

Federal Court



Cour fédérale

Date: 20100527

Docket: IMM-5393-09

Citation: 2010 FC 584

Toronto, Ontario, May 27, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JIAN FENG CHEN

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a story of love gone wrong. Mr. Chen, a Chinese citizen, married Ms. Zou, a Canadian resident. She then sponsored him for permanent residence. When he arrived in Canada about a year later, he found her pregnant with another man's child. After a month or two, the marriage fell apart.

[2] After their divorce, he married an old flame in China and as a Canadian permanent resident endeavoured to sponsor her. At this stage the Immigration Authorities became suspicious. Not only was the sponsorship of his second wife disallowed, he was also declared inadmissible for misrepresentation by directly withholding information and representing that his first marriage was genuine. He appealed that decision to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. His appeal was dismissed. This is the judicial review of that decision.

[3] I find the decision completely unreasonable, grant judicial review and refer the matter back to the IAD for a fresh hearing before a different member.

THE FACTS

[4] After the marriage, while Mr. Chen was in China awaiting his papers and while Ms. Zou was back in Canada, a friend told him that someone originally from their village had seen Ms. Zou in the company of another man in Toronto. Mr. Chen hoped that nothing was going on.

[5] On arrival in Toronto, however, he found his wife was pregnant. He was willing to forgive, and asked her to get an abortion. She refused. On many occasions she made sexual overtures to him but he was both unwilling and unable to perform. She taunted his lack of manhood.

[6] Both angry and humiliated, he blew \$1,000 at a casino. This just made matters worse. The marriage was at an end.

[7] He only came to the attention of the authorities when he attempted to sponsor his second wife. They were suspicious that perhaps his first marriage was not genuine. The thrust of the various

reports, and the decision under review, is that the marriage and courtship were very brief, that no wedding reception was held despite Mr. Chen's original assurance that one would be held once he entered Canada, that he failed to confront his wife before he left China with the rumours of her affair, and that after the divorce he only met with his ex upon receiving a call-in notice in 2006, which was an indication that he only wanted to meet to discuss immigration matters so that therefore the primary motive of the relationship in the first place was to gain an immigration advantage.

DISCUSSION

[8] Section 40(1)(a) of the *Immigration and Refugee Protection Act* (IRPA) provides:

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

40. (1) Empovent interdiction de territoire pour fausses déclarations les faits suivants :

a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[9] Once an immigration officer's suspicions were aroused, she invoked Section 44(1)(a) of the Act and prepared a report opining that Mr. Chen was inadmissible. This led to an exclusion order under Section 229(1)(h) of the *Immigration and Protection Regulations*, and finally to an appeal under Section 62 and following of IRPA.

[10] The appeal not only takes into account the original findings but also whether the applicant, in any event, should be permitted to remain in Canada on humanitarian and compassionate grounds.

[11] This is a classic case of viewing events through a rear-view mirror. One has to consider whether the marriage was genuine in the first place, and whether it was still genuine when Mr. Chen was interviewed about a month before coming to Canada, at which time he had heard rumours about his wife's conduct.

[12] The basis for holding that the marriage was not genuine was that it only lasted for a short period of time, that he did not immediately return to China when the marriage broke up but did return not all that much later in order to pursue a former flame.

[13] These facts cannot establish an evidentiary basis that the marriage was not genuine in the first place. How was he to know at the time of the marriage that he would find his wife pregnant with another man's child a year later? As to not immediately returning to China when the marriage broke down, he said that as a cuckold he would be the laughing stock of his village. There was no evidence to contradict that statement. When he returned thereafter, it was in a different context all together.

[14] As to not sharing the rumours with the officer at the time of his interview, what material fact did he withhold? The only fact was that he had heard rumours. Even if they were true, it did not mean that the marriage was necessarily at an end. The *Divorce Act* specifically contemplates the possibility of reconciliation and the divorce papers jointly signed by the parties, which are to be found in the tribunal record, contain their joint statement that reconciliation was not possible.

[15] The duty of candour did not oblige Mr. Chen to share his worries with an immigration officer. This case is quite different from *Singh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 378, in which I discussed fraudulent, negligent and innocent misrepresentations. In this case, there was no misrepresentation and no fact was withheld.

[16] In the circumstances, it is not necessary for me to consider the IAD's analysis of humanitarian and compassionate factors, which might have, in any event, allowed Mr. Chen to remain in Canada.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. The matter is referred back to the Immigration Appeal Division of the Immigration and Refugee Board for re-determination.
3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5393-09

STYLE OF CAUSE: JIAN FENG CHEN v.
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

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REASONS FOR ORDER: HARRINGTON J.

DATED: May 27, 2010

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