Federal Court

Cour fédérale

Date: 20091026

Docket: IMM-51-09

Citation: 2009 FC 1089

BETWEEN:

TEK MING LAU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON D. J.

Introduction

[1] These reasons follow the hearing of an Application for Judicial Review of a decision of the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board, dated the 17th of December, 2008, whereby the IAD dismissed an appeal from a decision of a Visa Officer at the Canadian Consulate General in Hong Kong refusing to approve the permanent resident visa application made by Ying Feng of the People's Republic of China who was sponsored to come to Canada by Tek Ming Lau (the "Applicant"). The Visa Officer's decision was motivated by his or her conclusion that a purported marriage between Ying Feng and the Applicant was deemed not to

be genuine and to have been entered into primarily for the purpose of gaining status or privilege under the *Immigration and Refugee Protection Act*[1]. The IAD dismissed the appeal before it on grounds different from the ground relied on by the Visa Officer.

Background

[2] The factual background giving rise to this Application for Judicial Review is essentially not in dispute and may be summarized as follows:

- The Applicant was born in the People's Republic of China ("China") on the 26th of January, 1954. He remained a citizen of China at all times relevant to this Application. He was a resident of China until 1990 when he moved to Canada to seek refugee status;
- Ziao Ying Huang ("Huang") was born in China on the 23rd of June, 1962;
- The Applicant and Huang married in China in 1984. A son was born to them in China on the 22nd of November, 1985;
- Like the Applicant, Huang remained a resident of China from birth until she moved to Canada in 1990, sometime before the Applicant moved to Canada, and she, like the Applicant, was a citizen of China at all times relevant to this Application;
- The Applicant and Huang were unsuccessful on their application for refugee status in Canada but were successful on an application for landing from within

---

1 S.C. 2001, c. 27.

Canada on humanitarian and compassionate grounds. They became permanent residents of Canada in 1999;

- A second child, a daughter, was born to the Applicant and Huang in Canada on the 14th of March, 1992;
- While the IAD expresses some doubt about this particular fact, the Applicant attests that he has a younger brother in China with whom he has maintained contact throughout his absence from China. If the Applicant has such a brother, the IAD expresses doubt about the significance of any such contact;
- The Applicant returned to China for a visit in 2000 and returned again in late December, 2004 for the purpose of obtaining a divorce from Huang and of settling up division of property and custody matters;
- By contrast, Huang returned to China about every year or year and a half, for ten days to a month on each occasion, from the time she obtained resident status in Canada in 1999 until the time of the divorce between she and the Applicant in early January, 2005. Apparently her purpose in returning was to visit family, including her ill mother;
- The Applicant and Huang jointly owned an apartment in China, apparently as an investment, which was transferred to Huang in the property settlement associated with their divorce;
- The Applicant attests that he became "increasingly dissatisfied" with his marriage to Huang from 1995 onward. Eventually he and Huang divorced on the 6th of January, 2005, in China, by mutual consent;

- The Applicant and Huang attested that they chose to divorce in China since they were advised that they could obtain the divorce there more quickly than they could in Ontario and because they were able to settle the disposition of their joint property and the issue of custody of their children in China at the same time;
- Seven months after the divorce, the Applicant married Ying Feng in China. The Applicant attested that it was a pre-condition to his marriage to Ying Feng that the parties provide to the marriage office a certificate certifying to their then unmarried (single or divorced) status and that he provided such a certificate.

The Decision Under Review

[3] Earlier in these reasons, I indicated that the IAD dismissed the appeal before it on grounds different from the ground relied on by the Visa Officer. At paragraph [7] of its reasons, the IAD wrote:

> After reading the said submissions [from counsel for the Applicant and counsel for the Respondent], and analyzing the law, the panel finds, on a balance of probabilities that the divorce in question [the divorce between the Applicant and Huang] was not undertaken in compliance with Canadian law and is not deemed to be a valid divorce according to the laws of Canada. Subsequently [Consequently], the appellant is still married to his wife Ziao Ying Lau nee Ziao Ying Huang, and hence is not eligible to sponsor the Applicant [Ying Feng] as he does not meet the definition of sponsor according to the *Immigration and Refugee Protection Act* .

The definition of "sponsor" is contained in subsection 130(1) of the *Immigration and Refugee Protection Regulations*[2].

---

[2] SOR/2002-227.

[4] The IAD very briefly disposes of the ground relied on by the Visa Officer. In it conclusion at paragraphs [27] to [29] of its reasons, the IAD writes:

> Therefore, given the above reasoning, in the panel's opinion, on a balance of probabilities, the divorce before the appellant and Huang is not valid in accordance with the *Marriage Act of Canada*, and subsequently the appellant [here the Applicant] is not eligible to sponsor the applicant [Ying Feng].
>
> As this appeal is dismissed, it is not necessary for the substantive issue of whether the marriage [between the Applicant and Ying Feng] is *bona fide* to be heard by this panel.
>
> The appeal is dismissed.

[5] Section 22 of the *Divorce Act*[3] deals with recognition in Canada of foreign divorces. That section reads as follows:

22. (1) A divorce granted, on or after the coming into force of this Act, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.	22. (1) Un divorce prononcé à compter de l'entrée en vigueur de la présente loi, conformément à la loi d'un pays étranger ou d'une de ses subdivisions, par un tribunal ou une autre autorité compétente est reconnu aux fins de déterminer l'état matrimonial au Canada d'une personne donnée, à condition que l'un des ex-époux ait résidé habituellement dans ce pays ou cette subdivision pendant au moins l'année précédant l'introduction de l'instance.

[3] R.S.C. (2nd SUPP.), c.3.

(2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.	(2) Un divorce prononcé après le 1er juillet 1968, conformément à la loi d'un pays étranger ou d'une de ses subdivisions, par un tribunal ou une autre autorité compétente et dont la compétence se rattache au domicile de l'épouse, en ce pays ou cette subdivision, déterminé comme si elle était célibataire, et, si elle est mineure, comme si elle avait atteint l'âge de la majorité, est reconnu aux fins de déterminer l'état matrimonial au Canada d'une personne donnée.
(3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.	(3) Le présent article n'a pas pour effet de porter atteinte aux autres règles de droit relatives à la reconnaissance des divorces dont le prononcé ne découle pas de l'application de la présente loi.

[6] The IAD determined that subsection 22(1) simply does not apply on the facts of this matter since neither the Applicant nor Huang was ordinarily resident in China for at least one year immediately preceding the commencement of proceedings for their divorce.

[7] Similarly, subsection 22(2) does not apply on the facts of this situation.

[8] In the result, subsection 22(3) of the *Divorce Act*, on the facts of this matter, refers the issue of recognition of the divorce purportedly granted to the Applicant and Huang in China, on the facts

of this matter, back to the common law which constitutes other rules of law respecting the recognition in Canada of divorces granted otherwise than under the *Divorce Act*.

[9] The IAD writes at paragraphs [12] to [15] of its reasons:

> ... Section 22(3) of the *Divorce Act, 1985*, allows for the recognition of foreign divorces on the basis of common-law principles, which have been the subject [of] a number of legal cases over the years, many of which were referred to by counsel for the appellant [here the Applicant] in his able submission of 23 October 2008.
>
> The panel does not deem it necessary to quote many of the cases that have been set out by counsel for the appellant in his submissions, because it has the advantage in being able to examine this whole issue of foreign divorces in the context of immigration law by examining the recent Federal Court case of *Amin, Tariq v. M.C.I.*, (F.C., no. IMM-1293-07, Barnes, February 8, 2008; 2008 FC 168). This case was referred to by counsel for the Minister and was subsequently commented on by the appellant's counsel in his reply of 21 November 2008.
>
> Mr. Justice Barnes, in the *Amin* decision indicated that the obvious intent of section 22(1) of the *Divorce Act, 1985* was to require that some form of adjudicative or official oversight be present before Canada will recognize a foreign divorce. He went on to state that the common-law principles, which provide for recognition of foreign divorces, extend beyond the need for there to be a real and substantial connection to the place of divorce and include an over-arching requirement for due process and fairness.
>
> Mr. Justice Barnes goes on to indicate that the real and substantial test does not arise until a foreign divorce has been determined, in Canada, to be legally valid in the place where it was granted and is also a divorce obtained by a process that is consistent with notions of fairness and is in harmony with Canadian public policy. He indicates that the connection requirement is a further pre-requisite to the Canadian recognition of a foreign divorce to prevent forum-shopping and similar problems.

[10] The IAD goes on to review the evidence before it of the attachment of the Applicant and Huang to China at the time of their divorce. While it acknowledges the evidence of connection, it concludes:

> In the panel's opinion, seeking a divorce in the circumstances of this appeal would in fact not be in harmony with Canadian public policy, and would offend Canadian notions of a genuine divorce. To allow residents of Canada to divorce in a jurisdiction, in which they do not have a connection to [sic] of any substantive nature, would offend a Canadian's notion of fairness and would not be in harmony with Canadian public policy.

[11] The decision under review, quoted earlier in these reasons, followed.

<u>The Issues</u>

[12] I am satisfied that the issues on this Application for Judicial Review are first, the appropriate standard or standards of review; second, whether the divorce obtained in China by the Applicant and Huang was properly determined to be a valid divorce in that country; and third, whether the IAD erred in a reviewable manner in determining that the divorce obtained in China between the Applicant and Huang does not meet the real and substantial attachment or connection test, on the facts of this matter, as that test has been interpreted to date.

<u>Analysis</u>

1) Standard of Review

[13] In Canada (*Citizenship and Immigration v. Hazimeh*)[4], Justice Russell wrote at paragraphs 16 to 20 of his Reasons:

> The Respondent relies upon *Ishmaeli v. Canada (Minister of Citizenship and Immigration*), ... at paragraph 19 for the following:
>
> > The onus on the applicant to refute the Board's findings is a heavy one. The applicant must be in a position to show that the conclusions reached were perverse or capricious or so unreasonable that the Court is duty-bound to set the decision aside.
>
> *Sivasamboo v. Canada (Minister of Citizenship and Immigration*), ... held that the IRB is a specialized body dealing with a highly complex factual and regulatory context in which its decisions are made ... . A supervisory court should only intervene with the findings and conclusions of fact of a specialized tribunal when it is shown to be a manifest or palpable error that is clearly patently unreasonable ... .
>
> *Chieu v. Canada (Minister of Citizenship and Immigration*), ... citing *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* ..., held ... that for legal questions of general importance in decisions of the IRB the appropriate standard is correctness.
>
> The Court in *Dunsmuir v. New Brunswick* ... held that when applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court should not show deference to the decision-maker's reasoning process; it should rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision-maker; if not, the Court should substitute its own view and provide the correct answer.
>
> The issues raised by the Applicant involve questions of law, and in light of the case law before me, I find the appropriate standard of review is correctness.
>
> [citations omitted]

---

[4] 2009 FC 380 (CanLII), 2009 FC 380, April 15, 2009.

[14] With the following qualifications, I adopt the foregoing as my own. The second issue question cited above, that is, whether the divorce obtained in China by the Applicant and Huang was properly determined to be a valid divorce in that country, is, I am satisfied a question of law where the appropriate standard of review is correctness. The third issue question cited above, that is, whether the IAD erred in a reviewable manner in determining that the divorce obtained in China between the Applicant and Huang does not meet the real and substantial attachment or connection test, on the facts of that matter, as that test has been interpreted to date, is a mixed question of fact and law and I should therefore review the decision of the IRB to determine whether it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law[5].

2) Did the IRB Properly Determine the Chinese Divorce Between the Applicant and Huang to be Validly Obtained in China?

[15] For ease of reference, I repeat here the text of subsection 22(3) of the *Divorce Act*[6]:

22. (3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.	22. (3) Le présent article n'a pas pour effet de porter atteinte aux autres règles de droit relatives à la reconnaissance des divorces dont le prononcé ne découle pas de l'application de la présente loi.
[emphasis added]	[je souligne]

[16] In *Amin v. Canada (Minister of Citizenship and Immigration)*[7] an authority heavily relied on by the IRB, Justice Barnes wrote at paragraph 25 of his Reasons:

5 *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190 at paragraph 47.
6 *Supra,* footnote 3.
7 [2008] F.C. 168, February 8, 2008.

> It seems to me that the real and substantial connection test does not arise until a foreign divorce has been determined in Canada to be legally valid in the place where it was granted and is also a divorce obtained by a process that is consistent with Canadian notions of fairness and in harmony with Canadian public policy. In other words, this is not a test by which the legal frailties of a foreign, extra-judicial divorce will be overcome. ...
>
> [emphasis added, one citation omitted]

[17] I read the foregoing quotation as requiring a determination in Canada regarding validity, in this case, in China. Here, the IRB made no determination whatsoever as to whether the divorce at issue was legally valid in the place where it was granted, that is to say, China, against the concept of real and substantial connection. Rather, it concluded that, on a balance of probabilities, the divorce at issue was not undertaken in compliance with Canadian law and therefore was not deemed a valid divorce according to the laws of Canada. It then went on to consider the Canadian notions of fairness and harmony with Canadian public policy portion of the test. In so doing, I am satisfied that, against a standard of review of correctness, the IRB simply failed to answer the question of whether or not the divorce here at issue was a "... divorce granted" otherwise than under the [*Divorce Act*], and in so doing failed to fully apply the test that it was required to apply under subsection 22(3) of the *Divorce Act*. Whether its conclusions regarding the second portion of the test, that is to say the Canadian notions of fairness and harmony with Canadian public policy portion, would have remained the same had it properly applied the first portion, that is to say the "... divorce granted" portion of the test under subsection 22(3) of the *Divorce Act*, is not for this Court to speculate on.

3) The IRB's Analysis and Conclusions Regarding the Canadian Notions of Fairness and Harmony With Canadian Public Policy

[18] In Castel & Walker[8], the learned authors wrote:

> In recent years, Canadian courts have been committed to the view that they will recognize foreign decrees of divorce where there existed some real and substantial connection between the petitioner and the respondent and the granting jurisdiction at the time of commencement of the proceedings. The purpose of the rule is to avoid limping marriages. Whether there exists a real and substantial connection between the granting jurisdiction and either the petitioner or the respondent must be determined by the court upon the analysis of all the relevant facts.
>
> [emphasis added]

[19] The concept of "avoiding limping marriages" was recently commented on by Justice G. A. Campbell of the Ontario Court of Justice in *Jahangiri-Mavaneh v. Taheri-Zengekani*[9] where he wrote:

> [23] It should only be in very rare circumstances that a foreign divorce properly obtained pursuant to the laws of that jurisdiction should not be recognized as being valid: ... This is not a case involving jurisdictional fraud, which was considered in Powell. As Dickson J., for the the court, stated ...:
>
>> The grounds upon which a decree of divorce granted by one state can be impeached in another state are, properly, few in number. The weight of authority seems to recognize, however, that if the granting state takes jurisdiction on the basis of facts which, if the truth were known, would not give it jurisdiction, the decree may be set aside. Fraud going to the merits may be just as distasteful as fraud going to jurisdiction, but for reasons of comity and practical difficulties, in the past we have refused to inquire into the former. Even within the limited area of what

---

8 Canadian Conflict of Laws, Sixth Edition LexisNexis Limited, 2006, Volume 2 at pages 17-7, 17.2.

9 (2003), 66 O.R. (3rd) 272 at p. 280 (Ontario Superior Court of Justice).

> might be termed jurisdictional fraud there should be great reluctance to make a finding of fraud for obvious reasons.
>
> [24] Whether the applicant was reluctant to participate in the Iranian divorce proceeding or, as she now discloses, whether she felt "duress", participate she did. She accepted then the monetary settlement and raises in this proceeding the impact upon her status in Iran as a divorced woman. In that respect, she concedes the effect on her and her family of those proper proceedings at that time. For the applicant now (three years later) to raise the issue of the extent of her voluntariness to the proceedings and whether she or her father obtained the divorce settlement appears to me to fall squarely within the "area" of the merits to which Dickson J. declared that Canadian courts "have refused to inquire into".
>
> [emphasis added; citations omitted]

On the facts of this matter, the IRB would appear in its analysis not to have focused on avoidance of limping marriages, as a matter of Canadian public policy and as a Canadian notion of "fairness", as a low threshold. Beyond the foregoing observation, the Court, in light of its determination with regard to the second issue before it, against a standard of review of reasonableness, makes no determination with respect to the IRB's determination regarding the notions of fairness and harmony wth Canadian public policy portion of the test.

Conclusion

[20] For the foregoing reasons, this Application for Judicial Review will be allowed, the decision under review will be set aside and the Applicant's appeal to the IAD will be referred back to the Immigration and Refugee Board for rehearing and redetermination.

Certification of a Question

[21] At the close of the hearing of this Application for Judicial Review, the Court reserved its decision and undertook to distribute reasons to counsel and to provide them with an opportunity to make representations on certification of a question before an Order issues. These reasons will be distributed. Counsel for the Respondent will have ten (10) days from the date of distribution of the reasons to serve and file any submissions on certification of a question only. Counsel for the Applicant will thereafter have seven (7) days to serve and file any responding submissions. Thereafter, counsel for the Respondent will have three (3) days to serve and file any reply. Only after the expiration of the foregoing periods and after the Court had had an opportunity to consider any submissions, will an Order herein issue.

"Frederick E. Gibson"
Deputy Judge

Ottawa, Ontario
October 26, 2009

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-51-09
STYLE OF CAUSE:	TEKI MING LAU v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 23, 2009
REASONS FOR ORDER:	Gibson D. J.
DATED:	October 26, 2009

APPEARANCES:

Samuel R. Baker, Q.C.	FOR THE APPLICANT
Kareena Wilding	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BAKER & ASSOCIATES Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT