkable coincidence that the child in question was his own daughter.

[34] The second reason why this documentary evidence could be relevant would be to show that the best interests of the child would be negatively impacted. However, the documentary evidence submitted by the Applicant's current counsel is misleading in that it predates the substantial changes to China's one child policy and hukou. The country conditions that existed at the time of the Applicant's hearing before the IAD are not consistent with the documents he now presents to this Court. It would have been highly unethical for Former Counsel to have presented such evidence before the IAD. In that regard, Former Counsel also directs the Court's attention to the Affidavit of Ms. Gonzalez Nino ("Gonzalez Affidavit") filed by the Respondent and pertaining to China's current family planning policies.

Analysis

Preliminary issue: confidentiality order

[35] By way of a motion in writing made pursuant to Rule 369 and filed on June 15, 2017, Former Counsel asked this Court to exercise its jurisdiction under Rule 151 and redact Former Counsel's name from this decision. Further, that any other personal and/or identifying details be excluded from the decision. Former Counsel submits that the publishing of counsel's name in a decision that addresses an allegation of professional incompetence, regardless of whether or not the Applicant succeeds, will be detrimental to Former Counsel's professional reputation which is

essential to Former Counsel's ability to practice law. Moreover, the Law Society of Saskatchewan, as the applicable professional regulatory body, is the appropriate forum for deciding issues of incompetence and that it is the practice of Law Societies across Canada to not publish the names of lawyers where there has not been a finding against them. In this case, because of the significant prejudice to Former Counsel, the salutary effects of redacting Former Counsel's name outweigh any deleterious effects (*Sierra Club v Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*")).

[36] Given that the motion was filed by Former Counsel on the afternoon preceding this hearing, the Applicant and Respondent were precluded from filing and serving written representations in reply within four days of being served with the motion, as permitted by Rule 369(3). I, therefore, directed that those parties would be permitted to address the request for a confidentiality order at the hearing before me.

[37] At the hearing counsel for both the Applicant and the Respondent took no position on the request. Counsel for Former Counsel clarified that he did not seek to seal Court records or close the hearing to the public. The request was restricted to the redaction of Former Counsel's name from the published decision of this Court. He noted that the Applicant had not made a complaint to the Law Society of Saskatchewan and that third parties are able to obtain and publish on the internet decisions of this Court. Thus, even if this Court does not make a finding of professional misconduct, Former Counsel's reputation would be damaged by the allegation contained in such circulation.

[38] In my view, it is arguable whether a mere allegation of incompetence will have negative consequences on Former Counsel's professional reputation and whether the limited affidavit evidence of potential harm presented by Former Counsel establishes that the deleterious effects of publishing Former Counsel's name outweigh the public interest in open court proceedings (Rule 151(2); *Sierra Club* at para 53). However, in this particular circumstance, the Applicant has not made a complaint to the Law Society of Saskatchewan and, for the reasons below I have made no finding as to whether or not there was incompetence. As well, I note that Former Counsel's request for confidentiality is limited to excluding identifying information in these reasons. The record before the Court remains accessible to the public. Given the totality of the circumstances and the nature of the request, I will permit Former's Counsel's name and identity to be omitted from the style of cause and in this decision (also see *Sierra Club* at paras 79, 86 and 87).

Should the decision of the IAD be set aside on the grounds of procedural fairness due to incompetence of counsel?

[39] In *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 Justice Russell articulated the test for addressing allegations of ineffective or incompetent assistance of counsel:

> [84] It is generally recognized that if an applicant wishes to establish a breach of fairness on this ground, he or she must:
>
> > a. Provide corroboration by giving notice to former counsel and providing them with an opportunity to respond;
> >
> > b. Establish that former counsel's act or omission constituted incompetence without the benefit and wisdom of hindsight; and
> >
> > c. Establish that the outcome would have been different but for the incompetence.

> See, for example, *Memari*, above; *Nizar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 557; and *Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305.

(Also see *Badihi v Canada (Citizenship and Immigration)*, 2017 FC 64 at paras 17-18; and, *Guadron* at para 18).

[40] It must be established, first, that counsel's acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted (*GDB* at para 26). The burden is on the applicant to establish both the performance and the prejudice components of the test to demonstrate a breach of procedural fairness (*Guadron* at para 17). Incompetence of former counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa* at para 12; *Memari* at para 36).

[41] As stated by Justice Mosley in *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 ("*Jeffrey*"):

> [9] […]The party making the allegation of incompetence must show substantial prejudice to the individual and that prejudice must flow from the actions or inaction of the incompetent counsel. It must be shown that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different.

(also see *Guadron* at para 11).

[42] There is also a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*GDB* at para 27; *Yang* at para 18). Incompetence will only result in procedural unfairness in "extraordinary circumstances" (*Shirwa* at para 13; *Memari* at para 36; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 38; *Nizar v Canada (Citizenship and Immigration)*, 2009 FC 557 at para 24).

[43] That said, in *GDB* the Supreme Court of Canada also stated:

> [29] In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow ([*Strickland v Washington*, 466 U.S. 668 (1984)] at p. 697).

[44] In my view, the determinative factor in this matter is that the Applicant has not established that the outcome of his appeal would have been different but for the incompetence of his Former Counsel. In other words, the prejudice component of the test has not been satisfied. Accordingly, the Court need not determine whether the conduct of Former Counsel did or did not amount to incompetence (*GDB* at para 29).

[45] While the Applicant has identified a number of acts or omissions which he asserts demonstrate incompetence by his Former Counsel, in my view, and keeping in mind that the Applicant did not challenge the ID's finding of misrepresentation but requested that the IAD exercise its discretion to allow his appeal on H&C grounds, the most significant of these allegations concern his Former Counsel's failure to provide corroborative evidence. However, it is apparent from the IAD's reasons and analysis that a lack of corroborative evidence was not determinative of its finding of insufficient H&C grounds to allow the appeal.

[46] In this regard, the two main factors raised by the Applicant were his close relationship to his family in Canada and the financial consequences his return to China would have on him and his daughter.

[47] As to the first of these, the IAD acknowledged positive factors in the Applicant's appeal and weighed these against the remainder of his evidence. It is not apparent how the testimony of any family members or additional corroborative evidence would have changed the IAD's findings. For example, although the IAD stated that the Applicant failed to provide any information regarding the closeness of his relationship with his cousins in Canada, it went on to find that the Applicant had demonstrated that he had established himself in Canada to an extent which was a positive factor in his appeal. The IAD also found that the support he received from his family and co-workers in Canada was a positive factor, as was his role in his aunt's life. The IAD determined that his aunt does not rely on him financially but has relied on him to keep her company, help with chores and repairs and that he assisted her with her restaurant prior to its sale. It found that the Applicant's removal would likely have an impact on his aunt. However, she has three daughters of her own in Canada and there was no evidence that they would not step in to assist their mother if the Applicant were not available. Further, although his removal would have an emotional impact on his aunt, the IAD stated that it placed limited weight on this again because of his aunt's three daughters and their spouses in Canada.

[48] In support of this application for judicial review, new affidavits were filed by the Applicant's cousins. These essentially state that the family is close and reiterate that they support the Applicant and that he has helped their mother. While it is suggested in the affidavits that the Applicant connects with their mother in a "cultural way" which they, her daughters, cannot, the affidavits do not say that the daughters will not step in to assist their mother if the Applicant is removed, which was evidence that the IAD noted as absent.

[49] In my view, given the IAD's reasons, it was not the lack of evidence as to the closeness of the cousins to the Applicant upon which it based its decision. Further, the content of the new affidavits does not persuade me that had the cousins or aunt been called to testify that the result of the proceeding would have been any different.

[50] I would also point out that in the answers to questions sent to the Applicant by Former Counsel in advance of the IAD hearing (an unredacted copy of which was submitted at the hearing before me), the Applicant stated that he used to live with his aunt before, and for a while after, he purchased her house. Yet the April 28, 2017 affidavit of Susan Wan states that the Applicant lives with their mother and allows her to live an independent life. That may be so, but it was not the information that was provided to Former Counsel prior to the hearing by the Applicant and a change of circumstances subsequent to the hearing cannot impact the decision already made.

[51] As to the second factor, the IAD raised a lack of documentary evidence pertaining to country conditions, specifically that the Applicant had failed to provide any documentary evidence that his standard of living in China would be lowered or that it would be lowered to an extent to cause undue hardship. It is clear from the record that the Applicant's Former Counsel did not file any documentary evidence in this regard.

[52] Nevertheless, and significantly, this lack of documentary evidence was not crucial to the IAD's reasoning and accordingly no prejudice is made out. The IAD referred to the Applicant's testimony that his former job in China would not be available to him upon his return but stated

that he had also conceded that he knows of no other reason why he could not find employment in China. A review of the transcript of the hearing confirms that the Applicant testified that his former employer in China would not accept people who quit, that it will be difficult for him to find a job and that his salary would not be much, perhaps CDN$400 to CDN$600. He also testified that he has the ability to work, that there is nothing legally preventing him from working or studying in China, and that he speaks the language in China. However, the IAD's reasons demonstrate that greater weight was placed on the Applicant's circumstances in China, being that his mother, brother, wife and child reside there and that because the Applicant failed to declare his daughter as a dependent, it was likely that she would be excluded as a member of the family class in relation to him. The IAD found, on balance, that the emotional or economic hardship of removal would be offset by reunifying with his family and working and living in China as he did for most of his life.

[53] I would also note that it was incumbent on the Applicant, in asserting that the absence of such documentary evidence was professional negligence leading to a procedurally unfair and unjust hearing, to put forward documentation clearly supporting his position and, in effect, filling that gap (*McKenzie v Canada (Citizenship and Immigration)*, 2015 FC 719 at paras 61-63; *Teganya v Canada (Citizenship and Immigration)*, 2011 FC 336 at paras 32 and 37). I have reviewed the evidence attached as an exhibit to the Applicant's affidavit filed in support of his application for judicial review in this regard. It is very limited. There are three articles. The source of the first undated document is unclear and current counsel for the Applicant could only point the Court to the contact information of the editor in that regard. The article speaks about the end of cheap labour in China, that most minimum wage earners have little left over at the end

of the month, planned layoffs in the coal mining and iron and steel industries, prior layoffs of private sector workers in the manufacturing and construction industries and that older low-skilled workers are likely to be the worst affected. A reference in the article to events in July 2016 also suggest that it post-dates the IAD hearing. The second three page online article by "War on Want", dated March 19, 2012 compared generally factory workers wages, cost of living and conditions to those of workers in the United States. The final document appears to be an extract from Huffpost Business (undated) which is described as an "infographic" and is entitled "Are Workers Better Off in China, Germany or the US?". In whole, and despite current counsel's efforts to tie these articles to the Applicant's circumstances, I am not convinced that, had these documents been filed by Former Counsel, they would have served to establish that the economic hardship he would suffer if returned to China outweighed the other factors considered by the IAD.

[54] Similarly, I have also reviewed the evidence submitted by the Applicant concerning the family planning laws in China and unauthorized or "black children" and considered whether this evidence could have had a material impact on the IAD's finding in respect of the best interests of the child. Having done so, I am satisfied that the evidence does not establish that the Applicant's daughter would not have access to public education because the Applicant does not have a certificate from the family planning authorities as he asserted.

[55] The IAD stated that the Applicant had testified that because his daughter did not have her birth registered with the Chinese government, she was not permitted to attend a publicly funded school but that he had not provided clear evidence on this point nor any documentary evidence to

corroborate this. In his affidavit filed in support of this application for judicial review, the Applicant stated there was no documentary evidence filed by his Former Counsel to support his testimony regarding the birth certificate issued by the hospital and the certificate issued by the family planning authorities. Had there been, the IAD would have understood what he was trying to explain about the two certificates and unauthorized births.

[56] However, the documentary evidence submitted by the Applicant in support of his application for judicial review does not clarify this. Rather, it speaks to the plight of children who are not registered in the household registration known as hukou without which a person cannot attend school, receive healthcare or government support, travel by train and plane or get married. As acknowledged in the Applicant's affidavit, his daughter is registered in a hukou, a copy of which, issued in 2010, was provided.

[57] And, while the Applicant alleges that his daughter does not have access to public education because he must first pay a fine of approximately CDN$10,000 and obtain a certificate from the family planning authorities, the documentary evidence that he submitted does not indicate that a child who has already been registered in the hukou would not have access to public education or any associated benefits until any fine has been paid and/or a certificate from a family planning authority has been obtained. Rather, it indicates that fines (or social support fees) are imposed and non-payment is used to withhold registration in the hukou, particularly in circumstances where children were born in contravention of China's prior "one child" policy, but also children born outside of wedlock. The evidence does not speak to a circumstance such as this where the parents subsequently marry and there is only one child of the marriage. The

evidence does not support a connection between a family planning certificate, the payment of the fines and the right to public education as asserted by the Applicant and by his wife in the letter she filed in support of the application for judicial review.

[58] And, as pointed out by Former Counsel, the Gonzalez Affidavit, filed by the Respondent, attaches documentation reflecting the current state of the law in this area. That evidence shows that the link between the hukou and fines is being broken and that effective January 2016, a two-child policy came into effect. Further, an article dated January 4, 2016 states that a document was issued by the General Office of the State Council, to the effect that illegal restrictions to citizens' rights to a hukou will be removed, that every citizen will get registered in the permanent residence registration system according to law, that unregistered citizens include those who do not have a birth certificate, those born out of wedlock or those holding previously invalid registration papers and that the hukou is a basic right linked to social welfare and other rights. Overall, both the evidence filed by the Applicant and the more recent documentary evidence filed by the Respondent does not support the Applicant's assertion that his daughter will not have access to public education, even though she has been registered in the hukou. I would also add, however, that while the evidence also suggests that children born outside of the one child policy or who are otherwise unauthorized can now register in the hukou without having to first pay fines, one source indicated that in some provinces the fine would eventually have to be paid.

[59] In any event, the IAD referred to the Applicant's statement that a fine of CDN$10,000 could be paid in order for the child to attend a public school. The IAD stated that the Applicant should have anticipated his removal from Canada after the ID hearing in May 2015, and other

than stating that he could not afford to pay the fine, provided no reason why he could not have prioritized the issue and set money aside in order to pay the fine. The IAD had previously noted that the Applicant claimed that he owed CDN$10,000 in credit card debt and that he held a Registered Retirement Savings Account. The documentary evidence submitted by Former Counsel showed that the Applicant had sent approximately CDN$24,550 to China between September 2014 and April 2016, that he had a mortgage on this home in the amount of $97,152 as of March 27, 2012 and that a 2016 property tax notice indicated a taxable assessment of $73,700. While in his affidavit filed in support of this judicial review the Applicant asserts that he has no equity in his house, that he took out a mortgage that exceeds it value, that the real estate market has dropped such that even if he could sell his home he may not be able to pay the mortgage and that his car broke down a few months ago and he cannot afford to repair it, he submitted no evidence in support of this or otherwise as to his finances nor does he take issue with the acts or omissions of Former Counsel on this point. His complaint is, in essence, with the finding of the IAD.

[60] The Applicant does, however, take issue with the lack of documentary evidence filed by Former Counsel in support of the "culture of factory workers" in China. In his view this would have supported his position before the ID and IAD that he had only a casual sexual relationship with Ms. Dong before coming to Canada and that such relationships are common among factory workers and that it was also common practice to provide ones identification if requested by another factory worker, thus his surprise upon learning after his arrival in Canada that he was the father of Ms. Dong's child. However, in his application for judicial review, the Applicant did not file any documentary evidence in this regard. He also asserted that Former Counsel had not

adequately prepared him to respond to the IAD questions including as to why Ms. Dong's long term boyfriend, who the Applicant claimed lived in Hong Kong and who he assumed was the father of the child, had not attended at the birth or provided his identification for the hospital birth certificate. Before the IAD the Applicant testified that there was a difference between Hong Kong and mainland China and that somehow this precluded Ms. Dong's boyfriend from attending the birth.

[61] It is true that his testimony on this point was unclear and that Former Counsel did not attempt to clarify it. However, the documentary evidence filed in support of his application for judicial review pertained only to the entry of foreign nationals to Hong Kong, a Special Administrative Region of China. No information was provided that addressed restrictions on former residents of mainland China, now residing in Hong Kong, returning to visit mainland China.

[62] In short, while the IAD found that the Applicant had not provided clear and cogent evidence to persuade it that he did not intend to mislead immigration officials and that the misrepresentation was serious and not an innocent mistake, I cannot conclude based on what the Applicant has filed in his application for judicial review, that the outcome would have been different but for the acts or omissions of his Former Counsel (see *Yang* at para 26). I have also reviewed the transcript of his hearing before the ID, which is not at issue and there he had different representation, but I do note that his testimony at that hearing was equally unclear.

[63] While the Applicant has made other allegations of incompetence, having regard to the totality of the evidence and the reasons provided by the IAD, I have concluded that he has not demonstrated that there is a reasonable probability that, but for the alleged incompetence and negligence of his Former Counsel, the result of the hearing would have been different (see *Jeffrey* at para 9), or, put otherwise, that incompetence by counsel resulted in a miscarriage of justice as it resulted in the Applicant being denied a meaningful hearing before the IAD leading to the dismissal of his appeal (*Rodrigues* at para 39). The IAD simply did not accept his explanations which, even if they had been imparted with greater clarity by the Applicant, would not have changed the underlying facts and concerns. As the Respondent submitted, there is insufficient evidence to show that the *Ribic* factors would have been assessed and weighed in a different manner but for the Applicant's Former Counsel's conduct.

[64] Accordingly, it is not necessary for me to decide whether the conduct of counsel amounted to incompetence. I would, however, say that Former's Counsel's conduct was not, by any measure, exemplary either in Former Counsel's dealings with the Applicant or in Former Counsel's submissions in response to his assertion of professional negligence.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is proposed by the parties and none arises; and

3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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