

Federal Court



Cour fédérale

Date: 20110628

Docket: IMM-5583-10

Citation: 2011 FC 790

Ottawa, Ontario, June 28, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

GUO MING LU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Guo Ming Lu's application to sponsor his wife Xia Li Zheng for permanent residence was refused. He appealed that decision to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board. The appeal was dismissed in a decision rendered orally on September 13, 2010. This is his application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA").

[2] The applicant's marriage to Ms. Zheng was found not to be genuine pursuant to the then-in-force section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*Regulations*"). Section 4 was amended after the decision of the IAD in the present matter. Under the former version, a marriage was considered to be of bad faith if it was found to be entered into primarily for the purpose of acquiring any status or privilege under the IRPA and was not genuine. The test was conjunctive: *Canada (Minister of Citizenship and Immigration) v. Tirer*, 2010 FC 414 at para. 12. Under the current version, the test is disjunctive meaning that a marriage could be found to be of bad faith if entered into primarily for the purpose of acquiring any status or privilege under the IRPA or is not genuine: *Wiesenhahan v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 656 at para. 3.

BACKGROUND

[3] The applicant was born in China and acquired Canadian citizenship in 1996 when he was sponsored as a dependent child. He is now a dim sum cook in a Chinese restaurant in Vancouver, British Columbia. The applicant's spouse, Ms. Zheng is an accountant by profession. Both had previous marriages. Mr. Lu married his first wife in 2001 and separated from her in June 2003. They divorced officially in September 2006. The month prior, Mr. Lu and Ms. Zheng were introduced by a mutual friend via QQ, a website used for communicating electronically in China.

[4] On October 26, 2006, the applicant travelled from Canada to China to meet Ms. Zheng in person. He returned to China again on or about November 10, 2006. In August 2007, the applicant proposed to Ms. Zheng and they were married on September 25 of that same year. The applicant

came back to Canada on October 7, 2007 and has only been to China again once, from November 16, 2009 until December 2, 2009, at which point the two travelled together to Hong Kong to meet the applicant's aunt.

[5] On September 16, 2009 the applicant's wife was not selected to be a permanent resident as a member of the family class, pursuant to subsection 12(1) of the IRPA.

DECISION UNDER REVIEW

[6] The officer noted a number of inconsistencies on material elements such as: confusing evidence with respect to the applicant's financial and living situation; inconsistencies with respect to the applicant's gambling and the couple's future plans as well as inconsistencies with respect to the applicant's visits to China. Furthermore, the officer found the applicant was a reluctant witness and did not answer questions in a straightforward manner. In particular, he asked for questions to be repeated when there was no need. The officer drew a negative inference from this behaviour. It could not be established on a balance of probabilities, the officer determined, that their marriage was not entered into for the purpose of acquiring status or privilege and was genuine.

ISSUES

The issues raised in this application are as follows:

1. Did the Board err in making findings under both prongs of the conjunctive test as required by law?
2. Did the Board misconstrue the evidence?

3. Was it reasonable that the Board conclude that the applicant was a reluctant witness?

ANALYSIS

Standard of Review

[7] Determinations of whether a relationship is genuine and entered into for the purpose of obtaining status under the IRPA are factual determinations and are therefore reviewable on the reasonableness standard: *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 417 at para. 14. In reviewing this matter, the Court will consider the existence of justification, transparency and intelligibility and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para.47; *Canada v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59. The *bona fides* of a marriage is, in particular, a pure question of fact and, as such, the decision is entitled to a high degree of deference from this Court.

Did the Board err in making findings under both prongs of the conjunctive test?

[8] As noted above, section 4 of the former *Regulations* are to be read conjunctively in that the marriage in question must be both not genuine and entered into primarily for the purpose of acquiring any status or privilege under the IRPA: *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490, 59 Imm. L.R. (3d) 251 at paragraph 5.

[9] In *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1131 at paragraphs 17-18, Justice Judith Snider found that there is a link between the two prongs of the test and that a “lack of genuineness presents strong evidence that the marriage was entered into primarily for the purpose of acquiring permanent residence in Canada”. It has been held that the lack of *bona fides* can create a presumption that the marriage was entered into for the purpose of gaining status: *Kaur*, above, at para. 16.

[10] The applicant asserts that the Board erred in analyzing only the first prong of the test and conducted a microscopic review that failed to see the whole picture. But, it is clear from the transcript and reasons that the Board considered a number of discrepancies in testimony that were central to the whole of this claim.

[11] Certain inconsistencies were related to the applicant’s financial situation. For example, with respect to his savings, the applicant said he was recently repaid \$30, 000 from his sister from a loan he had advanced her to buy a house. Ms. Zheng, however, testified that the applicant already had a sum of \$10, 000 to \$20,000 from savings which he had when she met him in August 2006. She said he saved the balance from his earnings at work. It was reasonable for the Board to question Ms. Zheng’s testimony and wonder how the applicant could have saved that money with his monthly income of \$1, 800 a month.

[12] Ms. Zheng also testified that the applicant has no credit card debt while the applicant said he does have some in the low thousands of dollars.

[13] Ms. Zheng said the applicant leased a \$45, 000 black Japanese vehicle in 2008 and that he pays \$800 a month in car payments. The officer found this to be a significant financial liability for someone with the applicant's income profile. The applicant said he does not own a vehicle.

[14] The Board also found the evidence of the couple to be confusing with respect to their evidence as to their living situation. The applicant said he had been living at a new address on East 28th Avenue for ten months. At the hearing, when asked why he moved to this address from where he lived before, he answered, "Cause that house was bought by my elder sister". He also confirmed that he told his wife, Ms. Zheng about the move. His wife, on the other hand, said he moved there one to two years ago and that she did not know why. It was reasonable for the Board to find this evidence confusing and to draw a negative conclusion from it. Even a couple in a long distance relationship would likely know when their spouse moved residences and for what reason. Ms. Zheng's responses cast serious doubt on the genuineness of their relationship.

[15] There were other inconsistencies in the evidence with respect to the applicant's gambling. For example, the applicant voluntarily noted that he had an addiction and that he was able to get over this through his Church and by voluntarily listing himself on the no-entry register maintained by casinos. He said his gambling was what led to his first divorce in 2005 and said that he had even stopped earlier than the divorce. Ms. Zheng testified that he was gambling until the two met in August 2006 and that she instructed him to stop gambling and he listened. These stories are not even closely related.

[16] The applicant and his wife had different stories with respect to their future plans as a couple. The applicant said that after a period of settling in and learning English in Canada, perhaps after working as a waitress here, his wife would study accounting in hopes of being able to work in the field. Ms. Zheng, however, said the long term plans were to open a restaurant together and mentioned nothing about accounting.

[17] There were further inconsistencies regarding the applicant's visits to China. Ms. Zheng said she met the applicant as soon as he arrived in China and said he arrived in China on October 26, 2006. The applicant said he entered China on October 24, 2007, as indicated by his passport, and that the couple met two days later. Ms. Zheng explicitly stated that the applicant did not stay anywhere over night before they met. Further, when discussing their visit to the applicant's aunt's home in Hong Kong, the applicant said they were there for three days and that they stayed with his aunt who is divorced but lives with her daughter. Ms. Zheng said they were there for five days and stayed with the aunt but said she lived alone. When confronted with the testimony of her husband, she tried to correct herself.

[18] This evidence was applied by the Board in reaching its conclusion as to genuineness and whether the marriage was entered into in order to obtain status or privilege. It was reasonable for the Board to use this evidence to reach a negative determination under both prongs of the test.

Did the Board Misconstrue the Evidence?

[19] The applicant has submitted that the Board misconstrued the evidence with respect to the \$30 000, noting that with that money, the applicant's sister purchased his home. That, the applicant said, is not what he testified. It does not appear, however, that the Board misconstrued the evidence on this point. The Board understood that the applicant lent his sister \$30, 000 to buy a home in which he now lives and that she returned the money to him in June 2010.

[20] In any event, the negative finding based on inconsistency on this point did not turn on whether the sister used the money to buy his house. The Board referenced the \$30 000 to illustrate the differences in testimony between the applicant and Ms. Zheng. The applicant's evidence was that the money came by way of loan re-payment whereas Ms. Zheng stated he already had a sum of \$10, 000 to \$20, 000 which he had saved up gradually. This is but one of several inconsistencies the Board found between the testimony concerning the couple's finances. In my view, nothing turns on this particular point.

[21] The applicant also claims that the Board failed to appreciate that the wife's future plans to study accounting were not definitive. Although this may be true, the applicant did confirm when it was put to him that his wife wants to study accounting. This is different from what Ms. Zheng stated about their future plans, namely that they would open a restaurant together. She did not even mention accounting.

Was it reasonable that the Board concluded that the applicant was a reluctant witness?

[22] The applicant submits the Board's finding that the applicant was a reluctant witness was unfounded, claiming that the Minister's Counsel browbeat him with excessively probing questions. The transcript does indicate that Minister's Counsel did get frustrated at a few points throughout the hearing. However, it is overreaching to say the applicant was browbeaten.

[23] The Court does not have adequate information to assess whether or not the Board was unfounded in determining that the applicant was a reluctant witness. Moreover, it is not for this Court to intervene on issues pertaining to the tribunal's assessment of witnesses. See: *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, 116 N.R. 1; *Aguebor v. (Canada) Minister of Employment and Immigration (F.C.A.)* (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 at para. 4.

[24] In the result, I see no reason to interfere with the IAD decision. This application will be dismissed. No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5583-10

STYLE OF CAUSE: GUO MING LU

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 11, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: June 28, 2011

APPEARANCES:

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