**Date: 20091015**

**Docket: IMM-91-09**

**Citation: 2009 FC 1044**

**Ottawa, Ontario, October 15, 2009**

**PRESENT: The Honourable Mr. Justice Kelen**

**BETWEEN:**

**PEI YUN MEI,**
**YING YU MEI**

**Applicants**

**and**

**THE MINISTER OF**
**CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated November 4, 2008 by a visa officer made overseas which denied the applicants an exemption based on humanitarian and compassionate (H&C) grounds pursuant to s. 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), from the requirements of subsection 117(9)(d) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (IRPR).

[2] At the time the sponsor applied for permanent residence, neither of the applicants was declared or examined as non-accompanying family members. The applicants were therefore excluded from the Family Class pursuant to subsection 117(9)(d) of the IRPR.

[3] The applicants submitted that the sponsor did not declare the existence of his dependants because there are punitive laws in China designed to discourage common-law relationships that result in children born out wedlock. Declaration and examination of the sponsor's dependants would have alerted the Chinese authorities to applicants' situation, which would then be subject to a punitive fine that they could not afford to pay.

[4] The sponsor did not gain any advantage by not disclosing his spouse or child. If he had disclosed them, they would likely have been granted landed immigrant status like the sponsor.

[5] The visa officer did not find compelling or exceptional circumstances that would lead him to conclude that sufficient H&C factors with respect to the best interests of the child exist to waive the requirements in subsection 117(9)(d) IRPR which exclude the applicants from the Family Class and deem them inadmissible. The Court, on a reasonableness standard, finds this part of the decision not in error. However, the Court finds the decision lacking in other respects.

[6] As discussed at the hearing, the Court finds that the decision did not adequately or sufficiently consider the following relevant considerations:

1. the reason the sponsor did not declare his common-law wife and child born out of wedlock on his application for permanent residence;

2. the fact that the sponsor did not declare his family members was not intended to circumvent some part of IRPA which would have made him ineligible, but was done

to avoid a punitive fine in China designed to discourage common-law relationships that result in children born out of wedlock; and

3. the humanitarian and compassionate reasons for allowing the sponsor and his wife to no longer be separated, and the fact that the sponsor is in Canada as a skilled worker arises from economic necessity so that the sponsor cannot simply return to China to be reunited with his wife for economic reasons.

[7] The parties advised the Court that if the sponsor had included his common-law spouse and child in his application for permanent residence, his application would still have been approved and his spouse and child would have also been granted permanent residence. Accordingly, this case is unlike other cases before the Court where the applicant has not declared family members because those family members would have made the applicant ineligible for permanent residence for reasons not applicable in the case at bar. This is a factor which the H&C officer should consider in his reasons.

[8] Accordingly, for these reasons, the Court will allow this application for judicial review and remit the matter to another visa officer for redetermination.

[9] Both parties advised the Court that this case does not present a question which ought to be certified for an appeal. The Court agrees.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

This application for judicial review is allowed, the decision is set aside, and this H&C application is remitted to another visa officer for redetermination.

"Michael A. Kelen"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-91-09 |
| **STYLE OF CAUSE:** | PEI YUN MEI ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | October 5, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KELEN J. |
| **DATED:** | October 15, 2009 |

**APPEARANCES:**

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|---|---|
| Mr. Rezaur Rahyman | FOR THE APPLICANTS |
| Ms. Julia Barss | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Mr. Rezaur Rahman<br>Barrister & Solicitor | FOR THE APPLICANTS |
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |