Federal Court  Cour fédérale

Date: 20190626

Dockets: IMM-1061-18
IMM-2023-18
IMM-3358-18
IMM-3629-18

Citation: 2019 FC 862

Ottawa, Ontario, June 26, 2019

PRESENT: The Honourable Mr. Justice Barnes

Docket: IMM-1061-18

BETWEEN:

CHAO YUAN LIN,
XIANG ZHOU

Applicants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-2023-18

AND BETWEEN:

SI YI YIN,
SI MAN YIN,
SHU YUN JIANG

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-3358-18

AND BETWEEN:

CHUN XIAN YIN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-3629-18

AND BETWEEN:

HUA REN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Each of these applications arises from a similar set of facts involving allegations of misrepresentation. Because of that similarity and the common legal issues that have been presented to the Court, this single set of reasons applies to all of the above applications.

[2] The Applicants are all Chinese nationals who face the prospect of losing their Canadian permanent residency status for alleged contraventions of s 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In each of these cases the Applicant has been the subject of the process described in ss 44(1) and ss 44(2) of the IRPA and now faces an admissibility hearing before the Immigration Division [ID].

[3] What is also common to all of the Applicants is their employment of the same immigration consultant, namely Xun "Sunny" Wang. Mr. Wang was running a widespread fraudulent immigration and income tax scheme on behalf of several hundred clients from whom he received millions of dollars in fees. Mr. Wang's methods typically involved a falsification of a client's travel history to overcome a shortfall in Canadian residency as required by s 28 of the IRPA or to obtain Canadian citizenship. Among other things, Mr. Wang often forged client passport entries and fabricated client employment records. In many cases evidence was obtained showing that clients were aware of, or actively involved in, the frauds. For each of these Applicants, Mr. Wang misrepresented residency histories in support of requested renewals of their permanent residency cards.

[4] Mr. Wang was charged and convicted of 8 criminal counts under the IRPA, the *Criminal Code*, RSC, 1985, c C-46, and the *Income Tax Act*, RSC, 1985, c 1 (5th Supp). In 2015 he was

sentenced to seven years of imprisonment and fined $900,000. Needless to say, Mr. Wang's misconduct led the Canada Border Services Agency [CBSA] to reflect on the conduct of Mr. Wang's clients and, in particular, whether they were inadmissible for misrepresentation under s 40 of the IRPA. In a number of cases including these, the CBSA initiated the inadmissibility process under s 44 of the IRPA. It is the reasonableness of those referrals that is the subject of all of these proceedings.

[5] The Applicants maintain that they are all innocent and unknowing victims of Mr. Wang and that, in referring their cases to an admissibility hearing before the ID, the decision-makers failed to consider their asserted lack of individual complicity. On this issue the common argument they advance is the following:

> 21. The Respondent's counsel appears to be advancing the same belief of the Minister's Delegate in charge of admissibility referrals, that **as a group** these clients of the fraudulent consultant are all complicit without the need to see evidence of their individual complicity.
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> 22. The Respondent presented no evidence of complicity by these Applicants. The only evidence that the Respondent has is incorrectly stated days of absences from Canada. While that may be sufficient to allege misrepresentation under the Respondent's current understanding of the law, each case will still have to be assessed individually to see (1) if the under-reporting of absences constitutes misrepresentation under 40(1)(a) of IRPA; (2) the materiality and seriousness of the misrepresentation which requires an examination of the evidence with respect to complicity; (3) given the level of seriousness found, what corresponding level of humanitarian and compassionate grounds is required to overcome such seriousness so that the discretion not to refer may be exercised.
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> [Paras 21 and 22 of the Applicant's Reply in IMM-2023-18]

[6] The Applicants also complain that the referrals of their cases to an admissibility hearing were unreasonable because the responsible officials failed to resolve their legal argument that a false statement made to obtain a permanent residency card does not constitute a misrepresentation under s 40 of the IRPA. This somewhat convoluted statutory interpretation argument, with variations, was submitted by the Applicants' legal counsel for consideration in the s 44 referral process [see CTR in IMM-2023-18 at pp 593-599 and pp 413-420]. However, the issue was not resolved by the referring officials on the basis that "these arguments are better to be heard by a Member of the Immigration Division" [see CTR in IMM-2023-18 at p 495 and p 7; and also see CTR in IMM-3629-18 at p 6].

[7] In the case of the Applicants, Xiang Zhou and Chao Yuan Lin in IMM-1061-18, an additional argument was advanced that the s 44 referral process employed against them constituted an abuse of process because the misrepresentation allegations could and should have been raised in the context of earlier admissibility hearings dealing with their residency obligations [see CTR in IMM-1061-18 at pp 755-758]. This argument was rejected in the case of Mr. Lin for the following reasons:

> By signing and submitting an Application for a Permanent Resident Card Mr. LIN is responsible for its' contents as by signing he makes a declaration as to the truthfulness of the information in the application. By signing Mr. LIN also declares he understands all the information in the application and also understands false statements or concealment of material facts may be grounds for his prosecution or removal. The submissions alleges the misrepresentation was committed by the "crooked" consultant he had hired and that he is a victim of this consultatnt [sic] and the activities he undertook. It is established in case law that misrepresentation can be committed by another person without one's knowledge as per Goudarzi v. Canada, 2012 FC 425.
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> Mr. LIN had successfully appealed a decision made by the Mission in Beijing regarding residency obligations. Mr. LIN had been

> refused a Travel Document (Permanent Resident Abroad) as the Officer came to the decision Mr. LIN did not fulfill his residency obligations. On 28 September 2015 the Immigration and Refugee Board (IRB) – Immigration Appeal Division (IAD) set aside the Officer's decision and found Mr. LIN had not lost his permanent resident status. During this proceeding the issue that was dealt with may have been touched upon during the IAD appeal however the main issue was the Mission's decision to refuse to issue Mr. LIN a Travel Document from a previous application due to his alleged failure to meet residency obligations. The issue currently being dealt with is that of misrepresentation on a Permanent Resident Card Application and a Section 44 report pursuant to Section 40(1)(a) of the Immigration and Refugee Protection Act (IRPA) had not been written previous to that appeal. Regardless of whether Mr. LIN met residency requirements or qualified under one of the options regarding residency obligations, the fact is Mr. LIN had submitted a fraudulent travel history in his Application for a Permanent Resident Card dated 28 March 2013.

[8] In the case of Mr. Zhou the abuse of process argument was dismissed because the misrepresentation referral was only made in 2016 following the completion of the CBSA criminal investigation into Mr. Wang, whereas the residency case dated back to 2011 [see CTR in IMM-1061-18 at p 650].

[9] The applicable standard of review in these cases requires the Court to assess the reasonableness of the Officer's and the Minister's Delegate's [Delegate] respective inadmissibility "opinions" made under ss 44(1) and ss 44(2) of the IRPA to refer these cases to the ID for an admissibility hearing: see *Faci v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693 at para 28, [2011] FCJ No 893.

[10] Clearly the opinions under review are not decisions in the usual sense because, beyond the bare referral for further consideration before the ID, no determinative findings of fact or law

are made. Such an opinion is no more than an evidence-based belief that the circumstances, as presented, are sufficient to warrant a more formal inquiry and a decision. An opinion in this context bears some resemblance to the formation of a *prima facie* belief of the sort described in *Kindler v MacDonald*, [1987] 3 FC 34 (FCA) at para 9, [1987] FCJ No 507, where a referral decision was said not to require even a paper hearing. Contrary to the Applicants' submissions the formation and expression of an opinion under s 44 is not equivalent to a misrepresentation finding made in connection with an attempt to acquire status under the IRPA. Status is neither gained nor lost by the referral process described in ss 44(1) or ss 44(2).

[11] The preparation of an inadmissibility report under ss 44(1) of the IRPA requires only that an assigned Officer form an opinion that a permanent resident is inadmissible. After forming such an opinion, the Officer is authorized to prepare a report setting out the relevant facts. The use of the words "may prepare a report" has been held to connote some level of discretion in certain circumstances not to write a report: see *Hernandez v* Canada, 2005 FC 429, [2005] FCJ No 533. It is presumably in recognition of that discretion that a practice has arisen for the Officer to invite submissions from the person affected to make the case not to refer the matter to the Delegate. Indeed, the CBSA utilizes a standard form request inviting the person to address several factors including age, length of Canadian residency, location of family support and responsibilities, conditions in the home country, degree of establishment, criminal history, history of non-compliance and current attitude (see CTR in IMM-2023-18 at p 432). This approach is consistent with the duty of procedural fairness recognized in some decisions of this Court requiring the Officer to invite submissions from the interested party.

[12] If, after hearing from the person, the Officer is not persuaded to defer, a highlights report is sent to the Delegate for consideration. Under ss 44(2), if the Delegate is of the opinion that the Officer's report is well-founded, the report may be referred to the ID for an admissibility hearing. Once again the word "may" is used. Presumably this language also affords some discretion not to refer the matter to the ID. Except in limited circumstances that do not apply to these cases, the Delegate is not authorized to issue a removal order. Once the matter is in the hands of the ID, the process takes on a quasi-judicial character that includes a right to a hearing. Unlike the language of s 44 of the IRPA, s 45 requires the ID to make a decision concerning admissibility. It has several available options including the authority to recognize the right of a permanent resident to enter Canada or it can "make the applicable removal order". If the ID makes a removal order, it must be "satisfied" that the permanent resident is inadmissible. In cases like these where the ID issues a removal order a right of appeal exists to the Immigration Appeal Division [IAD]. Unlike the ID, the IAD has the discretion to excuse a default based on humanitarian and compassionate considerations.

[13] The Applicants contend that, in their cases, the Officer and the Delegate were required to reflect on the validity of their arguments concerning an asserted abuse of process, their respective levels of complicity in Mr. Wang's fraudulent activity and whether, on a correct interpretation of the IRPA, a misrepresentation made in support of an application to renew a permanent residency card can support an inadmissibility finding under s 40. Among other points, the Applicants argue that, in order to properly exercise the discretion under s 44 of the IRPA not to refer their cases onward, the Officer and the Delegate must examine and resolve these complex issues before coming to their required opinions. This is particularly the case, they

say, for assessing the humanitarian and compassionate factors that they presented, unsworn, through their counsel (including credibility assessments) about their respective levels of awareness and complicity concerning the misconduct of Mr. Wang. Although the Applicants appear to accept that a misrepresentation may be found in the absence of a fraudulent intent, they argue that the degree of a person's culpability is still relevant to the exercise of humanitarian and compassionate discretion: see Applicant's Memorandum in IMM-3358-18 at paras 76 and 78.

[14] It must first be said that the above arguments advanced by the Applicants involve complex issues of law and evidence that could never be adequately addressed in the context of the process contemplated by ss 44(1) and 44(2). While a practice has developed to invite persons subject to these provisions to make humanitarian and compassionate submissions and sometimes to attend for an interview, there is no method under these provisions by which disputed evidence can be effectively challenged or weighed by the Officer or by the Delegate.

[15] The idea that the Officer or the Delegate has the ability, let alone the responsibility, to assess the level of individual culpability of the Applicants is, in practical and legal terms, untenable. The same can be said for the argument that, in forming the necessary opinions, the Officer and the Delegate should have considered whether false statements made in the context of the applications to renew permanent residency cards could ever constitute misrepresentations upon which inadmissibility findings could be made and whether, in two of the cases, an abuse of process had occurred. The obvious place to advance such matters is before the ID and, where available, before the IAD where adjudicative processes are in place and where conflicting evidence can be properly tested and complex legal issues concerning admissibility can be

considered. I would add that the argument that a misrepresentation cannot legally arise from a misrepresentation made in connection with an application to obtain or renew a permanent residency card was firmly rejected by Justice Ann Marie McDonald in *Geng v Canada*, 2017 FC 1155, 286 ACWS 3d 728.

[16] Neither the Officer nor the Delegate is authorized or required to make findings of fact or law. They conduct a summary review of the record before them on the strength of which they express non-binding opinions about potential inadmissibility. This is no more than a screening exercise that triggers an adjudication. It is at the adjudicative stage where controversial issues of law and evidence can be assessed and resolved. As the Federal Court of Appeal held in *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at paras 47 and 48, [2007] 1 FCR 409, the referral process is intended only to assess readily and objectively ascertainable facts concerning admissibility. It does not call for a long and detailed assessment of issues that can be properly assessed and fully resolved in later proceedings. To the extent that there is any discretion not to make a referral to the ID, it is up to the Officer and the Delegate to determine how that will be exercised and what evidence will be applied to the task. This point was made by Justice James Russell in *Faci*, above, at para 63:

> [63] The jurisprudence of this Court makes clear that, when deciding whether to recommend an admissibility hearing, the Minister's Delegate has the discretion, not the obligation, to consider the factors set out in ENF 6. See *Lee*, above, at paragraph 44; and *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at paragraphs 22-23. The Minister's Delegate in this case reasonably concluded that country conditions need not be considered at this stage of the process because a risk assessment would have to be done before the Applicant could be removed.

[17] Although the Court in *Cha*, above, was careful to limit the application of its reasons to cases involving foreign nationals I cannot identify a rational basis to extend a more generous substantive discretion to permanent residents under s 44. I accept that greater due process requirements may apply to permanent residents because they are at risk of losing their residency status. However, unlike some provisions in the IRPA that grant heightened substantive rights to permanent residents, s 44 treats foreign nationals and permanent residents alike. Accordingly, whatever the basis of inadmissibility may be, the discretion not to make a referral to the ID is the same for both classes.

[18] The decision of the Federal Court of Appeal in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, 274 ACWS 3d 382, is also instructive on the scope of the discretion available to the Officer and the Delegate in the exercise of their s 44 authority. Mr. Sharma was a permanent resident who faced an admissibility hearing on the ground of criminality. The Court recognized that the Officer and the Delegate had "some flexibility when deciding whether or not to write an admissibility report" but their discretion was said to be "very limited" with respect to both foreign nationals and permanent residents. Beyond observing that a permanent resident may be entitled to "a somewhat higher level of participatory rights" the decision does not identify a broader substantive discretion favouring that class of residents. Indeed, the Court applied the security rationale from its earlier decision in *Cha*, above, to Mr. Sharma saying that it applied with equal force to foreign nationals and permanent residents [see para 23]. The decision described the very limited purpose served by the s 44 process in the following way:

> [33] The case review of recommendations prior to the public danger opinion or the internal risk opinion triggered by a

> humanitarian application are of a different nature and cannot be analogized to the report and the referral envisaged by subsections 44(1) and (2). I agree with the respondent that the inadmissibility report and the case highlights are more in the nature of pro forma documents, whose essential purpose is to list relevant information from the file (revolving around the criminal conviction and related objective facts) and to provide a brief rationale for the Officer's actions and recommendation. They are clearly distinguishable from case review recommendations in the context of public danger opinion and internal risk opinions, which are more akin to advocacy tools.
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> …
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> [37] …Yet, as previously noted, the decisions to make a report and to refer it to the ID are administrative in nature, and do not translate to any change in status for the appellant. Only the ID can make a removal order in this case, and the appellant has a number of other recourses available to him before actually being removed from the country (applications for judicial review of the report, of the referral and of the ID decisions, a pre-removal risk assessment, and an H&C application)…

[19] Clearly the Court was not sympathetic to the kind of arguments made by the Applicants' in these proceedings that the s 44 referral process includes an obligation to sort out complex matters of evidence and credibility or to assess issues of law beyond forming a bare opinion as to whether a person is inadmissible.

[20] For these reasons I conclude that the scope of discretion available to the Applicants in these cases is no greater than that described in *Cha*, above, which is to say that aggravating and disputed mitigating circumstances are effectively off the table. It is open to the Officer and the Delegate to reflect on "clear and non-controversial" facts concerning the grounds of inadmissibility – and presumably to entertain a submission about those facts – but the legal obligation extends no further than that.

[21] It is accordingly up to the ID to make an inadmissibility determination, followed in some cases, including these, by a *de novo* appeal to the IAD where a full humanitarian and compassionate review may take place.

[22] The Applicants' counsel argued that the ID is unlikely to extend relief because its authority does not include the resolution of the issues he raised with the Officer and the Delegate. That argument, however, unduly limits the ID's jurisdiction. For instance, if it can be proven that the minor dependants, Si Yi Yin and Si Man Yin, were not in control of their applications and had no knowledge of what was taking place, a misrepresentation finding arguably could not be made again them: see *Sidhu v Canada*, 2019 FCA 169 at para 71. Similarly, if an Applicant can establish that he or she took all available precautions to protect against the perpetration of a fraud, an inadmissibility finding may not be open. The Applicants' further statutory interpretation argument – complex though it may be – can also be put to the ID for consideration. If what took place does not constitute a misrepresentation under s 40, it would obviously fall within the ID's authority to decide. It is also open to argument that the ID can consider an abuse of process argument based on an assertion that, in at least two of these cases, the CBSA was unfairly attempting to split its admissibility case into two parts (ie. residency followed by misrepresentation). The only avenue that may not be available to the Applicants before the ID is recourse to the humanitarian and compassionate relief, but that would be available before the IAD.

[23] I will make a further observation about the Applicants' approach to the s 44 process. Not one of the Applicants provided sworn evidence about their awareness of what Mr. Wang was

doing on their behalf. The only "evidence" of a lack of complicity provided to the Officer came from the Applicants' counsel's uncorroborated representations. It seems implausible that Mr. Wang's involvement would have been required to simply renew the Applicants' permanent residency cards. Although such a renewal may not be conditional on meeting the minimum residency requirement, a truthful representation of time spent in Canada could have triggered a residency enquiry with a resulting loss of status. This concern was more likely to have been behind the retainer of Mr. Wang by the Applicants than the bare renewal of their residency cards. But, in any event, it was not unreasonable for the Delegate to refer these complex evidentiary and legal arguments to the ID. Furthermore, whatever the scope of the discretion, in the absence of sworn corroboration counsel's attestations of the Applicants' innocence were deserving of little, if any, weight.

[24] For the reasons stated above, I am satisfied that the decisions to refer these cases to the ID were reasonable and made in conformity with the discretion conferred by s 44 of the IRPA. These applications are, accordingly, dismissed.

[25] The Applicants have proposed nine questions for certification. In my view only one question is appropriate or needed. The state of the law concerning the scope of discretion under s 44 to refer a case to the ID for a permanent resident remains clouded. Indeed, in *Sharma*, above, the Court of Appeal left that issue for another day. These may be the cases that are needed to clarify the law on this point. I will, therefore, certify the following question:

> What is the scope of discretion afforded by s 44 of the IRPA to refer the case of a permanent resident to the Immigration Division for an admissibility hearing on the ground of misrepresentation

under s 40 and was that discretion properly exercised in these cases?

JUDGMENT IN IMM-1061-18, IMM-2023-18, IMM-3358-18

AND IMM-3629-18

THIS COURT'S JUDGMENT is that these applications for judicial review are, accordingly, dismissed.

THIS COURT'S FURTHER JUDGMENT is that the following question be certified:

> What is the scope of discretion afforded by s 44 of the IRPA to refer the case of a permanent resident to the Immigration Division for an admissibility hearing on the ground of misrepresentation under s 40 and was that discretion properly exercised in these cases?

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-1061-18 IMM-2023-18 IMM-3358-18 IMM-3629-18
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