Federal Court

Cour fédérale

Date: 20150121

Docket: IMM-3213-14

Citation: 2015 FC 81

Ottawa, Ontario, January 21, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

WEI WEI SUO

Applicant

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(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a February 26, 2014 decision by a Citizenship and Immigration Canada [CIC] visa officer of the Consulate General of Canada in Hong Kong, China [the officer] rejecting the applicant's application for permanent residence. The substantive basis for the officer's refusal of the application was the fact that the applicant

was unable to provide evidence that his relationship with his non-accompanying wife had been legally severed.

[2] The applicant was seeking to have the decision quashed and referred back to a different visa officer for re-determination on a number of grounds. These included that the officer unreasonably requested information related to his spouse's employment (which he submitted was not relevant to the application), that procedural fairness was not accorded in respect of a request for an extension of time to provide materials in respect of his spouse, and that the officer fettered his discretion in refusing to reconsider the application when evidence was furnished of the applicant's divorce.

[3] However, in the course of the proceedings, the issue arose as to whether, in the circumstances, the applicant was required to demonstrate that the relationship was legally severed, when he had indicated that it had broken down "in fact."

[4] In consideration of this issue, I allow the application inasmuch as I find that, pursuant to the Act, the applicant was entitled to establish that the relationship with his spouse had broken down "in fact" and he was denied the opportunity to demonstrate this to the officer.

II. Background

[5] The applicant is a citizen of China. He married Ms. Hongxia Li on May 1, 1999.

[6] The applicant arrived in Canada on September 17, 2008 under a closed work permit and worked at New Tang Dynasty TV until December 2010. He then received a new work permit in January 2011 and began working at Heaven's Taste Chinese Cuisine [Heaven's Taste].

[7] In August 2011 the applicant applied to the Saskatchewan Immigration Nominee Program [SINP]. His application was approved on or about November 15, 2012 and he was nominated by the Province of Saskatchewan under the National Occupation Code 6242 (Cook) in the "Workers With Job Offers" category.

[8] The applicant continued working at Heaven's Taste until January 2013.

[9] In May 2013, the applicant submitted an application to CIC for permanent residence as a provincial nominee [the application]. A notice dated September 13, 2013 advised that CIC had received the application on June 14, 2013. He later received a second notice from CIC, dated August 12, 2013, advising that his file was considered complete and that it would be forwarded to a local visa office for processing.

[10] On October 8, 2013, the applicant received two emails from the Hong Kong visa office [the visa office]. The first email [Email 1] was a procedural fairness letter stating that it appeared that the applicant may not meet the requirements for immigration to Canada. These concerns were eventually resolved.

[11] The second CIC email [Email 2], dated October 8, 2013, requested a number of specific documents for the applicant, all of which were later supplied by the applicant. However, it also requested that Ms. Li provide the following documents: police clearance certificates from the PRC and Macau, newly completed AFI, newly completed Schedule A, and employment reference letter, records and job contract from her employer in Macau for a number of years. Email 2 noted that these documents were required in order for CIC to continue processing the application and must be received by November 7, 2013.

[12] In his reply, with respect to the information requested on his wife, the applicant stated that he and Ms. Li had been formally separated since September 30, 2013. The applicant indicated that there was no hope for reconciliation and that Ms. Li no longer wished to reside in Canada. Accordingly, he did not provide any of the requested documents related to Ms. Li and requested that she be removed from the application. Counsel attached an "IMM-0008" form to reflect the applicant's change in marital status and address changes.

[13] The applicant received an email from the visa office on November 19, 2013 [Email 3], requesting the applicant to provide the requested documents pertaining to Ms. Li. The officer stated that Ms. Li remained an eligible dependent on the application because their relationship had not been legally severed, so it was still necessary for the visa office to establish that she is not inadmissible to Canada and meets the requirements of the Act.

[14] In responding to another email from the visa office on November 20, 2013 [Email 4], requesting further information regarding the documentation for Ms. Li, the applicant's counsel

indicated that she was "only…willing to cooperate with [the officer's] request for examination to a limited extent." Ms. Li had obtained the PRC police clearance since this "posed little inconvenience" to her and the applicant included a copy of that document, requesting a further 30-day extension to provide the original document. The applicant stated that Ms. Li was not willing to obtain the Macau police clearance because it would require her to personally travel to Macau and she had no local contacts there to make the request on her behalf. The applicant and his counsel had prepared the Schedule A and AFI forms for Ms. Li but she had not yet returned the signed forms, so counsel attached copies of the unexecuted forms to the letter. The applicant requested a further 60-day extension to provide the Macau police clearance and executed forms for Ms. Li, submitting that this was warranted in the circumstances as Ms. Li intended on divorcing from the applicant and no longer wished to be included on the application.

[15] On December 31, 2013, the applicant submitted the original PRC clearance certificates for himself and Ms. Li to the visa office.

III. Impugned Decision

[16] In a notice dated February 26, 2014, the officer refused the application for permanent residence for failure to provide the documentation for Ms. Li that was requested in the October 8, 2013 and November 19, 2013 emails. The officer cited subsections 11(1) and 16(1) of the Act and paragraph 70(1)(*e*) of the *Regulations* as the statutory basis for this decision.

[17] The officer summarized the communications between the applicant and the visa office, noting in particular that no evidence had been submitted by the applicant's immigration

consultant to show that he and Ms. Li had legally severed their relationship or that they were in that process and they were "not just physically separated from each other as a result of [the applicant's temporary] employment in Canada."

[18] The officer stated that the visa office had not received "any information or reliable evidence … clarifying your dependent wife's past employment as a "Worker" in Macau nor her Macau police certificate" to date. The officer noted that the applicant had been provided with a link to a CIC webpage containing instructions on how to apply for police certificates from various countries (including Macau) and that that webpage clearly indicates that one may apply for a Macau police certificate via a representative with written permission.

[19] The officer concluded as follows:

> In conclusion, <u>you have been provided with ample time and opportunities to submit your dependent wife's Macau police certificate and to clarify her employment</u> as a "Worker" in Macau from JUN08 to JUL09. <u>I am not satisfied with the reasons provided for your dependent wife's reluctance</u> to apply for a Macau police certificate as requested by this office. You have been advised in our emails sent to you that failure to submit the requested documentation and/or information could result in the refusal of your application. <u>Based on all available documentation and information, I am not satisfied that your dependent wife is not inadmissible to Canada. As a result, I am not satisfied that you and your dependents meet the requirements of this Act</u> for the reasons set out above. I am therefore refusing your application pursuant to subsection 11(1) of the Act.
>
> [Emphasis added.]

[20] On May 2, 2014, the applicant submitted a request for reconsideration to the visa office on the basis that his divorce from Ms. Li had been finalized on March 26, 2014. In support of

this request, the applicant included a covering letter from counsel explaining the situation, as well as a copy of the PRC Certificate of Divorce and an English translation thereof.

[21] On June 22, 2014, the officer refused the request for reconsideration on the basis that the applicant had numerous opportunities to comply with the officer's requests and that the applicant had at no time advised the visa office that he had undertaken divorce proceedings.

IV. Statutory Provisions

[22] The following provisions of the Act are applicable in these proceedings:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
2. (2) Unless otherwise indicated, references in this Act to "this Act" include regulations made under it and instructions given under subsection 14.1(1).	**2.** (2) Sauf disposition contraire de la présente loi, toute mention de celle-ci vaut également mention des règlements pris sous son régime et des instructions données en vertu du paragraphe 14.1(1).
[...]	[...]
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

this Act.

[…]

[…]

16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

16. (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

[…]

[…]

42. (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if

42. (1) Emportent, sauf pour le résident permanent ou un personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :

(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible;

a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas règlementaires, ne l'accompagne pas ;

[…]

[…]

[Emphasis added.]

[Je souligne.]

[23] The following provisions of the *Immigration and Protection Regulations*, SOR/2002-227 [the Regulations] are applicable in these proceedings:

Immigration and Protection Regulations, SOR/2002-227

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

23. For the purposes of

23. Pour l'application de

paragraph 42(1)(a) of the Act, the prescribed circumstances in which the foreign national is inadmissible on grounds of an inadmissible non-accompanying family member are that

l'alinéa 42(1)a) de la Loi, l'interdiction de territoire frappant le membre de la famille de l'étranger qui ne l'accompagne pas emporte interdiction de territoire de l'étranger pour inadmissibilité familiale si :

(a) the foreign national is a temporary resident or has made an application for temporary resident status, an application for a permanent resident visa or an application to remain in Canada as a temporary or permanent resident; and

a) l'étranger est un résident temporaire ou a fait une demande de statut de résident temporaire, de visa de résident permanent ou de séjour au Canada à titre de résident temporaire ou de résident permanent;

(b) the non-accompanying family member is

b) le membre de la famille en cause est, selon le cas :

(i) the spouse of the foreign national, except where the relationship between the spouse and foreign national has broken down in law or in fact,

(i) l'époux de l'étranger, sauf si la relation entre celui-ci et l'étranger est terminée, en droit ou en fait,

(ii) the common-law partner of the foreign national,

(ii) le conjoint de fait de l'étranger,

[…]

[…]

70. (1) An officer shall issue a permanent resident visa to a foreign national if, following an examination, it is established that

70. (1) L'agent délivre un visa de résident permanent à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

[…]

[…]

(e) the foreign national and their family members, whether accompanying or not, are not

e) ni lui ni les membres de sa famille, qu'ils l'accompagnent ou non, ne sont interdits de

inadmissible.	territoire.
[…]	[…]
87. (12) A foreign national who is an <u>accompanying family member</u> of a person who makes an application as a member of the provincial nominee class shall become a permanent resident if, following an examination, it is established that	**87.** (12) L'étranger qui est un <u>membre de la famille et qui accompagne</u> la personne qui présente une demande au titre de la catégorie des candidats des provinces devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après sont établis :
a) the person who made the application has become a permanent resident; and	a) la personne qui présente la demande est devenue résident permanent;
b) <u>the foreign national is not inadmissible.</u>	b) <u>il n'est pas interdit de territoire.</u>
[Emphasis added]	[Je souligne]

V. Issues

[24] I find for the purpose of disposing of this matter that there is only one issue, namely whether the officer misdirected himself on the law in respect of an inadmissible non-accompanying member, and thereby, in requesting that the applicant demonstrate that his relationship with Ms. Li had been legally severed.

VI. Standard of Review

[25] The interpretation of a provision of the Act specifically providing for an exemption concerning the inadmissibility of a category of applicants seeking permanent residency in Canada by an officer exercising administrative functions with limited discretion and bearing a

minimal judicial content would attract a standard of correctness: *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, 343 DLR (4th) 128 at para 27; *Patel v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 187 at paras 26-27.

VII. Analysis

[26] The applicant originally submitted that the officer's request for information and documentation regarding Ms. Li's employment in Macau was unreasonable because it would not impact her admissibility to Canada and that the officer breached the duty of procedural fairness by failing to respond to his reasonable requests for an extension of time. However, during the course of reviewing this case, the Court raised the issue as to whether the officer had misdirected himself by limiting the exemption to an inadmissible non-accompanying family member to demonstrating that the relationship had been "legally" severed.

[27] By direction, the Court sought the submissions of the parties with respect to the interpretation of the prescribed exemption for an inadmissible non-accompanying spouse member in section 42(1)(*a*)of the Act, as described in section 23(*b*)(i) of the *Regulations*. In particular, the Court sought the parties' assistance with respect to the interpretation of the wording of a relationship being "broken down in law or in fact" in section 23(*b*)(i).

[28] In reply to the direction, the applicant submitted that the grounds of the exemption were not limited to situations where the relationship had been legally severed, but also included situations where the relationship had broken down "in fact." Because the officer never considered whether the applicant's statements about the breakdown of the relationship

sufficiently demonstrated that the relationship had broken down in fact, he wrongly rejected the application for the applicant's failure to demonstrate that the relationship had been legally severed. The applicant submitted that the judicial review should be granted on that basis alone. The respondent did not reply to the specific issue of the interpretation of section 23(*b*)(i) of the Regulations raised by the Court's direction.

[29] I agree with the submissions of the applicant. It is apparent from the ordinary meaning to be attributed to section 23(*b*)(i) that it was intended to provide an exemption for an inadmissible non-accompanying spouse where the relationship has broken down. This provision, which specifically refers to a spouse, is distinguishable from section 23(*b*)(ii), which refers to a common law partner. The distinction between these two terms is consistent throughout the Act. For example, subsection 12(1) of the Act states that a foreign national may be a member of the family class based on their relationship as a spouse or a common-law partner of a Canadian citizen or permanent resident.

[30] Inasmuch as a "spouse" refers to a married person, the exemption from the inadmissibility requirement for a non-accompanying spouse may be "broken down" either in law (i.e. by a divorce) or in fact (i.e. to be determined by the circumstances described by the applicant and other evidence in support). In the latter case, the focus of the evidentiary inquiry is whether the relationship that is the basis of the marriage has come to an irreconcilable end. In my view, the intention of permitting an exemption for a non-accompanying spouse when the relationship has broken down "in fact" is to respond to the situation of the applicant, where the marriage relationship has ended, but the parties have not yet taken the formal steps to obtain a

divorce. The inclusion of the words "in fact" in the section 23(*b*)(i) exemption contemplates the practical reality of relationship breakdowns and indicates that a certain degree of flexibility is required on the part of the officer.

[31] The officer misinterpreted section 23(*b*)(i) by limiting its application to marriage breakdowns "in law", and in failing to consider the inclusion of the words "in fact" in the administration of the provision. In light of the evidence provided by the applicant that he and Ms. Li had formally separated since September 30, 2013, that there was no hope for reconciliation, and that Ms. Li intended on divorcing from the applicant and no longer wished to be included on the application or to reside in Canada, the officer's insistence that the applicant provide further information on Ms. Li on the basis that it had not been demonstrated that the relationship was legally severed, was clearly unreasonable. This approach reflects the officer's misapprehension of the scope of the exemption under section 23(*b*)(i).

[32] Accordingly, the decision must be set aside and returned to another visa officer for re-determination. In the circumstances, it is not necessary to consider the applicant's other submissions. There was no suggestion in the parties' reply to the Court's direction that a question of overriding importance was raised and none exists. There is no question for certification.

VIII. Conclusion

[33] The application is allowed. The February 26, 2014 decision by the officer rejecting the applicant's application for permanent residence is set aside and the matter referred back to another officer for re-determination. There are no questions for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the decision is set aside;

2. The application for permanent residence is to be returned before another officer for reconsideration; and

3. There are no questions for certification.

"Peter B. Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3213-14
STYLE OF CAUSE:	WEI WEI SUO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 12, 2014
JUDGMENT AND REASONS:	ANNIS J.
DATED:	JANUARY 21, 2015

APPEARANCES:

Dov Maierovitz	FOR THE APPLICANT
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dov Maierovitz Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT