

Federal Court



Cour fédérale

**Date: 20110510**

**Docket: IMM-4094-10**

**Citation: 2011 FC 541**

**BETWEEN:**

**SU LING LIANG**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER**

**BLANCHARD J.**

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board [the IAD] dated June 11, 2010, dismissing an appeal of a Visa Officer's decision refusing the permanent resident application for the Applicant's spouse, Mr. Wei Tu Wu, on the basis of "bad faith" pursuant to section 4 of the *Immigration and Refugee Protection Regulations* [the Regulations] and on the basis that Mr. Wu is inadmissible to Canada by reason of misrepresentation, pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27, (the IRPA). The Applicant also seeks judicial review of the IAD's

decision to deny the Applicant's application for a summons to a Visa Officer and the IAD's determination that there was no reasonable apprehension of bias in the Panel that refused the application for the summons.

### **Factual Background**

[2] The Applicant, Ms. Liang, was landed in Canada on May 4, 1997. On March 10, 2003, the Applicant and her husband, Mr. Wu, registered their marriage in China. That same year, Ms. Liang submitted an application to sponsor Mr. Wu's application for permanent resident status in Canada. Mr. Wu was interviewed on January 5, 2004, and the application was refused by letter dated October 13, 2005.

[3] Ms. Liang submitted a second application to sponsor Mr. Wu in 2007. Mr. Wu was interviewed by Visa Officer, Mr. Gary Wallace, [the Officer] on September 11, 2008, at the Canadian Consulate General in Hong Kong. During the interview, Mr. Wu signed a declaration stating, among other things, "that for the purpose of immigrating to Canada, I paid money to arrange this false marriage". The second application was refused by letters dated September 11, 2008 and September 12, 2008, on the basis that the marriage was not genuine and was entered into primarily for the purpose of acquiring permanent resident status in Canada, in violation of section 4 of the Regulations, and on the basis that the applicant was found to be inadmissible to Canada for misrepresentation pursuant to paragraph 40(1)(a) of the IRPA.

[4] Ms. Liang appealed the Officer's decision refusing Mr. Wu's application for permanent resident status to the IAD.

[5] Ms. Liang also applied to the IAD for a summons requiring the attendance of the Officer at the hearing of the appeal. Ms. Liang argued that the Officer wrongfully enticed Mr. Wu into making an admission of misrepresentation. The application was denied by the IAD on November 12, 2009.

[6] On November 13, 2009, Ms. Liang's Counsel wrote to the IAD registering a "profound concern" with the IAD's decision to deny the request for a summons. By letter dated November 17, 2009, the IAD indicated that Counsel would have the opportunity to make submissions about the weight to be given to the Officer's evidence at the hearing scheduled for November 30, 2009.

[7] By letter dated November 24, 2009, Counsel for Ms. Liang sought the recusal of the Member who denied the Applicant's application for a summons on the basis of reasonable apprehension of bias given that the Member had previously been employed by the Minister.

[8] The hearing proceeded as scheduled on November 30, 2009.

### **The IAD's decision**

[9] The IAD dismissed the recusal application. Applying the legal test as set out by the Supreme Court in *Committee for Justice and Liberty et al. v The National Energy Board*, [1978] 1 SCR 369, the IAD found that an informed person viewing the matter realistically and practically and having thought the matter through would not conclude that the panel would, more likely than not, not decide the matter fairly.

[10] The IAD also denied the application for a summons to the Officer on the basis that there was no authority in the Act, Regulations or Rules to compel compliance with a summons to someone who is located outside Canada.

[11] The IAD dismissed the appeal. It found that the evidence supported the conclusion that Mr. Wu was inadmissible for misrepresentation. It also found that Mr. Wu's declaration was reluctantly but voluntarily signed. The IAD placed more weight on Mr. Wu's signed declaration and responses at his interview than on his affidavit and testimony at the hearing.

### **Issues**

[12] The following three issues are raised in this judicial review:

- (1) Did the IAD err in finding there was no reasonable apprehension of bias on the part of the IAD member?
- (2) Did the IAD err in finding that Mr. Wu's declaration was reluctantly but voluntarily signed and consequently finding him inadmissible for misrepresentation?
- (3) Did the IAD err in failing to issue a subpoena for the Officer?

### **Standard of review**

[13] The standard of correctness applies to questions concerning issues alleging a breach of procedural fairness and principles of natural justice. See *McConnell v Canada (Canadian Human Rights Commission)*, 2005 FCA 389, at para 7.

[14] Questions concerning reasonable apprehension of bias and the determination of inadmissibility for misrepresentation are both questions of mixed fact and law. The applicable standard of review on such questions is reasonableness. Pure questions of facts are also reviewable on the reasonableness standard. See *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 53.

### Analysis

#### *Reasonable apprehension of bias*

[15] The Applicant argues that there exist a reasonable apprehension of bias on behalf of the panel member of the IAD by reason of the fact the Member worked for the Canadian Border Security Agency [CBSA] and the IAD at the same time. The Applicant argues the Member was a CBSA hearing officer from September 19, 2007 to May 25, 2008, and as a result, the Applicant cannot be assured that the Member did not come into contact with her file as a CBSA hearing officer in 2008 and 2009. The Applicant also argues that the Member is in a conflict of interest pursuant to *the Conflict of Interest Act*, SC 2006, c 9, s 2, as the Member worked for both the IAD and the CBSA at the same time. The Applicant's position is that the close or accommodating employment relationship between the Member and the CBSA calls into question the impartiality of the Member.

[16] The applicable legal test to conclude to the existence of a reasonable apprehension of bias is found in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 (SCC), at page 372: "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that

[the decision maker], whether consciously or unconsciously, would not decide fairly?" In *R v S*, [1997] 3 SCR 484 at para 15, Justice Cory emphasizes that the grounds for an apprehension of bias must be substantial and the threshold for finding an apprehension of bias is high.

[17] At paragraph 15 of its reasons, the IAD describes the duties of the Member while employed by the CBSA as follows:

Moreover, while the panel was employed by the Minister for a period of about six months, where the duties were primarily to update training materials for hearing officers and participate in Alternative Dispute Resolution sessions, the panel was not assigned this particular file or used this file or information from this file in any training materials and Minister's counsel confirmed there was no indication that this particular matter had ever been assigned to the panel.

[18] The above findings by the IAD are not in dispute. The Applicant has pointed to no evidence showing the Member has had dealings with the Applicant's file while she was working for the CBSA. The Applicant acknowledges that there is no evidence that the Member reviewed the present case as a hearing officer or advised other hearing officers on the case. In the circumstances, I agree with the Respondent that the fact the panel member worked for the CBSA for a number of months as a hearing officer with the above described duties and denied the Applicant's application for a summons do not constitute substantial grounds on which to establish a reasonable apprehension of bias by the panel member.

[19] I therefore conclude that the IAD applied the correct legal test and reasonably concluded that there was no reasonable apprehension of bias on the part of the IAD member.

*Was the declaration voluntary?*

[20] The Officer based his refusal of Mr. Wu's application for permanent resident status on the following declaration he obtained from Mr. Wu during the interview conducted in Hong Kong:

To Whom It May Concern:

I, WU Wei-Guo, admit that for the purpose of my emigrating [*sic*] to Canada, I paid money to arrange this false marriage. I paid an advance of 50,000 RMB and promised that if I were successful in coming to Canada, I would pay another 200,000 RMB.

I also admit that my Canadian spouse (i.e. my present guarantor) also knows the details of this matter and was involved throughout the various steps of this false marriage.

This declaration is to the Immigration Section of the Canadian Consulate in Hong Kong.

[21] The CAIPS notes indicate that the Officer, early in the interview, questioned Mr. Wu about his first application for permanent resident status inquiring as to why the negative decision was not appealed. Mr. Wu responded that they had tried to appeal but did not receive their letter in time and missed their chance. The Officer rejected Mr. Wu's response and the following exchange ensued:

Why can't you be specific, it's a simple question. You never got a chance to file your appeal, who told you this? My wife.

Is that why you re-applied, because you missed your chance to appeal? Yes.

That seems like bad luck to me? Yes, it was just because she moved otherwise we would have done an appeal.

OK this is a big problem. The truth is very different. The truth is that your wife did appeal. She appealed but the appeal was denied. Do you understand what I'm saying? Yes.

So can you explain it? (No Answer)

This is your big problem today. You see before I asked you those questions about your appeal. I already knew it was dismissed. I wanted to see if you also knew. The reason for that is because when people do fake marriages they try really hard to figure out all the details. But they never quite cover everything. There is always some little detail that escapes them. That what just happened here. The reason they never told you about the denial of appeal was because they wanted to keep you going. They wanted to keep getting money from you. Am I right? (No answer)

These questions are not going to go away. I'm not going to just forget about it because you don't want to answer. I already have into to just refuse you right now because you had no idea about what happened. In CDA so it means you really have no idea about this girl and her life, do you? I have to check that.

I'll show you right now, you don't have to check it. (I have turned the computer monitor around so the PA can see it.) Look here, it says right on the screen "Appeal Dismissed", the translator can tell you what it says. Do you see it? Yes.

OK so that is settled. You just got screwed over by these people. They probably sucked more money out of you to keep you applying didn't they? (No answer. PA is staring at the floor.)

Here is the deal. I can see just by looking at your face that I am right. You don't have to say a word. I can see it on your face. At this point it's over for this application. The only chance I am going to give you is to just tell me the truth? What truth.

The truth about what is going on here. Like I said, I already know it's fake. I already caught you and you know it. You're in a bad situation right now because you can't explain it and you can't take back what you already just said, do you understand? Yes.

So you admit that I caught you? (No answer)

There's no point keeping it going at this point. The people who ran this just ripped you off by getting you to come here. If I was you I'd be pretty mad right now. I'd be mad at them for setting me up and not telling me this detail which just caught me. Are you going to talk to me now? There's no point.

There is a point. The point is to explain it and hopefully clear all this up, the way I see it it's the only option you have? (No answer)



Like I said, you're already caught. Why would you protect them after they screwed you? What will you do?

I'm not doing anything right now. I'm waiting till I get all the details of what happened then I'll make a decision based on what you say. If I think you are jerking me around we end this right here and you go home. If you want to keep this intv going you can tell me what happened otherwise we stop now? OK

[22] Mr. Wu then went on to respond to questions relating to how much money he had paid to “start the plan”. The CAIPS notes do not address the circumstances which led to the preparation and signing of the declaration by Mr. Wu. The notes are silent regarding any exchanges that may have transpired between the Officer and Mr. Wu relating to the declaration. The Officer subsequently admitted that he had mistakenly questioned Mr. Wu about his first sponsorship application that his wife had appealed, when in fact he had no evidence that this had occurred or that such an appeal was dismissed. The Officer had mixed up the disposition of another file which had been appealed and dismissed. The Applicant argues that this error and the way the interview was conducted by the Officer was fundamentally wrong that it induced Mr. Wu into admitting a fraud that he did not commit by signing the declaration.

[23] In his statutory declaration sworn on July 1, 2009, Mr. Wu attests to the following:

12. I was both shocked and confused because I knew my wife and I had decided to re-apply instead of appealing. My wife did not cheat me of anything.

13. The Officer then said if I told the truth he could still let me come to Canada. He told me he knew most of the marriage cases from Emping were fake. There were 78 fake cases this month so far.

14. I told him again that my case is not fake but he insisted that it is fake and I got “ripped off” because I had no chance of success. He kept asking me about how much I had to pay.

15. I never expected an interview about my marriage would turn into the Officer accusing me of outright lying and about my wife cheating me. He just went on and on and he kept taunting me to give him a figure as to how much I paid for the marriage.

16. I knew at that time this Officer was too hyper and intimidating for me to have a proper interview.

17. He saw me not reacting to his taunting then he changed his tone and said if I told him the truth he would let me pass.

18. I told him I was telling him the truth. He closed his file and I could see he wanted to end the interview.

19. At that moment I was desperate as I did not want to fail again. If I failed this time I would never be with my wife again. So I just gave him a number I heard from people in town. I said \$250,000.

20. He asked me questions about how much had been paid and who was to get paid what. I just made up the numbers as I went along but he was pressing me for details and I could not give him details because I just made things up.

21. Then he changed his tone again and said he would approve me because I was honest.

22. He told me that my medical had expired so he said he would send me new medical to do and confirmed my address with him. He told me to study English and not to contact my wife after I arrived in Canada.

23. Then he brought in a Chinese staff member and he asked me to sign a piece of paper about the marriage being fake.

24. He never told me this paper would be used to bar me from coming to Canada for 2 years or it was an admission of misrepresentation.

25. The staff member kept reassuring me that they would send me the medical papers and confirmed my address again.

26. This whole experience was bizarre as I could not believe I passed the interview because I did what the Officer asked me to do. He was not interested in what I had to say.

27. I told my wife afterwards that I had passed the interview and how the Officer said this was a fake marriage but he still passed me.

28. Since we were both very happy about passing the interview, my wife and I just to let the fake marriage insult go.

[24] The IAD acknowledged the error by the Officer when he confused the outcome of the Applicant's case with that of another file but found it not to be determinative. Ultimately, the IAD rejected Mr. Wu's affidavit and concluded that the declaration was reluctantly but voluntarily signed. At paragraph 40 of its reasons the panel wrote:

... The panel places more weight on the applicant's declaration and responses at his interview than the applicant's affidavit and testimony at the hearing. The panel finds the applicant's declaration is credible evidence that the applicant paid money and entered a false marriage as a means to immigrate to Canada. This evidence is not consistent with the information provided in the application documents.

[25] From the outset, the Applicant challenged the Officer's version of events and sought to have the Officer subpoenaed for the purpose of clarifying what happened during the interview. The Respondent did not file an affidavit of the Officer and the IAD rejected an application to have him subpoenaed. Consequently, the Officer's version of events was not before the IAD and could not be tested by the Applicant.

[26] The IAD's negative decision turned on its determination that Mr. Wu's declaration was made voluntarily. The IAD decided the issue on the following evidence: the unsworn CAIPS notes; Mr. Wu's declaration which it preferred over his affidavit evidence; and two e-mails from the

Officer. In assessing whether the IAD erred in finding the declaration voluntary, its treatment of the evidence will be considered.

*The CAIPS notes*

[27] The IAD accepted “much of the information in the CAIPS notes as reliable to the extent they are generally an accurate reflection of what transpired at the applicant’s interview as to the questions and responses in relation to the issue of the misrepresentation.” However, the CAIPS notes are silent in respect to the circumstances that led to the signing of the declaration by Mr. Wu. The notes reflect no information regarding any exchange that might have occurred between the Officer and Mr. Wu relating to the content of the declaration, its terms and the impact it would have on Mr. Wu’s permanent resident application if signed. The IAD found that this does not indicate the Officer omitted recording questions or comments he had made to Mr. Wu on this matter. In my view, considering the format and level of detail of the notes relating to prior exchanges between Mr. Wu and the Officer during the interview, it is difficult to accept that not one single word was spoken relating to the declaration and its content. There is an apparent gap in the CAIPS notes that remains unexplained. The gap takes on added importance in the circumstances since it is at this stage of the interview that Mr. Wu alleges that promises were made by the Officer to entice Mr. Wu to sign the declaration.

[28] Other than his testimony at the hearing, Mr. Wu’s affidavit is the only direct evidence that deals with the issue of the voluntariness of his declaration. The CAIPS notes do not explain away the allegations made by Mr. Wu relating to the Officer’s conduct and promises made during the interview. The notes consequently provide little by way of an evidentiary foundation to assist in

determining the voluntariness of the declaration. It is therefore important to consider how the IAD disposed of the remaining evidence it had before it, the Officer's e-mails and Mr. Wu's evidence.

*The Officer's e-mails*

[29] The November 25, 2008 e-mail authored by the Officer was in response to an inquiry made by a CBSA Hearings and Appeals officer relating to the Officer's error made during the interview. The error concerned the erroneous understanding by the Officer of the disposition of his prior application. The last two paragraphs of the e-mail are reproduced below:

It's an unfortunate error as it allows the opposing counsel to use that error to call the rest of the decision into doubt. In my opinion I don't think it should be fatal in this case. It's true the PA may have been a bit confused about the discussion of his previous case, but they did in fact make a voluntary confession of MOC [marriage of convenience] and signed docs to that effect. I would put it to the member that in spite of whatever confusion the PA may claim, it does not mitigate the voluntary admission of having paid for the visa. It's unlikely that his confusion caused him to invent a detailed MOC story.

Btw, this lawyer is also involved in a number of other MOC cases in our office and we suspect that he colludes to create these MOCs. As that is the case we will do whatever it takes to defend this decision, if you have any further queries kindly do not hesitate to ask.

[30] Other than the assertion by the Officer that the declaration was a "voluntary confession", the e-mail does little to clarify the circumstance in which the declaration was made.

[31] The second e-mail dated November 30, 2008 contains the very same information except for the last paragraph in the earlier e-mail, impugning the conduct of Applicant's counsel, which is deleted. The IAD noted that both e-mails were included in the record and "do not detract from the reliability of the immigration officer's notes or support an inclination of the officer to delete or not

include information in his notes that may be unfavorable to him.” In my view, the paragraph was likely deleted by the Officer to remove information that would prove embarrassing if made part of the record. I agree, however, in all the circumstances, the deletion has no bearing on the determinative issue of whether the declaration was voluntary.

*Mr. Wu's evidence*

[32] Mr. Wu was cross-examined on his affidavit during the hearing. He admitted signing the declaration on the understanding that the Officer was going to give him a visa. Mr. Wu's affidavit evidence was rejected by the IAD on the basis of two discrepancies in his evidence. The first, deals with who mentioned the specific amount of money at issue first, Mr. Wu or the Officer. The second, viewed as more significant by the IAD, relates to what the Officer said during the interview.

[33] Regarding the first inconsistency, the CAIPS notes indicate that the Officer raised the matter of money first in his questions. He asked, “How much money did you pay to start the plan?” The exchange that followed is reproduced below:

How much money have you paid so far? Around 50K RMB

So the 200, 000 RMB was for when you got visa? Yes.

When you got to CDA how much did you have to pay them?  
Another 200, 000.

How much did the SPR get? I'm not sure about the amount but it should be around 250, 000.

I want to be sure about the money here. It was 200, 000 to the visa and then 2000, 00 when you got to CDA? No, 50 000 and then another 200, 000 when I got to CDA.

[34] I reproduce below the pertinent passages from the transcripts of the hearing:

PRESIDING MEMBER: Okay. Did you first mention the amount of money?

A. No.

BY MR. BULMER:

Q. Okay. Who did?

A. The Immigration officer asked me would that kind of amount be required.

Q. What kind of money?

A. He asked me whether it would require 200,000 or 250,000, something like that.

Q. So you're saying the visa officer says 250,000 before you ever had a chance. Is that your testimony now?

[35] In the circumstances, I would agree with the IAD that the inconsistency is not "as significant". The inconsistency, on its own, would not reasonably justify a finding that Mr. Wu's affidavit evidence is not credible.

[36] In relation to the second discrepancy, at paragraph 37 of its reasons, the IAD articulates the inconsistency as follows. In his affidavit M. Wu declares that the Officer said: if he told the truth he would still let him come to Canada; that he would approve him because he was honest; to study English; and not to contact his wife after he arrived in Canada. Mr. Wu also declared that the Officer did not tell him the paper would be used to bar him from coming to Canada for two years or that it was an admission of misrepresentation. However, at the hearing Mr. Wu attested that he did sign a declaration but did not agree with it and signed it because the Officer agreed he would let him

go and told him he could not go to Canada without signing it. He agreed the Officer did tell him he found the marriage was fake but he was still going to give him a visa and did not know why the Officer asked him not to be with his wife when he arrived.

[37] Upon a careful review of the record, I fail to see how Mr. Wu's testimony at the hearing is necessarily inconsistent with his affidavit. Essentially, in both his affidavit and during his oral testimony, Mr. Wu's evidence is that the Officer said he would give him a visa if he admitted to the fake marriage. His oral testimony expands on his account attested to in his affidavit but is not, in my view, necessarily inconsistent with it.

[38] The IAD further impugns Mr. Wu's credibility because he failed to provide a satisfactory explanation as to why the Officer would allegedly advise Mr. Wu as he did, i.e. promising to approve his application in exchange for his admission of fraud. At paragraph 26 of his affidavit Mr. Wu explained, "This whole experience was bizarre as I could not believe I passed the interview because I did what the Officer asked me to do. He was not interested in what I had to say." In the circumstances, Mr. Wu cannot be faulted for failing to further explain the plausibility of the Officer's alleged conduct. An equally relevant inquiry, not pursued by the IAD, would have been to ask, but for the alleged inducement, what would have motivated Mr. Wu to sign such a declaration, knowing that the only outcome possible would be to have his sponsorship application rejected?

[39] The circumstances of this case are unique. The conduct of the visa officer is squarely at issue and his direct evidence, which was available, was not adduced to clarify the circumstances



surrounding the declaration signed by Mr. Wu during the interview. As discussed above, the CAIPS notes also do not assist in clarifying those circumstances.

[40] In my view, the IAD's credibility findings which led it to reject Mr. Wu's evidence in favour of his declaration are not supported in the evidence. Consequently, the IAD erred in rejecting Mr. Wu's affidavit evidence on that basis. This error considered in the context of this case, in particular the nature of the allegations concerning to the Officer's conduct at the hearing relating to the alleged inducement, the gap in the unsworn CAIPS notes, the sworn evidence of Mr. Wu, the absence of any direct evidence of the Officer to explain away Mr. Wu's allegations, leads me to conclude that the IAD's decision is unreasonable. It is not, in the circumstances, a decision that falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

*Did the IAD err in failing to issue a subpoena for the Officer?*

[41] Given that my above determination is dispositive of this application, it is unnecessary to consider this last issue.

*Conclusion*

[42] For the above reasons, the application for judicial review will be allowed. The matter will be returned for re-determination before a differently constituted panel of the IAD. Given the seriousness of the allegations made against the Officer, the Respondent is directed to adduce an affidavit by the Officer who will be made available for cross-examination by the Applicant. The matter will then be decided on the basis of the more fulsome record.

*Certified question of general importance*

[43] At the close of the hearing, counsel for the Respondent informed the Court that the Respondent did not intend to propose a question for certification. The Applicant is directed to serve and file her submissions relating to certification of a question of general importance, if any, within ten (10) days of receipt of these reasons. The Respondent will have a further four (4) days to serve and file his reply submissions, if any. Following consideration of the submissions, an order will issue allowing the application for judicial review and disposing of the issue of a serious question of general importance as contemplated by section 74(d) of the IRPA.

“Edmond P. Blanchard”

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Judge

Ottawa, Ontario  
May 10, 2011

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-4094-10

**STYLE OF CAUSE:** SU LING LIANG v THE MINISTER OF  
CITIZENSHIP AND IMMIRATION

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** February 17, 2011

**REASONS FOR ORDER  
AND ORDER:** Blanchard J.

**DATED:** May 10, 2011

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