Federal Court  Cour fédérale

Date: 20210616

Docket: IMM-472-20

Citation: 2021 FC 616

Vancouver, British Columbia, June 16, 2021

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

YING ZHENG

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

(Delivered from the Bench at Vancouver, British Columbia, on June 9, 2021 and edited for syntax and grammar with added references to the relevant case law)

[1] A visa officer concluded that Changqian Chen is not a member of the family class by application of section 4.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. His sponsor, Ms. Ying Zheng appealed that decision to the Immigration Appeal Division (the "IAD"). On January 2, 2020, the IAD upheld the visa officer's determination. I have before me an application for judicial review pursuant to section 72(1) of

the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], in which Ms. Zheng seeks to quash the IAD's decision.

[2] In the excerpt below, Ying Zheng is referred to as the Appellant and Mr. Chen as the Applicant, as those terms were used by the IAD.

[3] Counsel for the Respondent has referred the Court to paragraphs 5-7 and 13-23 of the IAD decision. I find those excerpts helpful in setting out the facts. I can do no better than did the IAD, and I quote.

> [5] The couple met in November 1997 and moved in together in January 1998. They resided in the home of the Applicant's parents until August 2001 when the Applicant left China for the first time and they lost contact. They had two sons, the first in July 2000 and the second in February 2002, after the Applicant left the country the previous year. According to the Appellant she continued residing with the Applicant's parents for a few months after the birth of her second son until they [the Applicant's parents] disappeared with her two sons and she could not find them.

[4] I interrupt the quotation at this point to indicate that, during the course of the hearing, I inquired of Ms. Zheng's counsel, whether she reported the abduction of her two children to Chinese authorities. Counsel advised that she did not.

[5] I return now to the quotation, starting at paragraph 6 of the IAD decision:

> [6] The Applicant made his way to Canada by December 2001 and made a refugee claim in Canada which was denied as not credible in February 2003. He agreed to leave Canada to comply with a departure order which came into effect after the conclusion of his refugee process, but later cancelled the ticket and remained in Canada without status until 2015. During this same period the Appellant returned to her parents' home and married for the first

time, to Da Fu Feng in August 2003 who sponsored her to Canada. She became a permanent resident of Canada on June 7, 2004 in the spousal category. That relationship ended a short period after her landing in Canada and her divorce from Mr. Feng was finalized in March 2006. The Appellant married for a second time in October 2006 to Chunqiang Xu in China and initiated a sponsorship application on his behalf. The application was refused as a marriage of convenience in March 2009. An appeal of that refusal was filed in April 2009, but declared abandoned in June 2010 and the Appellant divorced Mr. Xu in May 2015.

[7] The Appellant and Applicant reportedly reconnected by chance in October 2008 and married in March 2017. The Appellant filed a sponsorship application for the Applicant in July 2017, the refusal of which underlies this appeal.

[…]

[13] According to the testimony of the Appellant her relationship with the Applicant ended around August 2001 when he first left China and went to Malaysia. The Applicant briefly returned in November 2001 to ask his parents for money to attempt to go to the United States. This timeline is in slight contrast to the one provided by the Applicant who initially told the visa officer at his interview in July 2018 that his relationship with the Appellant only ended when he applied for refugee status in Canada in 2002. He then stated that the relationship ended when his refugee claim failed in early 2003 and he no could no longer contact the Appellant because he did not have a phone [sic]. At the time of his refugee hearing in January 2003 he told the Refugee Protection Division (RPD) Panel that his fiancée was still living at his parents' home with their two sons. Based on the discrepancies between the testimonies and available evidence it is difficult to conclude if and when the relationship between the couple ended. However, I note that the Applicant's refugee claim was denied in February 2003, he went underground shortly after that in Canada and the Appellant married Mr. Feng in August 2003 who sponsored her to Canada that same year.

The temporal relationship between the Appellant's separation from the Applicant and the relationship with her first and second husbands.

[14] The Appellant indicated that she met her first husband in March 2003 and then changed her testimony to the fall of 2003 and immediately began residing with him for one month. The couple married in August 2003 and the Appellant was sponsored to Canada, becoming a permanent resident in June 2004. According to the Appellant this relationship was short lived and in October

2004 she left her spouse just a few months after coming to Canada and discovering his gambling issues. According to the Appellant's application forms she moved away from her first husband even earlier on July 17, 2004. The Applicant told the visa officer that the Appellant never told her first husband about her two children and when he saw the stretch marks on her abdomen and became aware of her past he ended the relationship. This version of events seems supported by the fact that the Appellant did not declare her children on her original sponsorship application. However, at the hearing both witnesses insisted that the Applicant was nervous at the interview and answered incorrectly when the real reason for the divorce was the sponsor's gambling issues.

[15] As previously indicated, the Appellant and Applicant testified to have ended their relationship sometime in 2001. However, I note that the Applicant's refugee claim was refused in February 2003 which is the date he originally gave the visa officer as the end of their relationship. If true it would mean the Appellant began a relationship with her first husband within months of the dissolution of the relationship with the Applicant. Based on the general timelines and conflicting reasons for the dissolution of this first marriage, I conclude on a balance of probabilities that the Appellant's first marriage was not genuine and entered into by the Appellant for immigration purposes.

[16] The Appellant went on to marry a second time. She divorced her first husband in March 2006 and married her second one in October 2006. The Appellant submitted a sponsorship application for this second husband which was denied in March 2009 after an interview. She filed a notice to appeal the refusal in April 2009 which was declared abandoned in June 2010. According to the Appellant she learned that her second husband was having other relationships after she applied to sponsor him, but did not take any action to end the sponsorship application. The divorce document indicates that the Appellant's second husband was introduced to the Appellant in order to settle down in Canada but the couple did not live together after the marriage, nor hold a wedding according to countryside's custom. The immigration intention of the Appellant's second husband is further supported by the Applicant's answers during the visa office interview when he stated that the Appellant's mother told her that her second husband only wanted to marry her to immigrate to Canada a few months after she returned to Canada.

[17] Given the information available to the Appellant after she applied to sponsor her second husband it is difficult to understand why she filed an appeal of the refusal and never withdrew the sponsorship after becoming aware of her husband's other

relationships and immigration intentions through the marriage. The reasons become clearer when remembering that the Appellant had reconnected with the Applicant in October 2008 and was living with him in early 2009 prior to the filing of the appeal related to her second husband. I find this timeline also supports the finding on the lack of genuineness and the primary purpose of the Appellant's marriage to her second husband. On a balance of probabilities, I conclude that this second marriage was one of convenience entered into by both parties for immigration purposes.

Evidence that the former spouses did not separate or end contact with each other

[18] The timeline provided for the end of the relationship between the couple varied between their testimonies, visa office interview and documentation. The Applicant first told the visa officer that the relationship with the Appellant ended in 2001 then stated it ended when his refugee claim failed in early 2003 and he no longer had contact with her from the end of 2002. At the hearing the Applicant testified that he did not have any contact with the Appellant after he came to Canada in December 2001. According to the Appellant she lost contact with the Applicant one month after the birth of her second son in February 2002 and considered the relationship over in March 2002.

[19] This sequence of events is further muddied by the information the Applicant provided to the RPD at the time of his refugee claim. In his Personal Information Form received March 8, 2002 the Applicant listed the Appellant as his common-law wife and indicated she was still living with his parents in the attached narrative. He continued with this version of events at the hearing in January 2003 as reflected by the RPD member's decision. "His fiancée has not had any problems with the authorities in China, and she is at his family's home and has remained there throughout the period of alleged interest by government officials".

[20] While counsel has highlighted the lack of evidence of communication between the couple after their separation until their re-acquaintance in 2008, I note that this is but one factor in the assessment, and even accepting it as true, it would not address the reason for the divorce or the nature of the Appellant's first marriage.

[21] Accepting, based on the witness testimony, that the couple did not directly communicate between 2001/2003 and 2008, I do not find that the relationship ended in 2000 for either of them, rather they were both in love with the other, but frustrated by their separation.

> [22] As well, the ease with which the couple got back together after so many years apart is also not consistent with a complete breakdown of the relationship. After meeting randomly at the Appellant's sushi restaurant in Vancouver in October 2008 when the Applicant was looking for a job the couple resumed co-habiting shortly thereafter. The witnesses testified that they began living together in early 2009 in contrast to the information provided on the sponsorship application which indicates they were common-law partners again from October 2008.
>
> [23] This re-connection apparently occurred after years of separation between the couple and after the Appellant lost her two young children who were taken away by the Applicant's parents. I find the apparent ease of the reconnection between the Appellant and the Applicant not to be in keeping with a complete breakdown of their previous relationship. I find that the more probable explanation for the ease with which the Applicant and Appellant re-entered their relationship is that their relationship continued for both of them, in some manner, throughout these years, even during the periods where there was little to no communication between the couple.

[6] Section 4(1) and 4.1 of the *Regulations* reads as follows.

4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	**4 (1)** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	**a)** visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	**b)** n'est pas authentique.
New relationship	**Reprise de la relation**

4.1 For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the foreign national has begun a new conjugal relationship with that person after a previous marriage, common-law partnership or conjugal partnership with that person was dissolved primarily so that the foreign national, another foreign national or the sponsor could acquire any status or privilege under the Act.	**4.1** Pour l'application du présent règlement, l'étranger n'est pas considéré comme l'époux, le conjoint de fait ou le partenaire conjugal d'une personne s'il s'est engagé dans une nouvelle relation conjugale avec cette personne après qu'un mariage antérieur ou une relation de conjoints de fait ou de partenaires conjugaux antérieure avec celle-ci a été dissous principalement en vue de lui permettre ou de permettre à un autre étranger ou au répondant d'acquérir un statut ou un privilège aux termes de la Loi.

[7] Ms. Zheng contends that section 4.1 is being applied retrospectively by the IAD.

[8] Ms. Zheng submits that if the dissolution were to have taken place due to acquiring status in Canada through her marriage in 2003, the dissolution of a previous relationship with Mr. Chen would have occurred in 2003. Since section 4.1 of the *Regulations* came into force on August 11, 2004, after the alleged dissolution, the IAD, according to Ms. Zheng, improperly applied s. 4.1 retroactively.

[9] The Respondent contends that Ms. Zheng's argument has no merit. The Respondent contends that section 4.1 of the *Regulations* does not contain a temporal limitation, rather the provision is to be applied to current applications for permanent residence under the family class.

The provision describes who can be included as a member of the family class, and therefore requires a decision maker to consider an alleged dissolution and assess the relationship as it existed in the past.

[10] The Respondent contends it was reasonable for the IAD to assess the relationship between Ms. Zheng and Mr. Chen, as it currently exists and as it previously existed, and to make a finding that the couple had dissolved their relationship to facilitate Ms. Zheng's admission to Canada, by way of marriage to another party and a subsequent sponsorship application.

[11] The IAD found the dissolution in 2003 was not genuine; it was only undertaken to allow Ms. Zheng to enter into a marriage and obtain permanent residence in Canada. The Respondent refers the Court to the decision of Madam Justice Walker in *Jin Hui Fang v. The Minister of Citizenship and Immigration*, 2020 FC 851 [*Fang*]. At paragraph 13 of that decision Justice Walker penned the following:

> [13] Section 4.1 is premised on three conjunctive elements. Rephrasing the three elements, Ms. Chen will not be considered Mr. Fang's spouse pursuant to section 4.1 if:
>
> 1. She and Mr. Fang had a previous marriage, common-law partnership or conjugal partnership;
>
> 2. The previous marriage, common-law partnership or conjugal partnership was dissolved primarily so that Ms. Chen or Mr. Fang could acquire immigration status or privilege in Canada; and
>
> 3. Ms. Chen and Mr. Fang subsequently began a new conjugal relationship.

[12] I agree with the conjunctive test outlined in *Fang*. I also agree with the Respondent's contention that section 4.1 of the *Regulations* is not being applied retrospectively in the circumstances. There is no temporal effect. I find there is no merit to the retrospective argument advanced by Ms. Zheng.

[13] I turn briefly to the test for reasonableness. The IAD rendered a fulsome decision. The IAD fully considered the facts, the law and the relevant jurisprudence. This Court has no difficulty in understanding the pathway of decision-making undertaken by the IAD. I find it meets all of the hallmarks of transparency, justification and intelligibility, as required by both *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[14] I now turn to the question proposed for certification for consideration by the Federal Court of Appeal. Ms. Zheng requests the Court certify the following question:

> Does section 4.1 of the *Immigration and Refugee Protection Regulations* offend the principle of the presumption against retrospectivity in that it applies to a conjugal or common-law relationship that was dissolved prior to its enactment?

[15] The Respondent contends firstly that it received no notice of the proposed certified question as required by the *Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings* dated November 5, 2018. Those Guidelines read: "Where a party intends to propose a certified question, opposing counsel shall be notified at least five [5] days prior to the hearing, with a view to reaching a consensus regarding the language of the proposed question".

[16] Regardless, counsel for the Respondent argues that section 4.1 of the *Regulations* does not offend the presumption against retrospectivity. As noted above, counsel for the Respondent says that the point at which the relationship is alleged to have been dissolved is immaterial. It is the purpose of the dissolution that is relevant.

[17] The test for certification has recently been reformulated by the Federal Court of Appeal in *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paragraph 46:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).

[18] In the circumstances, I am not satisfied that the proposed question is appropriate for certification for consideration by the Federal Court of Appeal. This case turns on the facts.

[19] The legislation is clear. The decision by Justice Walker is clear. The contentions of the Respondent are accurate with respect to the temporal issue surrounding the factual matrix the Court is required to consider. I therefore refuse to certify the question for certification.

[20] I would add that were I inclined to conclude that the Respondent is incorrect and were I inclined to conclude that this decision does not meet the test of reasonableness, I would nonetheless exercise my discretion and refuse this application for judicial review on the basis that Ms. Zheng does not come to the Court with clean hands. I am of the view Ms. Zheng has attempted to improperly manipulate the Canadian immigration system at every opportunity available to her. See Madam Justice Strickland's summary of the unclean hands doctrine in *Debnath v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 332 at paras. 20-24.

[21] This application for judicial review is dismissed for the reasons already outlined.

[22] I requested the parties' position on costs. I am cognizant of Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, which directs that no costs are to be awarded in immigration matters except in special circumstances. The threshold for establishing special reasons is high and must be assessed in the context of the particular circumstances of each case. This Court has found special reasons to exist in situations where, for example, a party has unnecessarily or unreasonably prolonged legal proceedings, acted in an unfair, oppressive or improper manner, or acted in bad faith (*Taghiyeva v. Canada (Citizenship and Immigration)*, 2019 FC 1262 at paras. 16-23; and *Garcia Balarezo v. Canada (Citizenship and Immigration)*, 2020 FC 841 at para. 48). Given the above reasons, I order costs payable by Ms. Zheng to the Respondent forthwith in the amount of $1,000.

JUDGMENT in IMM-472-20

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs payable by Ms. Zheng to the Respondent, forthwith, in the amount of $1,000.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-472-20
STYLE OF CAUSE:	YING ZHENG v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 9, 2021
JUDGMENT AND REASONS:	BELL J.
DATED:	JUNE 16, 2021

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