

Federal Court



Cour fédérale

Date: 20170908

Docket: IMM-856-17

Citation: 2017 FC 814

Toronto, Ontario, September 8, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

WEIZE CHEN (A.K.A. WEI ZE CHEN)

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada dated January 30, 2017, dismissing an appeal under s. 63(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of a decision by an immigration officer not to issue a permanent resident visa to the Applicant's wife.

[2] For the reasons explained in greater detail below, this application is dismissed. The IAD's credibility assessments were reasonable. Both cultural context and the expressed intentions of the parties to a relationship can be relevant to the determination of whether a conjugal relationship exists, such context representing a lens through which to assess those intentions. However, the expressions of intention are of little value where the parties have been found not to be credible. It is therefore not a reviewable error for the IAD's decision in this case not to have expressly referenced consideration of the cultural context of the parties' relationship.

II. Background

[3] The Applicant, Mr. Weize Chen, is a Chinese national who became a permanent resident of Canada on November 14, 2008. He was previously married to his first wife with whom he had a son. Mr. Chen and his now-wife, Ms. Xiao Feng Gao, met in 2005 when she began working at his company. They entered into a romantic relationship, and she moved into his residence in 2006. When Mr. Chen was granted permanent residence in 2008, he departed China for Canada with his son. He did not declare Ms. Gao as a dependent. Mr. Chen and Ms. Gao married in China on September 13, 2011, and Ms. Gao applied for permanent residence as a member of the family class, with Mr. Chen as her sponsor. Her application was refused on March 15, 2013 on the basis that their relationship was not genuine. Mr. Chen appealed this decision to the IAD.

[4] In the course of the appeal, the Respondent, the Minister of Citizenship and Immigration [the Minister] conceded that the marriage was genuine. However, the Minister argued an alternative ground of refusal, that Ms. Gao is not a member of the family class because of the effect of s. 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227

[IRPR] and the fact that Mr. Chen did not identify Ms. Gao, and she was not examined, when Mr. Chen applied for permanent residence. Section 117(9)(d) provides that a foreign national shall not be considered a member of the family class if the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

[5] The Minister's position was that Mr. Chen and Ms. Gao were in a common-law relationship at the time of Mr. Chen's landing on November 14, 2008, relying on s. 1(1) of the IRPR, which defines a "common-law partner" as an individual who is cohabiting with a person in a conjugal relationship, having so cohabited for a period of at least one year. It was undisputed that Mr. Chen and Ms. Gao had been cohabiting for longer than one year at the time of Mr. Chen's landing. Therefore, the issue for the IAD's consideration was whether the couple had been in a conjugal relationship.

[6] The IAD concluded on a balance of probabilities that Mr. Chen and Ms. Gao were living together as common-law spouses as of January or June 2006 until November 2008 when Mr. Chen was landed in Canada. The IAD found that they were in a conjugal or "marriage-like" relationship. They lived together, had sexual relations, shared financial resources similar to what they did after their marriage, each shopped and cooked, and they took meals together. They were known as a couple by their families and, although they were not generally known as a couple by their workmates, this was because of a deliberate effort to conceal the relationship so as not to adversely affect workplace morale.

[7] The IAD also made a number of adverse credibility findings with respect to Mr. Chen and Ms. Gao, which are canvassed in more detail later in these Reasons. As a result, the IAD did not believe them when they said they were not in a conjugal relationship. Noting that the application of s. 117(9)(d) was not limited to deliberate or fraudulent nondisclosure of non-accompanying family members, the IAD was satisfied that the ground of refusal added by the Minister during the appeal was valid and therefore dismissed Mr. Chen's appeal.

III. Issues and Standard of Review

[8] The Applicant raises the following issues for the Court's consideration:

- A. Whether the IAD erred by failing to consider the totality of evidence and through a microscopic examination of the evidence speaking to the Applicant's and Ms. Gao's credibility;
- B. Whether the IAD erred by failing to take into account the cultural context in which the Applicant's pre-marital relationship with Ms. Gao took place and, as a result, by unreasonably concluding that the relationship was a common-law partnership despite evidence on the record to the contrary.

[9] The parties agree, and I concur, that these issues are reviewable by the Court on a standard of reasonableness.

IV. Analysis

Whether the IAD erred by failing to consider the totality of evidence and through a microscopic examination of the evidence speaking to the Applicant's and Ms. Gao's credibility

[10] Mr. Chen argues that the IAD dismissed his appeal for the primary reason that it found him and Ms. Gao to lack credibility with respect to their assertion that they were not in a common-law relationship at the relevant time. He takes issue with certain of the individual credibility findings and the resulting overall negative credibility determination.

[11] Mr. Chen refers in particular to implausibility findings by the IAD, which he argues are not sufficiently plain and obvious to withstand review. The IAD found implausible Mr. Chen's testimony that the agent who assisted him with his application for permanent residence did not inquire as to whether he was in a relationship and that Mr. Chen simply signed the application after the agent completed it, without having the contents of the application translated back to him to ensure its accuracy. Mr. Chen argues that this finding represents a reviewable error, referring to the decision in *Totaram v Canada (Citizenship and Immigration)*, 2009 FC 853 [*Totaram*], at para 27, in which Justice Zinn overturned an IAD refusal of an appeal, concluding that it is not impossible or even improbable that an applicant, who has given a form preparer what he believes to be all the relevant documents and who he understands has a track record of success, would sign a form without reading it. Justice Zinn stated that it is most certainly not implausible when the person is otherwise found to be an honest and credible witness.

[12] I find *Totaram* distinguishable, in part because, as further canvassed below, Mr. Chen was not otherwise found to be an honest and credible witness. The IAD also noted that, in explaining why he did not include Ms. Gao in his application for landing in Canada, Mr. Chen first stated that she was not a common-law spouse as they were not in a conjugal relationship and then attempted to blame the omission on the agent. In that context, I do not find it unreasonable for the IAD to have made a negative inference as to Mr. Chen's credibility as a result of this explanation.

[13] Mr. Chen also notes that the IAD expressed concerns with respect to the genuineness of a letter provided by the property management company speaking to when Ms. Gao took residence in his home. The IAD had concerns that the English language letterhead used the term "Manage" in the name of the company when it clearly should say "Management". As a result, the IAD suspected the letter was not genuine and had been prepared to bolster Mr. Chen's case when the genuineness of the marriage was the issue in his sponsorship application. He argues that this again represents an implausibility finding, applying Canadian standards to the practices of a foreign company, without any consideration as to whether that this was actually implausible in its particular context.

[14] I find no merit to this submission. Mr. Chen is asking the Court to reweigh this aspect of the evidence, which is not the Court's role in judicial review. Moreover, the RAD had concerns about the genuineness of the letter not only because of the error in the letterhead but because of an inconsistency between its contents and his testimony. The letter stated that Ms. Gao moved in with Mr. Chen in January 2006, not June 2006 as he alleged.

[15] Mr. Chen also argues that the IAD misapprehended his testimony as to his motivations to assist Ms. Gao's family when her father suffered a heart attack in 2005. In its decision, the IAD noted Mr. Chen's argument that he was not in a common-law relationship prior to his marriage to Ms. Gao, because he did not have an obligation to provide for her parents. The IAD did not accept this argument, because part of the explanation of the development of the couple's relationship was that Mr. Chen offered her father assistance when he had a heart attack. Mr. Chen argues that it is clear from his testimony that he made the choice to assist Ms. Gao's father, which he submits differs from the moral responsibility towards Ms. Gao and her family that he assumed after they married. Mr. Chen therefore submits that the IAD erred in finding that he contradicted himself.

[16] I do not read the IAD's conclusion on this point as a credibility determination. Rather, it found that the assistance offered to Ms. Gao's father early in their relationship undermined Mr. Chen's argument that they were not in a common-law relationship prior to their marriage. I appreciate that there is a distinction between acting out of choice and acting out of obligation. A further distinction could be drawn between a legal obligation and a moral obligation, which is the sort of responsibility Mr. Chen argues he assumed towards Ms. Gao's family following their marriage. While the IAD did not conduct an express analysis of such distinctions, it accurately noted the fact that family assistance was provided early in the relationship, and I cannot conclude that this portion of the decision discloses a misapprehension of the evidence. Rather, I consider the IAD's conclusion with respect to this evidence to be within the range of possible, acceptable outcomes and therefore reasonable.

[17] Mr. Chen also notes the IAD's reference to the varying ways in which he characterized his relationship with Ms. Gao. The IAD refers to Mr. Chen saying it was like a family relationship, then saying it was a working relationship, then saying it was one of a boyfriend and girlfriend, and then saying they were only living together. However, I do not read the IAD's decision as making any negative credibility inference as a result of these different characterizations.

[18] Finally, Mr. Chen argues that, in making its overall negative credibility determination with respect to himself and Ms. Gao, the IAD relied on inconsistencies related to peripheral issues not germane to the key events surrounding whether a common-law relationship existed. Again, I find little merit to this submission. I accept that some of the credibility concerns identified by the IAD related to events less central than others. However, given the number of inconsistencies and credibility concerns identified by the IAD, I cannot conclude its overall negative credibility determination to be unreasonable. While I accept Mr. Chen's argument that a decision-maker should not be overly vigilant or microscopic in its examination of the evidence, and that discrepancies or inconsistencies must be rationally related to the applicant's credibility, my conclusion is that the IAD's analysis cannot be characterized in this manner.

[19] I note for instance the IAD's conclusion that a letter sent to Ms. Gao convoking her for an interview on March 14, 2013 had been altered to instead read May 14, 2013, to support an explanation for Ms. Gao having missed that interview. On this basis, the IAD found that Ms. Gao was overall not credible and that nothing she averred need be accepted as true unless otherwise verifiable. This issue also raised concerns for the IAD about Mr. Chen's credibility, as he did not

deny that the letter was altered but attempted to blame the alteration on his ex-wife or his son, without providing any plausible rationale for such an explanation.

[20] It is therefore my decision that the IAD acted reasonably in its overall negative credibility determinations. As explained below, these determinations affect the analysis of the second issue raised by Mr. Chen in this judicial review.

Whether the IAD erred by failing to take into account the cultural context in which the Applicant's pre-marital relationship with Ms. Gao took place and, as a result, by unreasonably concluding that the relationship was a common-law partnership despite evidence on the record to the contrary

[21] Mr. Chen's counsel explained at the hearing of this judicial review application that the principal issue he wished to raise was that the IAD had reached its conclusion, that the relationship was conjugal in nature, without giving any consideration to the cultural context of the relationship. He argues that the intentions of the parties to a relationship is a very significant factor that must be considered in assessing the nature of the relationship, that such intentions can only be assessed in a cultural context, and that the IAD failed to undertake this analysis.

[22] In advancing this position, Mr. Chen's counsel noted that he is conscious of the decision in *Savescu v Canada (Citizenship and Immigration)*, 2010 FC 353, in which Justice Mainville held that Romanian law, which did not recognize common-law relationships, mattered little to the determination whether the applicant in that case and his partner were common-law partners

within the meaning of the IRPR. The Court observed that the definition of common-law partner is not variable according to any applicable foreign legislative framework and that the recognition or non-recognition of common-law relationships by a foreign jurisdiction has no bearing on the implementation of the IRPR. Mr. Chen does not take issue with this jurisprudence, and his counsel was careful to explain that he is not arguing that the lack of recognition of common-law relationships under Chinese law precludes a finding that he and Ms. Gao were in a conjugal relationship. Rather, his argument is that the decision-maker must be conscious of and take into account the foreign cultural context in assessing the nature of the relationship.

[23] The Minister takes issue with Mr. Chen's argument that the analysis of whether a conjugal relationship exists must focus upon the parties' intentions. The Minister notes that the IAD referred to the decision in *Adjani v Canada (Citizenship and Immigration)*, 2008 FC 32, which explains that the scope of s. 117(9)(d) of the IRPR is not limited to deliberate or fraudulent nondisclosure of non-accompanying family members, and argues that the parties' intentions are therefore irrelevant or of little significance to the determination the IAD must make. I disagree with this submission. While I accept that intent to misrepresent or withhold information is not relevant to the application of s. 117(9)(d), it is not that intent which the Applicant's arguments focus upon.

[24] Rather, Mr. Chen argues that the intentions of the parties to a relationship must be considered in assessing the nature of the relationship and whether it is properly characterized as conjugal. He notes that the Supreme Court of Canada in *Nova Scotia (AG) v Walsh*, 2002 SCC 83, at paras 43 and 54-57, emphasizes that the intentions of the parties to a relationship must

form the basis for a determination whether a common-law relationship exists. While that case was decided in a different context, being the Supreme Court's consideration of whether Nova Scotia's matrimonial property legislation infringed the Charter because it did not apply to common-law couples, I accept Mr. Chen's proposition that the intentions of the parties to a relationship are relevant and indeed important to the characterization of that relationship.

[25] I also accept that the cultural context surrounding the parties can be relevant to the assessment of the parties' intentions and therefore to the determination of the nature of the relationship. While not binding on the Court, the decision of the IAD in *McCulloch v Canada (Citizenship and Immigration)*, 41 Imm LR (3d) 168, is instructive in referring to the need to keep in mind the different mores and customs, and differing societal views and acceptance of conjugal relationships, that may exist in different countries where the existence of conjugal relationships are being assessed for immigration purposes.

[26] However, this does not mean that a determination as to whether a conjugal relationship exists turns on how the parties to the relationship subjectively describe their intentions or characterize their relationship. Rather, intentions can be assessed by both subjective and objective indicators. It is common ground between the parties that the Supreme Court of Canada in *M v H*, [1999] 2 SCR 3 [*M v H*], at para 59, explained the generally accepted characteristics of a conjugal relationship as including shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple, while recognizing that these elements may be present in varying degrees and that not all are necessary for the relationship to be found to be conjugal. In my view, these characteristics assist

in assessing a couple's commitment to each other and therefore represent objective indicators of the couple's intentions. This is not to say that the manner in which the parties to the relationship describe their intentions is irrelevant to the determination. However, the extent to which the parties' expressions of their intentions, as opposed to objective indicators of their intentions, are helpful to the decision-maker who is charged with determining the nature of the relationship will depend at least in part on the credibility of those parties.

[27] It is in that context that I cannot conclude the IAD to have made a reviewable error in its analysis of the relationship between Mr. Chen and Ms. Gao. As expressed in the IAD's decision, and as acknowledged by the Applicant, the IAD's conclusion that Mr. Chen and Ms. Gao were not credible, with respect to their assertion that they were not in a common-law relationship, was fundamental to the dismissal of the appeal. I have found no reviewable error in the adverse credibility determinations. As noted above, I accept that cultural context can be relevant to the determination whether a conjugal relationship exists, such context representing a lens through which to assess the intentions as expressed by the parties to the relationship. However, the parties' expressions of their intentions are of little value where the parties have been found not to be credible. Against that backdrop, I do not consider it a reviewable error for the IAD's decision in this case not to have expressly referenced consideration of the cultural context of the parties' relationship. The IAD's reasoning is transparent and intelligible, based on the more objective considerations prescribed by *M v H*, and the result is within the range of possible, acceptable outcomes based on the evidence before the IAD. It is therefore reasonable.

[28] Having found no reviewable error on the part of the IAD, this application for judicial review must be dismissed. Neither of the parties proposed a question for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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