Federal Court  Cour fédérale

**Date: 20190618**

**Docket: IMM-3733-18**

**Citation: 2019 FC 824**

**Ottawa, Ontario, June 18, 2019**

**PRESENT: Mr. Justice Annis**

**BETWEEN:**

**WENLI SUN**
**LEI ZHANG**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] by Wenli Sun [the female Applicant] and Lei Zhang [together referred to as "the Applicants"] in respect of a June 6, 2018 decision of an immigration officer [the Officer] refusing the application for a permanent residency visa. In the

decision, the Officer held that the Applicants did not qualify for permanent residence because they misrepresented facts with regards to their personal history.

## II. Background

[2] The Applicants submitted an application under the business stream of the Provincial Nominee Program for New Brunswick.

[3] Upon reviewing their application, the Officer noted that there was a publicly listed company, Taian Jintai Plastic Products Co Ltd [Taian Products] where the Applicants were the listed shareholders but that they had not listed this company in their personal history or any other part of their application.

[4] The Officer wrote a procedural fairness letter seeking an explanation for this omission.

[5] The Applicants provided a response and explained that the female Applicant's sister and brother-in-law were looking to earn money, but were not allowed to own a company in their own name as they are teachers. The Applicants explained that they invested the funds in the company, but that they were holding the company as nominees for the sister and brother-in-law.

[6] The Officer considered the Applicants' explanation but noted the absence of any evidence to support their contention that the sister and brother-in-law were unable to register a company in their own name due to their employment as teachers.

[7] The Officer found that the Applicants had withheld information that could have induced an error in the administration of the IRPA. As such, the Officer found that they are inadmissible under section 40 of the Act.

[8] The Applicants now seek judicial review of this decision.

## III. Issues

[9] The Applicants submit the following issues:

a) Did the Officer err in finding that the Applicants made a misrepresentation?

b) Did the Officer err in failing to explain how the omission was material?

## IV. Statutory Framework

***Immigration and Refugee Protection Act*, section 40**

| **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; |
| … | […] |

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| **Application** | **Application** |
| **(2)** The following provisions govern subsection (1): | **(2)** Les dispositions suivantes s'appliquent au paragraphe (1): |
| **(a)** the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and | **a)** l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi; |
| … | […] |
| **Inadmissible** | **Interdiction de territoire** |
| **(3)** A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a). | **(3)** L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent. |

## V. Standard of Review

[10] The parties agree, as do I, that determinations of misrepresentations under paragraph 40(1)(a) of the IRPA call for deference in judicial review proceedings, as they are factual in nature (*Khorasgani v Canada (Citizenship and Immigration),* 2012 FC 1177 at para 8, *Kobrosli v Canada (Citizenship and Immigration),* 2012 FC 757 at para 24, *Dunsmuir v New Brunswick,* 2008 SCC 9).

[11] However, the Applicants argue that since the second question raises an issue as to the sufficiency of the Officer's reasons, which is a question of procedural fairness, the standard of correctness should apply to this issue (*Kastrati v Canada (Citizenship and Immigration)*, 2008 FC 1141 at paras 9-10).

[12] I disagree inasmuch as the law has evolved since 2008. The Supreme Court of Canada noted the following in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708:

> [21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
>
> [22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[13] As such, the reasonableness standard of review applies to the second issue.

## VI. Analysis

### A. *Did the Officer err in finding that the Applicants made a misrepresentation?*

(1) Applicants' submissions

[14] The Applicants argue that a review of the materials they have filed indicates that there were no questions in Schedule A that were improperly answered. At no point were the Applicants required in Schedule A to disclose all of their assets. The Applicants note that in the reasons, the Officer referred to Schedule 4 A. In that document, Question 6 calls for the following disclosure of assets:

> A complete and current statement of total personal net worth of you and your spouse or common-law partner is required. All assets and liabilities must be identified. All assets must be your own personal holdings or your spouse's or common-law partner's and must be disclosed.

[15] The Applicants argue that this question indicated to the Applicants that the only assets they had to disclose were their personal holdings. In their response to the fairness letter, the Applicants explained that their interest in Taian Products was limited to being nominees for the female Applicant's sister. Given the instructions, which explicitly told the Applicants to only disclose their own personal holdings, they maintain that the non-disclosure of their holdings in Taian Products was not an omission. The Applicants argue that they correctly omitted holdings which were not their own personal holdings, and that the Officer erred in finding to the contrary.

[16] The Applicants rely on *Baro v Canada (Citizenship and Immigration),* 2007 FC 1299 at paragraph 15 and *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126 to argue that there cannot be a finding of misrepresentation when the Applicants honestly believed that they were not omitting relevant details. The Applicants were only asked to declare personal holdings. They did so. The Applicants explained that they were holding the undeclared assets as

nominees for the female Applicant's sister. As the assets were not their own personal holdings, they believed that they did not have an obligation to disclose them. There was no misrepresentation and it was an error to conclude otherwise.

[17] The Applicants further argue that the Officer did not take into account the explanation they provided in their response to the fairness letter. Instead of considering that explanation, the Officer responded: "however documentation submitted supports that SUN Wenli and ZHANG Lei are listed as the company shareholders and have made substantial investments with the company and that SUN Wenli is the legal representative". The Applicants submit that the fact that the Applicants were shareholders does not contradict their statement that they were nominees for the female Applicant's sister, and that the funds belonged to her. The Applicants argue that by failing to appreciate and properly consider this explanation, the Officer erred in law.

[18] Finally, the Applicants argue that the Officer erred in concluding that the non-disclosure of the Applicants' holdings in the company was material, given that they had already established that they met the criteria for selection as an investor. The Applicants maintain that the non-disclosure of this information could not have induced any error in the administration of the Act. The Applicants had qualified as investors and had been found to meet the qualifications for investors prior to the issuance of the fairness letter. The fact that they had an interest as nominees could not have impacted in any way this determination.

[19] The Applicants argue that given that they had met all of the requirements there was simply no basis to conclude that the omission was material (*Ali v Canada (Citizenship and Immigration)*, 2008 FC 166 at paras 2-4, *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421 at paras 18-20, *Koo v Canada (Citizenship and Immigration*), 2008 FC 931 at paras 37-38 [*Koo*]).

(2) Discussion

[20] In *SMN v Canada (Citizenship and Immigration)*, 2017 FC 731, Justice Fothergill examined the purpose and nature of section 40 of the IRPA:

> [30] Section 40 of the IRPA is intended to deter misrepresentation and maintain the integrity of Canada's immigration processes. It requires applicants to disclose all material facts to immigration officials in their applications (*Oloumi* at paras 23 and 37; *Khorasgani v. Canada (Minister of Citizenship* and Immigration), 2012 FC 1177 (F.C.) at paras 14 and 19 [*Khorasgani*]). Misrepresentation occurs where two elements are present: (i) there is a misrepresentation by an applicant; and (ii) that misrepresentation is material, such that it induces or could induce an error in the administration of the IRPA (Khorasgani at paras 11 and 14).
>
> …
>
> [32] As Justice Danièle Tremblay-Lamer held in Oloumi at paragraph 25, a misrepresentation need not be decisive or determinative to be material. It will be material if it is important enough to affect the process. The information that SMN chose to withhold was clearly relevant to the determination of his application for permanent residence, and it ought to have been disclosed.
>
> [My emphasis.]

[21] The objective of section 40 is to deter misrepresentation and maintain the integrity of the immigration process. To accomplish this, the onus is placed on the applicant to ensure the completeness and accuracy of the application. Section 40 is to be given a broad interpretation in order to promote its underlying purpose. As such, it encompasses misrepresentations even if they are made by another party, including an immigration consultant without the knowledge of the applicant (*Patel v Canada (Citizenship and Immigration),* 2019 FC 422 at para 37-38 [*Patel*]).

[22] An applicant for permanent residence has a "duty of candour" to provide complete, honest and truthful information in every manner when applying for entry into Canada. As the Applicants are responsible for the content of the application, their belief that they were not misrepresenting a material fact is not reasonable where they fail to review their application and ensure the completeness and veracity of the document before signing it (*Patel* at paras 37-38).

[23] As noted by Justice Harrington in *Singh v Canada (Citizenship and Immigration),* 2010 FC 378 at paragraph 16, given that the word "knowingly" does not appear in section 40, it follows that knowledge is not a prerequisite to a finding of misrepresenting or withholding material facts. As such, even an innocent failure to provide material information can result in a finding of inadmissibility (*Baro v Canada (Citizenship and Immigration),* 2007 FC 1299 at para 15).

(a) *Was there a misrepresentation by the Applicants?*

[24] In the case at bar, the Officer's finding that the Applicants made a misrepresentation was reasonable. The Applicants were the listed shareholders for Taian Products, but they failed to list

this company in their personal history or any other part of their application. The essence of the Applicants' argument is that the only assets they had to disclose were their personal holdings and that their interest in Taian Products was limited to being nominees for the female Applicant's sister.

[25] However, there is an absence of any evidence to objectively explain why the female Applicant's sister could not own the company in her own name, nor was there evidence to support the Applicants' contention that despite being the named shareholders and the only ones who invested in the company, it is not a personal asset. Rather, the evidence on its face supports the conclusion that they are the only listed shareholders and that the company belongs to them.

[26] With regards to the Applicants' argument that they ought to fall under the exception for misrepresentation on the basis that they honestly did not believe that they were withholding material information, this argument fails because the Officer did not accept that they established that they were holding the undeclared assets as nominees for the female Applicants' sister, for the reasons described in the previous paragraph.

(b) *Was the misrepresentation material?*

[27] A misrepresentation need not be decisive or determinative in order to be material. A misrepresentation is material if it is important enough to affect the process, and an applicant may not take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application. The materiality analysis is not limited to a particular point in time in the processing of the application (*Patel* at paras 37-38).

[28] In the case at bar, I agree with the Respondent: the omission of information regarding economic interests is material since an officer cannot assess the information if it is not provided. In a case such as this, where the Applicants are being assessed on their business history and future business or investor potential, it is axiomatic that their investment in any and all companies would be material to their application.

[29] I further agree with the Respondent that the Applicants' reliance on cases such as *Koo* is misplaced. In *Koo*, the evidence was that the Citizenship and Immigration Canada was aware of the information that the applicant had not disclosed and that, in fact, the applicant had previously disclosed the information in issue. There was no such prior disclosure in the case at bar.

B. *Did the Officer err in failing to explain how the omission was material?*

[30] When an applicant is required to give specific information regarding their personal assets and their entire business ownership experience, but they fail to mention that they were shareholders in a company or list it in their personal history, this constitutes an unexplained misrepresentation, as was found to be by the Officer. In these circumstances, there is no requirement to provide any reasons beyond the Officer's finding of fact that there was an unexplained omission in respect of financially related information specifically required to be provided, and therefore material.

VII. Conclusion

[31] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal, and none is certified.

**JUDGMENT in IMM-3733-18**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed and no question is certified for appeal.

"Peter Annis"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3733-18 |
| **STYLE OF CAUSE:** | WENLI SUN ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 14, 2019 |
| **JUDGMENT AND REASONS:** | ANNIS J. |
| **DATED:** | JUNE 18, 2019 |

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| Nadine Silverman | FOR THE RESPONDENT |

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