Date: 20070705

Docket: IMM-5527-06

Citation: 2007 FC 710

Ottawa, Ontario, July 5, 2007

PRESENT: THE CHIEF JUSTICE

BETWEEN:

SHUM, MEI WING

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] On November 11, 1997, the applicant's spouse, a citizen of Hong Kong, pleaded guilty to aiding and abetting the breach of a condition of a visitor's undertaking not to be employed while in that country. The visitor was apparently employed as a housemaid at a time when she did not have the legal authority to work in Hong Kong. The applicant's spouse was sentenced to a fine worth the Canadian equivalent of approximately $500.

[2] On the basis of these facts, the immigration officer concluded that the applicant's spouse was inadmissible in Canada on grounds of criminality, pursuant to paragraphs 36(2)(b) and

124(1)(c) of the *Immigration and Refugee Protection Act*. This resulted in the refusal of the applicant's application for permanent residence in accordance with paragraph 42(a) of the Act. The applicant seeks to be landed as a Québec investor.

[3] Paragraph 124(1)(c) creates an offence for a person who employs a foreign national in an unauthorized capacity. According to paragraph 36(2)(b), a foreign national is inadmissible on grounds of criminality if convicted outside of Canada of an offence which if committed in Canada would be an offence under an Act of Parliament.

[4] Both parties agree that the immigration officer in this case determined the equivalency between the Hong Kong offence and paragraph 124(1)(c) "… by examining the evidence adduced … to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings …": *Hill v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 47 (QL) (C.A.)

[5] After considering the able submissions of both counsel, I have concluded that the immigration officer exercised her discretion without regard for an important element in the material before her.

[6] In April 2006, the Hong Kong Police Force advised the immigration officer in writing of the offence committed by the applicant's spouse. The letter was stamped as follows: "This conviction is regarded as spent in Hong Kong by virtue of subsection 2(1) of the Rehabilitation

of Offenders Ordinance" (Ordinance). There is no mention of this notation by the immigration officer in any of her analysis.

[7] The Ordinance is not included in the tribunal record but is available through the internet. Subsection 2(1) of the Ordinance provides that the conviction is not admissible in any proceedings if a period of three years has elapsed without the individual having been convicted again in Hong Kong of an offence.

[8] The tribunal record discloses no other offence committed by the applicant's spouse. This explains the notation on the letter received by the immigration officer that the conviction of the applicant's spouse "is regarded as spent in Hong Kong".

[9] Both parties agree that this provision of the Ordinance does not constitute a pardon as understood in Canadian law: *Kan v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1886 (QL) (T.D.) and *Lui v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1029 (QL) (T.D.).

[10] However, I cannot be satisfied that the exercise of the immigration officer's discretion would not have been materially affected had she considered the Ordinance. Such consideration may have invited her to assess more carefully the seriousness of the offence. Also, she may have asked more precise questions to determine whether the person was hired by the applicant's spouse or someone else. In her response to the immigration officer, the applicant's spouse noted

that the illegal worker “was hired as a housemaid” without stating by whom. If the immigration officer had pursued the matter further, in light of the Ordinance and the nature of the offence, she may have learned more concerning the identity of the employer.

[11] As a general rule, the burden is on the applicant to satisfy the immigration officer concerning the merits of the application for permanent resident. However, I agree that this is one situation where the applicant or his spouse should have been given “effective notice” of the legal issues in play: *Keymaresh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 641 at paragraph 18.

[12] For these reasons, the application for judicial review will be allowed and the matter referred to a different immigration officer for redetermination in accordance with these reasons. Neither party suggested the certification of a serious question and none will be certified.

ORDER

THIS COURT ORDERS that the application for judicial review is allowed and the matter referred to a different immigration officer for redetermination in accordance with these reasons.

"Allan Lutfy"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5527-06
STYLE OF CAUSE:	SHUM, MEI WING v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	May 30, 2007
REASONS FOR ORDER:	Lutfy CJ.
DATED:	July 5, 2007

APPEARANCES:

Mr. Ronald Pederson	FOR THE APPLICANT
Ms. Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Ronald Pederson Wong Pederson Law Offices Barrister & Solicitor #4 – 1854 West 1st Avenue Vancouver, BC V6J 1G5	FOR THE APPLICANT(S)
John H. Sims, QC Deputy Attorney General of Canada Ottawa, ON	FOR THE RESPONDENT(S)