Federal Court  Cour fédérale

Date: 20171214

Docket: IMM-1853-17

Citation: 2017 FC 1155

Ottawa, Ontario, December 14, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

ZHANGLI GENG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Ms. Geng [the Applicant] seeks judicial review of the August 5, 2016 Minister's delegate [MD] decision under s. 44(2) of the *Immigration and Refugee Protection Act* [IRPA] referring her for an admissibility hearing before the Immigration Division [ID]. The MD concluded that the Applicant had misrepresented the number of days she was in Canada in her October 2008 application to renew her permanent resident card [PRC].

[2] For the reasons that follow this judicial review is dismissed. The report of the Canada Border Services Agency [CBSA] Officer [the Officer] which was relied upon by the MD reasonably interpreted and applied the relevant provisions of the IRPA. The Applicant seeks to insulate herself from an admissibility hearing by taking a siloed approach to the application of the provisions of the IRPA. This is not in keeping with the current state of the law.

[3] Further, I decline to certify the questions proposed by the Applicant. The impact of a misrepresentation under the IRPA and the interplay of the provisions of the IRPA at issue here are well-settled in the case law.

I. Background

[4] In 1997, the Applicant and her husband became permanent residents of Canada. In October 2008, she applied for a renewal of her PRC.

[5] The statutory requirements of ss.28(2)(a)(i) and 28(2)(b)(ii) of the IRPA require a permanent resident to be physically present in Canada for at least 730 days in the 1825 days (5 years) prior to the “examination” period.

[6] The relevant five year period for which the Applicant needed to demonstrate residency was October 2003 to October 2008. During this period, she reported being absent from Canada for a total of 889 days in the five year period.

[7] On June 3, 2009, pursuant to s.40 (1)(a) of the IRPA, the Officer concluded that the Applicant misrepresented the number of days she was absent from Canada. Specifically, the Officer concluded that the Applicant appeared to be absent from Canada for a total of 1158 days. CIC requested the Applicant complete a residency questionnaire in support of her PRC application.

[8] The Applicant did not respond to the residency questionnaire and her PRC application was declared abandoned.

[9] In October 2012, CBSA conducted an investigation into the immigration consulting companies operated by an immigration consultant, [referred to as SW]. In the course of this investigation, documents were seized from SW's office which showed that the Applicant was in fact, absent from Canada for 1641 days during the relevant 5 year period, rather than the 889 days declared in her 2008 PRC application.

[10] In 2015, the Applicant applied for a new PRC, which was issued for a 5 year term pursuant to s. 59 of the *Immigration and Refugee Protection Regulations* [IRPR]. However given the information obtained from a search of SW's office, the Applicant's PRC application was re-examined. Based upon this re-examination, on March 11, 2016, the Officer issued an inadmissibility report under s.44 (1) of the IRPA, on the grounds that there was a misrepresentation on the 2008 PRC application.

[11] On August 5, 2016, the MD concurred with the inadmissibility report, and referred the matter to the ID for an admissibility hearing.

II. Decision Under Review

[12] The decision under review is the referral report by the MD dated August 5, 2016. The MD based her referral on a report and highlights produced under s.44(1) of the IRPA by the Officer, alleging misrepresentation on the PRC application.

[13] The Officer outlined the inconsistencies in the Applicant's documents and noted that "[b]y omitting several out of Canada absences an officer would not be able to complete a proper residency determination under Section 28 of IRPA." The Officer concluded that there were insufficient humanitarian and compassionate [H&C] grounds to grant the Applicant status. The H&C finding is not under review in this case.

[14] The Officer concluded that the Applicant misrepresented the number of days she was absent from Canada in her 2008 PRC renewal application.

III. Issues

[15] The issues raised by the parties are addressed as follows:

A. What is the appropriate standard of review?

B. Is the misrepresentation relevant?

C. Could the misrepresentation induce an error in the administration of the IRPA?

D. Is the Respondent estopped from taking action?

E. Are the reasons adequate?

IV. Analysis

A. What is the appropriate standard of review?

[16] At the core of this application is the interpretation of the provisions of the IRPA and the interplay of the various provisions of the IRPA. As this is the interpretation of a home statue, reasonableness is the presumed standard of review for statutory interpretation (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para 23).

[17] The presumption of reasonableness is not easily rebutted (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 31 [*Vavilov*]). Here, none of the contextual factors or categories identified in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], which invite a correctness standard of review, arise on these facts.

[18] Further, this Court has applied a reasonableness standard of review to MD statutory interpretation decisions in the immigration context (*Gupta v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1086 at paras 9-10 [*Gupta*]).

[19] Although the appropriate standard of review is reasonableness, the *Dunsmuir* range of possible, acceptable outcomes may be narrower on questions of law such as the one presented

here (*Vavilov*, at paras 36- 37; *Gupta*, at para 10; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58).

[20] Accordingly, I conclude that the applicable standard of review is reasonableness. The Officer/MD's decision and interpretation of the relevant statutory provisions must fall within a range of reasonable, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para 47).

B. Is the misrepresentation relevant?

[21] The Applicant argues that she is only required to meet the requirements of s. 28 of the IRPA if she has a *pending* PRC application. Here, as her PRC application was deemed to be abandoned, she argues that she has no pending application, therefore the Respondent has no authority to insist upon an examination for residency. In essence, the Applicant argues that she cannot be compelled to undergo an examination for a misrepresentation regarding residency because the misrepresentation is irrelevant.

[22] There is a three-step process for the assessment of misrepresentations under s.40(1)(a) of the IRPA: (1) there is a misrepresentation by the Applicant; (2) the misrepresentation concerns material facts relating to a relevant matter; and (3) the misrepresentation induces or could induce an error in the administration of the IRPA (*Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 32 [*Kazzi*]).

[23] Here, assuming there was a misrepresentation by the Applicant, which was not disputed, the next consideration is whether the misrepresentation "concerns material facts relating to a relevant matter."

[24] Maintaining permanent resident status under the IRPA and obtaining a PRC under the IRPR have different legislative requirements (*Khan v Canada (Citizenship and Immigration)*, 2012 FC 1471 at paras 21, 40 [*Khan*]). The PRC process is governed by s.59 of the IRPR, which lays out the requirements to obtain a PRC. In order to obtain a PRC, an applicant need not demonstrate residency as required for permanent resident status under s.28 of the IRPA (*Khan*, at para 40). Accordingly, the five year residency requirement in s.28 of the IRPA is not a precondition to the grant of a PRC.

[25] However, that does not mean that the PRC process is irrelevant to the assessment of residency under the IRPA. This Court has held that it is appropriate for an officer to consider residency on a PRC application. In *Khan*, the Court concluded that it "was open to the officer…to question whether [the Applicant] met the residency obligation" as of the date of the PRC issuance (*Khan*, at para 40). In *Khan*, the Court noted that this is true in cases where there is "uncertainty as to whether the residency obligation is met as at the date of filing" (at para 38).

[26] This follows from the wording of s.28 (2)(b)(ii) and s.15 of the IRPA. Under s.15 of the IRPA, an authorization to examine is triggered by *any* application under the IRPA. This includes a PRC application. Therefore, it is open to an officer to consider whether the Applicant met the residency requirement in any five year rolling period, upon the filing of the PRC application

(*Sarfaraz v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 735 at paras 3, 18, 22).

[27] Here it was the October 2008 PRC renewal application which triggered the authorization to examine. The authorization to examine for the relevant period (2003-2008) did not "die" because the application was declared abandoned. Therefore, the Applicant's contention that the "authorization to examine disappeared" when the application was abandoned is not a reasonable interpretation of the statute. As noted in *Khan*, once the authorization was triggered, it was open to the Officer/MD to consider the issue of residency. Though the PRC does not confer status, it was the vehicle by which the Officer/MD considered whether the Applicant's permanent resident status was maintained.

[28] Therefore, the Officer/MD decision that the misrepresentation on the 2008 PRC application was relevant to the assessment of residency is a reasonable conclusion from the facts and the relevant legislative provisions.

C. Could the misrepresentation induce an error in the administration of the IRPA?

[29] The Applicant argues that a misrepresentation in an abandoned application cannot induce an error in the IRPA.

[30] This argument needs to be considered in the broader context of the IRPA and the relevant provisions.

[31] Section 40(1)(a) of IRPA states as follows:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(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;	**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;

[32] In considering how this section should be interpreted, the most recent comment by the Supreme Court of Canada is relevant. In *Tran v Canada (Public Safety and Emergency Preparedness*), 2017 SCC 50 at para 23, the Supreme Court of Canada confirmed its position that the modern approach to statutory interpretation requires a consideration of the relevant text, its context, and the purpose of the statute.

[33] In keeping with the accepted approach to statutory interpretation, this Court has confirmed that a broad approach should apply to s. 40(1)(a) of IRPA in light of its overall purpose (*Kazzi*, at para 38). The text of s.40(1)(a) speaks of a misrepresentation which "induces or could induce" an error in the administration of the IRPA. Therefore, the fact that an error is possible allows an officer to find a misrepresentation (emphasis added).

[34] The wording of s. 40(1)(a) supports its broad purpose which is to require accuracy in immigration applications by deterring misrepresentation (*Sayedi v Canada (Citizenship and Immigration)*, 2012 FC 420 at paras 23-27 [*Sayedi*]). The wrong which s.40(1)(a) seeks to guard against is the misrepresentation itself. Any "exception to this general rule is narrow and applies only to truly extraordinary circumstances" (*Kazzi*, at para 38).

[35] As a result of this broad interpretation, the date which a court must assess whether a misrepresentation leads to an error or *potential* error in the administration of the IRPA is the date of the misrepresentation (*Inocentes v Canada (Citizenship and Immigration)*, 2015 FC 1187 at para 16). Here, that date is in 2008 when the Applicant filed her PRC application.

[36] Therefore, the fact that the PRC renewal was abandoned does not change the fact that the misrepresentation was made in 2008 - the time when the Court must consider the misrepresentation. As noted above, the "authorization to examine" was already triggered by the PRC application. As such, the misrepresentation on the PRC application could have induced an error in the administration of the IRPA; it could have led to an erroneous assessment of whether the Applicant met the residency requirements in s.28 of the IRPA.

[37] To accept the interpretation urged by the Applicant would lead to absurdity in allowing an applicant to avoid a finding of misrepresentation by withdrawing and resubmitting an application, even though the withdrawn application contained a misrepresentation. This Court has not supported this approach (*Kazzi*, at para 38; *Sayedi*, at paras 23-27; *Goburdhun v Canada*

(Citizenship and Immigration), 2013 FC 971 at para 28 [*Goburdhun*]; *Brar v Canada (Citizenship and Immigration)*, 2016 FC 542).

[38] The facts of *Kazzi* are helpful as a demonstration. There, the applicant failed to make full disclosure regarding a previous arrest and detention when arriving in Canada. The applicant argued that it was not relevant because his H&C and pre-removal risk assessment applications were denied. However, the Court rejected this argument stating: "I am not persuaded that the success or failure of the underlying application changes the interpretation that paragraph 40(1)(a) should receive…" respecting the date of assessment at the time of the misrepresentation (*Kazzi*, at para 37).

[39] In this case, the Officer/MD clearly concluded that the Applicant's misrepresentation could lead to an erroneous assessment of the number of days the Applicant had been in Canada in the relevant period. Based on the range of acceptable outcomes permitted by the text, context, and purpose of the statute, the Officer's conclusion is reasonable in light of s.40(1)(a) and the case law interpreting that provision.

[40] Accordingly, on a reasonableness review, there is no basis for the Court to intervene.

D. Is the Respondent estopped from taking action?

[41] The Applicant argues that she received a PRC in 2015 and therefore she had a legitimate expectation that the matter was resolved. She argues that the Respondent is now estopped from reassessing her status because her application was previously accepted.

[42] The Applicant's argument seeks to establish estoppel by representation. To establish estoppel, the Applicant must meet the test set forth in *Canadian Superior Oil Ltd. v Paddon-Hughes Development Co*, [1970] SCR 932 at 939 as follows:

> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
>
> (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
>
> (3) Detriment to such person as a result of the act or omission.

[43] Here there is no evidence that there were representations made to the Applicant that the provisions of the IRPA would not apply to her.

[44] Further, while estoppel can apply to the Crown, it cannot compel a result which would be contrary to a statute (*Vallelunga v Canada*, 2016 FC 1329 at para 11). Here, the Applicant's suggestion would undermine the very purpose of the misrepresentation provisions of the IRPA. The Officer/MD must assess the misrepresentation, and whether an error in the IRPA could result, as of the date the misrepresentation was made. That date is 2008. Therefore, it was reasonable for the Officer/MD to reconsider the 2008 PRC application.

[45] On the facts, the Applicant has not established that the principles of estoppel have any application.

E. Are the reasons adequate?

[46] In this case, the Applicant alleges that it is unclear whether the Officer/MD adequately engaged with the statutory analysis required by s.40(1)(a).

[47] It is clear that the Officer/MD concluded that the misrepresentation made it difficult for CIC to undertake a residency requirement analysis. As noted above, the Officer/MD was entitled to draw this conclusion from the misrepresentation, in light of the broad purpose afforded to s.40(1)(a) of the IRPA.

[48] The conclusion reached by the Officer/MD allows the Court to consider the interpretation of the statute undertaken by the decision-maker (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 57-58). Here the Court can understand why the decision-maker made the decision it did.

[49] Further, the reasons provided are adequate. In any event, the adequacy of reasons is not a standalone basis for the quashing of a decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14 [*Nfld Nurses*]).

[50] All that is required is for the reviewing court, through the record, to understand why the tribunal made its decision in order to determine whether the conclusion is within the range of

acceptable outcomes (*Nfld Nurses*, at para 16).That standard is met in this case, and the reasons are adequate.

F. Certified Questions

[51] The Applicant proposes the following questions for certification:

(i) Can the Minister of Public Safety and Emergency Preparedness seek a removal order for a misrepresentation about days in Canada made in a renewal application for a permanent resident card?

(ii) If so, can the Minister of Public Safety and Emergency Preparedness seek a removal order for a misrepresentation about days in Canada made in a renewal application for a permanent resident card which was abandoned?

(iii) Can section 40(1) of the IRPA be used to remove status of a person for misrepresentation not related to the acquisition or retention of status of that person?

[52] The test for certification provides that the question must be dispositive of the appeal, in that it was decided by the application judge and arises from the case. The proposed question must transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance (*Burton v Canada (Citizenship and Immigration)*, 2014 FC 910 at para 57).

[53] Additionally, a certified question will only be sufficiently general and important where the law is unsettled on the question (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 36; *Leite v Canada (Citizenship and Immigration)*, 2016 FC 1241 at para 28).

[54] The proposed questions in (i) and (ii) do not arise on the facts as they are not relevant to the decision under review. The decision under review is the referral of the Applicant for an admissibility hearing. A removal order is not at issue. Therefore, these questions are not appropriate for certification.

[55] With respect to question (iii), the principles surrounding misrepresentation under the IRPA are well-defined in the case law (see *Goburdhun*, at para 28 and *Kazzi*, at para 38).

[56] Further the wording of question (iii) assumes that misrepresentation on a permanent resident card application is "not related" to the acquisition or retention of status. As noted above, that is not consistent with the case law that an officer is legally entitled, pursuant to the relevant provisions of the IRPA, to assess residency and misrepresentation on an application for a permanent resident card.

[57] Therefore the question proposed cannot be dispositive of an appeal because it does not arise from the facts of this case. It involves presumptions of law which are not supported by the case law (*Tabañag v Canada (Citizenship and Immigration)*, 2011 FC 1293 at para 28).

[58] I therefore decline to certify any questions.

JUDGMENT in IMM-1853-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1853-17
STYLE OF CAUSE:	ZHANGLI GENG v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 16, 2017
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	DECEMBER 14, 2017

APPEARANCES:

Mr. David Matas	FOR THE APPLICANT
Mr. Brendan Ward	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lawrence Wong & Associates Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT