

Date: 20081104

Docket: IMM-5118-07

Citation: 2008 FC 1227

Ottawa, Ontario, November 04, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**HONG BIN CHEN
NI ZHAO
YIZHE ZHAO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Hong Bin Chen applied for permanent residence at the Canada Consulate General in Hong Kong as a member of the skilled worker category. Included as family members were his wife, Ni Zhao, and her son by a previous marriage, Yizhe Zhao. The Visa Officer (the “Officer”) refused Mr. Chen’s application because the Officer was not satisfied Mr. Chen answered truthfully about his marriage to Ms. Zhao.

[2] On review of the file and the Officer's report, the Immigration Program Manager (the "Reviewing Manager") decided Mr. Chen was inadmissible pursuant to section 40(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, (*IRPA*) because he misrepresented material facts relating to his marriage.

[3] The applicants apply for judicial review of these two decisions.

[4] In my view, the issues that arise and are dispositive of this judicial review are as follows:

1. Did the Officer have jurisdiction to look at the *bona fides* of a marriage in a skilled worker application?
2. Did the Officer deny the applicants procedural fairness in the examination to assess the *bona fides* of the marriage?
3. Did the Officer err in concluding that the adult applicants' marriage was not genuine?

STANDARD OF REVIEW

[5] The question of whether the Officer had jurisdiction to look at the question of the *bona fides* of marriage in a skilled worker application involves a matter of statutory interpretation. This question goes to the fundamental issue of whether section 4 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (*Regulations*), confers jurisdiction upon an officer processing an application in the skilled worker class.

[6] Given the fundamental importance of questions of jurisdiction, the standard that must apply is that of correctness. A reviewing court applying the correctness standard undertakes its own analysis of the question and asks whether the decision was correct. *Dunsmuir v. New Brunswick* 2008 SCC 9 at para. 50.

[7] Procedural fairness requires a very high standard of review. In *Menon v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273, the Court held that procedural fairness is required in the application of section 40(1) of *IRPA* on the *Regulations* where a foreign national was determined inadmissible for misrepresentation. Procedural fairness therefore applies in respect of the Reviewing Manager's decision on Mr. Chen's inadmissibility. In my view, the same standard applies in respect of the Officer's decision based as it is on the issue of truthfulness involving the same facts and applicant.

[8] The process of determining whether a marriage is *bona fide* is a factual determination. Factual determinations by the decision maker attract a standard of reasonableness. An immigration officer assessing an application for permanent residence is involved in making factual conclusions within his or her area of expertise. The officer is to be afforded deference with respect to the finding. Deference requires the courts to give "a respectful attention to the reasons offered". *Dunsmuir* at para. 48.

BACKGROUND

[9] Mr. Chen applied for permanent residence in Canada in May 2005. There is no dispute that Mr. Chen, based on his age, education, experience, language ability and adaptability had a sufficient number of points to qualify for permanent residence as a member of the skilled worker category.

[10] Mr. Chen included as accompanying family members, Ms. Zhao, whom he had married three months earlier on February 21, 2005, and her son, Yizhe Zhao, who was the progeny of a previous marriage.

[11] The Officer determined that an interview was required because:

- a. Mr. Chen had never been married before his marriage to Ms. Zhao two and a half months before applying for permanent residence.
- b. The circumstances of the marriage were inconsistent with local and Chinese customs that an unmarried young man marry a woman eleven years his senior with a dependant child.

[12] The Officer's concern was whether the marriage was entered into in order for Mr. Chen to serve as a "courier" husband and stepfather and thereby assist Ms. Zhao and her son gain admission to Canada as family members.

[13] The Officer did not advise Mr. Chen or Ms. Zhao that the purpose for the scheduled interview was to ascertain whether their marriage was genuine.

[14] Mr. Chen claimed to have had a relationship with Ms. Zhao since 1999 while she was still married to her first husband. He admitted at the interview:

- i. the couple did not have a wedding banquet;
- ii. neither wanted their respective parents to know of the marriage;
- iii. Ms. Zhao's dependent son did not know of the marriage and referred to her husband as Mr. Chen;
- iv. Mr. Chen had not met Ms. Zhao's brother; and
- v. Mr. Chen had not brought Ms. Zhao to any of his family's dinners or gatherings since their marriage.

[15] Based on the interview and information on file the Officer was not satisfied their marriage was genuine. The Officer concluded the marriage was entered into for the purpose of helping Ms. Zhao gain admission to Canada with her son as a member of the family class.

[16] The Officer relied on section 16(1) of *IRPA* which states that a person who makes an application must answer truthfully all questions for the purpose of examination. The Officer found that Mr. Chen had not answered truthfully as required by section 16 of *IRPA*. The Officer concluded that Mr. Chen would be denied a visa under section 11(1) of *IRPA* which requires that prior to a visa being issued an officer must be satisfied the applicant has met the requirements of *IRPA*.

[17] The Officer alerted the Review Manager who, after consideration of the record, determined Mr. Chen was inadmissible pursuant to section 40(1) of *IRPA* because of misrepresentation, and

consequently, both Ni Zhao and Yizhe Zhao were inadmissible as accompanying family members. That section states a foreign national is inadmissible for misrepresentation of material facts that could induce an error in the administration of *IRPA*. Section 40(2) provides that an applicant remains inadmissible for a period of two years.

[18] After the Officer's decision, the applicants sent a package with written submissions and supporting documents as further proof that their marriage was genuine. The Officer responded by letter advising the decision had already been made.

ANALYSIS

Did the Officer have jurisdiction to look at the bona fides of a marriage in a skilled worker application?

[19] The applicants submit that the Officer's determination was not made on the basis of whether the marriage was invalid but rather on the basis of bad faith by the applicants. The applicants submit that while it is permissible to assess *bona fides* of a marriage in a family class application, there is no statutory basis to do so in the skilled worker category.

[20] The applicants submit that section 13(1) of *IRPA* and section 4 of the *Regulations* must be read in conjunction:

**Sponsorship of Foreign
Nationals**

Right to sponsor family member

13. (1) A Canadian citizen or

Régime de parrainage

Droit au parrainage : individus

13. (1) Tout citoyen canadien et tout résident permanent peuvent,

permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class.

sous réserve des règlements, parrainer l'étranger de la catégorie « regroupement familial ».

The *Regulations* at section 4 state:

Division 2

Section 2

Family Relationships

Notion de famille

Bad faith

Mauvaise foi

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

4. Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

SOR/2004-167, s. 3(E).

DORS/2004-167, art. 3(A).

[21] The applicants submit that determination of whether a marriage is genuine is reserved for family class applications only.

[22] The applicants further submit that section 85 of the *Regulations* provide that as long as a deponent is in fact a family member and the dependant is not inadmissible, the person is qualified for immigration to Canada accompanying a qualified skilled worker.

[23] At the time of Mr. Chen's application, Section 85 of the *Regulations* stated:

Permanent resident status

85. A foreign national who is a family member of a person who makes an application for a permanent resident visa as a member of the federal skilled worker class shall become a permanent resident if, following an examination, it is established that the family member is not inadmissible.

Statut de résident permanent

85. L'étranger qui est membre de la famille de la personne qui présente une demande de visa de résident permanent au titre de la catégorie des travailleurs qualifiés (fédéral) devient résident permanent s'il est établi, à l'issue d'un contrôle, qu'il n'est pas interdit de territoire.

[24] Section 85 has been since amended and now reads:

Permanent resident status

85. A foreign national who is an accompanying family member of a person who makes an application as a member of the federal skilled worker class shall become a permanent resident if, following an examination, it is established that

(a) the person who made the application has become a permanent resident; and

(b) the foreign national is not inadmissible.

SOR/2008-202, s. 1.

Statut de résident permanent

85. L'étranger qui est un membre de la famille et qui accompagne la personne qui présente une demande au titre de la catégorie des travailleurs qualifiés (fédéral) devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après sont établis :

a) la personne qui présente la demande est devenue résident permanent;

b) il n'est pas interdit de territoire.

DORS/2008-202, art. 1.

[25] The applicants submit that the Officer exceeded her jurisdiction by considering the *bona fides* of their marriage as nowhere in *IRPA* does the legislation indicate that the spouse of a skilled worker is to be assessed against the criteria of section 4 of the *Regulations*.

[26] The modern principle of statutory interpretation as expressed by Driedger:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p.67

[27] The positioning of the bad faith marriage provision at the beginning of the *Regulations* instead of within the family class provisions is indicative that the provision is to apply to all relevant following provisions concerning family provisions. The language of section 4 is broadly stated beginning with “For purposes of these Regulations ...”. This wording expresses the legislative intention that section 4 is to apply to all subject matter addressed in the *Regulations* including skilled worker applications as well as family class sponsorship.

[28] Section 4 imposes consequences if a marriage or relationship is “not genuine” and entered into primarily for the purpose of acquiring status or privilege under *IRPA*. “Genuine” is defined as:

(1) really coming from its stated, advertised or reputed source; (2) properly so called; not sham; (3) (of an opinion) etc. sincere; (4) (of a person) free from affectation or hypocrisy. *Canadian Oxford Dictionary*, Second Edition, Oxford Press 2004.

[29] I take from the definition that the section 4 word “genuine” is directed to an intention to form a familial relationship rather than a description of the legality of the marriage.

[30] Finally, the closing words of the provision refer to the question of the marriage or relationship being entered into “for the purpose of acquiring any status or privilege under the *Act*”. *IRPA* and the *Regulations* set out a process for acquiring immigrant status with defined criteria and procedures. Section 4 is directed at maintaining the integrity of *IRPA* by preventing the acquisition of immigrant status by subterfuge. The language of the provision is not limited to a particular process or category referring as it does to “any status or privilege”.

[31] In my review of section 4 in the context of the purpose of *IRPA* and the *Regulations* as a whole, I conclude that it is not limited to family class sponsorships. Section 4 of the *Regulations* applies to family members of an applicant in the skilled worker class.

Did the Officer deny the applicants procedural fairness in the examination to assess the bona fides of the marriage?

[32] The applicants did submit that the Officer’s failure to consider their additional documents and submissions in the assessment of the *bona fides* of their marriage was a breach of procedural fairness. It is clear from the Record that the Officer considered the genuineness of the marriage as the primary issue when she called the applicants in for the examination. The examination results were a significant factor in both the Officer’s and Reviewing Manager’s respective decisions.

[33] In *Menon* at para. 15, the Court held that a very high standard of procedural fairness is to be applied in the application of section 40(1) where a foreign national is determined inadmissible for misrepresentation. I am of the view that a similar standard of fairness must apply where the issue involves an examination with respect to section 4 of the *Regulations*, the bad faith marriage provision.

[34] The applicants had no notice that the marriage issue was vital to their application for a permanent resident visa. Had the applicants been notified in advance about this issue, the potential for being denied a permanent resident visa, and the consequence of being ruled inadmissible, they could have had the opportunity to obtain additional documents and make focussed submissions to the Officer.

[35] I conclude that the Officer denied the applicants' procedural fairness when, having not given advance notice of the purpose of the examination, she did not afford the applicants the opportunity to supply further documentation and submissions.

Did the Officer err in concluding that the adult applicants' marriage was not genuine?

[36] Deciding as I have on the question of procedural fairness, I need not address this issue.

DECISION

[37] The application for judicial review is granted in respect of both the Officer's decision that Mr. Chen did not answer truthfully as required by section 16(1) of *IRPA* and the Reviewing Manager's decision that Mr. Chen was inadmissible pursuant to section 40(1) of *IRPA*.

CERTIFIED QUESTION OF GENERAL IMPORTANCE

[38] The applicants submit the following question for certification:

In the context of a skilled worker application assessment, does an officer have the jurisdiction to enquire into the *bona fides* of the relationship of the principal applicant and his or her dependant spouse or partner under s. 40 of the [*Immigration and Refugee Protection Act* ("*IRPA*")] misrepresentation?

[39] The Respondent opposes the question.

[40] Having decided this judicial review on the issue of procedural fairness, I consider the evidence to be factually incomplete. I decline to certify the question as one of general importance but do so without prejudice to the applicants advancing the question should there be a subsequent proceeding.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review of both the decision of the Visa Officer and the Immigration Program Manager is granted.
2. The matter is to be referred back for reconsideration.
3. No costs are awarded.
4. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5118-07

STYLE OF CAUSE: HONG BIN CHEN ET AL v. MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: JUNE 19, 2008

**REASONS FOR ORDER
AND ORDER:** MANDMIN, J.

DATED: NOVEMBER 04, 2008

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